American Political Parties
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As parties are buffeted by a changing media environment, so also are they shaped by a gusher of money that has flooded the political system in breathtaking amounts. An avalanche of funds has strengthened and professionalized the national party committees, giving them unprecedented access to resources they lacked for much of their history and fueling a Hamiltonian-style nationalization of the parties. At the same time, individual candidates are also collecting unprecedented amounts of cash. Much of this money comes from individual donors contributing online, while mega-wealthy individuals have taken advantage of campaign finance rules that permit them to donate millions without any public knowledge.

These developments have added intensity to an ongoing debate about the role of money in our political system. Reformers view large and hidden campaign contributions as a vehicle for bending the system to the interests of contributors, which may be at odds with the interests of the broader public. They have suggested numerous proposals to correct this, including limits or bans on large-dollar contributions, public financing of federal campaigns, and better government enforcement and oversight of campaign finance laws. Their efforts have been countered by a Supreme Court that views campaign spending as a form of protected expression and a Congress that has been reluctant to alter the political playing field by tinkering with campaign finance rules, especially while under pressure from large contributors who do not want to see their influence undermined.

The debate over the appropriate role of money in politics can be boiled down to the following questions:

1. How much money given to a political candidate is too much?
2. Are corporate donations inherently corrupt?
3. What limits, if any, should be placed on corporate and/or individual donations to political candidates?
4. Should federal campaigns rely mostly on local contributions?
5. Is money a form of speech that deserves protection under the First Amendment?
6. If money is a constitutionally protected form of speech, does this protection permit unlimited contributions to political candidates?
7. At what point do large contributions become a form of political bribery?

Jeffersonian Localism and Early Campaigns

Early political campaigns were local affairs conducted through newspapers. During much of the nineteenth century, Jeffersonian localism defined every aspect of running for office: control of local newspapers, disbursement of local party jobs, and mobilization of local volunteers. It was an amateur enterprise, but it was highly effective.

As we saw in chapter 1, the surest way to win favorable attention for candidates in the early days of the republic was to own a newspaper or sponsor the editor. Thus, in 1791, Thomas Jefferson gave Philip Freneau a part-time clerkship in the State Department so that he would move to Philadelphia to become editor of the National Gazette, the paper that became the mouthpiece for Jefferson’s Democratic-Republican Party. Alexander Hamilton, meanwhile, was a major financial backer of the competing Gazette of the United States. As late as the mid-nineteenth century, newspapers were a major source of campaign expenditures. When a wealthy backer wanted to aid the presidential candidacy of James Buchanan in 1856, he contributed $10,000 to start a sympathetic newspaper. Likewise, Abraham Lincoln secretly purchased a small Illinois newspaper to advance his presidential ambitions in 1860.

“Treating” was another common form of electioneering during the early days of the republic. Candidates would sponsor events at which voters would be treated to lavish feasts. Thus, when George Washington ran for the Virginia House of Burgesses in 1751, he reportedly purchased a quart of rum, wine, beer, and hard cider for every voter in the district (a manageable task because there were only 391 voters). In 1835, Ferdinand Bayard, a Frenchman traveling in the United States, commented that “candidates offer drunkenness openly to anyone who is willing to give them his vote.” Besides owning newspapers and treating political supporters, candidates also sent mailings to voters, printed pamphlets for distribution, and organized rallies and parades. By the 1840s, pictures, buttons, and novelty items were widely distributed.
Although it was costly to purchase newspapers and distribute campaign paraphernalia, collecting massive sums of money was unnecessary. Prior to 1828, only white males could vote, there were property qualifications in some states, and voting was even restricted in some places to those belonging to a particular religious denomination. Fewer voters meant fewer expenditures. Modes of communication were limited to word of mouth and the print media. After the formation of the spoils system in the 1830s (whereby party workers were rewarded with government jobs), volunteers were called upon to organize parades and get voters to the polls. Entrenched party loyalties made it easy to identify supporters, as there was little partisan movement from one election to the next and straight-ticket voting was the norm.

Mark Hanna, the Campaign of 1896, and the Rise of Hamiltonian Nationalism

Mark Hanna is often credited with being the first campaign consultant in U.S. history, having orchestrated William McKinley’s 1896 presidential victory. He also helped transform the role of money in politics, once famously saying, “There are two things that are important in politics—the first is money, and I can’t remember what the second one is.” This was an astonishing statement, given the secondary role of money in elections during the first century of our nation’s history. Why did this change?

