

## **BUCKLEY 2.0: WOULD THE BUCKLEY COURT OVERTURN CITIZENS UNITED?**

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### ABSTRACT

*Since Buckley v. Valeo was decided in 1976, a series of decisions claiming to rest upon its foundations have eroded the campaign finance framework that it erected, culminating in the Citizens United decision and its progeny, SpeechNow.org. During the same period, campaign financing has been transformed by the skyrocketing cost of campaigns, innovative campaign practices, rapid increases in the amount of money injected into elections by business interests, an increasingly small number of high-wealth individuals accounting for an increasingly large percentage of campaign spending, and a trend toward employing dark-money campaign vehicles and adopting other strategies to evade campaign finance disclosure rules.*

*Many critics of Citizens United believe that the real villain is Buckley and, thus, that there is no way to undermine Citizens United without overturning Buckley. This Article rejects that understanding and the assumption upon which it is based: that Citizens United faithfully adhered to Buckley in reaching its holdings about corporate political speech. It argues instead that Citizens United can be invalidated based upon Buckley's own doctrines and reasoning and, moreover, that were the original Buckley Court to review Citizens United (a thought experiment this Article calls "Buckley 2.0"), it would overturn the later case.*

*Buckley 2.0 would re-assess Citizens United based upon its own understanding of the original Buckley's principles and reasoning and in light of empirical evidence derived from contemporary campaign practices. It would also demonstrate the ways Citizens United disregarded the explicit teachings of other precedents it claimed to follow. The result is a more faithful reading of the original Buckley and subsequent campaign finance cases, coupled with a more honest recognition of campaign financing realities that threaten the integrity of representative government in America.*

*The immediate result of Buckley 2.0's analysis would be to restore the provision of federal campaign finance law requiring corporations to use money raised by their political action committees ("PACs") to fund independent expenditures. The Article demonstrates that invalidating Citizens United would leave business interests the ability to raise enormous sums of money to finance their campaign spending and to engage in issue advocacy. Thus, Buckley 2.0's rejection of Citizens United would leave business interests able to communicate their views widely and effectively to the public using a combination of regulated and unregulated funds.*

*A more far-reaching consequence of Buckley 2.0's invalidation of Citizens United would be to invalidate the holding of SpeechNow.org, which relied on reasoning from Citizens United to hold that individuals and groups can give unlimited amounts of money to organizations that engage in independent campaign spending. The amount of money raised by such vehicles since 2010 has been immense, has profoundly altered the financing of contemporary campaigns, and has reduced transparency in campaign financing. Thus, by rejecting Citizens United, and thereby undermining SpeechNow.org, Buckley 2.0 would roll back some of the worst excesses of contemporary campaign-finance law and practice.*

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## INTRODUCTION

If you read Supreme Court campaign finance cases, you will be struck by the disconnect between the lofty rhetoric used to justify the constitutional protections political speech is afforded and the impoverished sound bites and hyperbolic attack ads that dominate contemporary electoral communications. The origin of this disconnect is in large part two phenomena. First, in the last decade the Court has failed to take the factual record seriously and, as a result, has made generalizations that are belied by contemporary campaign practices. Second, it has misrepresented the content of several election law precedents so as to claim consistency with decisions at odds with its rulings. As a result, the Court has created an alternative universe that only First Amendment absolutists find credible, and it has constitutionalized an increasingly corrupt electoral landscape.

All campaign finance cases rely, in varying degrees, on *Buckley v. Valeo*,<sup>1</sup> the first Supreme Court decision to evaluate the constitutionality of the Federal Election Campaign Act (“FECA”), enacted in 1971.<sup>2</sup> *Citizens United*<sup>3</sup> relied repeatedly on *Buckley* to reach its holding that it is unconstitutional to prevent corporations and unions from using their general business revenues for campaign spending, assuming that their actions are not coordinated with candidates and their campaigns.<sup>4</sup> As a consequence, many critics of *Citizens United* believe that the real villain is the *Buckley* decision and, thus, that there is no way to undermine *Citizens United* without overturning *Buckley*, presumably by a constitutional amendment declaring *Buckley* or its key doctrines null and void.<sup>5</sup>

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<sup>1</sup> 424 U.S. 1 (1976) (per curiam). All the Justices except Justice Stevens, who did not take part in the decision, joined in the part of the opinion finding that there was a case or controversy. Justices Brennan, Stewart, and Powell joined the entire opinion, but the remaining four Justices joined in some parts and concurred or dissented in others.

<sup>2</sup> Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 382 (as amended). The law was originally codified at 2 U.S.C. §§ 431 *et seq.*, but sections in Title 2 of the *United States Code* were editorially reclassified in Title 52, Voting and Elections, in the 2014 supplement to the Code as 52 U.S.C. §§ 30101–26. See generally *Editorial Reclassification Title 52*, United States Code, OFFICE OF LAW REVISION COUNSEL, U.S. HOUSE OF REPRESENTATIVES, <http://uscode.house.gov/editorialreclassification/t52/index.html>.

<sup>3</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>4</sup> See *infra* notes 180, 201, 213, 255–56, 262, 262, 279 and accompanying text.

<sup>5</sup> See Ellen L. Weintraub, *Overturn Buckley v. Valeo*, POLITICO MAG., <http://www.politico.com/interactives/2019/how-to-fix-politics-in-america/corruption/overturn-buckley-valeo> (last visited Apr. 4, 2020); Scott Casleton, *It's Time for Liberals to Get Over Citizens United*, VOX (May 7, 2018),

This Article rejects that understanding and the assumption upon which it is based, namely, that *Citizens United* faithfully adhered to *Buckley*'s framework in reaching its holdings about corporate political speech. It argues instead that *Citizens United* can be invalidated based upon *Buckley*'s own doctrines and reasoning and, moreover, that were the original *Buckley* Court to review *Citizens United*, it would overturn the decision itself.

*Buckley* spoke very forcefully about the importance of political speech for democratic self-government. Yet the decision did not endorse an absolutist position for protecting political speech.<sup>6</sup> Rather, *Buckley* can be seen as striking a balance between the free speech claims of individuals and groups, on the one hand, with other societal interests, especially the integrity of elections in a representative democracy, on the other. Although that balance has been criticized by many, the Supreme Court has so far declined to overrule the decision explicitly, preferring to modify several of *Buckley*'s holdings to provide support for its own groundbreaking decisions.<sup>7</sup> As a result, the balance struck in *Buckley* between free-speech values and the goal of election integrity has been lost, and it has been replaced by political speech absolutism justified in pseudo-*Buckley* terms.

To draw out the consequences of these developments, this Article conducts a thought experiment which analyzes how the *Buckley* Court would decide *Citizens United* and its progeny, taking into account its original decision, precedents relying upon its decision, and the factual and doctrinal changes that have occurred since it issued its pioneering opinion. This thought

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<http://www.vox.com/the-big-idea/2018/5/7/17325486/citizens-united-money-politics-dark-money-vouchers-primaries>; Derek Cressman, *End Court-Ordered Corruption*, U.S. NEWS (Jan. 29, 2016), <http://www.usnews.com/opinion/articles/2016-01-29/reverse-buckley-v-valeos-40-years-of-campaign-finance-damage>; BRENNAN CTR. FOR JUST., STATEMENT IN SUPPORT OF OVERTURNING *BUCKLEY V. VALEO*, available at <http://www.brennancenter.org/sites/default/files/legacy/d/buckley.pdf> (last accessed May 17, 2020).

<sup>6</sup> See *Buckley*, 424 U.S. at 25 (citing *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers AFL-CIO*, 413 U.S. 548, 567 (1973), for the proposition that “[n]either the right to associate nor the right to participate in political activities is absolute”).

<sup>7</sup> The main exception is *McCutcheon v. FEC*, 572 U.S. 185 (2014), which expressly invalidated FECA's limit on aggregate contributions during a campaign cycle, despite *Buckley*'s upholding of that restriction. See *infra* notes 93–96 and accompanying text. Criticism of *Buckley* began with the decision itself: five of the eight Justices wrote opinions that concurred in part and dissented in part. See *Buckley*, 424 U.S. at 235 (Burger, C.J., concurring in part); *id.* at 257 (White, J., concurring in part); *id.* at 286 (Marshall, J., concurring in part); *id.* at 290 (Blackmun, J., concurring in part); *id.* (Rehnquist, J., concurring in part). The most consistent critic of *Buckley* is Justice Thomas. See *McCutcheon*, 572 U.S. at 228 (Thomas, J., concurring) (urging that *Buckley* be overruled and listing five previous decisions in which he called for it to be overruled).

experiment is called *Buckley 2.0*. Part I examines campaign practices at the time *Buckley* was decided and today and compares the amounts spent then and now in constant dollars. Part II moves to the doctrinal plane and analyzes how *Buckley 2.0* would likely respond today to issues *Buckley* decided in 1976 or parallel issues arising today, taking into account contemporary empirical data and campaign finance practices and doctrines developed in the last decade.

In Part III, *Buckley 2.0* considers whether the time has come to overrule *Citizens United*.<sup>8</sup> It begins by reviewing the basic principles animating the original *Buckley* decision. It then examines the reasoning set forward in *Citizens United* that Congress has no legitimate interest in restricting the sources of funds that corporations and unions use to support candidates in federal elections if these organizations engage in independent spending. Based upon the analysis in Part II, *Buckley 2.0* would conclude that the later case did not faithfully represent the teachings of the original *Buckley*. Thus, it would reject *Citizens United*'s claim that its reasoning is based upon *Buckley*. Re-assessing the validity of *Citizens United*'s conclusion based upon its own understanding of the *Buckley* principles and holdings, and in light of empirical evidence derived from contemporary campaign practices, *Buckley 2.0* would conclude that unlimited spending by corporations and unions—as well as unlimited contributions to groups independent in name only—pose a threat of corruption and the appearance of corruption sufficient to justify restrictions by Congress on the sources and amounts of certain types of campaign spending.

The immediate result of *Buckley 2.0*'s conclusion would be to restore the provision of federal campaign finance law requiring corporations to use money raised by their political action committees (“PACs”) to fund campaign messages that urge the support or defeat of specific candidates for elective office or their functional equivalent. As the statistics in Part I make clear, prior to the changes initiated by *Citizens United*, spending by corporations and other business interests by means of their own PACs and the PACs of trade associations to which they contribute had increased more than eight times over their spending at the time of *Buckley*, calculated in constant, i.e., inflation adjusted dollars. Invalidating the holding of *Citizens United* would thus leave those interests still able to raise enormous sums of money to finance their campaign spending, although it would require them to raise the money

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<sup>8</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

following federal rules governing the funding of PACs. Moreover, business interests would continue to be able to avail themselves of the issue advocacy rules to fund without limit messages that omit express advocacy of the election or defeat of specific candidates. Thus, *Buckley 2.0*'s rejection of *Citizens United* would leave business interests able to communicate their views widely and effectively to the public using a combination of regulated and unregulated funds.

A more far-reaching consequence of *Buckley 2.0*'s invalidation of *Citizens United*'s ruling would be to invalidate the holding of *SpeechNow.org v. FEC*,<sup>9</sup> which relied on the analysis of part of *Citizens United* to hold that individuals and groups can give unlimited amounts of money to organizations that engage in independent spending, whether they are Super PACs or independent-expenditure exempt organizations, commonly known as dark money groups. As is shown in Part I, the amount of money raised by such vehicles since 2010 has been immense, has profoundly altered the financing of contemporary campaigns, and has further reduced transparency in campaign financing. Thus, by rejecting *Citizens United* and thereby undermining *SpeechNow.org*, *Buckley 2.0* would roll back some of the worst excesses of contemporary campaign finance law and practice.

## I. THE ELECTORAL LANDSCAPE THEN AND NOW

Campaign finance law affects all who participate in the electoral process, whether as individuals, business entities, or other groups. This Part compares selected campaign practices at the time *Buckley* was decided with the most recent presidential campaign cycle (2015–2016). The goal is to establish the electoral landscape—the facts on the ground—at the time of *Buckley* and now, so that a hypothetical *Buckley 2.0* would have an empirical basis for reassessing its original decision in light of contemporary campaign finance law and practices.

There is a tendency to blame corporate spending for many of the ills of the campaign finance system. Those who do this probably mean spending by business entities or interests in general, rather than corporations per se, given that much business revenue in the United States is generated by non-corporate entities such as limited liability companies (“LLCs”) and other

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<sup>9</sup> *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir.) (en banc), cert. denied, 562 U.S. 1003 (2010).

limited liability business vehicles.<sup>10</sup> Business interests also contribute money or make expenditures through trade associations, chambers of commerce, and other interest groups. The discussion that follows attempts to be precise about which types of entities are at issue. However, because what corporations do or fund has traditionally been captured more systematically than campaign spending by business interests in general, it is often not possible to compare apples to apples. This is especially true because the proliferation of types of business entities and outside groups had not yet blossomed in the 1970s, when *Buckley* was litigated. Moreover, the disclosure rules enacted as part of the original FECA legislation did not become effective until April 1972,<sup>11</sup> so data from the last presidential election cycle before *Buckley* is incomplete.<sup>12</sup>

To provide perspective on the discussion that follows: the last presidential election held prior to the *Buckley* litigation was in 1972.<sup>13</sup> The cost of the presidential and congressional races combined was \$236 million,<sup>14</sup> or \$1.355 billion in 2016 inflation-adjusted dollars.<sup>15</sup> In 2016, the cost of the presidential and congressional races combined was roughly \$6.5 billion,<sup>16</sup> or

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<sup>10</sup> See *SOI Tax Stats—Integrated Business Data*, INTERNAL REVENUE SERV. (Mar. 5, 2020), <https://www.irs.gov/statistics/soi-tax-stats-integrated-business-data> (scroll down to Table 3 and follow the 2015 hyperlink) (showing, based upon 2015 returns, that traditional “C” corporations account for 1.6 million of 35 million business returns). “S” corporations file roughly 4.9 million returns and LLCs and other pass-through entities accounted for 3.7 million returns. *Id.*

<sup>11</sup> See JOSEPH E. CANTOR, CONG. RESEARCH SERV., REP. NO. 84-78, POLITICAL ACTION COMMITTEES: THEIR EVOLUTION, GROWTH AND, IMPLICATIONS FOR THE POLITICAL SYSTEM 55, 64 (1984).

<sup>12</sup> See *id.* at 63–64 (describing the main private organizations and scholars that collected data before the FEC began to collect data systematically). A comprehensive empirical study of financing the presidential and Congressional elections in 1972 is HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION (1976). In general, the present analysis examines presidential elections rather than off-year elections. The statistics compared include aggregate amounts spent on presidential and congressional races unless otherwise specified.

<sup>13</sup> The case was heard by the Supreme Court in 1975 and the decision was published January 30, 1976. *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

<sup>14</sup> See HERBERT E. ALEXANDER, Financing Politics: Money, Elections, and Political Reform 16 (1976). According to Alexander, the presidential contest cost \$138 million in 1972, and the congressional contests combined cost \$98 million. *Id.*

<sup>15</sup> See *Inflation Calculator*, U.S. INFLATION CALCULATOR, <http://www.usinflationcalculator.com> (last visited Dec. 28, 2019) (showing that the inflation rate was 474.2%).

<sup>16</sup> See Niv M. Sultan, *Election 2016: Trump’s Free Media Helped Keep Cost Down But Fewer Donors Provided More of the Cash*, OPENSECRETS (Apr. 13, 2017, 1:10 PM), <https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash> (listing spending total as “nearly \$6.5 billion”). Other sources list the total amount spent during the 2015–2016 election

roughly four-and-a-half times as much as the 1972 federal elections in constant dollars. Some of the increase may be attributable to a larger electorate in 2016.<sup>17</sup> Yet there have been other developments that could have reduced the cost of races, such as many fewer swing states<sup>18</sup> and competitive congressional races,<sup>19</sup> as well as the use of relatively inexpensive electronic sources like e-mail and social media to reach potential voters. It is, then, not clear how much, if any, of the 450% increase in aggregate election spending can be attributed to the cost of reaching a significantly larger electorate. Other forces appear to be driving the rapid acceleration of the cost of federal elections.

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differently, ranging from \$6–7.5 billion. See COMM. FOR ECON. DEV., CONFERENCE BOARD, THE LANDSCAPE OF CAMPAIGN CONTRIBUTIONS: CAMPAIGN FINANCE AFTER *CITIZENS UNITED* 3 (2017), available at <https://www.ced.org/pdf/TCB-CED-The-Landscape-of-Campaign-Contributions.pdf> (listing total as \$7.5 billion).

- <sup>17</sup> The voting age population in 1972 was 140,776,000. See *Voter Turnout in Presidential Elections 1820–2012*, AMERICAN PRESIDENCY PROJECT, U.C. SANTA BARBARA, <http://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> (last visited Apr. 4, 2020). In 2016, it was 250,055,734, an increase of roughly 75%. See *2016 General Election Turnout Rates*, U.S. ELECTION PROJECT, <http://www.electproject.org/2016g> (last visited Apr. 4, 2020).
- <sup>18</sup> See William A. Galston & Pietro S. Nivola, *Delineating the Problem*, in 1 RED AND BLUE NATION? 14 n.39 (Pietro S. Nivola & David W. Brady eds., 2006) (identifying roughly twenty-four competitive states in the 1976 presidential election and twelve in 2004); STACEY HUNTER HECHT & DAVID SCHULTZ, *PRESIDENTIAL SWING STATES: WHY ONLY TEN MATTER* xi-xvi (2015) (recounting the history and concluding that the concept of a swing state is not precisely defined).
- <sup>19</sup> Between 1996 and 2016, the number of competitive districts decreased by over half to merely seventeen. See Galen Druke, *Want Competitive Elections? So Did Arizona. Then the Screaming Started*, FIVETHIRTYEIGHT (Dec. 21, 2017), <https://fivethirtyeight.com/features/want-competitive-elections-so-did-arizona-then-the-screaming-started/> (describing how an attempt by the State of Arizona to dismantle gerrymandering resulted in partisan battle over the best means for creating competitive districts during the 2011 round of redistricting). According to another source, in November 2016 there were roughly 395 safe seats in the House, and of the 40 remaining seats, 11 leaned toward one of the parties. See Nathan L. Gonzales, *House Ratings*, INSIDE ELECTIONS (Nov. 3, 2016, 3:55 PM), <http://www.insideelections.com/ratings/house/2016-house-ratings-november-3-2016>. In the Senate, in 2016, twenty-three out of thirty-four elections that year were considered safe. See Nathan L. Gonzales, *Senate Ratings*, INSIDE ELECTIONS (Nov. 3, 2016, 3:56 PM), <http://www.insideelections.com/ratings/senate/2016-senate-ratings-november-3-2016>. The Cook Political Report has roughly the same numbers. See *2016 House Race Ratings*, COOK POL. REP. (Nov. 2, 2016), <https://www.cookpolitical.com/ratings/house-race-ratings/139359>; *2016 Senate Race Ratings*, COOK POL. REP. (Nov. 2, 2016), <https://www.cookpolitical.com/ratings/senate-race-ratings/139360>.

### A. *Electoral Spending by Corporations and Other Business Interests*

Business spending on federal elections has risen dramatically, assessed in constant dollars, since 1976, when *Buckley* was decided.<sup>20</sup> Even in areas where corporations are still restrained by *Buckley*-era regulations, they now inject vastly larger sums into federal races.<sup>21</sup> In addition, when *Buckley* was decided, corporations were limited in their electoral funding and spending by several campaign finance laws that no longer apply since *Citizens United*. The amounts spent by business interests in areas affected by these changes have similarly risen dramatically.<sup>22</sup>

#### 1. *Spending by Business Interests Where Law Has Not Changed*

From 1971 until 2002, corporations were allowed to spend their general treasury funds (business revenues) on all electoral matters except for expressly urging the election or defeat of specific candidates (“express advocacy”) or for making contributions to candidates, their campaigns, and their agents.<sup>23</sup> In 2002, Congress amended FECA by enacting the Bipartisan Campaign Reform Act (“BCRA”),<sup>24</sup> which included a provision prohibiting corporations from using treasury funds for “electioneering communications” on the eve of a primary or an election.<sup>25</sup> Thus, as of 2010, corporations were

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<sup>20</sup> *Buckley* examined the constitutionality of federal campaign law, so this Article is limited to federal issues, even though state campaign finance developments can affect federal practices.

<sup>21</sup> See Part I.A.1 (examining business contributions and expenditures in areas unchanged by *Citizens United*).

<sup>22</sup> See Part I.A.2 (examining business spending in areas changed by *Citizens United*).

<sup>23</sup> On the many avenues for corporations to fund federal candidates or campaigns before FECA, see CANTOR, *supra* note 11, at 28–35. For a history of the legal limits on corporate campaigns spending, both state and federal, see *United States v. Int’l Union United Auto., Aircraft, & Agric. Implement Workers of Am.*, 352 U.S. 567, 570–87 (1957) (detailing the historical legal boundaries on corporate spending in federal elections). This history predates the enactment of FECA, which considers spending (by individuals or entities) that is coordinated with candidates or their campaigns to be contributions to them and, therefore, subject to contribution limits. See *Buckley v. Valeo*, 424 U.S. 1, 46–47 (1976) (per curiam); 52 U.S.C. § 30116(a)(7)(B) (2018) (formerly 2 U.S.C. §441a(a)(7)(B)); 11 C.F.R. §109.21(b) (2019).

<sup>24</sup> See Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified at 52 U.S.C. §30118(b)(2), formerly 2 U.S.C. §441b(b)(2)) (amending FECA).

