

Introduction

The average total cost of a winning campaign in a competitive federal senate election has tripled since 2004 (citation here). During that year, one of the most expensive senate races took place in Pennsylvania. Arlen Specter's Republican campaign spent \$20.3 million dollars on his re-election effort while also enjoying \$117 thousand dollars in assistance from 4 outside groups, including a political action committee (PAC) called the NRA Political Victory Fund ([FEC citation here](#)). This total sum was enough to propel him through a bitter primary challenge against a more conservative Republican named Patrick ("Pat") Toomey and the general election. By 2009, Specter felt like he no longer recognized his place in the Republican party and joined the Democratic caucus. He ran for re-election in 2010 as a Democrat but failed to emerge from the primary. Pat Toomey won the senate seat in 2010 and stood for re-election in 2016. Once again, the Pennsylvania senate election was one of the most expensive in the nation. Toomey's campaign spent \$31.5 million dollars and, in stark contrast to the 2004 race, enjoyed \$48.2 million dollars in assistance from 26 outside groups spending in support of his candidacy and in opposition to his general election opponent Kathleen McGinty ([FEC citation](#)). This represented a 4100% increase in outside spending.

This dramatic increase was made possible by a series of court decisions made in 2010, specifically *Citizens United v. FEC* in January and *SpeechNOW v. FEC* in March. Broadly, the two decisions served to erode a legislative framework built to limit the

financial influence of megadonors, corporations and unions on campaign finance. This was not the first time the courts had engaged in unraveling federal legislation. There is an established pattern of the courts and congress undoing the work of the other body.

The premise of corporate personhood was first established in the 1886 decision of *Santa Clara County v. Southern Pacific Railroad*, then later blunted by the Tillman Act of 1907 which banned corporate contributions made directly to candidates (citation will go here). The Federal Election Campaign Act (FECA) of 1971 and the FECA amendments of 1974 established the Federal Election Commission and a robust package of enforceable regulations. These regulations were later eroded by the 1976 *Buckley v. Valeo* decision which asserted the concept of campaign spending being protected under the premise of 1st Amendment free speech. The Bipartisan Campaign Reform Act (BCRA, also known as McCain Feingold) passed in 2002 created new regulations regarding the content of political advertising. This prompted a series of court challenges which culminated in the landmark *Citizens United* and *SpeechNOW* cases.

This continuous pattern of change regarding an already nebulous and complicated regulatory structure has created understandable confusion within the American electorate. Most voters are unaware of the methods and moments of corporate and megadonor influence (Miller 2014 citation), but they overwhelmingly disapprove of the concept. 39% of respondents from a bipartisan 2015 New York Times poll said that our

current campaign finance system should undergo fundamental changes, and 46% said it should be completely rebuilt (NYT [citation](#)).

The most common argument for rejecting our current campaign finance framework is that corporations, unions and mega donors are exerting unchecked influence on politicians. This effect has been studied by academics and has yielded mixed results. SuperPACs, unions and large donors tend to support candidates whose positions on key issues are already known and favorable. And the burden of proof for prosecuting a federal bribery charge has become increasingly more difficult, as proven by the US Supreme Court case *McDonnell vs The United States* which saw the court overturn the conviction of former Virginia Governor Bob McDonnell ([citation](#) here).

It's also difficult to prove that campaign spending alone is responsible for who wins or loses a campaign. There are instances such as a 2012 senate race in Connecticut which saw Republican Linda McMahon spend \$52 million dollars (combining campaign and outside funding), only to lose by 12% to a Democratic candidate who spent less than \$20 million dollars. Another example is the case of traditionally democratic Massachusetts electing Republican Scott Brown to the senate in 2010 even though he was easily outspent by his opponent Martha Coakley.

This paper seeks to examine the lesser discussed effects of excessive campaign spending which have accompanied the *Citizens United* and *SpeechNOW* decisions.

First, the ability for corporations and mega donors to make unlimited contributions to outside giving mechanisms (such as SuperPACs) has neutralized the impact of the “small dollar” movement. Online and recurring transactions have made it easier than ever for individuals to make donations directly to candidates, but the contributed amounts are easily dwarfed by the influx of financing available from corporations, unions and mega donors.

Second, the nearly unlimited source of funding has given rise to negative opposition spending which has created a polarizing effect in the ideological distribution in the senate. In addition to there being fewer senators occupying the center of the ideological spectrum, there are also fewer states with split party delegations. Before the December 2017 special election of Democrat Doug Jones in Alabama, there were only 13 split state delegations in the senate out of 50. This represented the lowest count in over five decades (citation will go here).