A tremendous surge in campaign funds coincided with the vast transformation of the U.S. economy following the Civil War. By the 1870s, the Industrial Revolution was in full swing, the nation’s industrial infrastructure was booming, and Americans were migrating to the nation’s largest cities. Relationships were forged between party machines and captains of industry, in which the latter pumped money into party coffers with the understanding that elected officials would not interfere with the free market.

The election of 1896 marked a turning point in the tale of money and politics. William McKinley pledged to continue the GOP’s laissez-faire economic policies, whereas William Jennings Bryan, McKinley’s Democratic opponent, wanted more government regulation of business. Fearing a Democratic Party groundswell would threaten the free-market economic system should Bryan become president, Republicans mounted the best-bankrolled campaign to date. For the first time, corporations made political contributions directly from their company treasuries. Mark Hanna met with financiers like J.P. Morgan and John
D. Rockefeller to solicit funds. The return was enormous, including $250,000 from Rockefeller’s Standard Oil Company; $174,000 from western railroads; even $50,000 in cash from a single railroad executive.

The Republicans’ massive war chest, estimated at $3.5 million, allowed Hanna to sponsor hundreds of speakers for small gatherings and debates, produce more than 200 million pamphlets (the GOP headquarters employed over 100 full-time mail clerks) and hundreds of thousands of posters, buttons, and billboards; invest heavily in newspaper advertising; and hire legions of workers to register new Republicans and get them to the polls. McKinley simply stayed at home in Canton, Ohio, where trainloads of supporters numbering 750,000 in total (or one out of every 20 voters), were brought to his front porch. Many carried envelopes of cash. In September alone, McKinley and the Republicans raised $570,000, while the Democrats raised a mere $650,000 for their entire campaign. Bryan accused McKinley of trying to buy the presidency, but to no avail. McKinley won with 51.7 percent of the vote, the highest Republican percentage since the reelection of Ulysses S. Grant in 1872.

Mark Hanna’s efforts were significant in two ways. First, the 1896 election was the first time that systematic fund-raising techniques were used in a presidential campaign. No longer would party operatives wait for the money to come in; instead, they would go out and get it. Second, Hanna demonstrated that political advertising could rule the day. Word-of-mouth campaigning and relying on volunteers were becoming obsolete. Press releases, direct mail, billboards, soon radio, and later television and the Internet, would transform electioneering by creating national messages that were developed by strategists at the highest levels and could be disseminated to voters using new messaging tools.

In addition to a shift in campaign tactics, the US was experiencing a rapid expansion of the electorate thanks to immigration and women’s suffrage. With more voters to reach, political parties needed more resources, and an age of aggressive fund-raising began. It was once reported that when a union leader came to a US senator to urge support for protections against child labor at the turn of the century, the senator supposedly replied, “Sam, you know damn well as I do that I can’t stand for a bill like that. Why those fellows this bill is aimed at—those mill owners are good for $200,000 a year to the party. You can’t afford to monkey with a business that friendly.”

Hanna and the Republican Party created a new type of political campaign in the image of Hamiltonian nationalism. By designing a centralized campaign structure and using new, top-down techniques to communicate with a mass electorate, Hanna and his colleagues began a rapid retreat from locally based
campaigning that grew with the passage of time and vastly transformed American politics. Going forward, political parties became professional organizations and a nexus for gathering large sums of money. Elections would be conducted by party professionals, and the party machines would exert considerable control over policymaking. Party bosses expected those in government to ante up, and anyone interested in shaping public policy was expected to woo them. Party coffers were filled through small numbers of huge contributions from so-called fat cats. By 1928, over half the funds in the Democratic and Republican treasuries came from contributions of $5,000 or more—a sum that could buy 10 family cars at that time. The cornerstone of Hamiltonian parties is money—and lots of it.

Television Marketing and the Skyrocketing Costs of Campaigns

If the cost of elections rose during the Industrial Revolution, it skyrocketed during the technological revolution that has transformed American politics in the twenty-first century. In 2020, Joe Biden raised over $1.6 billion, with over $1 billion coming from individual donors to his campaign. Donald Trump raised $1.045 billion, with $774 million coming from individual contributors. Indeed, the cost of running for every political office has grown at a staggering rate. In 2020, more than $7 billion was spent on congressional races.