<sup>25</sup> An “electioneering communication” is a communication made using broadcast, satellite, or cable media, if it is made in the thirty days before a primary or sixty days before an election, refers to a candidate (by name or other identifying attribute or logo), and can be received by at least 50,000 people in a congressional candidate’s district, a Senate candidate’s state, or, in the case of a

required to fund contributions to candidates, express advocacy, and electioneering communications using money raised by their PACs, which are strictly regulated by the Federal Election Commission (“FEC”).<sup>26</sup> Among other restrictions, corporations can raise funds for their PACs from their shareholders, executives, or administrative personnel (and the families of these groups), but not from the general public.<sup>27</sup> In addition, the amount each contributor can give to a corporation’s PAC is capped at \$5,000.<sup>28</sup> Further, PACs are themselves limited to giving a maximum of \$5,000 to each candidate, although they can also contribute additional amounts to certain political committees.<sup>29</sup> As a rule, these restrictions provided corporations with a smaller pool of funds and limited them to smaller contributions for the three types of restricted activities than would have been possible in the absence of the FECA limits. Unions were similarly limited with respect to using their PAC funds for contributions and for spending on express advocacy and electioneering communications.<sup>30</sup>

As discussed below, in 2010, *Citizens United* held that corporations can use their treasury funds on spending that is independent of candidates and

candidate for President, in the United States. See 52 U.S.C. § 30104(f)(3) (2018) (formerly 2 U.S.C. § 434(f)(3)); 11 C.F.R. § 100.29(a)–(b) (2019). See also *infra* notes 118–22 and accompanying text.

<sup>26</sup> 52 U.S.C. § 30118 (2018) (formerly 2 U.S.C. § 441b(a), (b)(4)(A)(i)). FECA does not speak about PACs, but about “political committees,” which include PACs and other groups involved in federal elections.

<sup>27</sup> 52 U.S.C. § 30118(b)(4)(A)(i) (2018) (formerly 2 U.S.C. § 441b(b)(4)(A)(i)). Corporations are permitted to solicit permitted parties twice a year, by mail to their homes, as long as procedures are adopted to prevent the corporation from determining who had contributed nothing or less than fifty dollars. *Id.* § 30118(b)(4)(B) (formerly 2 U.S.C. § 441b(b)(4)(B)). Early research found that most of the money raised came from high-level personnel. See John R. Mulkern, Edward Handler & Lawrence Godtfredsen, *Corporate PACs as Fundraisers*, 23 CAL. MGMT. REV. 49, 51 (1981). Corporations are permitted to use their business revenues to pay the expenses of administering their PACs. See 52 U.S.C. § 30118(b)(2) (2018) (formerly 2 U.S.C. § 441b).

<sup>28</sup> 52 U.S.C. § 30116(a)(1)(C) (2018) (formerly 2 U.S.C. § 441a(a)(1)(C)). This statement was true of multicandidate PACs only. If a PAC did not give to at least five different candidates and raise money from fifty people, the maximum contribution to it was \$1000. However, most PACs qualified for the larger contribution. See Frank J. Sorauf, *Political Action Committees*, in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK* 123 (Anthony Corrado et al. eds., 1997).

<sup>29</sup> See 52 U.S.C. § 30116(a)(2)(A)–(C) (2018) (formerly 2 U.S.C. § 441a(a)(2)(A)).

<sup>30</sup> See *Id.* § 30118(b)(4)(A)(ii) (formerly 2 U.S.C. § 441b(a), (b)(4)(A)(ii)) (limiting unions to soliciting contributions from unions members and their families); *Id.* § 30118(b)(4)(B) (formerly 2 U.S.C. § 441b(b)(4)(B)) (permitting unions to solicit members twice a year by mail at their homes as long as procedures are adopted to prevent them from determining who has contributed nothing or less than \$50).

campaigns.<sup>31</sup> This means that corporations can now use general business revenues for express advocacy and electioneering communications as long as they do not coordinate with candidates or their campaigns when they engage in these activities. In contrast, corporations must still make contributions to candidates for federal office or their campaigns using money from their PACs. Parallel rules apply to unions.<sup>32</sup>

Although the same rules govern the funding of corporate PACs and contributions from them to candidates today as they did when *Buckley* was decided, the sums corporate PACs and other business interests raised and spent at the time the case was decided are very different from what they raise and spend today. These amounts can be divided into contributions that PACs make to candidates and other expenditures made by PACs.

Because FECA went into effect only seven months before the 1972 election,<sup>33</sup> statistics from 1974<sup>34</sup> and 1976 provide a better baseline for comparison with 2015–2016 than would 1972.<sup>35</sup> In those two elections, corporate PAC contributions were \$2.4 million and \$6.7 million respectively,<sup>36</sup> or \$11,680,000 and \$28,260,000 in inflation-adjusted dollars. In the 2016 election cycle, in contrast, corporate PACs gave approximately

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<sup>31</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010). Although the plaintiff in *Citizens United* was a nonprofit corporation, the holding applies to all corporations and to unions, as long as they operate independently of candidates and their campaigns.

<sup>32</sup> See FEC, CAMPAIGN GUIDE: CORPORATIONS AND LABOR ORGANIZATIONS (2018), available at <https://www.fec.gov/resources/cms-content/documents/colagui.pdf>.

<sup>33</sup> Prior to the enactment of FECA, which went into effect in April 1972, corporations had no way to contribute to candidates. See Tillman Act of 1907, Pub. L. No. 59-36, 34 Stat. 864 (1907). Since FECA, they can contribute to candidates using PAC money.

<sup>34</sup> The 1974 election was not a presidential election cycle, but the 1976 election also involved predominantly House and Senate contributions since the presidential candidates took public financing.

<sup>35</sup> In 1972, the last presidential election before *Buckley*, corporate PACs gave at least \$1.7 million to congressional candidates, which would be almost \$9.8 million in 2016 dollars. See CANTOR, *supra* note 11, at 124. Another source has \$3.1 million, but that figure combines “business” and “professional” contributions. See ALEXANDER, *supra* note 14, at 214. Professional PACs included PACs of groups like the American Medical Association (“AMA”). *Id.* at 32–33, 60. The 1984 Congressional Research Service overview of federal campaign finance laws lists only contributions to congressional candidates because presidential candidates at that time opted for public financing, precluding contributions to them by PACs or others, and because PAC contributions to presidential candidates have historically accounted for less than 5% of their contributions. See CANTOR, *supra* note 11, at 64–65.

<sup>36</sup> See CANTOR, *supra* note 11, at 124. These amounts are somewhat exaggerated because they are based upon FEC data that combined “corporate” and “business” contributions. See *id.* at 126 n.2 (explaining the inconsistencies in FEC reporting of “business” and “corporate” contributions).

\$182 million in contributions to all federal candidates,<sup>37</sup> or roughly six-and-a-half times the inflation-adjusted amount that corporate PACs contributed in 1976.

Trade associations also represent business interests.<sup>38</sup> The category was not identified as such in 1972 as it is now.<sup>39</sup> In 1974 and 1976, “Trade, Membership, and Health” group PACs contributed \$1.8 million and \$2.6 million to congressional candidates, respectively,<sup>40</sup> which are \$8.76 million and \$11 million in inflation-adjusted dollars. In 2015–2016, trade associations contributed \$82.56 million to congressional candidates,<sup>41</sup> an increase of more than seven times those in 1974 and 1976. In addition, membership and cooperative PACs in 2015–2016 contributed almost \$45 million to congressional candidates.<sup>42</sup> These comparisons are rough, among other reasons, because health PACs are not broken out in 2015–2016 and because not all membership PACs are business oriented, e.g., those of the

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<sup>37</sup> See FEC, PAC CONTRIBUTIONS TO CANDIDATES: JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), available at [https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2\\_2016\\_24m.pdf](https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf). Labor PAC contributions to all federal candidates in 2015–2016 totaled \$46,728,402. *Id.* The numbers reported on the FEC website are slightly different from those reported by the Campaign Finance Institute, which applies its own methodology to the raw FEC statistics. See, e.g., CAMPAIGN FIN. INST., PAC CONTRIBUTIONS TO CONGRESSIONAL CANDIDATES 1978–2016 (2018), available at [http://www.cfinst.org/pdf/federal/HistoricalTables/pdf/CFI\\_Federal-CF\\_18\\_Table2-10.pdf](http://www.cfinst.org/pdf/federal/HistoricalTables/pdf/CFI_Federal-CF_18_Table2-10.pdf).

<sup>38</sup> See Tie-ting Su, Alan Neustadt & Dan Clawson, *Business and the Conservative Shift: Corporate PAC Contributions 1976–1986*, 76 SOC. SCI. Q. 20, 22 & n.1 (1995) (stating that trade association PAC contributions are “highly correlated with corporate donations”); CANTOR, *supra* note 11, at 88 n.2 (stating that trade associations and health care groups are assumed to have “a basically pro-business orientation.”).

<sup>39</sup> See CANTOR, *supra* note 11, at 126 & n.2. Another source classifies business, professional, agricultural, dairy, and health-related groups as “special interest groups,” see ALEXANDER, *supra* note 14, at 228, but does not distinguish business and professional when it lists contributions. See *id.* at 214. Alexander does list contributions by dairy, education, health-related, and “rural-related,” which includes electrical and agricultural interests, and contributions by these groups totaled \$3,950,000 in 1972.

<sup>40</sup> See CANTOR, *supra* note 11, at 125–26, n.3; see also JOSEPH E. CANTOR, CONG. RESEARCH SERV., REP. NO. 86-148, CAMPAIGN FINANCING IN FEDERAL ELECTIONS: A GUIDE TO THE LAW AND ITS OPERATION 36 (1986) (listing \$10 million in “business-related” contributions to candidates, which included a portion of trade association contributions). But see HERBERT E. ALEXANDER: MONEY, ELECTIONS AND POLITICAL REFORM 84 (2d ed. 1980) (stating that corporate and business-related trade associations gave more than \$7 million in direct contributions to candidates that year).

<sup>41</sup> See FEC, PAC CONTRIBUTIONS TO CANDIDATES: JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), available at [https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2\\_2016\\_24m.pdf](https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf). In 2015–2016, trade associations gave only \$213,407 to presidential campaigns. *Id.*

<sup>42</sup> See *id.*

Sierra Club and the National Rifle Association.<sup>43</sup> Despite these limitations in the data, combining inflation-adjusted totals of corporate and trade association PAC contributions in 1974 (\$20 million) and 1976 (\$40 million) with comparable amounts in 2016 (\$265 million), business-related PACs in 2016 contributed to candidates between six and ten times what they did when *Buckley* was decided, even though the campaign finance rules in this area have remained unchanged.

The dramatic increase in business-related contributions to candidates for federal office has been mirrored by other expenditures made by business interests in federal elections (without taking into account their contributions to Super PACs and social welfare organizations, which are discussed below<sup>44</sup>). Typical examples include independent expenditures, contributions to state or local candidates, direct mail, contributions to presidential candidates in primaries, fundraising, and administrative costs.<sup>45</sup> According to the FEC, corporate PACs made roughly \$5.8 million in total expenditures in the 1975–1976 election cycle,<sup>46</sup> equal to \$24,464,685 in 2016 dollars. In the 2016 election cycle, in contrast, corporate PACs spent \$385,710,026 in total expenditures on behalf of federal candidates,<sup>47</sup> which is more than fifteen times what they spent in 1975–1976 in constant dollars.

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<sup>43</sup> A better comparison might be that in 1974, business and business-related special interest groups gave \$4.8 million to House and Senate candidates, *see* ALEXANDER, *supra* note 14, at 228, or \$27.3 million in 2014 dollars, as compared with \$257,264,309 in the 2014 House and Senate races. *See* Press Release, FEC, Statistical Summary of 24-month Campaign Activity of 2013–2014 Election Cycle (Apr. 3, 2015), <https://www.fec.gov/updates/statistical-summary-of-24-month-campaign-activity-of-the-2013-2014-election-cycle/>. Contributions in 2014 were more than nine times the contributions in 1974 in constant (2014) dollars.

<sup>44</sup> *See infra* Part I.A.2 (examining business spending in areas changed by *Citizens United*).

<sup>45</sup> *See* CANTOR, *supra* note 11, at 68–70. According to Cantor, independent expenditures were responsible for an increasing share of PAC spending other than contributions to candidates between 1974 and 1980. *Id.* at 67.

<sup>46</sup> *See* Press Release, FEC, FEC Releases Index on Corporate-Related Political Committees (Sept. 18, 1977), [https://transition.fec.gov/press/archive/1977/19770918\\_Index-76PAC.pdf](https://transition.fec.gov/press/archive/1977/19770918_Index-76PAC.pdf). There is no separate data for corporate PAC expenditures in 1974; for combined “business related” expenditures of \$8.1 million in 1974, *see* CANTOR, *supra* note 11, at 84. Cantor notes that the numbers are “subject to dispute” because of a lack of consistency in standards for types of business spending prior to 1978. *See id.* at 83–84.

<sup>47</sup> *See* FEC, SUMMARY OF PAC ACTIVITY, JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), available at [https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1\\_2016\\_24m.pdf](https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1_2016_24m.pdf). During the 1975–1976 election cycle, union PACs spent a total of \$17.5 million on federal candidates. Richard Briffault, Herbert E. Alexander & Elizabeth Drew, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2087–88 & n.28 (1984). That is \$73.8 million

In addition to direct spending by corporate PACs, business-related trade association PAC expenditures for congressional candidates in the 1975–1976 election cycle was roughly \$5.5 million,<sup>48</sup> which would be \$23.2 million in 2016 dollars. Trade association PACs spent approximately \$65.5 million in the 2015–2016 cycle on direct spending,<sup>49</sup> or almost three times as much in constant dollars. Given that trade association PAC direct expenditures combined with those of corporate PACs were \$451,210,026 in 2015–2016,<sup>50</sup> corporate and business-related PACs spent almost ten times in 2015–2016 what they did in 1975–1976, in constant dollars.

In sum, combining business-related contributions to candidates with other expenditures, business interests spent \$716 million in 2015–2016, as compared with \$87 million in 1975–1976 (in inflation-adjusted dollars), or eight-and-a-half times more than in the 1976 election cycle. This dramatic increase does not take into account increased spending by business interests as a result of the 2010 decision in *Citizens United*.

## 2. *Business Spending After Changes in the Law*

Changes in the Court’s election-law doctrines have accelerated spending by corporations and other business entities on elections. Since *Citizens United* held that corporations can use non-PAC money for independent campaign spending,<sup>51</sup> the amount of corporate expenditures during campaigns has increased, although it is difficult to track such spending for two reasons. First, corporations and other business entities are now free to contribute unlimited amounts to independent expenditure-only groups. Some of these organizations are exempt from income tax under the *Internal Revenue Code* (“IRC”), are active in political campaigns, and rarely have to disclose or fully

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in 2016 dollars, compared with total union PAC spending in the 2015–2016 election cycle of \$256.9 million, *see id.*, which is roughly three-and-a-half times the 1975–1976 amount in constant dollars.

<sup>48</sup> See ALEXANDER, *supra* note 40, at 84.

<sup>49</sup> Compare FEC, SUMMARY OF PAC ACTIVITY, JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), available at [https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1\\_2016\\_24m.pdf](https://transition.fec.gov/press/summaries/2016/tables/pac/PAC1_2016_24m.pdf), with Press Release, FEC, Statistical Summary of 24-Month Campaign Activity of the 2015–2016 Election Cycle (Mar. 23, 2017), <https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle>. The former source states that trade association contributions in 2015–2016 to candidates for President, House and Senate totaled \$82.7 million, while the latter states that total trade association PAC disbursements during that election were \$148.2 million. This leaves \$65.5 million for all other trade association PAC spending.

<sup>50</sup> See *supra* notes 47, 49 and accompanying text.

<sup>51</sup> See *supra* note 31 and accompanying text.

disclose their donors.<sup>52</sup> For example, until recently, exempt organizations, like section 501(c)(4) social welfare groups and section 501(c)(6) trade or business association groups had to list their donors on their IRS information returns, although this information was not usually disclosed to the public. Thus, the identities of individual corporate or other business entity donors to such exempt organizations were not available to the public, but could be monitored and quantified by the IRS. The IRS changed its disclosure policy in 2018, so that these exempt organizations no longer have to list their donors' identities on their information returns filed with the IRS.<sup>53</sup> The IRS's new position was widely criticized, among other reasons because the agency will no longer be able to determine if donors to the organizations are foreign persons, who are prohibited by law from funding election activities.<sup>54</sup> The new policy will also prevent the IRS from easily determining contributions to such entities by corporations, LLCs, and other business entities or by labor unions and similar organizations. Although a federal court subsequently invalidated the IRS action, it did so because the agency had not followed the notice and comment procedures of the Administrative Procedure Act ("APA").<sup>55</sup> Because the court did not rule on the merits of its proposal, the IRS did not appeal the decision and instead proposed the identical change in a rulemaking allowing for the notice and comment

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<sup>52</sup> For disclosure, see *infra* notes 54–72 and accompanying text. The most commonly used exempt organizations are I.R.C. § 501(c)(4) social welfare groups, I.R.C. § 501(c)(5) labor organizations, and I.R.C. § 501(c)(6) trade associations and chambers of commerce. For Super PACs, see *infra* notes 84–90. Independent-expenditure-only groups are funded with contributions unlimited in amount from businesses, unions, or individuals as long as the groups operate independently of candidates, parties, and their campaigns. See *infra* notes 105–06 and accompanying text. Independent expenditures of any size made by individuals singly have been protected by the Supreme Court since before *Buckley*, so they were unaffected by the recent judicial rulings. *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam).

<sup>53</sup> See Rev. Proc. 2018-38, 2018-31 I.R.B. 280.

<sup>54</sup> See Press Release, David E. Price, Member, U.S. House of Representatives, Rep. Price Introduces Legislation to Overturn Controversial “Dark Money” Rule (Dec. 13, 2018), <https://price.house.gov/newsroom/press-releases/rep-price-introduces-legislation-overturn-controversial-dark-money-rule>. One commentator has opined that the IRS's decision may be an effort to reduce claims that its actions reflect bias against certain groups. See Philip Hackney, Dark Money Darker? An Examination of the IRS Choice to End the Collection of Donor Information on Form 990, at 10–11 (Apr. 18, 2019) (unpublished manuscript, N.Y.U. Law Nonprofit Forum) (on file with author).

<sup>55</sup> See *Bullock v. IRS*, 401 F.Supp.3d 1144 (D. Montana 2019); see also IRS, NOTICE 2019-47, PENALTY RELIEF RELATED TO RELIANCE ON REVENUE PROCEDURE 2018-38 (2019) (providing that organizations that failed to disclose contributors on Schedule B in reliance on Revenue Procedure 2018-47 prior to the District Court decision will not be subject to penalties).

procedures required by the APA.<sup>56</sup> Thus, IRS disclosure rules will no longer enable the agency to determine what different donors contribute based upon organizations' annual information returns, although it will retain the ability to request such information during an audit.

Second, there are FECA disclosure rules imposed on exempt organizations funding campaign advertising, but as interpreted by the FEC, these have little or no efficacy. Sections 30104(c)(1) and 30104(c)(2)(C) of FECA require an entity making independent expenditures greater than \$250 to disclose the identity of each person contributing more than \$200 made for the purpose of furthering an independent expenditure and the amount and date of the contribution.<sup>57</sup> However, the FEC promulgated a regulation under these provisions requiring the disclosure of only contributors who made donations to fund the specific independent expenditure the entity was required to report.<sup>58</sup> Because of the discrepancy between the statute's reach and that of the regulation, a watchdog group sued the FEC and won a judgment invalidating the regulation.<sup>59</sup> In response, the FEC issued a Press Release stating that, while it appeals the district court decision, it would require entities (other than political committees) to disclose the identity of "donors of over \$200 making contributions earmarked for political purposes."<sup>60</sup> By including the qualification "earmarked," the FEC seems to have created an enormous loophole. An exempt entity could devote 40% of its funds to independent expenditures but, unless those who contribute to it earmark their donations for "political purposes," the entity could claim that 100% of its contributors would not need to be identified.<sup>61</sup>

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<sup>56</sup> See IRS, Notice of Proposed Rulemaking, Guidance Under Section 6033 Regarding the Reporting Requirements of Exempt Organizations, 84 Fed. Reg. 47447 (Sept. 10, 2019).

<sup>57</sup> See 52 U.S.C. § 30104(c)(1), (2)(C) (2018). This Section incorporates the contents of 52 U.S.C. § 30101(8)(A) (defining a contribution) and 52 U.S.C. § 30104(b)(3)(A) (specifying that the reports filed must identify certain persons and the date and amount of their contributions).

<sup>58</sup> See 11 C.F.R. § 109.10(e)(i)(vi) (2019).

<sup>59</sup> See *Citizens for Responsibility & Ethics in Wash. v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), *appeal filed sub nom. Crossroads Glob. Policy Strategies v. Citizens for Responsibility & Ethics in Wash.*, No. 18-5261 (D.C. Cir. filed Aug. 30, 2018).

<sup>60</sup> See Press Release, FEC, FEC Provides Guidance Following U.S. District Court Decision in *Crew v. FEC* (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>.

<sup>61</sup> See Brendan Fischer & Maggie Christ, *New Reports Show Why the FEC Needs to Clarify Disclosure Requirements for Dark Money Groups—and Why Congress Should Go Even Further*, CAMPAIGN LEGAL CENTER (Feb. 6, 2019), <https://campaignlegal.org/update/new-reports-show-why-fec-needs-clarify-disclosure-requirements-dark-money-groups-and-why> (describing that, notwithstanding a D.C. District Court decision, dark money is still largely secretive).