Finally, the increased demand for fundraising has resulted in senators and candidates spending a disproportionate amount of time courting affluent donors. Senators are paid \$174,000 per year to work on behalf of their constituencies, but many have admitted that the fundraising metrics they must maintain keeps them from performing their core job responsibilities. Additionally, the time spent with affluent donors and corporate lobbyists creates an illusion of priorities which do not align with the priorities of most voters.

Background

Prior to 1907, candidates were allowed to accept unlimited contributions from corporations. Theodore Roosevelt won the 1904 presidential election and, in the process, accepted donations from railroad and insurance corporations. Despite this, Roosevelt recognized the increasingly lopsided distribution of wealth and the threat of unlimited corporate money in politics. He worked with Senator Tillman of South Carolina to pass the Tillman Act which banned corporate campaign contributions and established criminal penalties for violations of the law. Roosevelt's benefactors were incredulous, including the steel and railroad businessman Henry Clay Frick who later stated, "He got down on his knees to us. We bought the son-of-a-bitch and then he did not stay bought." (Toobin citation here?) However, loopholes still allowed for massive donations to occur from corporate interests (with corporations simply reimbursing individuals for their donations). By the 1940s, the proliferation of radio and television allowed for advertisements to be aired by interest groups. This type of transaction (made independent of a candidate's campaign) became known as an "independent expenditure." Unions were especially powerful during this time, and in 1947 an anti-union Republican Congress passed the Taft-Hartley Act which banned independent expenditures made by corporations and unions. This elevated participation from independent political action committees (PACs).

The next wave of reform started with the 1971 Federal Election Campaign Act. FECA focused on increasing the requirements for contribution disclosures during both general

elections and primaries. It was signed into law by Richard Nixon in February of 1972. Months later, five burglars were caught breaking into the Democratic National Committee's Washington DC headquarters in the Watergate complex. Nixon went on to win the November 1972 presidential election with 520 electoral votes, but the Watergate investigation revealed that the burglars had been paid out of a 1.7 million dollar fund which was ostensibly raised for Nixon's reelection campaign ([citation](#) here). Nixon resigned in August of 1974 and was succeeded by Gerald Ford. A bipartisan Congress drafted and passed a sweeping campaign finance reform package called the FECA Amendments. The 1974 Amendments introduced profound changes--they established the Federal Election Commission (FEC), placed limits on campaign contributions and independent expenditures, capped the amount of money campaigns could spend, and created the presidential election matching funds and public financing systems. Ford signed the bill in October of 1974, stating "There are certain periods in our Nation's history when it becomes necessary to face up to certain unpleasant truths. We have passed through one of those periods. The unpleasant truth is that big money influence has come to play an unseemingly role in our electoral process." (Citation goes [here](#)).

Three months later, several plaintiffs (including US senator named James Buckley) filed a court challenge stating that the spending and contribution limits imposed by the 1974 Amendments violated their 1st amendment right to free speech. The plaintiffs appealed to the US Supreme Court. In a landmark decision, the court upheld some provisions of the 1974 Amendments but struck down limits on campaign spending. By successfully

invoking the protection of free speech, the *Buckley v. Valeo* ruling created the winning framework for which to challenge campaign finance laws in court.

There were no major reforms between 1974 and the Bipartisan Campaign Reform Act of 2002. Again, loopholes proliferated. The concept of “soft money” versus “hard money” was introduced during this period. Broadly speaking, hard money is defined as funds which are used in accordance with FEC regulations--they’re capped and they are disclosed. Alternatively, soft money is a term which describes funds that exist outside of FEC regulations. A common example includes money given to a political party (such as the Republican National Committee) which isn’t earmarked for a particular candidate. The money can be used for party-building activities such as advertisements or “get out the vote” (GOTV) operations. By law these types of donations existed under no disclosure requirements or limitations, and both party committees exploited the loophole. Senators John McCain of Arizona and Russ Feingold of Wisconsin worked together to eventually garner 60 votes to pass the BCRA (which is often referred to as “McCain Feingold”). A version of the bill also passed in the House and President George W. Bush signed it into law.