The single greatest force behind these outsized sums is media expenditures. Most voters hear from politicians through television, radio, and social media, while the Internet allows campaigns to acquire digital information about individual voters. Advertising and information acquisition costs can be enormous. Veteran political strategist Roger Stone, later pardoned by Donald Trump for making false statements and tampering with witnesses in the federal investigation of Trump’s 2016 campaign, explained why the costs of media advertising have risen exponentially:

There’s so much competition in the marketplace in terms of information. There’s information overload. There’s 100 cable channels, there’s digital TV, there’s your tablets, your Netflix type sites, your Twitter, your Facebook. I mean, we’re bombarded with information from everywhere. There’s a magazine [and a website] for every discipline you can think of. You want a magazine for biking? There’s a biker’s magazine. You want a motorcycle magazine? There’s a motorcycle magazine. If you’re into fly-fishing, there’s a fly-fishing magazine. Knitting, there’s a knitting magazine. So, I mean, it’s a lot harder to reach people because they have all this
information at their fingertips, and therefore everything takes greater repetition, far greater than it used to, say, when television was in its infancy.\textsuperscript{20}

The emergence of professional campaign consultants has also fueled election costs. In 1896, Mark Hannah could singularly organize and run a presidential campaign. Today, campaigns require a team of media gurus, pollsters, fundraising professionals, legal advisors, and direct mail experts. These professionals do not come cheap. Consider what it cost Donald Trump to run for re-election. During the first ten months of 2020, the Trump campaign spent $1.4 billion on media professionals, legal bills, and direct payments to Trump-owned properties for campaign events. These included $41 million for legal matters; $55 million for payroll and associated fees, and $17 million for one-time campaign manager Brad Parscale’s digital and consulting firm. American Made Media Consultants, a firm established by the Trump campaign to handle its advertising and paid media, was paid a whopping $453 million. Because of this profligate spending, by mid-October the Trump campaign and the Republican National Committee were left with only $223.5 million of the $1.6 billion they had raised since 2017.\textsuperscript{21}

The Rise of Political Action Committees

Interest groups have played an important role in funding elections for over a century. During the Industrial Revolution, businesses, trade associations, and labor unions channeled large donations to parties and their candidates. Even though reform measures limited direct contributions from corporations, banks, and labor union, many loopholes existed. In 1943, the Congress of Industrial Organizations (CIO) circumvented contribution restrictions by creating a separate fund to receive and spend voluntary contributions—a new organizational unit it called the political action committee (PAC). It was legal, the CIO argued, because none of the monies used to support the group or given to candidates came directly from the labor union itself.

By the late 1950s, scores of businesses and professional associations began to develop their own PACs.\textsuperscript{22} But the real growth period began in the 1970s. In 1974, there were roughly 600 PACs.\textsuperscript{23} Today, 5,738 so-called “Super PACs” are registered with the Federal Election Commission. These Super PACs can receive unlimited contributions from individuals, corporations, and labor unions and spend that money independently of a specific campaign in support of a candidate. In addition, 70,943 so-called “Hybrid PACs” are registered with the Federal Election
Commission. These Hybrid PACs solicit money from individuals, corporations, and labor unions, and use that money to support candidates for political office.24

Today, outside groups are a major source of funding for political campaigns. For example, in 2020, America First Action, Preserve America, and the Committee to Defend the President spent a combined total of $270 million on Trump’s behalf.25 Joe Biden’s campaign had help from Future Forward, Priorities USA, and American Bridge, which spent a combined $368 million to advocate for his candidacy.26

Congress, the Supreme Court, and Campaign Finance

What difference does it make whether some outside groups or individuals give money during elections while others do not? One could argue that contributing money is one way citizens can participate in the democratic process. This argument is often heard from opponents of campaign finance reform who claim that the more money there is in electoral politics, the better off the system is. After all, they reason, is not the act of contributing money an exercise of freedom of speech guaranteed by the First Amendment? Viewed from this perspective, the massive influx of money into campaigns is nothing more than democracy churning on all cylinders.