The situation for electioneering communications is less ambiguous, but no more transparent. Section 30104(f) of FECA requires an entity funding more than \$10,000 in electioneering communications during a calendar year to file a report that contains, among other things, the names and addresses of anyone contributing \$1000 or more in aggregate to the entity during that year.<sup>62</sup> Arguably, Congress intended this provision to require reporting of all contributors of \$1000 or more. However, the FEC promulgated a regulation requiring disclosure of only those who made such contributions “for the purpose of furthering electioneering communications.”<sup>63</sup> This regulation was upheld by an appellate court that found the agency’s decision was not only a permissible interpretation of BCRA; it was persuasive as well.<sup>64</sup> As a result, despite FECA’s provisions that would appear to require exempt organizations active in campaigns to disclose information about their contributors, such disclosures are easily avoided and occur quite rarely.

The exempt organizations in question may use the money they raise to fund their own election advertising and other campaign activities. Alternatively, they can transfer some or all of their money available for campaign spending<sup>65</sup> to Super PACs, which are subject to disclosure rules. Super PACs are required to reveal the names of individuals and entities that give directly to them, but in practice the names of entities are frequently generic, so they do not reveal the ultimate donors to their funds. As a consequence, the extent of business spending on campaigns that is funneled through certain exempt organization intermediaries cannot be known. Similarly, although I.R.C. §527 requires PACs not regulated by FECA to disclose their donors,<sup>66</sup> the disclosures typically reveal only the immediate, not the ultimate donor. In many instances, then, corporations may be

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<sup>62</sup> See 52 U.S.C. § 30104(f)(2) (2018).

<sup>63</sup> See 11 C.F.R. § 104.20(c)(9) (2019). The history of the FEC’s ruling process is detailed in *Van Hollen v. FEC*, 811 F.3d 486, 490–91 (D.C. Cir. 2016).

<sup>64</sup> See *Van Hollen*, 811 F.3d at 493.

<sup>65</sup> Under IRS regulations, exempt organizations must be “primarily” devoted to the purpose and activities that constitute the mission justifying their exemption from taxation, e.g., social welfare for section 501(c)(4) groups, employee welfare for section 501(c)(5) labor groups, and business interests for 501(c)(6) trade associations and related groups. See 26 C.F.R. § 1.501(c)(4)-1(a)(2)(I); I.R.S. GEN. COUNS. MEM. 34,233 (Dec. 3, 1969). The IRS has not published precedential guidance regarding the meaning of “primarily” in this context. For the IRS’s litigating position with regard to the primarily standard for 501(c)(4) groups, see Miriam Galston, *Vision Service Plan v. U.S.: Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX REV. 165 (2006).

<sup>66</sup> I.R.C. § 527(j)(3)(B). The requirement applies to donations of \$200 or more in a calendar year. *Id.*

“hiding behind dubious and misleading names,”<sup>67</sup> so their political spending is invisible to the public and impossible to quantify. Further, groups have devised other stratagems to evade disclosure of donors’ identities.<sup>68</sup>

In contrast, in the case of trade associations and chambers of commerce, which are exempt under section 501(c)(6), all their money comes from business interests.<sup>69</sup> Although the donors to these organizations are also not disclosed to the public or IRS, some of their spending on campaigns can be captured. In particular, businesses are usually permitted to deduct the cost of dues to trade associations from their gross income, thereby reducing their taxable income.<sup>70</sup> However, the *IRC* denies such deductions for costs incurred for campaigning or lobbying, whether the money is spent directly by the business entity or through an intermediary, such as a trade association that engages in those activities.<sup>71</sup> Because those seeking business deductions for dues or other payments made to trade associations have the burden of showing the portion of their payments not attributable to campaigning or lobbying (by the recipient organization), the *IRC* requires that organizations tell donors the percent of their payments attributable to the nondeductible activities.<sup>72</sup> The aggregate amounts spent on each of these activities should also be listed on an organization’s information return,<sup>73</sup> making possible an estimate of the amount each trade association has spent each year on campaign-related activities.

As a result of the complexities involved in tracing the sources of campaign spending by independent expenditure entities, experts disagree about whether, or to what degree, corporate and other business spending has

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<sup>67</sup> *McConnell v. FEC*, 540 U.S. 93, 197 (2003) (basing its statement on the record in the case).

<sup>68</sup> For example, in the month before a recent special election in Alabama, at least one Super PAC bought millions of dollars of advertisements on credit, thereby avoiding the need to disclose its donors until after the election. See Ashley Balcerzak, *Mystery Money Floods Alabama in Senate Race’s Final Days*, CTR. FOR PUBLIC INTEGRITY (Dec. 8, 2017), <https://www.publicintegrity.org/2017/12/08/21368/mystery-money-floods-alabama-senate-races-final-days>; see also CAMPAIGN LEGAL CTR., *DODGING DISCLOSURE: HOW SUPER PACS USED REPORTING LOOPHOLES AND DIGITAL DISCLAIMER GAPS TO KEEP VOTERS IN THE DARK IN THE 2018 MIDTERMS* (2018), available at <https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf>.

<sup>69</sup> See 26 C.F.R. §1.501(c)(6)-1 (2019) (stating that a section 501(c)(6) organization “is an association of persons having some common business interest,” that is devoted to advancing that common business interest, although the organization cannot itself engage in a business for profit).

<sup>70</sup> I.R.C. § 162(a).

<sup>71</sup> See I.R.C. § 162(e); Treas. Reg. § 1.162-20(c)(1) (2011).

<sup>72</sup> See I.R.C. § 6033(e)(1).

<sup>73</sup> See IRS, FORM 990 sched. C (2020).

increased since *Citizens United* was decided. According to several sources, large, publicly traded corporations have not increased their non-PAC political spending.<sup>74</sup> However, privately held corporations' electoral spending is not covered by this assertion, and according to one source privately held businesses that used treasury funds on electoral spending "were among 2012's biggest sources of outside money."<sup>75</sup> In addition, as noted earlier, business spending not subject to contribution limits may not be captured when an intermediary vehicle, such as a section 527 organization, a Super PAC, or an exempt organization is utilized.<sup>76</sup> Data provided by The Campaign Legal Center, a watchdog group, reveal that trade association groups spent more than \$129 million on election advertising from 2012 to 2016, and I.R.C. § 501(c)(4) groups spent more than \$520 million on elections during the same period.<sup>77</sup> While it is probable that trade associations represent business interests, it is unclear what proportion of spending by I.R.C. §501(c)(4) groups reflects business interests because these groups do not need to reveal the identities of their contributors and their missions may be attractive to an array of interests, not all of which are business oriented.

What is known is that overall, contributions to Super PACs in 2015–2016 by entities of all kinds (such as unions, corporations, trade associations, PACs, and Super PACs) totaled \$519,000,161, or 32% of contributions to Super PACs in that election cycle and that between a third and half of that sum came from business interests.<sup>78</sup> Again, these are amounts disclosed and the

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<sup>74</sup> See MICHAEL J. MALBIN & BRENDAN GLAVIN, CAMPAIGN FIN. INST., CFF'S GUIDE TO MONEY IN FEDERAL ELECTIONS: 2016 IN HISTORICAL CONTEXT 1 (2018); COMM. FOR ECON. DEV., *supra* note 16, at 5, 6.

<sup>75</sup> Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, OPENSECRETS (Jan. 21, 2014), <https://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout>.

<sup>76</sup> See Trevor Potter, *Citizens United Defenders Use Deceptive Arguments to Underestimate Money in Politics*, CAMPAIGN LEGAL CTR. (Oct. 26, 2017), <https://campaignlegal.org/update/citizens-united-defenders-use-deceptive-arguments-underestimate-money-politics> (arguing, based upon data provided by OpenSecrets.org, that Floyd Abrams's claim that corporate spending since *Citizens United* represents a "comparatively small" part of campaign spending during that period is "highly misleading"). Potter also notes that data based upon corporate contributions to candidates for president is misleading because ninety-nine percent of corporate PAC contributions in 2016 went to candidates for Congress. *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> COMM. FOR ECON. DEV., *supra* note 16, at 5 & fig. 2. The remaining 68% was contributed by individuals. *See id.* CED's statistics for Super PACs are based upon an analysis of the ninety largest Super PACs, which were the source of 94% of Super PAC spending in 2015–2016. *Id.* at 4. Since

immediate donors, whereas, as noted above, there are potentially large sums of undisclosed spending that cannot be quantified and misleadingly disclosed contributors that cannot be identified. Thus, since Super PACs became the “primary vehicles of outside spending,”<sup>79</sup> and outside spending accounted for more than one fifth of election spending in 2015–2016,<sup>80</sup> business interest spending on elections has increased commensurately. Given that business interests have also increased their spending under pre-*Citizens United* law more than eight times,<sup>81</sup> it is fair to conclude that campaign spending by business interests today has increased dramatically over what it was at the time of *Buckley*, even after correcting for inflation.

### B. Spending by Individuals

Since *Buckley*, individuals singly have been able to spend unlimited amounts directly on campaigns if they do not coordinate with a candidate or a candidate’s campaign.<sup>82</sup> In 2010, the United States Court of Appeals for the District of Columbia Circuit greatly expanded individuals’ ability to influence campaigns by enabling them to give unlimited amounts to groups, if the groups act independently of candidates and their campaigns.<sup>83</sup> This decision, known as *SpeechNow* or *SpeechNow.org*, enabled individuals to amplify the impact of their spending by combining their contributions with other contributions—large and small, made by other individuals or by ideological or business groups—in one campaign vehicle acting in a unified way. These independent expenditure groups are now known as Super PACs.<sup>84</sup>

Even extremely large amounts spent by a wealthy individual singly can have their impact amplified by being combined with contributions from other individuals and entities. The amplification effect will be heightened because none of the contributors to the recipient organizations will be subject

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Super PACs are only required to report contributors who give \$200 or more, the CED analysis is based upon 81% of Super PAC receipts in 2015–2016.

<sup>79</sup> ISSUE ONE, OUTSIDE SPENDING IN ELECTIONS (2017), available at <https://www.issueone.org/wp-content/uploads/2017/09/outside-spending.pdf>.

<sup>80</sup> *Id.*

<sup>81</sup> *See supra* notes 36–50 and accompanying text. The statistics cited in this section include only reported expenditures. *See infra* Part I.D (discussing the post-*Buckley* trend of outside money spent on campaign-oriented issue advertisements not subject to reporting).

<sup>82</sup> *See Buckley v. Valeo*, 424 U.S. 1, 51 (1976) (per curiam).

<sup>83</sup> *SpeechNow.org v. FEC*, 599 F.3d 686, 693, 698 (D.C. Cir. 2010).

<sup>84</sup> On Super PACs, see generally R. SAM GARRETT, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS (2016); Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644 (2012).

to dollar limits, so the resulting combined funds are in principle unlimited. In the 2015–2016 election cycle, Super PACs spent in excess of \$1.1 billion, which was almost half of the spending of all PACs active in the election cycle combined.<sup>85</sup> One estimate based upon data available from the FEC found that almost 68% of contributions to Super PACs came from individuals.<sup>86</sup> A large part of that amount came from contributions that would not have been legal before *SpeechNow.org*,<sup>87</sup> given that prior to that decision individuals could give at most \$5000 to a single PAC.<sup>88</sup> In the 2015–2016 cycle, of the \$1.1 billion contributed by individuals to Super PACs, the top 1% of individual donors (511 individuals) contributed \$1.05 billion or 88.6% of all individual contributions, and the remaining 50,559 individuals who gave to those Super PACs in aggregate contributed 11.4% of the total.<sup>89</sup> Similarly, records reveal that 85% of the money raised by the Super PAC associated with Hillary Clinton’s 2016 campaign came from donors who contributed at least \$1 million dollars.<sup>90</sup> Taking into account other unlimited spending vehicles, such as I.R.C. § 501(c)(4) organizations, OpenSecrets estimates that the top one percent of the top one percent (.01%) of the American adult population

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<sup>85</sup> See FEC Press Release, Statistical Summary of 24-Month Campaign Activity of the 2015–2016 Election Cycle (Mar. 23, 2017), <https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle/> (identifying \$1.8 billion in disbursements from all separate segregated fund PACs and all nonconnected PACs); see also NATHANIEL PERSILY, ROBERT BAUER & BENJAMIN L. GINSBERG, BIPARTISAN POLICY CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 38 (2018), available at <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf> (explaining that Super PACs raised \$1.8 billion but only spent \$1.1 billion in the 2016 election cycle).

<sup>86</sup> See COMM. FOR ECON. DEV., *supra* note 16, at 5 & fig. 2 (noting that individuals accounted for 67.7% of itemized contributions to Super PACs, or \$1,086,032,803). This is “roughly double the \$534 million individuals gave to Super PACs in 2012.” David B. Magleby, Super PACs and 501(c) Groups in the 2016 Election 7 (Nov. 9–10, 2017) (unpublished manuscript), available at <https://www.uakron.edu/bliss/state-of-the-parties/papers/magleby.pdf>; see also Persily et al., *supra* note 85 (noting the difference between amounts contributed to Super PACS and Super PAC expenditures).

<sup>87</sup> See MALBIN & GLAVIN, *supra* note 74, at 42, tbl. 1-9A (showing that 96% of contributions made by individuals and groups to Super PACs for presidential candidates in 2016 were in amounts greater than \$5400); ZACHARY ALBERT, TRENDS IN CAMPAIGN FINANCING, 1980–2016, at 18–19 (2017) (showing that the top 25% of individual donors gave 90% of campaign funds in 2016).

<sup>88</sup> This cap on individual contributions to regular PACs was established by the 1976 amendments to FECA, which were enacted in response to the *Buckley* decision. See Federal Elections Campaign Act Amendments of 1976, Pub. L. 94-283, §112, 90 Stat. 475 (enacting 2 U.S.C. §441(a)(1)(C)).

<sup>89</sup> See *Super PACS: How Many Donors Give*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/donor\\_stats.php?cycle=2016&type=I](https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2016&type=I) (last visited Apr. 5, 2020).

<sup>90</sup> MALBIN & GLAVIN, *supra* note 74, at 9.

by wealth gave more than \$2.3 billion in 2015–2016, which was 45% more than the parallel group gave in 2012.<sup>91</sup>

Thus, the changes initiated by *Citizens United*, and extended by *SpeechNow.org*, which enable individuals to give unlimited amounts to independent expenditure entities, have resulted in a dramatic increase in the overall amount contributed by individuals to such organizations. One analysis has estimated that more than \$1 billion of total federal election spending in the 2015–2016 cycle is attributable to changes in the law made by *Citizens United* and *SpeechNow.org*.<sup>92</sup> Regardless of whether one finds these amounts troubling as a policy matter, they have created an electoral environment unimaginable to the *Buckley* Court. Equally dramatic, the changes discussed have made it possible for a small number of extremely wealthy individuals to dominate outside spending vehicles.<sup>93</sup> The potential dominance over specific races attributable to contributions from such a small number of donors may mark the greatest departure of the current electoral landscape from electoral politics at the time of *Buckley*.

In addition to the impact of *Citizens United* and *SpeechNow.org*, the potential for greatly increased individual spending on behalf of traditional recipients of regulated contributions also may have occurred because of a change in the law regarding aggregate spending, although it is too soon to know what the actual effects of the change will be. The legal change occurred when the Supreme Court ruled in *McCutcheon v. FEC* that *Buckley*-era caps on aggregate per-election-cycle spending cycle are unconstitutional.<sup>94</sup> At the time of the *Buckley* decision, the aggregate contribution limit on individuals imposed by FECA was \$25,000,<sup>95</sup> or \$105,451 in 2016 dollars. As a result of the Court's

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<sup>91</sup> Sultan, *supra* note 16 (noting that the increase in number of individuals in 2016 was only three percent).

<sup>92</sup> See ADAM LIOZ, JUHEM NAVARRO-RIVERA & SEAN MCELWEE, DEMOS, COURT CASH: 2016 ELECTION MONEY RESULTING DIRECTLY FROM SUPREME COURT RULINGS 2, 4, 7, 17 n.10 (2017), available at <http://www.demos.org/publication/court-cash-2016-election-money-resulting-directly-supreme-court-rulings>.

<sup>93</sup> Not all of these groups need to report all of the funds they raise or spend. See *What Super Pacs, Non-Profits, and Other Groups Spending Outside Money Must Disclose About the Source and Use of Their Funds*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/rules.php> (last visited Apr. 5, 2020). Thus, the figures in the text outlining the concentration of wealthy donors are necessarily incomplete. For outside spending, see *infra* Part I.C.

<sup>94</sup> *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014).

<sup>95</sup> *Buckley v. Valeo*, 424 U.S. 1, 38 (1976) (per curiam). The limit had already increased to \$123,200 by 2012. *McCutcheon*, 572 U.S. at 194; R. SAM GARRETT, CONG. RESEARCH SERV., R43334, CAMPAIGN CONTRIBUTION LIMITS: SELECTED QUESTIONS ABOUT *MCCUTCHEON* AND POLICY ISSUES FOR CONGRESS 2 (2014).

invalidation of the aggregate contribution limit in *McCutcheon*, the maximum aggregate contribution limit per individual is now estimated to be \$3,628,000 in an election cycle, if the individual gives the maximum permitted to each federal candidate and entities associated with the candidates and parties.<sup>96</sup> In constant (2016) dollars, this is an increase of more than thirty times per individual contributor. It is unlikely, however, that many, if any, individuals will spend the theoretical maximum this way. Nevertheless, a watchdog group found that 646 individuals had given “at or near the overall limit” before *McCutcheon* was decided and, thus, that the increase in aggregate spending now permitted could enable high-wealth individuals to greatly magnify their influence on particular candidates.<sup>97</sup>

In sum, wealthy individuals employing unlimited contribution vehicles now fund an enormous share of the spending in federal campaigns. The implications for *Buckley 2.0* are discussed in Parts II–III.

### C. Outside Spending

According to the Center for Responsive Politics, since *Citizens United* there has been “an explosion of election-related outside spending.”<sup>98</sup> The term “outside spending” often refers to spending on elections by persons other than candidates, their campaigns, and political parties.<sup>99</sup> The main examples

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<sup>96</sup> *McCutcheon*, 572 U.S. at 268 (Breyer, J., dissenting).

<sup>97</sup> Bob Biersack, *McCutcheon’s Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS NEWS (Sept. 17, 2013, 11:38 PM), <https://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why>.

<sup>98</sup> Roy Slatko, *PolitiQuiz: Outside Spenders and the IRS*, OPENSECRETS NEWS (Mar. 12, 2014, 1:00 PM), <https://www.opensecrets.org/news/2014/03/politiquiz-outside-spenders-and-th/>.

<sup>99</sup> See, e.g., WESLEYAN MEDIA PROJECT & CTR. FOR RESPONSIVE POLITICS, SPECIAL REPORT ON OUTSIDE GROUP ACTIVITY, 2000–2016 (2016), [http://mediaproject.wesleyan.edu/wp-content/uploads/2016/08/DisclosureReport\\_FINAL-5.pdf](http://mediaproject.wesleyan.edu/wp-content/uploads/2016/08/DisclosureReport_FINAL-5.pdf); IAN VANDEWALKER, BRENNAN CTR. FOR JUST., ELECTION SPENDING 2016: OUTSIDE GROUPS OUTSPEND CANDIDATES AND PARTIES IN KEY SENATE RACES (2016), <https://www.brennancenter.org/sites/default/files/publications/Election%20Spending%202016%20outside%20groups%20outspend.pdf>. Some authorities consider political party committees outside spending groups. DAVID B. MAGLEBY, *The 2012 Election as a Team Sport*, in FINANCING THE 2012 ELECTION 2 (2014). Since some political party spending can be coordinated with candidates and some can be independent, parties may in fact be considered outside groups when their spending is independent of candidates. See *Making Independent Expenditures as A Political Party Committee*, FEC, <https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/making-independent-expenditures-political-party-committee> (last visited May 17, 2020). Some would not consider single-candidate Super PACs and Leadership Super PACs “outside.”

of such entities are exempt organizations described in a subsection of 501(c) of the *IRC*,<sup>100</sup> section 527 organizations, and Super PACs. Most organizations described in 501(c) are social welfare organizations, labor groups, and trade associations and chambers of commerce.<sup>101</sup> Together these groups and Super PACs are estimated to have spent between \$1.5 and \$1.8 billion in 2015–2016, which represents more than 20% of the roughly \$6.5 billion spent on that election.<sup>102</sup> This amount is almost 50% greater than the amount of outside spending in 2012.<sup>103</sup> During the 2018 mid-term elections, outside spending was roughly \$1.3 billion, which represented a 60% increase over the previous mid-term election.<sup>104</sup>

The term “outside spending” is intended to connote spending by groups or individuals that are independent of candidates. In order to be entitled to receive contributions that are not capped by FECA contribution limits, the entities spending must be independent of candidates because the Supreme Court first justified unlimited spending by corporations using their corporate treasuries (instead of their PAC money) on the ground that there would be no possibility of campaign corruption as long as corporate expenditures were not coordinated with a candidate.<sup>105</sup> One type of independent expenditure

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<sup>100</sup> See 26 U.S.C. § 501(c)(4)–(6) (2018).

<sup>101</sup> See *supra* note 93.

<sup>102</sup> See Press Release, FEC, Statistical Summary of 24-Month Campaign Activity of the 2015–2016 Election Cycle (Mar. 23, 2017), <https://www.fec.gov/updates/statistical-summary-24-month-campaign-activity-2015-2016-election-cycle/> (showing that independent expenditure only political committees spent \$1.8 billion in 2015–2016). Other sources state that Super PACs spent \$1,066,914,448 during that cycle in addition to more than \$200 million spent by exempt organizations. *Outside Spending*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=2016](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016) (last visited Apr. 5, 2020). The statistics do not reflect election spending not reported to the FEC, e.g., messages like electioneering communications broadcast outside the thirty- and sixty-day regulated periods. See 11 C.F.R. § 109.10(b)–(e) (2019); *infra* Part I.D.