The McCain Feingold legislation is commonly associated with closing soft money loopholes but its other primary objective was to add transparency and regulation to political advertising. Its most recognizable artifact was the “stand by your ad” provision which required advertisements paid for by campaigns to include a statement from the

candidate stating “I am [candidate’s name] and I approve this message.” Additionally, McCain Feingold defined a new term called “electioneering communications.” Prior to 2002, advocacy groups could run advertisements which were referred to as “issue advocacy advertisements.” These advertisements would often mention a candidate’s name. McCain Feingold classified this type of advertisement as a electioneering communications and mandated that they could not air 30 days before a primary or caucus and 60 days before a general election, essentially limiting the airwaves to advertisements paid for by campaigns. This clause would become the basis for the *Citizens United v. FEC* challenge.

Citizens United is a non-profit conservative advocacy group with 501(c)(4) tax status. Founded in 1988, the group was primarily known for creating television advertisements in opposition to democratic candidates and progressive issues. Its “social welfare” tax status granted the group minimal regulatory friction until the electioneering communications provision of McCain Feingold became law. In 2004, David Bossie (the group’s president) saw advertisements for the documentary *Fahrenheit 9/11*. Bossie recognized the success of the documentary both as a source of revenue and political advertisement, so Citizens United began making films. In the lead up to the 2008 election, the group funded the production of *Hillary: The Movie*. The film (which was done in an investigative documentary style) portrays Hillary Clinton in deeply unflattering terms. After a brief six-theater run, the film was scheduled for release through a video-on-demand service days before the democratic party’s January 2008

primaries. In coordination with the release, Citizens United wished to air promotional advertisements on television but the FEC blocked the advertisements, claiming a violation of the electioneering communications provision of McCain Feingold. Citizens United filed their complaint in the US District Court for the District of Columbia, challenging the constitutionality of the provision (Citation should go here).

Lower courts ruled in favor of the FEC, and *Citizens United v. FEC* eventually made its way to the US Supreme Court. David Bossie hired Ted Olsen (the former solicitor general during the George W. Bush administration). Oral arguments were heard in March of 2009. Olsen began his argument with a familiar plea: “Participation in the political process is the First Amendment’s most fundamental guarantee. Yet that freedom is being smothered by one of the most complicated, expensive and incomprehensible regulatory regimes ever invented by the administrative state.” He went on to claim that since the government was impeding free speech, it had a “heavy burden to establish each application of a restriction” is preventing *quid pro quo* corruption ([Citation](#) here). The case was originally meant to be a narrow challenge to whether a film like *Hillary: The Movie* could be shown, but events during the March oral arguments opened the scope of the case.

In 2003, the US Supreme Court heard its first challenge regarding the constitutionality of the McCain Feingold Act. *McConnell v. FEC* challenged several provisions, including whether the government was impeding free speech by limiting contributions to political

parties. The court issued a 5-4 ruling which upheld most of McCain-Feingold. But the court's makeup had changed since then, with a conservative Samuel Alito replacing moderate Sandra Day O'Connor. O'Connor had joined the majority in *McConnell v. FEC*.

During the March 2009 *Citizens United* argument, Alito began to focus on the requirements of the electioneering communications clause, specifically the distribution mediums (television, radio, cable or satellite) and why a 90-minute movie should be regulated in the same way as a 30-second advertisement. Solicitor General Malcolm Stewart indicated that the delineations between formats and mediums were interchangeable in the spirit of the law. This created an opportunity for Alito to pose a question about whether books could also be banned (NYT [citation](#) here). Stewart answered in the affirmative. The five conservative justices were aghast and ready to rule against the FEC, but like Alito, Chief Justice John Roberts was also not part of the 2003 *McConnell v. FEC* case. Instead of issuing a narrow ruling in favor of Citizens United, he saw this as an opportunity to have the case re-argued with a wider scope. The court would consider whether the provisions of McCain Feingold which distinguished between the expenditure activity campaigns and individuals could do, versus what corporations and outside groups could do, was a violation of the first amendment. The court ruled that it was unconstitutional. Anthony Kennedy wrote the majority opinion and referred to the 1886 *Santa Clara County v. Southern Pacific Railroad* case. Corporations (and unions, and advocacy groups) should have the same

rights as individuals, and that means their speech (in the form of funding independent expenditures such as advertisements) cannot be impeded.

Prior to the *Citizens United v. FEC* decision, independent expenditure activities (such as buying advertisements) were available to anyone who could pay for them--groups like Citizens United, unions, political parties or PACs (which limit contributions from everyone). Why are individuals who lack the affluence of someone like George Soros, or affiliation with a corporation or union, essentially unable to access the opportunity to be part of an advertisement purchase? This was the fundamental question of *SpeechNOW v. FEC*. David Keating was the Executive Director for the Club for Growth--a conservative advocacy group with 501(c)(4) status (citation goes [here](#)). He created a group called SpeechNOW and filed a lawsuit against the FEC in 2008. The case progressed to the DC Circuit Court of Appeals where the court issued a stay as it awaited the outcome of *Citizens United v. FEC* ([citation](#) here). After the US Supreme Court issued its ruling, the DC Circuit Court of Appeals issued their opinion in favor of SpeechNOW, and the US Supreme Court denied an appeal (citation [here](#)). This is the decision which created the SuperPAC.