Most Americans do not share this upbeat view. In 2019, three-in-four Americans opposed Supreme Court decisions that allowed for unlimited amounts of money to directly support or oppose political candidates.27 These results are hardly surprising, since there remains a long-standing belief that money plays a competing role in the development of public policy and should be subject to government regulation. Americans are suspicious of money in politics, as the vast majority never contribute to a candidate or a political party. According to a 2020 Pew Research survey, only 20 percent of Americans gave money to a candidate running for office in the past year.28

Prior to the Progressive Era, there were few efforts to curb the flow of money in elections. In 1867, Congress passed legislation prohibiting assessments on navy yard workers. Nine years later, the ban was extended to all federal employees.29 The most prominent of these reforms occurred in 1883 when Congress, prompted by the 1881 assassination of President James A. Garfield by a disappointed office seeker, passed the Civil Service Reform Act. Besides creating the civil service, the law continued the ban on assessing federal government employees for political contributions.30
In 1907, Congress passed the Tillman Act, which made it a crime for any corporation or national bank to contribute to either congressional or presidential candidates. A Senate report concluded that “[t]he evils of the use of [corporate] money in connection with political elections are so generally recognized that the committee deems it unnecessary to make any argument in favor of the general purpose of this measure. It is in the interest of good government and calculated to promote purity in the selection of public officials.” Three years later, Congress required House candidates to disclose the source of their party committee contributions if they operated in two or more states—but only after the elections. The law, passed by a Republican-controlled Congress, was strengthened in 1911 when Democrats came to power. The new law established spending limits and required pre-election disclosure of finances in House and Senate races.

The Teapot Dome scandal that gripped the Warren Harding Administration led to additional cries for reform. In 1925, Calvin Coolidge signed the Federal Corrupt Practices Act into law. This legislation required quarterly reports (even in nonelection years) of contributions to federal candidates and to multistate political committees. The law reaffirmed the spending limits, but it was easily circumvented as candidates established a multitude of supporting committees, thus making it hard to determine the total amount of receipts and expenditures in any given campaign.

Another flurry of reform measures occurred during the late 1930s and early 1940s—most notably the Hatch Act of 1939, officially called the Clean Politics Act. This measure made it a crime for any federal employee to become an active political participant, and for anyone to solicit funds from people receiving federal relief. Within a year, several amendments were added—including the first federal limit on contributions from individuals (they could give no more than $5,000 to a candidate for federal office), and a prohibition on contributions from banks and corporations to include labor unions as part of the Taft-Hartley Act. Congress enacted the measure over the veto of President Harry S. Truman, who warned that the expenditure ban was a “dangerous intrusion on free speech.” During the Trump years, the Hatch Act was repeatedly violated as administration officials undertook political activities, even using the White House as a backdrop—violations that were not prosecuted by the Justice Department. Calls to reform the Hatch Act have become more frequent, but no legislation has been passed by Congress.

In fact, attempted campaign finance reforms have largely been meaningless. The flow of large sums of money into campaigns has not slowed down; rather, it is simply channeled along different paths. Although the names given these statutes sound impressive, they failed to create public authorities responsible for
collecting the disclosure reports and prosecuting any illegal activity. Moreover, the laws were fraught with many loopholes. One was a provision that limited reporting requirements to “campaign periods,” allowing contributors to evade the law by donating to candidates prior to the start of any designated period. Moreover, expenditure limits applied only to a particular candidate, not to the separate committees that sprang up on a candidate’s behalf (e.g., “Friends to Elect Mary Smith to Congress”). Additionally, corporations evaded contribution prohibitions by reimbursing corporate executives who sent money to candidates. Under-the-table gifts were also commonplace. Finally, there was a lack of will among elected officials to enforce the existing regulations. There is no record of a single prosecution for campaign finance violations from the passage of the Corrupt Practices Act of 1925 until the 1970s.

Watergate and Campaign Finance Reform

By the 1970s, reform was back on the congressional agenda. Spending on television was increasing campaign costs, while incumbents from both parties were worried that well-financed challengers could connect with voters through the mass media and toss them out. The shocking disclosures of fat-cat contributions, including businessman Clement Stone’s $3 million gift to Richard M. Nixon’s 1968 presidential campaign, added to the pressure for reform.