<sup>103</sup> See *Outside Spending in Elections*, ISSUEONE, <http://www.issueone.org/wp-content/uploads/2017/09/outside-spending.pdf> (last visited May 17, 2020). Outside spending in 2012 accounted for 16.5% of total election spending, while in 2016, it was 21.7%. See *id.* These amounts reflect only expenditures reported to the FEC. Other election related spending by outside groups is not captured by these figures. For parallel statistics that include spending by parties as outside spending, see WESLEYAN MEDIA PROJECT & CTR. FOR RESPONSIVE POLITICS, *supra* note 99.

<sup>104</sup> See Soo Rin Kim, *Midterms Spending Overview: Total Expected to Reach \$5.2 Billion*, ABC NEWS (Nov. 6, 2018), <https://abcnews.go.com/beta-story-container/Politics/midterms-spending-overview-total-cost-expected-reach-52/story?id=58996037>.

<sup>105</sup> For a fuller account of *Citizens United*, its reasoning, and developments based upon that decision, see *infra* Part II.B. This decision applies to union spending not funded by union PACs as well. See *What Citizens United Means for Union Political Spending*, CTR. FOR UNION FACTS, <https://www.unionfacts.com/article/political-money/what-citizens-united-means-for-union-political-spending> (last visited Apr. 5, 2020).

entity that arose in the wake of *Citizens United* and its progeny was the Super PAC, which is “super” because it is permitted to receive contributions not subject to FECA contribution limits as long as the Super PAC operates independently of candidates and their campaigns, as independence is defined in the regulations implementing FECA.<sup>106</sup> It should be noted, however, that a significant portion of Super PACs are single-candidate Super PACs: their expenditures are made exclusively on behalf of a single candidate, although they do not coordinate their activities with that candidate, as coordination is defined by the FEC. In 2012, roughly 42% of Super PAC spending was attributable to single-candidate Super PACs; by 2016, half of Super PAC spending was attributable to them.<sup>107</sup>

Is outside spending a bad thing? Some have argued that outside money enables a wider range of voices to be heard during campaigns than was possible when candidates and party committees dominated campaign spending.<sup>108</sup> That may be true, given that FEC reports indicate that the amount of outside spending has surpassed the amount of candidate spending in a growing number of races since 2008.<sup>109</sup> However, who these newly

<sup>106</sup> On the FECA standard for independence, see *infra* Part II.B.5.

<sup>107</sup> In 2012, single-candidate Super PACs spent \$273,479,098. *2012 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C> (last visited Apr. 5, 2020). In 2012, total Super PAC spending was \$609,936,792. *Outside Spending: Total by Type of Spender, 2012*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/fes\\_summ.php?cycle=2012](https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012) (last visited Apr. 5, 2020). In 2016, single-candidate Super PACs spent over \$530,000,000. *2016 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=C> (last visited Apr. 5, 2020).

<sup>108</sup> See, e.g., Bradley A. Smith, *Why the Media Hate Super PACs*, NAT'L REV. (Nov. 6, 2015, 9:00 AM), <https://www.nationalreview.com/2015/11/campaign-finance-super-pacs/> (arguing that Super PACs allow citizens to speak to other citizens without interference); Bradley A. Smith, *Citizens United Gives Freedom of Speech Back to the People*, REUTERS (Jan. 16, 2015), [http://blogs.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people](http://blogs.reuters.com/great-debate/2015/01/16/citizens-united-gives-freedom-of-speech-back-to-the-people/) (“*Citizens United* has made it far easier for challengers to compete with incumbents . . .”).

<sup>109</sup> See *Independent Spending Dominated the Closest Senate and House Races in 2016*, CAMPAIGN FIN. INST. (Nov. 10, 2016), [http://www.cfinst.org/Press/PRelases/16-11-10/independent\\_spending\\_dominated\\_the\\_closest\\_senate\\_and\\_house\\_races\\_in\\_2016.aspx](http://www.cfinst.org/Press/PRelases/16-11-10/independent_spending_dominated_the_closest_senate_and_house_races_in_2016.aspx); *Races in Which Outside Spending Exceeds Candidate Spending, 2018 Election Cycle*, OPENSECRETS, [https://www.opensecrets.org/outside\\_spending/outscand.php?cycle=2018](https://www.opensecrets.org/outside_spending/outscand.php?cycle=2018) (last visited Apr. 5, 2020) (listing twenty-eight House and Senate races in which outside spending exceeded candidate spending, sometimes by large percentages); see also VANDEWALKER, *supra* note 99 (arguing that outside groups spent more than both candidates and political parties combined in ten key Senate races). OpenSecrets lists this data for election cycles going back to 2000, when there were zero such instances. *Races in Which Outside*

empowered voices are, and whom or what they represent, is only partially known. In the case of Super PACs, the names of individual donors are revealing, while some of the entity names are revealing, and others are not. Individuals, who are responsible for roughly two-thirds of the Super PAC receipts, can be identified using lists compiled by OpenSecrets.org and similar watchdog groups.<sup>110</sup> In contrast, as was noted earlier, exempt organizations are given great latitude to engage in campaign activities,<sup>111</sup> but they are not required to disclose their donors to the public. In general, then, the origin of much of the hundreds of millions of dollars spent by outside groups cannot be identified.<sup>112</sup>

It is impossible, therefore, to know if outside spending in fact makes possible the participation of a wide variety of voices that otherwise would not be heard or would not be heard effectively. Based upon the fragmentary evidence available, it seems that much outside spending consists of voices already well represented in elections that are now greatly amplified by means of unlimited contributions that are pooled in independent spending vehicles. The same evidence shows that outside spending vehicles are increasingly dominated by mega-donations contributed by a small number of high-wealth individuals.<sup>113</sup> It seems, then, that the rapid growth of outside spending coupled with the dominance of contributions by a tiny percentage of donors poses the risk that a handful of extremely wealthy people rather than citizens at large, or donors generally, will derive the benefit afforded by this new campaign finance phenomenon.

#### D. Issue Advocacy

When *Buckley* was handed down, the art of creating issue ads to influence an election without being subject to regulation<sup>114</sup> had not yet been refined,

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*Spending Exceeds Candidate Spending, 2000 Election Cycle*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/outvscand.php?cycle=2000>.

<sup>110</sup> See *2018 Top Donors to Outside Spending Groups*, OPENSECRETS, <https://www.opensecrets.org/outside-spending/summ.php?cycle=2018&disp=D&type=V&superonly=N> (last visited Apr. 5, 2020). By clicking on the “Cycle” dropdown menu, donor data as far back as 2004 is available.

<sup>111</sup> See *supra* note 65.

<sup>112</sup> See *Political Nonprofits (Dark Money)*, OPENSECRETS, [https://www.opensecrets.org/outside-spending/nonprof\\_summ.php](https://www.opensecrets.org/outside-spending/nonprof_summ.php) (last visited Apr. 5, 2020) (showing the total amount of spending by groups with no disclosure of donors).

<sup>113</sup> See *supra* notes 89–90 and accompanying text.

<sup>114</sup> Some issue advertisements can also be subject to regulation under provisions of the *Internal Revenue Code* prohibiting or restricting political campaign activity engaged in by exempt organizations as well as through FECA regulation. See, e.g., Rev. Rul. 2004-6, 2006-1 C.B. 264; Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

because the distinction *Buckley* drew between express advocacy and other campaign-related spending spawned the industry devoted to crafting electoral advertising ostensibly discussing issues rather than candidates. An issue ad is a public communication addressing a subject of potential interest to the public, and it may be made to educate or persuade people about a subject, with or without the intent to influence their vote in an election. For example, in order to persuade people to use reusable shopping bags, an environmental group may run ads informing the public that discarded plastic bags end up in rivers and kill fish who ingest too many of them.

The *Buckley* Court emphasized that pure issue discussion enjoys the highest level of First Amendment protection because such discussion is critical for ensuring an informed public and because the First Amendment protects free expression to the greatest extent possible. It ruled that communications during campaigns containing express advocacy could be subject to regulation by the FEC, but attempts to regulate other forms of speech during elections could pose a threat to the pure discussion of issues, especially when the difference between issue advocacy and campaign advocacy was unclear.<sup>115</sup> After concluding that the FECA provision regulating expenditures would be unconstitutionally vague unless limited to express advocacy, the *Buckley* Court noted that adept lawyers would have no trouble authoring messages that evaded FECA restrictions, since all they had to do was avoid words of express advocacy, such as “elect” or “defeat” Joe Smith, or their equivalents.<sup>116</sup> The Court was prescient, and in ensuing years, the phrase “sham issue advocacy” was coined to describe issue ads communicated with the intent to influence votes for candidates while evading FECA campaign restrictions imposed upon express advocacy, e.g., disclosure rules and rules requiring “hard” or PAC money to fund those communications.<sup>117</sup> Using the plastic bag example, urging people to stop

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<sup>115</sup> *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (per curiam).

<sup>116</sup> *Id.* at 44 n.52. Some commentators and courts have stated that few election ads contain express advocacy. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 127 (2003); BRENNAN CTR. FOR JUST., *Magic Words*, in STRAIGHT TALK ON CAMPAIGN FINANCE: SEPARATING FACT FROM FICTION (2009), available at <https://www.brennancenter.org/sites/default/files/legacy/d/paper5.pdf>. However, FEC data indicate that, since *Citizens United* was decided, and probably because of it, the rate of spending on express advocacy has skyrocketed. See Magleby, *supra* note 86, at 5 (stating that total reported independent expenditures in 2016 were \$1,631,002,075).

<sup>117</sup> See Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265 (2000); BRENNAN CTR. FOR JUSTICE, EXPRESS ADVOCACY AND ISSUE ADVOCACY: HISTORICAL AND LEGAL EVOLUTION OF POLITICAL

using plastic bags because of the environmental harm is pure issue advocacy. A similar ad broadcast near an election that also notes which candidates support or oppose a “bag tax” may be intended to influence how people vote in that election, but it would not be subject to regulation, despite its motivation, because it lacks words explicitly calling for the election or defeat of a candidate.

In 2002, Congress sought to curb the unregulated funding of issue ads likely aimed at influencing voters’ choice of candidates by amending FECA to include a new category of campaign speech called “electioneering communications.” The new category was defined to include communications using broadcast media (but not print or mail) that mention or otherwise refer to a specific federal candidate and that are made in the thirty days before a primary or sixty days before an election, if the ads target at least 50,000 members of the relevant electorate for that candidate.<sup>118</sup> The new provisions compelled the disclosure of the amounts and sources of electioneering communications and, if the funders of the communications were corporations or labor unions, the provisions required them to use PAC funds to pay for the ads.<sup>119</sup>

The electioneering provisions were upheld against a constitutional challenge in *McConnell v. FEC*.<sup>120</sup> However, in 2007, the Supreme Court revised and narrowed the definition of an electioneering communication for purposes of the ban on corporate funding so that it included little more than express advocacy.<sup>121</sup> In 2010, *Citizens United* held that corporations and unions could use general treasury funds to pay for express advocacy and electioneering communications as long as the communications were not coordinated with a candidate or campaign.<sup>122</sup> The result of *Citizens United* was thus to further undermine BCRA’s electioneering communication provision, thereby restoring corporations’ ability to spend potentially unlimited amounts on issue ads intended to influence voting for specific candidates, even if they explicitly refer to candidates and are broadcast on

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ADVERTISING 23–25, [www.brennancenter.org/sites/default/files/legacy/d/download\\_file\\_10667.pdf](http://www.brennancenter.org/sites/default/files/legacy/d/download_file_10667.pdf) (last accessed Apr. 5, 2020).

<sup>118</sup> 52 U.S.C. § 30104(f)(3) (2018).

<sup>119</sup> The provision was part of a larger campaign finance reform effort. See Part I.A.2.

<sup>120</sup> *McConnell*, 540 U.S. 93 (2003).

<sup>121</sup> See *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007) (holding that the ban could only apply to electioneering communications that were the functional equivalent of express advocacy). But see *infra* note 123 and accompanying text.

<sup>122</sup> See *Citizens United v. FEC*, 558 U.S. 310, 360–65 (2010).

the eve of primaries and elections, as long as the corporations do not coordinate with the candidates or their campaigns.

The amounts spent on issue ads intended to influence the election of candidates is difficult to capture since such spending is not in general disclosed in public records. However, *Wisconsin Right to Life* and *Citizens United* left undisturbed the disclosure rules pertaining to the original definition of electioneering communications; as a result, individuals and groups that fund issue ads mentioning or otherwise identifying a candidate in the period shortly before a primary or election must continue to report such expenditures to the FEC.<sup>123</sup> In that event, the identities of individuals and groups who directly finance such communications would become public, as would the amounts they give for that purpose. However, since the definition does not include ads in print media, mail, or social media (even in the period shortly before a primary or election) and it only covers broadcast advertising during that time frame,<sup>124</sup> most election-related issue advocacy will not need to be disclosed. Thus, most amounts spent on issue ads targeted to influence elections but not subject to reporting as independent expenditures cannot be known with any precision.<sup>125</sup> Spending on issue ads in the 1997–1998 congressional election cycle has been estimated at between \$135 million and \$150 million.<sup>126</sup> The Annenberg Public Policy Center estimated that \$509 million was spent on broadcast issue ads alone in 2000.<sup>127</sup> In 2010, according to OpenSecrets.org, tax-exempt social welfare organizations spent \$127 million on ads and other electoral activities, and they spent \$308 million in 2012.<sup>128</sup> They are not, however, in general required to reveal the identities

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<sup>123</sup> *See id.* at 368–71.

<sup>124</sup> *See supra* note 25.

<sup>125</sup> For a detailed discussion of disclosure rules that apply to certain issue advertisements, see generally *What Super PACs, Non-Profits, and Other Groups Spending Money Must Disclose About the Source and Use of Their Funds*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/rules.php> (last visited Apr. 5, 2020).

<sup>126</sup> Jeffrey D. Stanger & Douglas G. Rivlin, *Issue Advocacy Advertising During the 1997–1998 Election Cycle*, ANNENBERG PUB. POLY CTR. (1998), <http://library.law.columbia.edu/urlmirror/CLR/100CLR620/report.htm>.

<sup>127</sup> JOSEPH E. CANTOR, CONG. RESEARCH SERV., REP. NO. 97-91, *SOFT AND HARD MONEY IN CONTEMPORARY ELECTIONS: WHAT FEDERAL LAW DOES AND DOES NOT REGULATE* 5 (Mar. 15, 2002).

<sup>128</sup> *The 10 Things They Won't Tell You About Money-in-Politics*, OPENSECRETS, <https://www.opensecrets.org/resources/10things/03.php> (last visited Apr. 5, 2020). Organizations exempt under section 501(c)(4)–(6) of the *Internal Revenue Code* can engage in various kinds of campaign activity as long as such activity (combined with other activities not components of their exempt purpose) does

of their contributors, and even when they make required disclosures for independent expenditures, they may not be required to disclose the identities of donors unless the donors earmark their contributions specifically for reportable expenditures.<sup>129</sup> Similarly, figures for “political ad” spending are not helpful because they include numerous kinds of campaign advertising other than issue advocacy intended to influence votes on candidates.<sup>130</sup>

In short, although there may have been campaign-oriented issue advocacy at the time *Buckley* was litigated, there are no precise (or even imprecise) estimates of the amounts spent on such activity then. Similarly, it is impossible to quantify such issue advocacy today. Because outside group spending has skyrocketed since *Citizens United*, and much spending by outside groups appears to be campaign-oriented, the phenomenon of campaign ads masquerading as issue advocacy, which *Buckley* predicted,<sup>131</sup> has contributed to record campaign spending by commercial and non-commercial interests, whether funded by individuals or groups.

#### *E. Conclusion*

Hard data relating to many contemporary campaign practices are difficult or impossible to obtain, largely because of the absence of disclosure requirements in existing law, but also because of stratagems adopted by those who wish to influence the outcome of elections by injecting massive amounts of money while remaining invisible. Despite this, as this Part has shown, there is an abundance of evidence that there has been rapid growth in the amount of campaign spending attributable to business interests and more massive increases in the amounts spent by individuals, some of whom spend millions or tens of millions of dollars to influence the outcome of federal campaigns. These changes have profound implications for policymakers and lawmakers that are beyond the scope of the present analysis. These changes may also have consequences for the application of the legal doctrines and reasoning set forth in the *Buckley* decision more than forty years ago. It is the

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not become their primary activity. *See, e.g.*, 26 C.F.R. § 1.501(c)(4)-1(a)(2) (exempting organizations that operate exclusively for the social welfare).

<sup>129</sup> *See supra* notes 57–61 and accompanying text. For reporting of contributions funding their electioneering communications, see *supra* notes 62–64 and accompanying text.

<sup>130</sup> *See, e.g.*, Megan Janetsky, *Low Transparency, Low Regulation Online Political Ads Skyrocket*, OPENSECRETS (Mar. 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/> (summarizing spending on both broadcast and online advertisements since 2010).

<sup>131</sup> *Buckley v. Valeo*, 424 U.S. 1, 45 (1976) (per curiam).

latter concerns that Parts II–III and the *Buckley 2.0* thought experiment address.

## II. THE EVOLUTION OF CAMPAIGN FINANCE DOCTRINE

The main issues discussed in *Buckley* were limits on campaign contributions, limits on independent expenditures, aggregate limits, public financing, and the creation and operation of the FEC.<sup>132</sup> Although much could be said about all of these subjects,<sup>133</sup> *Buckley 2.0* will focus on the first two, which constitute the largest part of the campaign finance discussion today.

### A. Contributions to Candidates

The contribution question in *Buckley* was whether the newly enacted \$1000 cap on contributions to candidates and their campaign committees was constitutional.<sup>134</sup> The challengers argued that the caps impermissibly burdened their freedom of speech and especially their freedom of political expression.<sup>135</sup> The Supreme Court upheld the limits. It reasoned, first, that the burden on individuals limited to contributions to candidates of \$1000 per primary and an additional \$1000 in the general election was real but “only a marginal restriction” on their free speech and, second, that the government interest in preventing corruption or the appearance of corruption was “a constitutionally sufficient justification” for imposing this burden.<sup>136</sup> The Court considered the limit a marginal restriction for two reasons. First, it viewed contributions as symbolic speech<sup>137</sup> since they show general support for a candidate, but do not translate directly into an expression of support for

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<sup>132</sup> *Id.* at 7.

<sup>133</sup> See generally Liz Kennedy & Seth Katsuya Endo, *The World According to, and After* *McCutcheon v. FEC, and Why It Matters*, 49 VAL. U. L. REV. 533 (2015) (discussing the impact of *McCutcheon* and the significance of aggregate contribution limits); Note, *Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421 (2018) (analyzing the FEC’s weaknesses and arguing that it should be eliminated rather than reformed).

<sup>134</sup> *Buckley*, 424 U.S. at 23. The cap also applied to contributions to intermediaries if earmarked for candidates. *Id.* at 24.

<sup>135</sup> *Id.* at 11, 14–15.

<sup>136</sup> *Id.* at 20–21, 26–27.

<sup>137</sup> *Id.* at 21.

specific views or reasons.<sup>138</sup> A candidate can, for example, use contributed funds for ads or activities relating to issues not important to the donor; thus, the political expression funded would be a choice made by the recipient of the money rather than the donor. The highest degree of First Amendment protection goes to the donor's own speech rather than that of the recipient of the donor's largesse.<sup>139</sup> *Buckley* also stated that contribution limits are a marginal burden because they do not "in any way infringe the contributor's freedom to discuss candidates and issues,"<sup>140</sup> since contributors can still make independent expenditures, join political groups, and volunteer to advance their political views.<sup>141</sup>

One question *Buckley 2.0* would consider today is whether the current limit on individuals' contributions to candidates is unconstitutionally small. The maximum contribution to a candidate at the time of *Buckley* was \$1000 per primary or election,<sup>142</sup> which would be \$4486 for each in 2016 dollars. The maximum that individuals could contribute to a candidate in a primary or a general election in 2015–2016 was \$2700,<sup>143</sup> or roughly 60% of the *Buckley* era inflation-adjusted amount. Current contribution limits have not kept pace with the *Buckley*-era limits because Congress did not initially peg them to inflation. It was not until 2002 that Congress increased the maximum individual contribution to candidates for primaries and elections from \$1000 to \$2000 and also provided for an inflation adjustment to that amount by election cycle.<sup>144</sup>

The \$1000 limit on contributions was challenged in the original *Buckley* as unconstitutional because larger contributions would not raise the threat of corruption, which was the government's justification for imposing the limits.<sup>145</sup> The Court first responded that Congress could constitutionally conclude that some limit is necessary to avoid corruption or its

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<sup>138</sup> See *id.* at 21 (noting that a contribution indicates support for a candidate, but without "communicat[ing] the underlying basis for the support").

<sup>139</sup> See *id.* at 21 (stating that contributions involve "speech by someone other than the contributor").

<sup>140</sup> *Id.* at 21.

<sup>141</sup> *Id.* at 22.

<sup>142</sup> FECA Amendments of 1974, Pub. L. No. 93-443, § 101(a), 88 Stat. 1263 (1974).

<sup>143</sup> *Contribution Limits for 2015–2016*, FEC, <https://www.fec.gov/updates/contribution-limits-for-2015-2016> (last visited Apr. 5, 2020). Individuals can give additional amounts to federal PACs, national party committees, and state, district, or local party committees. See *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/> (last visited Apr. 5, 2020).

<sup>144</sup> BCRA, Pub. L. No. 107-155, § 307(a), (d), 116 Stat. 81 (2002).