In order to understand the SuperPAC, one must understand how it differs from other campaign funding models. And to understand these different models, one must think in terms of two core requirement schemas: financial limits and disclosures. The table

contains a general overview of common funding models and the characteristics which differentiate them from one another.

Funding Model	Description	Example	FEC Identifier	Contribution Limits	Disclosure Required
Campaign	This is the campaign's official funding mechanism. It can air official candidate advertisements and pay for campaign events and staff.	Ted Cruz for Senate	S2TX00312	Yes	Yes
527	Tax exempt group which exists solely for political activities but cannot expressly call for the election or defeat of a certain candidate.	Republican National Committee	C00003418	No	Yes
501(c)(4)	Also known as a "social welfare group," this is another tax exempt group for which only half of its activities relate to political activity.	NRA Institute for Legislative Action	C90013301	No	No
501(c)(5)	Labor union non-profit which exists in service to its members.	Service Employees International Union	C30001036	No	No
PAC	An organization which exists in service of a candidate, issue or industry.	Defend America PAC	C00325993	Yes	Yes
SuperPAC	An organization which could exist in service of a candidate, issue or industry. Can call for the election or defeat of a certain candidate.	Senate Leadership Fund	C00571703	No	Yes

An additional layer of complexity is added when considering the types of activities in which each funding model may participate, but also which types of groups may contribute to other groups. Consider the case of a 501(c)(4) group called One Nation.

One Nation was one of the largest donors to a highly active superPAC called the Senate Leadership Fund (SLF). Because superPACs must disclose activity to the FEC, interested parties can view donor names, dates and amounts for the \$117 million dollars worth of activity generated by the SLF during the 2016 election cycle. Familiar names appear amongst the donor lists: Betsy Devos gave a total of \$150,000. Chevron supplied \$2 million dollars. But some donors are quite obscure, such as One Nation. One Nation contributed a total of \$23 million dollars, accounting for nearly 20% of the entire superPAC's activity. It's impossible to determine the origins of the \$23 million dollars, because One Nation is a 501(c)(4). A deeper search reveals that One Nation is run by the former operatives of Crossroads GPS--another 501(c)(4) run by Karl Rove and his operatives. Crossroads GPS drew the ire of the IRS (along with other Tea Party-linked social welfare groups) for violating the rules of its tax status agreement. During this upheaval, Rove simply took control of a dormant 501(c)(4) called Alliance for America's Future and rebranded it as One Nation (citation [here](#)). The One Nation website's "about" section states its mission ([citation](#) here):

E pluribus unum. Out of many, one. This was the Founders' vision for America: a nation forged from different cultures, countries, creeds and classes--yet unified by a common commitment to freedom, democratic governance and guaranteed individual rights. We're dedicated to pursuing that vision: helping to solve America's great problems and seize America's greater opportunities through persuasion, research and advocacy.

Featured on the website's navigation bar is a link to the group's official Twitter account. The account has 123 followers and 291 followers, most of which appear to be media

and journalist accounts. It has not issued a single tweet since July 6, 2016--four months before the general election. The account's Twitter timeline mostly features links to press releases announcing expensive advertisement purchases in battleground states and YouTube videos hosted on its official YouTube channel.

All of the videos are political in nature and specific to candidates. One particular video titled "Disaster FL" received nearly 200,000 views and it targets Senator Bill Nelson from Florida (citation to [YouTube](#)). A woman's voice narrates a 30 second ad excoriating the Affordable Care Act (aka Obamacare). Quick cuts of three word quotes attributed to Florida and national news outlets dominate the frames alongside pictures of young mothers with children and seniors. Ominous music plays throughout the ad, and it ends by saying "Tell Senator Bill Nelson he was wrong to vote for Obamacare," leveraging a common language framework which 501(c)(4)s are allowed to use when mentioning a candidate's name in an advertisement.