Two significant measures became law in 1971. The Revenue Act created a fund for presidential campaigns and allowed voters to check off a one-dollar donation on their tax forms to help support the fund (it was increased to three dollars in 2001), and the Federal Election Campaign Act (FECA) was an ambitious attempt to tighten reporting requirements and limit campaign media expenditures. Unlike prior disclosure laws, FECA mandated that all campaign expenditures and contributions of over $100 be disclosed, regardless of when they were given. Moreover, reports would be filed with the General Accounting Office and made public within 48 hours. Media expenditures—including television, radio, billboards, and newsprint—would be limited to $50,000, or 10 cents per voting-age resident (whichever amount was larger).36

The FECA did increase disclosure levels, but the law had little impact on the 1972 elections. As in the past, candidates found different channels through which to spend their funds. But the story of campaign finance reform was about to take a dramatic turn. Investigations of Nixon’s involvement in the cover-up of the break-in at the Democratic National Committee headquarters at the Watergate Hotel revealed that the Committee to Reelect the President (CREEP) had
established its own secret fundraising program. Of the $63 million collected by Nixon, $20 million came from 153 donors who gave $50,000 or more. Commenting on the breadth of the Watergate scandal, John Gardner, head of the public interest group Common Cause, said: “Watergate is not primarily a story of political espionage, nor even of White House intrigue. It is a particularly malodorous chapter in the annals of campaign financing. The money paid to the Watergate conspirators before the break-in—and the money passed to them later [to keep quiet]—was money from campaign gifts.”

A shocked public, together with a Democratic-controlled Congress, led a reform effort and passed legislation establishing contribution limits and a regulatory system for enforcement (see Table 7.1). Despite his reservations, President Gerald R. Ford signed it into law, noting that “the times demand this legislation.”

A Challenge to the Supreme Court: Buckley v. Valeo

This moment of reform did not last long. As soon as FECA took effect in 1976, it was challenged in the courts. The case was brought by a diverse set of plaintiffs, including U.S. senator James Buckley, a conservative Republican from New York; US senator Eugene McCarthy, a liberal Democrat from Minnesota; the New York Civil Liberties Union; and Human Events, a conservative publication. In Buckley v. Valeo (Francis R. Valeo was the secretary of the Senate), Buckley and his allies maintained that campaign spending was a form of speech protected by the First Amendment. The government argued that democracy required a level playing field, and this meant limits should be placed on both campaign contributions and expenditures.

On January 30, 1976, the Supreme Court found that some, but not all, of the FECA restrictions were constitutional. They let stand limits on how much money individuals and political committees could contribute; they permitted public financing of presidential elections, so long as it was voluntary (meaning that candidates could refuse public monies and spend their own campaign dollars instead); and they required disclosure of campaign contributions and expenditures of more than $100. But the Supreme Court also struck down several features of the new law, including the overall spending caps; limits on what candidates and their spouses could contribute to their own campaigns; and limits on individual expenditures. Concerning its rejection of overall spending limits, the Court noted, “A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached.”
Reforming the Reforms: The Bipartisan Campaign Reform Act of 2001

New reforms emerged from public opposition to the increased amounts of money given to candidates and campaigns during the 1980s and 1990s, largely from several novel types of campaign contributions which found their way around existing laws. One of these was “soft money,” which was not regulated by
the Federal Election Commission. Soft money was collected by the national parties—including the Democratic National Committee, the Republican National Committee, and their corresponding House and Senate committees—and used for party-building activities ranging from public education to voter mobilization. “Hard money,” in contrast, refers to contributions made by individuals to federal candidates that are subject to the caps imposed by FECA and are monitored by the Federal Election Commission.

From 1994 to 2000, the total amount of soft money raised by the Democratic and Republican parties rose more than fourfold from $102 million to $495 million. Disgusted by the bipartisan evasion of FECA, consumer activist Ralph Nader ran for president in 2000, contending that the campaign finance system was broken and corrupted the system of checks and balances created by the U.S. Constitution. Said Nader: “If we don’t have a more equitable distribution of power, there is no equitable distribution of wealth or income. And people who work hard will not get their just rewards. And the main way to shift power, if you had to have one reform, is public financing of public elections.” Nader was not alone in his assessment. Elected officials from both parties agreed that the system was broken and in need of reform. Former senator Warren Rudman (R-New Hampshire) said it best: “You can’t swim in the ocean without getting wet, you can’t be part of this system without getting dirty.” Even donors acknowledged that money bought access. As one of them put it, “As a result of my $500,000 soft money donation to the Democratic National Committee (DNC), I was offered the chance to attend events with [President Clinton], including events at the White House a number of times.”