<sup>145</sup> *Buckley v. Valeo*, 424 U.S. 1, 30 (1976) (per curiam).

appearance.<sup>146</sup> It then conceded that Congress could have created a different standard, but held that its failure to do so did not make the provision invalid as long as the limit chosen was narrowly tailored to prevent the harm described.<sup>147</sup> The Court also quoted with approval the appellate court’s statement that it is not for a court to decide whether the limit should be \$2000 or \$1000, once Congress found that some limit was necessary to avoid corruption or its appearance.<sup>148</sup> For the *Buckley* Court, the test was whether the contribution limits “prevented candidates and political committees from amassing the resources necessary for effective advocacy.”<sup>149</sup> All candidates need sufficient resources, but the effective advocacy standard is especially critical for challengers who hope to replace incumbents but are hampered because of the many tangible and intangible benefits of incumbency their opponents enjoy.<sup>150</sup> The *Buckley* Court exhibited an attitude of deference to the legislature’s judgments when it upheld the \$1000 limit, explaining that the limit would not have “any dramatic adverse effect” on raising campaign funds, and it indicated that Congress was free to choose \$1000 rather than \$2000 since the former did not preclude effective advocacy by candidates.<sup>151</sup>

*Buckley 2.0* would apply the effective advocacy test of the original *Buckley* to assess the validity of the contribution cap for individuals (\$2,700 for each primary and election in 2015–2016), which will be adjusted for inflation regularly.<sup>152</sup> It would likely start by reviewing judicial decisions since *Buckley* that addressed challenges to contribution caps. The most recent and relevant such case, *Randall v. Sorrell*,<sup>153</sup> itself summarized the history of state and federal challenges to contribution limits. It noted that “the Court has consistently

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<sup>146</sup> *Id.* at 27–28.

<sup>147</sup> *Id.* at 30, 33.

<sup>148</sup> *Id.* at 30 (citing *Buckley v. Valeo*, 519 F.2d 821, 842 (D.C. Cir. 1975)).

<sup>149</sup> *Id.* at 21. The *Buckley* Court found that the plaintiff had failed to produce evidence that contribution limits “in themselves” discriminate unfairly between challengers and incumbents. *Id.* at 32.

<sup>150</sup> *Id.* at 31 n.33. See also *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402–04 (2000) (Breyer, J., concurring) (describing some benefits enjoyed by incumbents); *Randall v. Sorrell*, 548 U.S. 230, 248–49 (2006) (plurality opinion) (discussing the role of contribution caps in limiting the incumbent advantage).

<sup>151</sup> *Buckley*, 424 U.S. at 21, 34–35.

<sup>152</sup> See *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits> (last visited Apr. 5, 2020). The cap is \$2,800 per election, per candidate, for 2019–2020.

<sup>153</sup> *Randall v. Sorrell*, 548 U.S. 230 (2006).

upheld contribution limits.”<sup>154</sup> At the same time, even cases upholding contribution limits have cautioned that low limits can have the effect of making it difficult for challengers to challenge incumbents successfully.<sup>155</sup>

In *Randall*, which examined Vermont’s contribution limits relating to several state-wide offices, the Court held that the restrictions were unconstitutional. It emphasized that its ruling did not rest exclusively on the low dollar limits of \$200–\$400, depending upon the office; rather, the state had also imposed severe restraints on political parties and volunteers.<sup>156</sup> Further, the dollar limits were not indexed for inflation.<sup>157</sup> Thus, the Court suspended its usual deference to lawmakers’ assessments of what is necessary to avoid the threat of corruption or its appearance when very low dollar limits were combined with associated campaign constraints in such a way as to make effective advocacy difficult.

*Buckley 2.0* would certainly apply the doctrinal norms these cases reflect to the empirical reality of contemporary campaign funding. For example, the Court would note the total cost of elections as well as the cost of congressional and presidential contests separately. Adjusted for inflation, the cost of presidential contests has not necessarily increased each election cycle.<sup>158</sup> In contrast, the cost of congressional races in constant dollars has more than doubled since 2000.<sup>159</sup>

Several watchdog groups and nonpartisan organizations have gathered and analyzed data about the sources of campaign contributions and the characteristics of donors that would aid the Court in reaching a decision. In

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<sup>154</sup> *Id.* at 247 (first citing *Nixon*, 528 U.S. 377 (2000); then citing *Cal. Med. Ass’n v. FEC*, 453 U.S. 182 (1981)).

<sup>155</sup> *Id.* at 248–49.

<sup>156</sup> *Id.* at 253. The Vermont contribution caps were “the lowest in the Nation,” *id.* at 250, and they were a small fraction of the limits approved in *Buckley*, almost thirty years earlier. *Id.* at 250–51. In addition, the statute required volunteers to treat their expenses as contributions, *id.* at 259–60, which could severely restrict how much volunteering people could do if they incurred such things as transportation costs.

<sup>157</sup> *Id.* at 252.

<sup>158</sup> See *Cost of Election*, OPENSECRETS, <https://www.opensecrets.org/overview/cost.php?display=T&infl=Y> (compiling the cost of total, presidential, and congressional elections from 1998–2018). All spending (in inflation adjusted dollars), including PAC spending, was \$2,053,679,582 in 2000, \$2,539,322,657 in 2004, \$3,230,405,854 in 2008, \$2,859,684,723 in 2012, and \$2,495,740,931 in 2016. The 2016 figures, which were lower than expected, were explained by the free publicity given to Donald J. Trump, see *infra* note 298, although the 2012 total was almost \$400 million less than the 2008 total.

<sup>159</sup> See *id.* (showing that spending on congressional races was \$2,498,050,032 in 2000 and \$5,725,183,133 in 2018).

the last three presidential election cycles, there were wide variations in the percentage of total contributions to candidates for all offices that were small (\$200 or less) or larger, up to the election or election cycle limit.<sup>160</sup> *Buckley 2.0* would undoubtedly note the dramatic increase in the number of individual contributors to federal campaigns,<sup>161</sup> while the inflation-adjusted average contribution per individual has decreased.<sup>162</sup> This suggests that current contribution limits have not discouraged participation by individuals in elections, which was a concern of *Buckley*.<sup>163</sup> In fact, internet platforms that comply with FEC contribution regulations, like ActBlue, have facilitated the growth of small- and medium-sized donations to candidates.<sup>164</sup>

Because many sources aggregate a donor's contributions to candidates, parties, and other recipients, it is difficult to determine whether \$2700 or \$5400 per candidate per election cycle (or \$2,800 for 2019–2020) is too low, since it may be only one piece of a donor's giving. As was true when the original *Buckley* was decided, donors can also give to party committees of

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<sup>160</sup> See MALBIN & GLAVIN, *supra* note 74, at 31–33 (showing individual contributions to all presidential candidates in primaries); *id.* at 41 (showing individual contributions to general election presidential candidates); *id.* at 13–14, 61–62 (showing individual contributions to House and Senate candidates). The statistics for congressional candidates are less revealing because contributions of \$1000 or more are not further subdivided. For example, in 2012, roughly 50% of Mitt Romney's receipts from individuals were less than the \$2500 cap in that election cycle, compared with 78% for Barack Obama. *Id.*; CAMPAIGN FIN. INST., INDIVIDUAL CONTRIBUTION TO GENERAL ELECTION PRESIDENTIAL CANDIDATES, AGGREGATED BY DONORS, FULL TWO-YEAR CYCLES, 2008–2016 [http://www.cfinst.org/pdf/federal/2016Report/pdf/CFI\\_Federal-CF\\_16\\_Table1-08.pdf](http://www.cfinst.org/pdf/federal/2016Report/pdf/CFI_Federal-CF_16_Table1-08.pdf) (last accessed May 17, 2020).

<sup>161</sup> See PERSILY, BAUER & GINSBERG, *supra* note 85, at 22 (noting that 3.2 million people made contributions to federal campaigns in 2016 compared to roughly 66,000 in 1982); See ALBERT, *supra* note 87, at 17 (noting that the number of individual contributors increased 487% during this period).

<sup>162</sup> See ALBERT, *supra* note 87, at 17 (noting that the average total contribution from each individual “has declined sharply since 1982” and that the average individual contribution was less in 2016 than in any election since 1982). The figures are direct contributions from individuals to all candidates per election, and not to each candidate. *Id.*

<sup>163</sup> *Buckley v. Valeo*, 424 U.S. 1, 28–29, 36 (1976) (per curiam).

<sup>164</sup> In the 2018 non-presidential election cycle, ActBlue, which raises money for federal, state, and local Democratic candidates and organizations, raised roughly \$1.7 billion. See *2018 Election Cycle in Review*, ACTBLUE, <https://report.actblue.com> (last visited Apr. 5, 2020). This was roughly double the amount ActBlue had raised in the 2016 presidential election cycle. *Id.* Almost 64% of donors on ActBlue in 2018 were first-time donors to ActBlue, and their contributions were 37% of the money raised on the platform. See *id.* ActBlue classifies contributions of more than \$200 as large contributions. See *ActBlue Contributors, 2018 Cycle*, OPENSECRETS, <https://www.opensecrets.org/pacs/pacgave2.php?cmte=C00401224&cycle=2018> (last visited Apr. 5, 2020).

various kinds,<sup>165</sup> in addition to outside groups such as PACs, Super PACs, and exempt organizations. As a consequence, whether the limits on contributions to candidates are large enough to make possible effective advocacy by candidates cannot be determined in a vacuum, i.e., without reference to other campaign rules, including those that have emerged since the original *Buckley*. Among other things, *Buckley 2.0* would review the holdings in *Citizens United* and *McCutcheon* before reaching a conclusion about the constitutionality of the limits on contributions by individuals to candidates, measured by effective advocacy.

The original *Buckley* had expressed the view that independent spending on behalf of a candidate by third parties could be significantly less helpful to the candidate than the candidate's own spending and that outside spending could even undermine or otherwise harm the candidate's message.<sup>166</sup> *Buckley 2.0* might, then, view the huge sums of outside spending in recent elections<sup>167</sup> as a threat to a candidate's effective advocacy. In that event, the Court could find caps on contributions by individuals to candidates too low in the current campaign finance environment to enable candidates themselves to raise enough money to control their campaigns' messages. It would note that in some races, the amount of outside spending exceeds the amount of spending by the candidate.<sup>168</sup> Alternatively, *Buckley 2.0* might conclude that many Super PACs, especially single-candidate Super PACs, are "outside" groups in name only since the alleged barrier between the group and the candidate is so porous that much, if not most, single-candidate Super PAC spending will clearly supplement or be the equivalent of candidate spending.<sup>169</sup>

*Buckley 2.0*'s final conclusion regarding individual contribution limitations, then, must await its assessment of other aspects of the contemporary electoral landscape, both empirical and doctrinal.<sup>170</sup> For the present, *Buckley 2.0* would likely conclude that pre-*McCutcheon* aggregate limits had the effect of depressing the amounts individuals could give to multiple candidates because the aggregate cap created a zero-sum game in which giving the maximum contribution to nine candidates would make it

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<sup>165</sup> See *Contribution Limits*, FEC, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits> (last visited Apr. 5, 2020).

<sup>166</sup> *Buckley*, 424 U.S. at 47.

<sup>167</sup> See *supra* Part I.C.

<sup>168</sup> See *supra* note 109.

<sup>169</sup> See *infra* notes 239–43, 306 and accompanying text.

<sup>170</sup> For example, the statistics quoted for the 2015–2016 election cycle may reflect the impact of *McCutcheon*, which removed aggregate caps per election. *Buckley 2.0* also envisions the implications for effective advocacy if *Citizens United* and *SpeechNow.org* were no longer good law.

impossible to contribute to others. In that event, taking into account the failure of contribution limits for individuals to keep pace with inflation, the rate of increase in the cost of campaigns, and the ability of outside spending to overwhelm candidate spending, *Buckley 2.0* could well find the pre-*McCutcheon* limits on individual contributions to candidates unconstitutionally small, despite its acknowledged deference to Congress regarding appropriate restrictions to guard against corruption or its appearance. The reason would be that the original *Buckley* also established effective advocacy as an independent principle guiding its deliberations. Such a finding would not necessarily require *Buckley 2.0* to endorse *McCutcheon*, but it would likely constitute an important factor in the Court's assessment of *McCutcheon*. By the same token, if *Buckley 2.0* were to find the *McCutcheon* decision valid in light of contemporary campaign practices, it would likely leave intact the current rates coupled with FECA's formula for raising dollar amounts on a regular basis.

### *B. Contributions to Independent Spending Groups*

The original *Buckley* invalidated FECA's limits on independent expenditures, that is, amounts spent by individuals and entities on expressly advocating the election or defeat of specific candidates for federal office.<sup>171</sup> Although it did not consider contributions to independent expenditure groups, which did not exist at that time, the *Buckley* decision would inform *Buckley 2.0*'s analysis of this practice through its reasoning about the relationship between the threat of corruption and the character of independent actors.

#### *1. The Genesis of Unlimited Contributions to Independent Spending Groups*

Unlimited donations to independent spending groups were authorized by *SpeechNow.org*, an appellate court decision handed down in 2010.<sup>172</sup> The D.C. Circuit relied upon the Supreme Court's assertion in *Citizens United* that independent corporate spending could never give rise to corruption or the appearance of corruption and extended that holding to contributions made

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<sup>171</sup> See *Buckley*, 424 U.S. at 16–20.

<sup>172</sup> See *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc) (holding that the government violated the First Amendment by setting campaign contribution limits for independent expenditure-only groups like *SpeechNow*).

by individuals or groups to independent spending entities.<sup>173</sup> Some courts and commentators have challenged *SpeechNow.org*'s holding.<sup>174</sup> The Supreme Court, however, has never reviewed the decision or the central issue.<sup>175</sup>

In *Citizens United*, the Court challenged the FECA provision requiring corporations, unions, and certain other institutions to fund their campaign contributions and their independent expenditures with money amassed in PACs rather than with general revenues derived from their business (treasury funds).<sup>176</sup> The restrictions imposed by FECA on raising PAC money meant that these entities would likely have less to spend on campaign activities than would have been available from their treasury funds. The *Citizens United* Court concluded that the rules prohibiting campaign spending from treasury funds were unconstitutional if corporations or unions act independently of candidates because independent action precludes the possibility of corruption, which can only exist if there is a quid pro quo arrangement between candidates and those who act on their behalf.<sup>177</sup> In short, absent coordination, there is no quid pro quo; absent quid pro quo, there is no possibility of corruption.

The same year, the appellate court in *SpeechNow.org* held that it was unconstitutional for the government to cap contributions that individuals and others make to organizations involved in campaigns, if the recipient

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<sup>173</sup> *SpeechNow.org*, 599 F.3d at 692–95.

<sup>174</sup> See Albert W. Alschuler et al., *Why Limits on Contributions to Super PACs Should Survive* *Citizens United*, 86 *FORDHAM L. REV.* 2299, 2299 (2018) (arguing that the D.C. Circuit's decision in *SpeechNow.org* "created a regime in which contributions to candidates are limited but in which contributions to less responsible groups urging votes for these candidates are unbounded" and that "the judgment that the Constitution requires [this system of campaign financing] is astonishing . . . . Contrary to the D.C. Circuit's reasoning, contributions to super PACs can corrupt even when expenditures by these groups do not"); Albert W. Alschuler, *Limiting Political Contributions after McCutcheon*, *Citizens United*, and *SpeechNow*, 67 *FLA. L. REV.* 389, 471–77 (2015) (arguing that the *SpeechNow* court relied on dictum from the *Citizens United* opinion and that the D.C. Circuit "should have focused on *Buckley*'s holding that limits on contributions to official election campaigns are permissible and should have asked whether limits on contributions to super PACs can reasonably be treated differently"); see also Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War Over Coordination*, 9 *DUKE J. CONST. L. & PUB. POL'Y* 1, 15 (2014) (stating that "the arguments for individual contribution limits applied to candidate campaign accounts and to single-candidate reliable Super PACs appear to be very close to each other and roughly similar in strength"). For courts that have resisted the holding, see Alschuler et al., *supra*, at 2308–09, 2311.

<sup>175</sup> Hasen, *supra* note 174, at 11.

<sup>176</sup> The plaintiffs in *Citizens United* originally challenged the constitutionality of the electioneering communication as applied to them; however, the Court initiated the larger issue and had the case re-briefed. See *Citizens United v. FEC*, 558 U.S. 310, 321–22 (2010).

<sup>177</sup> *Citizens United*, 558 U.S. at 360–61.

organizations act independently of candidates and their campaigns.<sup>178</sup> The *SpeechNow.org* court argued that, in *Citizens United*, the Supreme Court held that “the government has *no* anti-corruption interest in limiting independent expenditures.”<sup>179</sup> As the *SpeechNow.org* court noted, to reach its conclusion, *Citizens United* relied upon the observation made in *Buckley* that the absence of coordination between a candidate and someone spending money to help the candidate “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>180</sup> “Alleviates,” however, means reduces; it does not mean precludes or prevents. Therefore, the *Buckley* Court added the further observation that advocacy funded by independent expenditures “does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>181</sup> The implication of “presently” is that it is in principle possible that independent spending could at some time come to pose a danger of real or apparent corruption equal to that of large contributions. Noting this implication, the *SpeechNow.org* court pointed out that the Supreme Court, in *First National Bank of Boston v. Bellotti*, had stated in a footnote that Congress might present evidence that independent corporate expenditures on behalf of a candidate could present “a danger of real or apparent corruption,”<sup>182</sup> even though *Bellotti* also held that—because the litigation concerned a ballot initiative rather than an election involving candidates potentially subject to corruption—no such danger existed in the case before it.<sup>183</sup> The *SpeechNow.org* court also mentioned two subsequent decisions by the Supreme Court that upheld laws designed to prevent corruption associated with independent corporate spending.<sup>184</sup>

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<sup>178</sup> *SpeechNow.org*, 599 F.3d at 693–96.

<sup>179</sup> *Id.* at 693.

<sup>180</sup> *Id.* (citing *Citizens United*, 558 U.S. at 357). The result would be the same if the money was spent to defeat a candidate’s opponent.

<sup>181</sup> *Buckley*, 424 U.S. at 46; see also *SpeechNow.org*, 599 F.3d at 693 (using “diminishes” to refer to the *Buckley* Court’s caveat).

<sup>182</sup> *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788 n.26 (1978).

<sup>183</sup> *SpeechNow.org*, 599 F.3d at 693–94 (noting that in *Bellotti*, the Supreme Court “struck down a state-law prohibition on corporate independent expenditures related to referenda”). The observation was in a footnote, but it was dictum in any event because the case challenged a law preventing corporations spending general funds to influence a ballot initiative, not the election of a candidate.

<sup>184</sup> *Id.* at 694 (referring to *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654–55 (1990), as upholding a state prohibition on corporate independent expenditures, and *McConnell v. FEC*, 540 U.S. 93, 203–09 (2003), as upholding the federal prohibition on corporate expenditures for electioneering

Despite these precedents suggesting that independent expenditures could pose the threat of corruption, the *SpeechNow.org* court, following *Citizens United*, stated that Congress had no interest at all in limiting contributions by the plaintiff groups in its own case because *Citizens United* had held as “a matter of law” that independent expenditures could never pose a threat of corruption or the appearance of corruption.<sup>185</sup> In addition, the *SpeechNow.org* court noted that *Citizens United* had asserted that corruption means quid pro quo corruption for campaign finance purposes and, further, that quid pro quo means agreement by one party to do something specific for another party in exchange for financial or other support by the other party on the first party’s behalf.<sup>186</sup>

The *SpeechNow.org* court traced the history of Supreme Court decisions elaborating a broader understanding of corruption than the understanding advanced by *Citizens United*, namely, the view that corruption includes gaining influence with or access to an official, in addition to obtaining a specific benefit. *Citizens United* rejected the broader understanding in favor of a narrow definition that implies the impossibility of independent expenditures corrupting as a matter of law.<sup>187</sup> The *SpeechNow.org* court then concluded that, based upon this position of *Citizens United*, the government could have no interest in regulating independent electoral spending by independent expenditure groups, and it extended this conclusion further to hold that contributions by individuals to independent expenditure organizations could not be limited because there was zero threat of corruption to balance against the fundamental interest of political speech in the form of contributions to such organizations.<sup>188</sup> The *SpeechNow.org* decision thus articulated as a constitutional right unlimited giving to electoral entities as long as those entities operate independently of candidates for public office.

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communications, enacted in 2002). *Austin* was overturned by *Citizens United*, which also invalidated parts of *McConnell*.

<sup>185</sup> *SpeechNow.org*, 599 F.3d at 694–95; see also Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 318–19 (2014) (calling *Citizens United*’s assertion a “legal fiction” that reveals the Court’s complete indifference to what actually causes corruption as an empirical matter in favor of a blanket assertion without evidentiary support).

<sup>186</sup> *SpeechNow.org*, 599 F.3d at 694.

<sup>187</sup> *Id.* (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.”) (quoting *Citizens United v. FEC*, 558 U.S. 310, 357–59 (2010)).

<sup>188</sup> *Id.* at 695 (stating that “the First Amendment cannot be encroached upon for naught”).

*Buckley 2.0* would evaluate these developments with the benefit of hindsight. In particular, in addition to applying the doctrines it set forth in the original *Buckley* opinion to contemporary electoral practices, it would have almost a decade of history with which to assess the impact of *Citizens United* and *SpeechNow.org* on those practices. Since the original *Buckley* repeatedly used statistics to support its arguments, it is reasonable to assume that *Buckley 2.0* would also consider empirical evidence in reaching its conclusions today.

## 2. *Buckley 2.0's Analysis of Unlimited Contributions and the Threat of Corruption: New Facts on the Ground*

There are several areas in which *Buckley 2.0* reaches a different conclusion than the court reached in *SpeechNow.org*. The first of these is the *SpeechNow.org* court's conclusion that the government's interest in regulating contributions to independent spending groups is a "naught" because independent or uncoordinated spending simply does not pose a threat of corruption or the appearance of corruption.<sup>189</sup>

*Buckley 2.0* would identify significant problems with this reasoning. As has been noted by several constitutional law scholars, it does not follow logically from the fact that groups are themselves engaged in independent spending—and, thus, may pose no threat of corruption, using the *Citizens United* definition—that contributions to these groups by individuals or other entities also pose no threat of corruption or the appearance of corruption.<sup>190</sup> The fallacy, they argue, is the failure to recognize that "[i]t is the six-, seven-, and eight-figure donations to super PACs that create the appearance (and likely the reality) of corruption, not the *groups'* expenditures" because ordinary people recognize that office holders reward with legislation or other favors those who write the large checks, not the recipient groups.<sup>191</sup> For

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<sup>189</sup> *SpeechNow.org*, 599 F.3d at 693–95.