Another advertisement featured on the YouTube page is titled "Fix UT." The first part of the advertisement is almost identical to "Disaster FL" except the quotes are attributed to the Salt Lake Tribune. The last ten seconds of the advertisement contain a more jubilant soundtrack and viewers are urged to "Tell Senator Orrin Hatch to keep fighting to repeal and replace the Obamacare mess." Upon closer inspection, the One Nation YouTube channel consists entirely of these types of ads built on the same few templates. There's no way to know who funded their production, and One Nation continues to enjoy tax

exempt status as a 501(c)(4) social welfare organization alongside groups like the NAACP and AARP.

Influence of the Small Dollar Donor

In 2008, presidential candidate Barack Obama drew comparisons to John F. Kennedy. He was young, charismatic democrat with little political experience. An additional similarity was their ability to galvanize voters through a relatively new media platform. For Kennedy, it was the television. The television was invented well before Kennedy's 1960 presidential campaign, but ownership was out of financial reach for most Americans. In 1950, only 9% of US households owned a television but by 1960 that number had climbed to an astounding 90% ([citation here](#)). Pew Research began tracking home internet usage starting in 2000. Initially, 52% of surveyed adults had some form of Internet access at home. This rate increased to 75% in 2008 and by 2012 it climbed to 83% (citation [here](#)). In 2008, the social media market was relatively fragmented between Facebook and MySpace, but Facebook started consolidating market share and, at the time of Obama's election, claimed 100 million active users (citation [here](#)). The Obama campaign leveraged Facebook and enjoyed fervent support from younger voters--a demographic which reported higher rates of Internet access at the time. In a February 2008 New York Times piece titled "Small Online Contributions Add Up to Huge Fundraising Edge for Obama," Julianna Smoot, the campaign's finance director, talks about the campaign's record \$36 million January total--roughly three times the amount Senators Clinton and McCain had raised for their respective

campaigns that month. \$28 million of the \$36 million were brought in via online donations, “with 90 percent of those transactions coming from people who donated \$100 or less, and 40% from donors who gave \$25 or less...” The article asserts that small-dollar online fundraising “has freed Mr. Obama from having to take valuable time off the trail for fundraising events for major donors--just \$4 million in January came from traditional fundraisers.” Ms. Smoot then claims “We know we don’t have to get him in front of as many major donors now.” (NYT citation [here](#)).

While January 2008 may have represented a high water mark in terms of the effects of small dollar online giving in campaign fundraising, a Reuters article reflecting on Obama’s January 2012 fundraising numbers strikes a markedly different tone: small dollar donations are still pouring in (accounting for 98% of the campaign’s \$29 million total for the month), but the campaign alone cannot keep up with superPAC funds powering the campaigns of Republican competitors. The article ends by stating “Obama is in the middle of a fundraising swing this week on the West Coast. He was expected to raise about \$8 million at events in Los Angeles, San Francisco and Seattle.” (citation is [here](#)) The 2008 fundraising model which was enabled by small dollar online giving and voter outreach was made obsolete by 2012 thanks to the *Citizens United* and *SpeechNOW* rulings. By 2016, individual donors accounted for nearly \$1.1 billion dollars of gifts, with the top 1% of individual donors accounting for 89% of the total (citation [here](#)). Proponents of the *SpeechNOW* decision claimed it would make it easier for individuals who lacked the affluence of George Soros or a union affiliation to financially

impact an election, but small dollar gifts register as little more than a rounding error when compared to the totals made available by top superPAC donors.

Party Polarization

Just as *Citizens United* and *SpeechNOW* gave way to unfettered political spending, it also introduced a stark rise in negative advertising. There is a mixed body of research on the effectiveness of negative advertising and how impactful it is in terms of changing minds or affecting voter turnout. Yet there has been an indisputable rise in the percentage of negative advertisements. According to the Wesleyan Media Project, the 2012 presidential campaign saw a 45% increase in the number of ads being aired on television between June 1 and Oct 21 when compared to the same time period in 2008, and 75% of the 2012 ads “appealed to anger.” (citation [here](#)). At the time of the Wesleyan Media Project’s research, the 2012 presidential campaign was the most negative campaign ever studied. Yet 2016 descended even further: according to the same research group, only 18% of presidential advertisements were classified as “positive.” Another trend was found in senate races, as outside groups went from accounting for 10% of senate advertisements in 2010 to nearly 50% (citation [here](#)). Opposition spending is built into the FEC reporting framework, as groups such as superPACs are required to note whether the expenditure they made was in support of or in opposition to a candidate. For example, the Senate Leadership Fund spent nearly \$86 million dollars during the 2016 cycle, with \$85 million being spent in opposition to democrats (citation [here](#)).