Prior to the 2000 election, senators John McCain, a Republican from Arizona, and Russ Feingold, a Democrat from Wisconsin, led a bipartisan effort to change the campaign finance laws. They were joined in the House by Representatives Christopher Shays, a Republican from Connecticut, and Martin Meehan, a Democrat from Massachusetts. Spearheading the opposition was Senator Mitch McConnell, a Republican from Kentucky. Clinging to the idea that money is a form of free speech, McConnell, along with a handful of Republicans, filibustered the McCain-Feingold effort. Unless they could muster sixty votes needed to end a McConnell-led filibuster, campaign finance would go nowhere.

The election of 2000 was pivotal. Democrats made gains in both houses of Congress, with many of the newcomers pledging to “clean things up.” Debate on the reform measure was finally set for March of 2001. After nearly two weeks of compromise, McCain and Feingold were able to break the filibuster and win over enough moderate Republicans by increasing the cap on individual contributions
from $1,000 to $2,000. But the battle was far from over. House Republicans offered an alternative to the Shays-Meehan plan that allowed contributions to the party committees above the proposed $90,000 limit. This less sweeping measure was meant to appeal to Black and Hispanic Democratic legislators, since the national party committees were instrumental in mobilizing minority communities to get out the vote. But Shays and Meehan knew that their bill would have to be identical to the one passed in the Senate to avoid a House-Senate conference committee that could potentially kill the measure. After months of further debate, Congress finally passed the legislation in 2002. McCain-Feingold, officially called the Bipartisan Campaign Reform Act (BCRA) became law.

The final version of the law included a ban on contributions to any national political party. The bill also banned issue advocacy ads thirty days before primary elections and sixty days prior to a general election. However, the ban on soft money did not apply to PACs, which were free to raise unlimited amounts of money. Even so, the passage of McCain-Feingold created its own set of controversies. The very day that the BCRA was signed into law, Mitch McConnell and a host of other federal legislators, along with various interest groups and minor parties, challenged it in the federal courts. The core of their complaint was that McCain-Feingold represented an assault on free association and expression. This was based on the restrictions the new law placed on issue advocacy and expressed advocacy for a given candidate sixty days prior to an election.\footnote{Previously, the Supreme Court ruled that political parties could spend unlimited amounts on issue advocacy advertisements so long as they were not done in concert with any candidate’s campaign.}

In the 2003 case of McConnell v. Federal Election Commission, the Supreme Court ruled in favor of keeping McCain-Feingold’s ban on soft money contributions. Writing for a five-to-four majority, Justices John Paul Stevens and Sandra Day O’Connor condemned the use of soft money in political campaigns:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies but according to the wishes of those who have made large financial contributions. . . . The best means of prevention is to identify and remove the temptation. The evidence set forth . . . convincingly demonstrates that soft-money contributions to political parties carry with them just such a temptation.\footnote{But the final paragraph of the majority opinion contained a prescient prediction: “Money, like water, will always find an outlet.”}

The flow of money into
campaigns would continue, and McConnell v. FEC would not be the last word from the Supreme Court on the subject of campaign finance.

Gutting the Reforms: The Supreme Court Weighs in

Evidence that the Supreme Court decision in McConnell v. FEC was beginning to fray mounted during George W. Bush’s second term. Justice Sandra Day O’Connor retired, Chief Justice William Rehnquist died, and President Bush filled the vacancies with conservatives Samuel Alito and John Roberts. This rapid turnover shifted to Court to the right.48

By 2007, the Roberts-led Court struck down as unconstitutional the McCain-Feingold ban on using a candidate’s name in issue advocacy advertisements thirty days before a primary and sixty days prior to a general election. In a five-to-four decision, the Supreme Court declared: “Discussion of issues cannot be suppressed simply because the issues may also be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor.”49 It was the first of several decisions that would effectively open the spigot for money to flow to parties and campaigns.

*Citizens United v. Federal Election Commission.* Four years later, the Supreme Court dealt an even more profound blow to campaign finance reform in the landmark 2010 case Citizens United v. Federal Election Commission. The case arose out of a campaign movie about then 2008 presidential candidate Hillary Clinton financed by the conservative group Citizens United. The film (called *Hillary, The Movie*) depicted Clinton in a negative light, claiming she was “driven by power,” “steeped in sleaze,” “deceitful,” and “would lie about anything.”50 In January 2008, Citizens United sought to broadcast its movie on video-on-demand channels provided by cable service providers. Citizens United wanted to purchase advertisements to promote the film. Both were scheduled to air within thirty days of the first presidential primaries, violating the provision in the McCain-Feingold Act that prohibited third-party groups from broadcasting advertisements advocating either for or against a candidate immediately before an election. Although the words “vote against” were not found in the film, the message was clear that Clinton should be defeated.