<sup>190</sup> See Alschuler et al., *supra* note 174, at 2308–12 (arguing that "super PAC contributions can corrupt even when these groups' expenditures do not" and referencing recent cases in which federal courts have "rejected the *SpeechNow* syllogism").

<sup>191</sup> See *id.* at 2311–12 (emphasis added). They mention as examples sugar subsidies, tax provisions, and arms deals that Congress has approved, even when agency staff opposed such acts of favoritism. *Id.* They also argue that if the independence of a recipient organization necessarily precluded or cleansed possible corruption taint associated with donors to independent spending groups, there would be no reason to have laws barring contributions by government contractors or foreign persons. *Id.*; see also Hasen, *supra* note 174, at 6–10; Alschuler, *supra* note 174, at 80–82 (arguing

example, in the eight years after *Citizens United* was decided, a mere eleven donors contributed more than \$1 billion to Super PACs, which was 20% of all the money raised by those groups during that time.<sup>192</sup> The largest donor gave almost \$78 million to Republican candidates in 2016, which included \$20 million to a single candidate running for President.<sup>193</sup>

*Buckley 2.0* would assess empirically the proposition that contributions to Super PACs or other independent expenditure groups cannot lead to corruption or the appearance of corruption by taking into account the extraordinary size of such contributions. Super PACs, dark money groups that receive certain earmarked contributions, and section 527 organizations all are required to disclose the names of their donors and the amounts of their donations, which then become a matter of public record.<sup>194</sup> For example, the 100 contributors of the largest amounts to outside groups in each election cycle are listed on OpenSecrets.org.<sup>195</sup> Since roughly half of Super PACs in 2015–2016 were single-candidate organizations,<sup>196</sup> candidates could easily know, for example, which individuals or entities each contributed millions of

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that the holding in *Caperton* is incompatible with saying that the government's interest in independent expenditures is zero, even though Justice Kennedy claimed there was a difference between the two situations).

<sup>192</sup> Michelle Ye Hee Lee, *One-Fifth of All Super-PAC Money, from Just Eleven Pockets*, WASH. POST, Oct. 27, 2018, at A14; see also *supra* notes 89–90 (documenting the small number of donors responsible for two-thirds or more of contributions to Super PACs).

<sup>193</sup> Lee, *supra* note 192. The constitutional scholars cited above also argue that *Citizens United*'s claim that independent spending poses no threat of corruption as a matter of law was actually dictum in the case, since it was unnecessary to reach a decision in the case after the Court concluded that “the First Amendment prohibits ‘restrictions distinguishing among different speakers, allowing speech by some but not by others.’” Alschuler et al., *supra* note 174, at 2312–13 (quoting *Citizens United v. FEC*, 558 U.S. 310, 340 (2010), which was paraphrasing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)). The authors also argue that the Court resolved the case a second time when it stated that only quid pro quo corruption counts as corruption. *Id.*

<sup>194</sup> See Jeffrey D. Stanger & Douglas G. Rivlin, *Issue Advocacy Advertising During the 1997–1998 Election Cycle*, ANNENBERG PUB. POL'Y CTR. (1998), <http://library.law.columbia.edu/urlmirror/CLR/100CLR620/report.htm>. However, earmarked contributions are rarely reported. See Lee, *supra* note 192 (noting that “[w]hile donors to super PACs are disclosed, public filings do not reflect contributions to politically active nonprofit groups that are not required to reveal their donors.”).

<sup>195</sup> *2018 Top Donors to Outside Spending Groups*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&disp=D&type=V&superonly=N> (last visited Apr. 5, 2020). The names listed are of individuals. As was noted earlier, the names of groups can be unrevealing (at least to the public). The OpenSecrets website cautions that the lists are incomplete because most 501(c)(4) groups do not reveal the identities of their donors or the amounts given. *Id.* The FEC's website enables the public to search a candidate's donors. See *Individual Contributions*, FEC, [https://www.fec.gov/data/receipts/individual-contributions/?two\\_year\\_transaction\\_period=2020&min\\_date=01%2F01%2F2019&max\\_date=12%2F31%2F2020](https://www.fec.gov/data/receipts/individual-contributions/?two_year_transaction_period=2020&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020) (last visited Apr. 5, 2020).

<sup>196</sup> See *supra* note 107 and accompanying text.

dollars to support them or defeat their opponents. Even in the case of dark money groups that do not disclose their donors to the public, candidates are likely to know which individuals and entities are contributing huge amounts because, although such groups cannot coordinate their activities with candidates, no law prohibits them from disclosing to candidates the names of their donors and the amounts donated, if they choose. Thus, the public is in the dark; but the beneficiary candidates may not be.

In 2008, the last election before *Citizens United* was decided, only three individuals and four entities gave sums in excess of \$1 million to outside groups.<sup>197</sup> Regardless of whether the Supreme Court's claim that independent spending could pose no threat of corruption was accurate at that time, the explosion of unlimited spending in the decade after *Citizens United* makes that assumption no longer tenable. For example, it is easy to link one donor's \$20 million contribution to Donald Trump's campaign to various actions the Trump Administration has taken that were specifically requested by that donor.<sup>198</sup> Although there is probably no way to prove the actual impact of huge campaign contributions on a recipient,<sup>199</sup> in many instances the appearance of a connection seems obvious.

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<sup>197</sup> *2008 Top Donors to Outside Spending Groups*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2008&disp=D&type=V&superonly=N> (last visited Apr. 6, 2020) (showing individuals' funding of outside groups); *2008 Top Donors to Outside Spending Groups*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2008&disp=D&type=O&superonly=N> (last visited Apr. 6, 2020) (showing organizations' funding of outside groups).

<sup>198</sup> See Jeremy W. Peters, *Sheldon Adelson Sees a Lot to Like in Trump's Washington*, N.Y. TIMES (Sept. 22, 2018), <https://www.nytimes.com/2018/09/22/us/politics/adelson-trump-republican-donor.html>. For example, the recognition of Jerusalem as the capital of Israel and decision to move the U.S. Embassy from Tel Aviv to Jerusalem, both urged by Adelson, occurred even before other Trump campaign promises were acted upon, such as moving forward on building a wall between the United States and Mexico, which had energized the vast majority of Trump's most ardent supporters. The timing suggests that the priority President Trump gave to the two Israel decisions, if not the inclination to make them in the first place, can be traced to the Adelson's campaign contributions and influence. Trump also acted quickly on tax cuts favoring the wealthy over the middle class, which arguably reflected the influence of large donors to his campaign.

<sup>199</sup> Some argue that those who donate huge sums do so because the candidate already is committed to the policies the donor favors. See Jake J. Smith, *When Corporations Donate to Candidates, Are They Buying Influence?*, KELLOGG INSIGHT (Sept. 5, 2017), <https://insight.kellogg.northwestern.edu/article/do-corporate-campaign-contributions-buy-influence> (referencing research on corporate campaign contributions suggesting "that donations do not buy meaningful political favors"). While undoubtedly true in some cases, it is hard not to believe that huge campaign contributions will not affect the priority the recipient assigns to his or her campaign promises. See Hasen, *supra* note 174,

In short, when assessing the proposition that independent expenditures preclude a threat of corruption as a matter of law, *Buckley 2.0* would take into account new facts on the ground, namely, the vast sums injected into campaigns on an ostensibly independent basis. These are facts that did not exist in 2010 and that the Justices making that decision may well not have anticipated. *Buckley 2.0* would ask whether at some point what begins as a matter of degree becomes a matter of kind. *Buckley 2.0* would also question whether the emergence of single-candidate independent expenditure Super PACs, responsible for almost two-thirds of a billion dollars in the 2015–2016 election cycle alone and accounting for an increasingly large percentage of total campaign spending, indicates that the formal independence of expenditures can no longer be presumed to alleviate the threat of corruption. Finally, focusing specifically on the holding of *SpeechNow.org*, *Buckley 2.0* would find that nothing in the law prevents the *contributors* to independent expenditure groups from coordinating with candidates, even if the groups themselves cannot.<sup>200</sup>

### 3. *Buckley 2.0's Analysis of the Meaning of Corruption and Quid Pro Quo*

In addition to reviewing the impact of unlimited giving on the original *Buckley's* assumption that independent spending is unlikely to pose a threat of corruption, *Buckley 2.0* would certainly take issue with the definition of corruption assumed by *SpeechNow.org*, based upon *Citizens United*, i.e., that corruption refers exclusively to quid pro quo corruption, and not “[i]ngratiation and access.”<sup>201</sup> This interpretation of quid pro quo corruption, *Buckley 2.0* would point out, misstates what the original *Buckley* said. When *Buckley* identified corruption with “political *quid pro quo's*,” it cited as support the opinion of the Court of Appeals below and expressly cited

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at 4 (opining that many large donors seek to ensure a candidate will support measures the donor desires).

<sup>200</sup> *SpeechNow.org*, 599 F.3d at 694–95; *supra* notes 178–79 and accompanying text (describing the legal standard, which depends upon the independence of the recipient organizations and not on any characteristics of the contributors); *infra* note 306 and accompanying text (describing an FEC Advisory Opinion permitting candidates to speak at and solicit contributions at fundraising events held by independent expenditure entities).

<sup>201</sup> *SpeechNow.org*, 599 F.3d at 694 (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)). On the changes in the meaning of corruption in Supreme Court opinions, see Trevor Potter, *The Court's Changing Concept of Corruption*, CAMPAIGN LEGAL CTR. (May 7, 2015), <https://campaignlegal.org/update/courts-changing-conception-corruption>.

footnotes in that decision summarizing parts of the record.<sup>202</sup> Both the appellate *Buckley* opinion and the footnotes cited there characterized quid pro quo situations in terms of influence as well as bribery. In addition to describing the problem campaign finance law was addressing as “undue influence,”<sup>203</sup> the appellate court included among illustrative examples large contributions made “in order to gain a meeting with White House officials” and testimony that donors were “motivated by the perception that this . . . would get us in the door and make our point of view heard.”<sup>204</sup> To the same effect, the original *Buckley* mentions “improper influence,” “undue influence,” “the “appearance of impropriety,” and “buy[ing] influence” repeatedly to describe the evils that Congress sought to counter with FECA, which suggests that the Court saw FECA as addressing problems beyond bribery or specific trades of money for concrete favors.<sup>205</sup> Further, the original *Buckley* explicitly rejected the plaintiffs’ claim that the law’s contribution limits were unconstitutional because bribery laws and disclosure requirements were a less restrictive means of treating quid pro quo arrangements.<sup>206</sup> The *Buckley* Court countered that “giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action,”<sup>207</sup> implying that “corruption” in the campaign finance context covers less blatant and specific attempts to affect official actions and policies.

*Buckley 2.0* might also observe that *Citizens United* appears to understand corruption as discrete transactions in which contributors exchange donations

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<sup>202</sup> *Buckley v. Valeo*, 424 U.S. 1, 26–27, n.28 (1976) (per curiam) (citing *Buckley v. Valeo*, 519 F.2d 821, 839–40 & nn. 36–38 (D.C. Cir. 1975)).

<sup>203</sup> *Buckley*, 519 F.2d at 840.

<sup>204</sup> *Id.* at 840 & nn. 36–37. The footnotes cited by the *Buckley* Court also mentioned large donors who saw their contributions as necessary “to be actively considered” for ambassadorships. *Id.* at n.38.

<sup>205</sup> See *Buckley*, 424 U.S. at 27, 30, 45, 53, 58, 76; *id.* at 256–57 (Burger, C.J., concurring in part) (characterizing the aim of FECA as countering “the risk of undue influence”); *id.* at 260–61 (referring to the aim of contribution limits as “preventing undue influence” and “improper[] influence”) (White, J., concurring in part); see also *Citizens United*, 558 U.S. 310, 447–52 (Stevens, J., concurring in part) (four Justice opinion) (describing the history of Supreme Court decisions prior to *Citizens United* that understood corruption as including influence and access).

<sup>206</sup> See *Buckley*, 424 U.S. at 27–28.

<sup>207</sup> *Buckley*, 424 U.S. at 28; see also Alschuler, *supra* note 174, at 466 (arguing that *Buckley*’s use of quid pro quo occurred fifteen years before the Supreme Court first used quid pro quo in a bribery case); *id.* at 468–69 (discussing Supreme Court decisions after *Buckley* that used quid pro quo to cover situations involving undue influence).

for specific acts by office holders,<sup>208</sup> whereas for the original *Buckley*, “the impact of the appearance of corruption stem[s] from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”<sup>209</sup> The notion of “a regime” of large contributions and the threat of “abuse inherent” in such a regime refers to more than occasional discrete acts of bribery; it suggests a climate in which the influence of those who make large contributions is pervasive. Thus, *Buckley 2.0* would likely reject the claims of *Citizens United* that the “fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt” and that favoritism by representatives is the equivalent of legitimate responsiveness, not corruption,<sup>210</sup> because the *Citizens United* Court disregarded the original *Buckley* opinion and its broader understanding of corruption.

The original *Buckley*’s interpretation of the scope of quid pro quo corruption is consistent with, indeed part and parcel of, the original *Buckley*’s concern with preserving “the integrity of our system of representative democracy.”<sup>211</sup> For the initial *Buckley*, corruption was problematic because it threatened the integrity of representative government. Eliminating corruption was thus a means to a more foundational end, the integrity of the electoral system that ensures that the U.S. government will be truly representative. In fact, *Buckley 2.0* might well diagnose the main error of *Citizens United* as the later Court’s attempt to reduce *Buckley*’s focus on the integrity of the American electoral system to a single threat to its integrity, namely, quid pro quo corruption, and a narrow version of quid pro quo corruption at that. The original *Buckley* had a much broader view of potential threats to the government’s integrity. If integrity is the end, and elimination of corruption is a means, then curbing the influence of big contributions on the decision-making of public officials is a compelling interest because their decisions should be guided by some vision of the public interest and deliberation.

In sum, *Buckley 2.0* would find that *Citizens United* could not legitimately cite *Buckley* as the basis for its holding because quid pro quo meant something

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<sup>208</sup> See *Citizens United*, 558 U.S. at 359–61 (distinguishing quid pro quo corruption from ingratiation and favoritism, which it equates with responsiveness to constituents).

<sup>209</sup> *Buckley*, 424 U.S. at 27.

<sup>210</sup> *Citizens United*, 558 U.S. at 359. *Citizens United* quotes Justice Kennedy’s opinion in *McConnell* as well, *id.*, but fails to note that Justice Kennedy was concurring in part with the decision’s holding and with its reasoning. The portion quoted forms part of Justice Kennedy’s disagreement with the *McConnell* majority.

<sup>211</sup> *Buckley*, 424 U.S. at 26–27.

more expansive for *Buckley* than the meaning adopted by *Citizens United*. Had *Citizens United* recognized that the actual meaning of quid pro quo for the *Buckley* Court included influence or access, it would have confronted two choices. Either it would have acknowledged the need to overturn this aspect of *Buckley* explicitly, or alternatively, it would have realized the necessity of providing an independent justification for its claim that giving access and influence cannot constitute corruption as a matter of law, based upon considerations other than precedent.<sup>212</sup> Absent such a justification or explicit rejection of *Buckley*, *Citizens United*'s claim about the meaning of quid pro quo has no foundation other than an interpretive mistake. *Buckley 2.0* would thus reject this aspect of *Citizens United*, which, in turn, would further weaken the claim that independent expenditures cannot pose a threat of corruption as a matter of law.

#### 4. *Buckley 2.0's Analysis of the Appearance of Corruption*

Justice Kennedy stated in *Citizens United* that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”<sup>213</sup> His support for his assertion is the further assertion that “ingratiation and access . . . are not corruption” as a matter of law<sup>214</sup> and the dictum that “it is our law and our tradition that more speech, not less, is the governing rule.”<sup>215</sup>

*Buckley 2.0* would observe that when the original *Buckley* stated that the appearance of corruption is “of almost equal concern” as the actuality of corruption, it immediately linked the appearance of corruption to “public awareness of the opportunities for abuse inherent in a regime of large

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<sup>212</sup> The *Citizens United* majority did rely on other precedents, but they were dissents in decisions where the majority opinion construed quid pro quo more broadly. There were numerous precedents in majority opinions, in contrast, supporting the *Buckley* majority's view. See *Citizens United*, 558 U.S. at 447-51 (Stevens, J.) (concurring in part and dissenting in part).

<sup>213</sup> *Citizens United*, 558 U.S. at 360 (citing *Buckley*, 424 U.S. at 46).

<sup>214</sup> Justice Kennedy adds that the fact that corporations make independent expenditures itself acknowledges “the ultimate influence” of voters. *Id.* Justice Kennedy's comment does not prove what he thinks it does. The fact that donors fund independent expenditures to get a candidate elected or re-elected is wholly consistent with the donors' hope that the candidate, once elected, will be grateful and thus influenced in his agenda or official actions by the donors' wishes. Candidates, in turn, want to continue to inspire their large donors' generosity in future elections and, thus, have an additional reason to please them while in office.

<sup>215</sup> *Id.* at 361.

individual financial contributions.”<sup>216</sup> The original *Buckley* reasoned that “Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”<sup>217</sup> The original *Buckley* thus agreed with *Citizens United* that preserving citizens’ trust or faith in their government is the underlying issue, but it disagreed with the latter decision about what causes citizens to lose trust or confidence in government. Further, the original *Buckley* specifically identified “the appearance of improper *influence*” as a significant threat to confidence in representative democracy justifying certain campaign finance regulations.<sup>218</sup> These statements are evidence that the original *Buckley* interpreted the appearance of corruption to include an ordinary person’s predictable reaction to oversize contributions, i.e., that they would influence, even if they did not completely determine, a recipient’s decision-making.

In addition, the *Buckley* approach reflects FECA’s legislative history, in which lawmakers expressly linked contribution limits to the problem of influence and indebtedness, not just to bargains struck.<sup>219</sup> Although *Citizens United* also recognized that the touchstone of the integrity of government is citizens’ trust in the system,<sup>220</sup> the Court seemed to assume that the appearance of corruption is inextricably connected to bribery—as, in its view, corruption is—as though public impressions of the influence of wealth on the agendas and attitudes of lawmakers short of bribery were of no legal consequence for the question of appearances.

In point of fact, empirical analysis shows otherwise. *Buckley 2.0* would bolster its interpretation of the original *Buckley* by citing numerous studies showing that ordinary citizens equate gaining influence or buying access with corruption.<sup>221</sup> It is thus consistent with both the Supreme Court’s own

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<sup>216</sup> *Buckley*, 424 U.S. at 27; see also *supra* notes 208–09 and accompanying text.

<sup>217</sup> *Buckley*, 424 U.S. at 27 (quoting U.S. Civil Serv. Comm’n. v. Nat’l Ass’n of Letter Carriers AFL-CIO, 413 U.S. 548, 565 (1973)).

<sup>218</sup> *Id.* at 27 (emphasis added).

<sup>219</sup> See, e.g., 117 CONG. REC. 291 (1971) (statement of Sen. Chiles) (emphasizing the need for measures to “restore public confidence” in “the elective process”); *Federal Election Campaign Act of 1971: Hearing Before the Subcomm. on Comm’ns of the S. Comm. on Commerce*, 92d Cong. 542 (1971) (statement of Sen. Frank E. Moss) (noting the “widespread cynicism” traceable to the “vast influence” of big contributors).

<sup>220</sup> *Citizens United*, 558 U.S. at 360.

<sup>221</sup> See, e.g., Liz Kennedy, *Citizens Actually United: The Overwhelming Bi-Partisan Opposition to Corporate Political Spending and Support for Achievable Reforms*, DEMOS (Oct. 25, 2012), <https://www.demos.org/policy-briefs/citizens-actually-united-bi-partisan-opposition-corporate-political-spending-a>

precedents and empirical data to have a capacious definition of corruption in “the appearance of corruption,” even if corruption per se is construed narrowly. In short, the question of appearances cannot be decided as a matter of law.<sup>222</sup> Thus, even if *Buckley 2.0* did not contest *Citizens United*’s definition of corruption, it would likely reject that Court’s narrow definition of the appearance of corruption when evaluating Congress’s attempt to enact reforms addressing threats to citizens’ trust in government owing to the appearance of corruption.

*Buckley 2.0*’s likely conclusion concerning the appearance of corruption can be traced to the specific concern articulated by *Buckley* and subsequent decisions, namely, that people’s “confidence in the system of representative [g]overnment,” i.e., the “integrity of our system,” will be undermined by seeing large contributors obtaining special access to or favors from public officials.<sup>223</sup> Although some commentators have argued that large contributions are more often motivated by candidates’ policies than the reverse,<sup>224</sup> the vast majority of ordinary voters see large donations as corrupting influences because they assume that large contributors have a disproportionate voice over legislation and public policies.<sup>225</sup> Representative government, in contrast to other forms of democracy, presupposes the

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nd (finding that 85% “call it corruption when financial supporters have more access and influence with members of Congress than average Americans”); Christopher Robertson et al., *The Appearance and the Reality of Quid Pro Quo Corruption: An Empirical Investigation*, 8 J. LEGAL ANALYSIS 375 (2016) (finding support, based upon a simulated grand jury and a representative online petit jury, for the position that contributions intended to influence a public official to support favorable legislation creates the appearance of corruption, even though the contributions are made to an independent entity that supports the official’s reelection); Molly J. Walker Wilson, *Financing Elections and “Appearance of Corruption”: Citizen Attitudes and Behavior*, 63 CATH. U. L. REV. 953, 980 (2014) (citing survey data); see also Ben Jacobs & David Smith, ‘Politics Are Corrupt’: Fears About Money and its Influence on Elections Loom Large, GUARDIAN (Jul. 8, 2016), <https://www.theguardian.com/us-news/2016/jul/08/trump-clinton-sanders-super-pacs-election-money> (noting that in the months leading up to the 2016 presidential elections, individuals “raised [the issue of campaign finance reform] as one of their main concerns”); William Alan Nelson II, *Buying the Electorate: An Empirical Study of the Current Campaign Finance Landscape and How the Supreme Court Erred in Not Revisiting Citizens United*, 61 CLEV. ST. L. REV. 443, 463–64 (2013) (citing multiple polls from 2010 in which a large majority of respondents agreed “that there should be limits on corporate political spending” and expressed opposition to the *Citizens United* decision); Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066, 1071–72 (2015) (describing how “large infusions of money into campaigns have the effect of causing the electorate to lose faith” in their representatives).

<sup>222</sup> See *supra* note 185 and accompanying text.

<sup>223</sup> *Buckley*, 424 U.S. at 26–27.

<sup>224</sup> See, e.g., *supra* note 199 and accompanying text.

<sup>225</sup> See, e.g., *supra* note 221 and accompanying text.

responsiveness of lawmakers to citizens in general, and not just to elites or interest groups. Although no individual or group can expect that its views will necessarily carry the day and be translated into government action, it is reasonable for them to believe that their views will be taken seriously and receive meaningful consideration and that the wishes of the majority of citizens will not be routinely disregarded in favor of the agendas of large contributors. If, *ex ante*, the views of donors of huge sums of money will determine legislative outcomes and executive actions, the resulting system does not deserve the label “representative.” In short, *Buckley 2.0* would justify its interpretation on the perceptions of ordinary citizens because the original *Buckley* and the concept of representative democracy both require this. It would thus reject *Citizens United’s* narrowing of the “appearance of corruption” for purposes of constitutional analysis both because it contradicts the original *Buckley* and because it ignores the necessarily experiential basis of what constitutes appearances.

5. *Buckley 2.0’s Analysis of the Independence of Contemporary Independent Expenditures*

*Citizens United* invalidated existing statutory restrictions on corporate spending using general business revenues in situations where corporations are engaged in independent spending.<sup>226</sup> In contrast, if their ostensibly independent spending is in fact coordinated with a candidate or a candidate’s campaign, *Citizens United* left unchanged the FECA provision that re-characterizes the amounts involved as contributions to a candidate and, thus, makes them subject to contribution limits.<sup>227</sup>

The original *Buckley*, which protected independent expenditures from limits enacted by Congress in 1971, involved independent spending by individuals or groups. As stated by the original *Buckley*, the reason Congress cannot constitutionally limit the amounts spent on independent expenditures is that such spending does not pose a threat of corruption because such spending is not controlled by a candidate and, thus, might be used in ways viewed by the candidate as unhelpful or even harmful.<sup>228</sup> As a consequence,

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<sup>226</sup> *Citizens United*, 558 U.S. at 365. Parallel rules apply to unions. See *supra* note 32.

<sup>227</sup> See, e.g., 52 U.S.C. § 30116(a)(7)(B) (2018) (formerly 2 U.S.C. § 441a(a)(7)(B)); *Buckley*, 424 U.S. at 46; 11 C.F.R. § 109.21(b) (2019). For the limited effectiveness of this rule, see *infra* notes 232–44 and accompanying text.

<sup>228</sup> *Buckley*, 424 U.S. at 47.

the candidate would not necessarily feel indebted to or under an obligation to please the persons responsible for independent spending.

In taking this position, the *Buckley* Court was not naive; it conditioned its holding on the independent spending being “totally” independent.<sup>229</sup> Otherwise the inference from the candidate’s lack of control and potential for harm would not be warranted. Further, it noted that independent spending did “not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions,”<sup>230</sup> thereby making clear that the Court did not rule out, as a matter of law or otherwise, the possibility that independent spending could at some time pose such a threat. For *Buckley*, independent spending was to be protected because of “its substantially diminished potential for abuse.”<sup>231</sup> The task for *Buckley 2.0*, therefore, is to examine whether the threat posed by independent spending as practiced in the current environment is as diminished as it was in 1976 or, in the alternative, independent spending now poses a threat of abuse. Depending upon the result, *Buckley 2.0*’s inquiry could affect independent spending by individuals as well as by corporations and other business interests, with ramifications for the constitutional status of unlimited contributions to independent expenditure groups as well.

FECA does not define “independent” or its opposite, “coordinated”; rather the terms are defined in FECA regulations.<sup>232</sup> Initially, the FEC’s implementing regulations defined coordination in terms of a candidate engaging in “substantial discussion or negotiation” with a third party that resulted in “collaboration or agreement.”<sup>233</sup> In 2001, Congress rejected that interpretation as too weak, and it directed the FEC to promulgate regulations covering a much wider range of interactions between candidates and third parties supporting their campaigns with allegedly independent spending.<sup>234</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 46. *Cf.* Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 246 (2010) (arguing that *Buckley* adopted the absurd view that “independent expenditures are not at all” corrupting).

<sup>231</sup> *Buckley*, 424 U.S. at 47.

<sup>232</sup> 11 C.F.R. § 109.20(a) (2019) (defining “coordinated” as “cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political party committee”).

<sup>233</sup> *Shays v. FEC (Shays I)*, 337 F. Supp. 2d 28, 55–56 & n.25 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005).

<sup>234</sup> *See, e.g.*, 52 U.S.C. § 30116(a)(7)(B)(ii) (2018); Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 94 (2002).

The resulting new coordination regulations were successfully challenged in court twice for being too permissive to satisfy the Congressional mandate.<sup>235</sup>

That the current regulations are still too permissive has been noted by reformers and members of both political parties because they do not classify as “coordinated” many communications that would be considered coordinated “under any common sense definition.”<sup>236</sup> Some aspects of the definition are vague. For example, communications made by an individual or group may only be considered coordinated if a candidate or staff member is “materially involved in decisions regarding the communications,”<sup>237</sup> with uncertain application of standards to determine materiality.<sup>238</sup> In addition, the rules themselves are often lax: they permit independent expenditure entities to hire the same vendors, such as pollsters and advertising companies, as the candidate uses, as long as a “firewall” is created between those in the company representing the candidate and those representing the independent expenditure entity.<sup>239</sup> Moreover, a firewall is not necessarily mandatory: the FEC approved an exempt organization with both a traditional PAC and an

<sup>235</sup> The history of this litigation is described in *Shays v. FEC*, 528 F.3d 914, 918–22 (D.C. Cir. 2008).

<sup>236</sup> See Campaign Legal Center & Democracy 21, Comment Letter on Commission’s Notice 2014-12 on Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (*McCutcheon*), at 19 (Jan. 15, 2015), <https://sers.fec.gov/fosers/showpdf.htm?docid=312983>; see also, e.g., Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471, 524 (2015) (describing the nature of indirect contributions and the difficulty in defining them “given the lack of direct guidance from the Supreme Court”); see also Bradley A. Smith, *Super PACs and the Role of “Coordination” in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 605–06 (2013) (quoting but disagreeing with lawmakers, academics, and party officials who deny the independence of independent entities like Super PACs); Public Citizen, Comment Letter on Notice of Proposed Rulemaking 2010-01 on Coordinated Communications, at 4 (Feb. 24, 2010), [https://www.fec.gov/resources/legal-resources/rulemakings/nprm/coord\\_commun/2009/public\\_citizen.pdf](https://www.fec.gov/resources/legal-resources/rulemakings/nprm/coord_commun/2009/public_citizen.pdf) (stating that there are “crippling weaknesses inherent in the 2007 coordination rule”).

<sup>237</sup> 11 C.F.R. § 109.21(d)(2), (3) (2019). If the information in question was obtained from a publicly available source, however, coordination has not occurred. *Id.* § 109.21(d)(3).

<sup>238</sup> According to the FEC, “[‘material’ has its ordinary legal meaning, which is ‘important; more or less necessary; having influence or effect; going to the merits.’ . . . The term ‘material’ is included to safeguard against the inclusion of incidental participation that is not important to, or does not influence, decisions regarding a communication.” Material Involvement, 68 Fed. Reg. 434 (Jan. 3, 2003) (codified at 11 C.F.R. § 109.21(d)(2)) (citing *Material*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

<sup>239</sup> 11 C.F.R. § 109.21(d)(4), (5) (2019); see also Ashley Balcerzak, *Candidates and Their Super PACs Sharing Vendors More Than Ever*, OPENSECRETS (Dec. 21, 2016, 3:25 PM), <https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/>; Idrees Kahloon, *Outside Groups, Presidential Committees Share Staff and Vendors*, SUNLIGHT FOUND. (Aug. 7, 2015, 12:01 AM), <https://sunlightfoundation.com/2015/08/07/super-pacs-presidential-committees-share-staff-and-vendors/>; Note, *Working Together for An Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1485–86 (2015).

independent expenditure Super PAC, even though the same individual was President of the exempt organization and Treasurer of both PACs, based upon the organization's simple representation to the FEC that the Super PAC would not engage in any coordinated activities.<sup>240</sup> Further, not infrequently, a member of a lawmaker's staff resigns from his or her staff position before an election and then establishes and operates an independent expenditure entity, even a single-candidate Super PAC, to help elect or reelect the lawmaker,<sup>241</sup> bringing along a reservoir of inside information. One commentator has opined that a candidate's spouse can buy advertising urging the election of the candidate without violating the coordination rules as long as they do not "discuss[] the details of specific ad buys."<sup>242</sup> Again, communications made in public are exempted from the definition of coordination, so candidates or their surrogates can, for example, state openly when interviewed on radio or television a campaign's "wish list" for additional advertising or get-out-the-vote efforts in specific locations.<sup>243</sup> For these and other reasons, the coordination rules have been repeatedly criticized for failing to ensure genuine independence. The lack of

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<sup>240</sup> FEC, ADVISORY OPINION 2010-09, at 4 (2010), available at <https://www.fec.gov/files/legal/aos/2010-09/AO-2010-09.pdf> (finding that the President's "overlap of duties" would not "compromise" the Super PAC's independence because of the representations made by the organization).

<sup>241</sup> For specific examples, see Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 90–91 (2013); see also FEC, ADVISORY OPINION 2016-21, at 3–7 (2017), available at <https://www.fec.gov/files/legal/aos/2016-21/2016-21.pdf> (discussing several situations in which a candidate's or party's former employee joins a hybrid PAC and concluding that the use of information acquired in previous position will be coordinated if it is material).

<sup>242</sup> Paul S. Ryan, *Two Faulty Assumptions of Citizens United and How to Limit the Damage*, 44 U. TOL. L. REV. 583, 586 (2013). Although the quoted statement may be an exaggeration, because the standard would be the materiality of the information transmitted, not specificity, nonetheless the less specific the information in question, the harder it would be to prove its materiality.

<sup>243</sup> See, e.g., Alex Roarty et al., *They're Not Allowed to Talk. But Candidates and PACs Are Brazenly Communicating All the Time*, ATLANTIC (Oct. 30, 2014), <https://www.theatlantic.com/politics/archive/2014/10/theyre-not-allowed-to-talk-but-candidates-and-pacs-are-brazenly-communicating-all-the-time/435771/>; Briffault, *supra* note 241, at 94. Cf. Kenneth P. Doyle, *FEC Drops Illegal Coordination Charges Against McGinty Campaign*, BLOOMBERG LAW (Dec. 19, 2016, 3:34 PM) (describing FEC's decision to drop coordination charges against a Pennsylvania Senate candidate). But see Complaint, Campaign Legal Center v. VoteVets (F.E.C. filed Feb. 18, 2020), available at <https://campaignlegal.org/sites/default/files/2020-02/02-18-20%20VoteVets%20Buttigieg%20%28final%20signed%29.pdf> (arguing that there is no public communication exception if the public communications were at the request or suggestion of the candidate or his campaign).

enforcement also contributes to the problem, and the FEC has rarely found an ostensibly independent activity to be coordinated.<sup>244</sup>

In light of these provisions and practices, *Buckley 2.0* would conclude that what satisfies the legal definition of independence is not in fact “totally” independent as originally understood by *Buckley* in 1976. Such a finding would force *Buckley 2.0* to assess, first, whether the absence of meaningful independence today is a sufficient reason for reversing *Citizens United*’s decision to allow corporations to fund independent spending with general treasury revenues and, second, whether *SpeechNow.org*’s extension of that ruling to contributions to independent spending groups remains valid. These questions are examined in the next Part.

### III. WOULD THE *BUCKLEY* COURT OVERRULE *CITIZENS UNITED* AND *SPEECHNOW.ORG*?

*Buckley 2.0* will thus be forced to consider whether the time has come to overrule *Citizens United*, which will have the concomitant effect of invalidating *SpeechNow.org* insofar as it relies on the reasoning of *Citizens United* regarding the relationship between independent expenditures and corruption.

#### A. Principles Governing the Protection of Speech During Elections

In contemplating such a consequential action, *Buckley 2.0* would first review the principles grounding the original *Buckley* decision. These are that:

1. The First Amendment affords a very high degree of protection to both political expression and political association.<sup>245</sup>
2. Neither of these protected rights is absolute. As stated in the original *Buckley*, “[e]ven a ‘significant interference’ with protected rights of political association” may at times be justified.<sup>246</sup>
3. Government restrictions on these rights must be subject to exacting scrutiny.<sup>247</sup>

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<sup>244</sup> See Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <https://publicintegrity.org/federal-politics/rules-against-coordination-between-super-pacs-candidates-tough-to-enforce> (relating criticism of current enforcement of coordination rules).

<sup>245</sup> *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam).

<sup>246</sup> *Id.* at 25 (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO*, 413 U.S. 548, 567 (1973)) (“Neither the right to associate nor the right to participate in political activities is absolute”).

<sup>247</sup> *Buckley*, 424 U.S. at 16. *Buckley* uses the standard of “exacting scrutiny” in connection with limits on independent expenditures, *id.* at 44–45, and disclosure regulations. *Id.* at 64. *Buckley* adopts “the closest scrutiny” when upholding contribution limits. *Id.* at 25 (quoting *NAACP v. Alabama*,

4. Exacting scrutiny requires the Court to assess the importance of the government's interest in regulating campaign speech and the relationship between the government's interest and the means chosen to effectuate that interest.<sup>248</sup>
5. The interest of the government in regulating campaign contributions is primarily to prevent corruption of candidates and office holders deriving from the influence of large outlays because corruption undermines the integrity of the system of representative government.<sup>249</sup>
6. The interest of the government in regulating campaign contributions is also to prevent the appearance of corruption in the eyes of the citizens because confidence in elected officials' integrity when acting in their official capacity is also essential to the integrity of the system of representative government and a primary goal.<sup>250</sup>
7. Although preventing corruption and its appearance are the primary justifications for FECA's restrictions on campaign contributions, nothing in the original *Buckley* precludes Congress taking additional steps to protect the integrity of the system of representative government if they satisfy exacting scrutiny.<sup>251</sup> For example, electoral integrity also depends upon an informed electorate.<sup>252</sup> Both the protection of political speech and disclosure rules are justified for the sake of facilitating an informed electorate.
8. The ability of candidates to have sufficient resources for effective advocacy is another condition of the integrity of representative government and, thus, the means that governments select to address corruption, its appearance, an informed electorate, confidence in elected officials, or other conditions of the integrity of representative government should not obstruct the possibility of effective advocacy by candidates for election or re-election.<sup>253</sup>
9. It is inconsistent with the First Amendment to restrict the speech of some to assure that citizens at large have equal resources to make their voices heard.<sup>254</sup>

*Buckley 2.0* would then examine, in light of these principles and current campaign practices, the reasoning presented in *Citizens United* to justify its

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357 U.S. 449, 460–61 (1958)) (“In view of the fundamental nature of the right to associate, governmental action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”).

<sup>248</sup> *Buckley*, 424 U.S. at 64–65.

<sup>249</sup> *Id.* at 26–27.

<sup>250</sup> *Id.* at 25–26; *see also id.* at 67.

<sup>251</sup> *Id.* 14–15, 49 n.55; *see also id.* at 26 (referring to corruption and its appearance as FECA's primary purpose, not its exclusive purpose); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978).

<sup>252</sup> *Buckley*, 424 U.S. at 68 (referring to Congress' goals of “curbing the evils of campaign ignorance and corruption”).

<sup>253</sup> *Id.* at 21–22.

<sup>254</sup> *Id.* at 48–49.

conclusion that it is unconstitutional to prevent corporations and unions from using general treasury funds for advocating the election or defeat of candidates when these entities do not coordinate with candidates or their campaigns.

*B. Citizens United's Claim that Corporations Have General Political Speech Rights*

*1. Buckley's Silence Concerning Corporate and Union Rights*

*Citizens United* asserted that the restrictions on corporations and unions spending general treasury funds “could not have been squared with the reasoning of [*Buckley*],”<sup>255</sup> based largely on inferences *Citizens United* drew from what *Buckley* failed to say. For example, according to *Citizens United*, when *Buckley* invalidated FECA’s limits on independent expenditures, it did not make an exception for corporations and unions engaging in independent spending; therefore, *Buckley* must have assumed these entities would be making independent expenditures along with individuals and other groups and, thus, it must have implicitly approved such activities.<sup>256</sup>

As a matter of logic, however, a court’s silence on a subject does not in general show that it endorses every possible inference based upon what it did not address in a decision. This is especially true in a system such as ours, where judges are limited to adjudicating cases or controversies.<sup>257</sup> *Buckley 2.0* would explain that, as *Citizens United* itself noted,<sup>258</sup> FECA’s prohibition on corporate and union independent expenditures financed through general treasury funds was not an issue in the original *Buckley*. *Buckley 2.0* would reject *Citizens United*’s assertion of *Buckley*’s implicit teaching because the Court was not asked to nor did it consider the application of independent expenditure rules to commercial corporations and unions. Thus, *Buckley*’s conclusion that independent expenditures “do[] not presently appear to pose dangers of real or apparent corruption” like large contributions do was reached without evidence presented as to the impact of campaign spending by commercial corporations or unions.<sup>259</sup>

Second, *Citizens United* supported its claim as to *Buckley*’s implicit teaching by observing that “some of the prevailing plaintiffs in *Buckley* were

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<sup>255</sup> *Citizens United v. FEC*, 558 U.S. 310, 346 (2010).

<sup>256</sup> *Id.* at 346.

<sup>257</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>258</sup> *Citizens United*, 558 U.S. at 346.

<sup>259</sup> *Buckley*, 424 U.S. at 46.

corporations.”<sup>260</sup> *Buckley 2.0* would respond that the corporate plaintiffs in the original *Buckley* were “political committees” under FECA or nonprofit advocacy organizations like the New York Civil Liberties Union.<sup>261</sup> *Buckley 2.0* would note that political committees were already subject to FECA’s fundraising and disclosure rules, so they could not use treasury funds for political spending anyway. The other corporate plaintiffs in the case were advocacy organizations, not commercial enterprises, so their sources of funds were largely donations or dues, not business revenues.

*Buckley 2.0* would thus conclude that the original *Buckley* had not examined the question of independent expenditures made by corporations or unions from their general treasury funds. Accordingly, *Citizens United*’s inferences from its silence or from the fact that some plaintiffs were corporations did not support *Citizens United*’s conclusion that *Buckley* was precedent for the proposition that commercial corporations and unions have general political speech rights.

## 2. Citizens United’s Argument Based Upon Bellotti

*Citizens United* asserted that *Buckley* stood for the “principle that the Government cannot restrict political speech based on the speaker’s corporate identity.”<sup>262</sup> It buttressed this claim by turning to *First National Bank of Boston v. Bellotti*, which invalidated a state ban on corporations funding independent expenditures.<sup>263</sup> *Bellotti* considered a Massachusetts statute banning contributions or expenditures by corporations and other business entities during a ballot initiative relating to a state-sponsored proposal to introduce a graduated income tax. The *Bellotti* Court emphasized that the challenged statute threatened to prevent the airing of a point of view that might not otherwise be represented during the debate over the proposed legislation, in particular, the viewpoint of business interests opposed to Massachusetts’ position endorsing the ballot initiative.<sup>264</sup> In expressing its concern about the

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<sup>260</sup> *Citizens United*, 558 U.S. at 346.

<sup>261</sup> According to *Buckley*, 424 U.S. at 7–8, the plaintiffs were three individuals and seven organizations. The organizations were political parties, nonprofits, and advocacy groups. *Id.*

<sup>262</sup> *Citizens United*, 558 U.S. at 346.

<sup>263</sup> *Id.* at 340 (citing *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784 (1978)).

<sup>264</sup> The Court thus seems to have viewed this as a case of viewpoint discrimination, because the Government sought to silence the view of business entities who opposed the state’s proposed tax reform. *But see Citizens United*, 558 U.S. at 347 (asserting that *Bellotti* was not about viewpoint discrimination).

government using its legislative power to suppress opposition to its position, the *Bellotti* Court said that the First Amendment does not permit the government to prevent a class of speakers from contributing to the discussion of a public issue.<sup>265</sup>

In reviewing *Citizens United's* reliance upon *Bellotti* for the proposition that the First Amendment categorically bars the government from preventing a class of speakers from engaging in political speech, *Buckley 2.0* would observe that neither the *Bellotti* holding nor its reasoning claimed to invalidate regulation of corporate political speech as a general matter. Rather, the *Bellotti* Court explicitly distinguished the government's interest in preventing corruption in a ballot initiative from other situations, noting that its "consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office."<sup>266</sup> The *Bellotti* Court reiterated that the "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue[]"<sup>267</sup> to be decided by a referendum. Because of *Bellotti's* express distinction between discussion of issues in the context of a referendum, on the one hand, and promoting candidates for election, on the other, *Buckley 2.0* would find that *Bellotti* does not stand for a general constitutional bar to singling out corporations with respect to speech in the elections of candidates or a presumptive right of corporate political speech outside the referendum context.

### 3. *Citizens United's* Argument Based Upon MCFL

*Buckley 2.0* would find *Citizens United's* reliance upon *FEC v. Massachusetts Citizens for Life (MCFL)*<sup>268</sup> similarly misplaced. MCFL was an educational and advocacy nonprofit corporation devoted to promoting human life that, by virtue of being a corporation, was prevented by the federal prohibition from spending its general treasury funds on political advocacy.<sup>269</sup> The *MCFL*

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<sup>265</sup> *Bellotti*, 435 U.S. at 784–85.

<sup>266</sup> *Id.* at 788 n.26 (emphasis added). *Citizens United* dismissed reliance on the Court's statement because it was in a footnote. However, the issue of spending by corporations in an election of candidates was not before the Court. In any event, the *Bellotti* Court also distinguished ballot measures from candidate elections in the text of its decision. See *infra* note 267 and accompanying text.

<sup>267</sup> *Bellotti*, 435 U.S. at 790.

<sup>268</sup> *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986).

<sup>269</sup> *Id.* at 242 n.1.

Court went to great lengths to distinguish the nonprofit corporation in *MCFL* from commercial corporations. It noted that *MCFL* was a small nonstock corporation that itself engaged in no commercial activities and, further, accepted no money from business entities or unions.<sup>270</sup> Indeed, it raised money from contributions from individuals and from garage sales, bake sales, dances, raffles, and picnics.<sup>271</sup> The Court emphasized how burdensome requiring a small and unsophisticated nonprofit to establish a PAC would be, given the FECA regulations applying to PACs.<sup>272</sup>

Despite the *MCFL* Court's restriction of its holding to these facts, *Citizens United* cited the administrative burdens catalogued in *MCFL* as evidence that requiring corporations and unions of any size to fund express advocacy with PAC money would be unconstitutionally burdensome. Accordingly, *Citizens United* cited *MCFL* as precedent for an absolute prohibition against limiting corporations and unions from engaging in political speech paid for by treasury funds.<sup>273</sup>

In reviewing *Citizens United*'s argument, *Buckley 2.0* would note that *MCFL* expressed concerns about the influence of corporate wealth on campaigns<sup>274</sup> and that it explicitly distinguished that situation of commercial corporations from “*this fund*.”<sup>275</sup> Thus, in *MCFL* the Supreme Court concluded that the difference between *MCFL* and commercial corporations was one of kind and not merely degree.<sup>276</sup> For these reasons, and because *MCFL* expressly asserted that the situation of commercial corporations was a “question not before us,”<sup>277</sup> *Buckley 2.0* would find the analogy between *MCFL*-type corporations and commercial ones untenable. It would thus conclude that *MCFL* cannot be used as precedent for equating the speech rights of all corporations of whatever size and purpose from a First Amendment perspective nor as support for *Citizens United*'s absolutist position regarding the regulation of corporate political speech.

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<sup>270</sup> *Id.* at 241–42.

<sup>271</sup> *Id.* at 242.

<sup>272</sup> *Id.* at 253–55. Even so, the Court concluded that the burdens were not “insurmountable,” and thus actually rested its holding on the lack of a compelling government interest. *Id.* at 263.

<sup>273</sup> *Citizens United v. FEC*, 558 U.S. 310, 338 (2010).

<sup>274</sup> *Mass. Citizens for Life*, 479 U.S. at 257–60.

<sup>275</sup> *Id.* at 258 (emphasis in original).

<sup>276</sup> *Id.* at 263.

<sup>277</sup> *Id.*; see also *id.* at 263–64 (outlining three features of the facts in *Mass. Citizens for Life* that support the Court's holding, none of which is true of commercial corporations).

In sum, *Buckley 2.0* would find that *Citizens United* leaped without justification from language about a ballot initiative in *Bellotti* and a small nonprofit advocacy organization funded by individual donations in *MCFL* to its assertion of general political speech rights for corporations of whatever size and nature when intervening in a campaign for public office.

C. *Citizens United's Inferences from Corporations' and Unions' General Political Speech Rights*

In addition to rejecting *Citizens United's* arguments underlying its assertion of general political speech rights for corporations based upon Supreme Court precedents, *Buckley 2.0* would also question *Citizens United's* subsequent argument that, because corporations in general have the same right to political expression as other speakers, it would be unconstitutional to restrict their use of their own resources (including general treasury funds) unless the government could show that such restrictions are necessary to avoid the threat of corruption or its appearance.

When the *Citizens United* Court asserted that such a showing is impossible as a matter of law if corporations are not coordinating with candidates, it relied upon the original *Buckley's* statement that uncoordinated spending at that time did not appear to pose a risk of corruption or its appearance.<sup>278</sup> The original *Buckley's* statement seems to have referred to independent spending by individuals (singly), non-corporate groups or associations, or advocacy groups.<sup>279</sup> *Citizens United* then concluded that the same reasoning would apply equally to commercial corporations or unions acting independently of candidates and, thus, that the existing ban on such entities using treasury funds was a violation of the First Amendment's protection of the presumptive political speech rights of corporations.

For reasons discussed in Part II, *Buckley 2.0* would have several grounds for rejecting this aspect of the reasoning of *Citizens United*. First, as noted above,<sup>280</sup> *Citizens United's* conclusion depended upon a narrow interpretation of quid pro quo as bribery or a concrete exchange between the person making the expenditure and a candidate or public official, which would be impossible if the parties acted independently of one another. *Buckley 2.0*, in contrast, pointed out that the original *Buckley's* understanding of quid pro quo was broader and included such things as influencing a candidate as well as

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<sup>278</sup> *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (per curiam).

<sup>279</sup> See *supra* note 261.

<sup>280</sup> See *supra* Part II.B.3.

obtaining access, and not exclusively outright bribery. *Citizens United's* misreading of this aspect of the original *Buckley* was significant because independent spending is not inherently inconsistent with the independent spender having influence on candidates, who are aware of the identity of those who make outsize expenditures, even in those instances when their identities are hidden from the public.

Second, *Buckley 2.0* also concluded that the appearance of corruption could arise when big contributors influence or gain access to candidates and elected officials, since these signal corruption to ordinary citizens, as they did to those who enacted FECA.<sup>281</sup> *Buckley 2.0* reinforced the original *Buckley's* observation with contemporary survey data linking people's perception of the influence of money on officials with their distrust of government.<sup>282</sup> Its conclusion was further strengthened by the proliferation of dark money groups to which business interests and wealthy individuals can contribute unlimited sums without public knowledge of the donors' identities despite the likelihood that candidates know their identities and will be influenced by such spending.<sup>283</sup>

Third, the original *Buckley* claimed that independent spending poses no threat of corruption or its appearance only if the spending is totally independent.<sup>284</sup> After reviewing current campaign finance regulations and practices, *Buckley 2.0* concluded that conformity with the legal test for independence does not guarantee total independence so as to preclude concrete exchanges between contributors and representatives, influence, or access.<sup>285</sup> Among other things, *Buckley 2.0* saw the importance of the emergence and rapid increase of single-candidate Super PACS staffed by former staff or associates of a candidate and permitted to raise money with the active assistance of the candidate.<sup>286</sup> Moreover, *Buckley 2.0* would note that the original *Buckley* assumed there would be disclosure to counter the risk of corruption; increasingly, however, campaign spending employs non-disclosing vehicles, uses non-revealing contributor names, or engages in other

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<sup>281</sup> See *supra* notes 216–19 and accompanying text.

<sup>282</sup> See *supra* note 221 and accompanying text.

<sup>283</sup> See *supra* Part I.C (noting that the amount of money involved cannot be quantified because of the absence of disclosure); see also *supra* notes 52–64 (discussing the reasons for the lack of disclosure pursuant to the *Internal Revenue Code* and FECA).

<sup>284</sup> *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (per curiam).

<sup>285</sup> See *supra* Part II.B.5.

<sup>286</sup> See *supra* notes 107, 241, 306 and accompanying text.

strategies to prevent voters from knowing who is responsible for campaign messages.<sup>287</sup> *Buckley 2.0* would thus conclude that in contrast to the situation in 1976, independent spending does in fact “presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.”<sup>288</sup>

*Buckley 2.0* would also consider the burden on corporate and union political speech that would result from overruling *Citizens United* in light of the empirical data discussed in Part I. In particular, it would note that spending by business interests during the 2016 election cycle was eight-and-a-half times more than in the 1976 cycle (in inflation-adjusted dollars) *without* taking into account new spending vehicles made possible by *Citizens United*.<sup>289</sup> In addition, business interests would continue to be able to spend general treasury funds on issue advocacy in general, as well as on communications mentioning candidates for public office on the eve of an election, as long as they are not the functional equivalent of express advocacy.<sup>290</sup> *Buckley 2.0* would thus conclude that the burden on corporate and union speech—if they lacked the opportunities for spending resulting from the holding in *Citizens United*—would not be severe because of the many avenues that would remain for these entities to spend enormous sums on campaigns and to participate in the discussion of candidates and issues raised by candidates during elections. At the same time, *Buckley 2.0* would find that the risk of corruption from such spending would be far greater than in 1976 because the original *Buckley* assumed there would be disclosure to counter the risk of corruption<sup>291</sup> and because of the rate of increase of business spending in elections in recent decades. *Buckley 2.0* would thus find that *Citizens United* should be overruled because the flaws in its reasoning rendered it inconsistent with the original *Buckley*, upon which it claimed to be based; political speech by business interests would continue to enjoy vast amounts of funding; and the threat of corruption posed by aggregate campaign spending by such interests in the wake of *Citizens United* has increased greatly due to the spike in contributions of millions of dollars.

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<sup>287</sup> See *supra* notes 53–55, 58–68 and accompanying text.

<sup>288</sup> See *supra* notes 181, 230 and accompanying text.

<sup>289</sup> See *supra* Part I.A.1.

<sup>290</sup> See *supra* Part I.D.

<sup>291</sup> See generally *Buckley v. Valeo*, 424 U.S. 1, 60–84 (1976) (*per curiam*).

D. *SpeechNow.org and Buckley 2.0's Analysis of Unlimited Contributions to Independent Spending Groups*

If *Buckley 2.0* rejects *Citizens United's* claims about the speech rights of corporations, the nature of quid pro quo arrangements, and the implications of FECA's independence standard as a matter of law, the holding of *SpeechNow.org* will not survive because of its dependence on these doctrines. Even if *Buckley 2.0* did not invalidate the central teaching of *Citizens United*, however, it would likely find the later case's extension of the earlier decision illegitimate.

The original justification for immunizing independent expenditures from dollar limits was twofold. As stated earlier, the main justification was that, because such expenditures were unlikely to pose a significant threat of corruption and the limits proposed by Congress would impose a "direct and substantial" burden on core political speech,<sup>292</sup> the government interest in imposing the statutory limits on individual expenditures was not compelling enough to overcome the protection afforded by the First Amendment. A second and related reason advanced by the original *Buckley* was that, because the dollar limits would only apply to communications advocating the election or defeat of candidates for federal office,<sup>293</sup> they would prohibit only a small subset of political communications that could pose a risk of corruption, thereby accomplishing "no substantial societal interest."<sup>294</sup>

*Buckley 2.0* would evaluate the constitutionality of limiting contributions to independent expenditure entities in light of the original *Buckley's* analysis of contributions and independent expenditures as well as developments in campaign finance law and practices since then. It would begin by reviewing

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<sup>292</sup> As enacted in 1971, FECA imposed a \$1000 cap on expenditures by individuals to support any specific candidate per year. *Id.* at 13. There was also an overall annual maximum of \$25,000. The overall limit was invalidated in *McCutcheon v. FEC*, 572 U.S. 185, 204 (2014).

<sup>293</sup> As originally enacted, FECA limits would also have applied to all speech "relative to a clearly defined candidate" and thus, would have applied to a wide range of campaign communications. However, the Court held that "relative to" was too vague to withstand First Amendment scrutiny because the limitation might be imposed on discussions of issues and legislative proposals. The Court thus invalidated the original provision except as it applied to words of express advocacy. *See Buckley*, 424 U.S. at 39–44.

<sup>294</sup> *Id.* at 45.

empirical evidence regarding the nature and extent of spending by these entities and the role of unlimited contributions in funding them.

1. In the 2015–2016 election cycle, more than a fifth of the total (reported) election spending of \$6.5 billion was traceable to independent expenditure groups, with Super PACs responsible for more than \$1 billion of this amount.<sup>295</sup> Unreported spending by outside groups, including issue advocacy calculated to influence the election of specific candidates but not subject to reporting, cannot be estimated, but clearly added hundreds of millions of dollars to these totals.<sup>296</sup>
2. The amount of identifiable outside spending in the 2015–2016 election cycle represented an increase of almost 50% over the comparable amount in the previous presidential election cycle.<sup>297</sup>
3. The massive nature of such spending was not an aberration. In fact, because Donald Trump received an unusual amount of free publicity, experts believe that total spending in 2015–2016 was significantly less than it would otherwise have been.<sup>298</sup> Further, outside spending for the 2018 mid-term elections was 60% greater than such spending for the 2014 mid-terms,<sup>299</sup> confirming that the trend is for rapid increases in outside spending.
4. Unlimited contributions accounted for almost 90% of receipts of Super PACs.<sup>300</sup>
5. Unlimited contributions also resulted in an unprecedented concentration of campaign spending by wealthy individuals, accounting for almost all of the funds raised by independent spending entities. Almost 90% of contributions to Super PACs (more than \$900 million) was attributable to 511 individuals, or one percent of donors.<sup>301</sup>
6. It has been estimated that, combining unlimited contributions to Super PACs and other independent spending groups and other spending, only 1% of the top 1% (.01%) of adults were responsible for \$2.3 billion in outside money raised during the 2015–2016 election cycle.<sup>302</sup>

In evaluating these statistics, *Buckley 2.0* would first observe that unlimited contributions to independent spending groups are not themselves direct independent expenditures made by the donors and, thus, are not entitled to the same level of constitutional protection as independent expenditures. Rather, they are contributions, entitled to the protection afforded

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<sup>295</sup> See *supra* notes 79–80 and accompanying text.

<sup>296</sup> See *supra* notes 111–12, 117, 121–28.

<sup>297</sup> See *supra* note 103 and accompanying text.

<sup>298</sup> Sultan, *supra* note 16 (stating that Trump received free media valued at \$5.9 billion in contrast to Clinton, who received free media valued at less than \$2.8 billion).

<sup>299</sup> See *supra* note 104 and accompanying text.

<sup>300</sup> See *supra* note 87 and accompanying text.

<sup>301</sup> See *supra* notes 87, 89 and accompanying text.

<sup>302</sup> See Sultan, *supra* note 16 (noting that most of the money went to independent spending groups); see also Persily et al., *supra* note 85 (noting the discrepancy between what Super PACs raised in 2016 and what they spent).

contributions by the original *Buckley*. The contributions reviewed in *Buckley*, of course, were given to candidates and their campaigns, not to groups deemed independent by the FEC. Given the reasoning set forth in *Buckley*, however, this is a distinction without a difference.

When *Buckley* upheld FECA's \$1000 cap on contributions by individuals to candidates, it argued that contributions are not entitled to the same degree of First Amendment protection as expenditures because the burden of a contribution cap is only a "marginal restriction" on the donor, since contributions are symbolic speech and the cap leaves individuals free to participate in elections in other ways, including making independent expenditures without dollar restrictions.<sup>303</sup> Eliminating *SpeechNow.org*'s validation of unlimited contributions to groups deemed independent by the FEC would similarly leave individuals and groups the ability to contribute up to \$5000 to individual PACs, make unlimited independent expenditures of their own, engage in unlimited issue advocacy relevant to an election, and participate in the other ways listed by *Buckley*.<sup>304</sup> *Buckley 2.0* would thus conclude that subjecting contributions made to independent spending entities to dollar limits would not excessively burden the speech rights of donors to those entities.

However, the original *Buckley* considered more than the extent of the burden caused by contribution limits. It upheld those limits because it found that the government interest in imposing dollar limits to reduce the threat of corruption was substantial. The unlimited contributions that *SpeechNow.org* validated are made to recipients other than candidates and their campaigns, so *Buckley 2.0* would have to examine the threat of corruption in this different context. It would explore whether unlimited contributions to Super PACs and certain exempt organizations are less prone to be corrupting than contributions to candidates because the recipient groups are classified as "independent" under federal campaign finance law.

*Buckley 2.0*'s conclusion would rest on a combination of factors. First, it would note again that the "totally" independent standard of *Buckley* is not satisfied in connection with several kinds of outside spending groups because of the problematic character of the legal standard for independence.<sup>305</sup> Further, even if groups are totally independent, the law does not bar those

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<sup>303</sup> See *supra* notes 136–41 and accompanying text.

<sup>304</sup> See *supra* notes 140–41 and accompanying text. For the greatly increased campaign spending made possible by *McCutcheon*, see *supra* notes 94–97 and accompanying text.

<sup>305</sup> See *supra* Part II.B.5.

who contribute to them from acting in concert with candidates. *Buckley 2.0* would note, for example, that the FEC permits candidates themselves to solicit contributions at fundraising events hosted by spending groups regarded as independent under FECA as long as the candidates request contributions of no more than \$5000 (the FECA limit for contributions to candidate PACs), even though the groups themselves can solicit sums of any size at the same event and advertise the candidate as a guest or featured speaker.<sup>306</sup> Further, no law bars candidates from letting potential donors know which groups the candidates regard as potentially helpful to their campaigns, including independent spending groups. Finally, the *Buckley 2.0* Court would observe that exempt organizations claiming to be independent are not required to disclose publicly their donors and the amounts they donate,<sup>307</sup> and even disclosing independent organizations may list donor entities that do not reveal the sources of their funds.<sup>308</sup> In those instances, there is no transparency, which, according to *Buckley* can deter corruption.<sup>309</sup> Based upon these considerations, *Buckley 2.0* would conclude that the risk of the reality or appearance of corruption from large contributions to independent spending groups is at least as great as the risk of corruption or its appearance from contributions made directly to candidates because of the close association of candidates to Super PACs, the unlimited size of the contributions, and the public's inability to identify which individuals or groups are financially supporting a candidate in many circumstances.

In addition to reviewing the legal standards governing proximity between candidates and independent spending groups in light of contemporary campaign practices, *Buckley 2.0* would also review the statistics for potentially unlimited funding of elections since *Citizens United*. It would observe that the sums raised have been enormous and that the ability of high-wealth donors to aggregate their contributions together in Super PACs and other groups has amplified their impact on elections far beyond what extremely large but uncoordinated independent expenditures by persons acting singly could generate.<sup>310</sup> Taking into consideration the prevalence of single-candidate independent expenditure groups, the rate at which such spending is growing, and the close ties between candidates and legally independent groups, *Buckley*

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<sup>306</sup> See, e.g., FEC, ADVISORY OPINION 2011-12 (2011), available at <https://www.fec.gov/updates/ao-2011-12-fundraising-by-candidates-officeholders-and-party-officials-for-independent-expenditure-only-political-committees/>. The candidates can be speakers or featured guests at these fundraisers.

<sup>307</sup> See *supra* notes 52–64, 124–25 and accompanying text.

<sup>308</sup> See *supra* notes 65–67 and accompanying text.

<sup>309</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam).

<sup>310</sup> See *supra* notes 85–93 and accompanying text.

2.0 would conclude that regardless of whether the groups and candidates coordinate specific strategies and ad buys, the groups have become conduits enabling individuals to evade the caps on contributions to candidates by millions of dollars.

Because the sums raised are so great, the threat of corruption is correspondingly acute. The threat is further magnified by the ability of independent spending groups funded by unlimited contributions to outspend candidates in targeted races.<sup>311</sup> In evaluating the significance of these statistics, *Buckley 2.0* would observe that post-*SpeechNow.org*, outside groups are now in a position to dictate the core of a candidate's governing agenda by threatening to withhold support in general elections or back competitors in primaries. In short, based upon empirical evidence of contemporary campaign practices and their effects coupled with the Court's review of the relevant legal standards, *Buckley 2.0* would conclude that the *SpeechNow.org* court erred when it held that contributions to independent spending groups were incapable of coordination and corruption as a matter of law. *Buckley 2.0* would, as a consequence, hold that permitting unlimited contributions to entities classified as independent under campaign finance law was not constitutionally required.

#### CONCLUSION

Since *Buckley* was decided in 1976, the campaign finance framework that it erected has been eroded by a series of decisions claiming to rest upon its foundations. During the same period, campaign financing has been transformed by the skyrocketing cost of campaigns, innovative campaign practices, rapid increases in the amount of money injected into elections by business interests, an increasingly small number of high-wealth individuals accounting for an increasingly large percentage of campaign spending, and a trend toward employing dark money campaign vehicles and adopting other strategies to evade campaign finance disclosure rules.

Some of these changes were introduced or accelerated by the decisions in *Citizens United* and its progeny, *SpeechNow.org*. In important respects, each of these decisions made two important errors: they misrepresented the extent of their support in precedent and they disregarded empirical campaign realities in applying doctrines. The *Buckley 2.0* thought experiment has

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<sup>311</sup> See *supra* note 109 and accompanying text.

attempted to identify and shine a spotlight on these errors. The result is a more faithful reading of the original *Buckley* and a more honest recognition of campaign financing realities that threaten the integrity of representative government in America.