The Supreme Court used the case to issue a sweeping five-to-four decision claiming that the First Amendment included the right of corporations and others to engage in free unregulated speech,51 and determined that the portion of McCain-Feingold act making it a felony to expressly advocate either for or against candidates (either thirty days before a primary or sixty days before a
general election) violated the First Amendment. Writing for the majority, Justice Anthony Kennedy declared: “No sufficient governmental issues justified limits on the political speech of non-profit corporations. . . . For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. . . . There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations.”

Virtually the only portion of the McCain-Feingold law the Court left intact was its disclosure requirements. Justice Kennedy found that disclosure did not inhibit political speech, noting that “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” But even this point was vigorously contested by Justice Clarence Thomas, who argued that disclosures of political contributions supporting California’s Proposition 8, a 2008 law that overturned the California Supreme Court’s decision legalizing gay marriage, resulted in intimidation and harassment. Said Thomas: “I cannot endorse a view of the First Amendment that subjects citizens of this Nation to death threats, ruined careers, damaged or defaced property, or pre-emptive and threatening warning letters as the price for engaging in core political speech, the primary object of First Amendment protection.”

The majority view was countered by Justice John Paul Stevens, who maintained that Congress was entirely correct to view unregulated sums of campaign money as a corrupting influence:

[O]ver the course of the past century Congress has demonstrated a recurrent need to regulate corporate participation in candidate elections to “[p]reserve[e] the integrity of the electoral process, prevent corruption, . . . sustain[e] the active, alert responsibility of the individual citizen, protect the expressive interests of shareholders, and [p]reserve[e] . . . the individual citizens’ confidence in government. . . . Time and again, we have recognized these realities in approving measures that Congress and the States have taken.

Stevens noted that corruption “can take many forms,” adding, “Bribery may be the paradigm case. But the differences between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf.” Thus, he argued that unrestricted campaign dollars would result in widespread
public “cynicism and disenchantment, an increased perception that large spend-
ers ‘call the tune’ and a reduced ‘willingness of voters to take part in democratic
governance.”58 In a parting shot, Stevens bluntly stated: “While American de-
mocracy is imperfect, few outside the majority of this Court would have thought
its flaws included a dearth of corporate money in politics.”59

McCutcheon v. Federal Election Commission. In 2014, the Supreme Court
took aim at the contribution limits in the McCain-Feingold law. The vehicle
was a case involving Shaun McCutcheon, an Alabama resident who donated to
various Republican Party committees, including the Republican National Com-
mittee and its congressional counterparts. In the 2011-2012 cycle, McCutcheon
contributed $33,088 to sixteen federal candidates, and wanted to contribute
to twelve more Republicans running for congressional office, seeking to give
each a symbolic $1,776 contribution. The Alabama Republican also contributed
$27,328 to several non-candidate committees, and $25,000 in total to the Re-
publican National Committee, the National Republican Senatorial Committee,
and the National Republican Congressional Committee. McCutcheon said his
objective was to encourage Republican candidates to adhere to the doctrine of
“smaller government and more freedom.”60

But McCutcheon wanted to spend even more and was forbidden from doing
so by a portion of the McCain-Feingold law that capped individual contribu-
tions to all federal candidates at $48,600 and limited individual contributions
to political parties to $74,600. Joined by the Republican National Committee,
McCutcheon contended these limits violated his First Amendment rights. In
McCutcheon v. Federal Election Commission, the Supreme Court sided with
McCutcheon. The five-to-four decision left intact limits on individual contribu-
tions to specific candidates for federal office but lifted the $48,600 and $74,000
individual limits placed on total contributions to all candidates and to political
parties respectively.

Chief Justice Roberts spoke for the majority:

To require one person to contribute at lower levels because he wants to
support more candidates or causes is to penalize the individual for robustly
exercising his First Amendment rights. In assessing the First Amendment
interests at stake, the proper focus is on an individual’s right to engage in
political speech, not a collective conception of the public good. The whole
point of the First Amendment is to protect individual speech that the ma-
majority might prefer to restrict, or that legislators or judges might not view
as useful to the democratic process.”61
Roberts added that the only congressional interest when it came to regulating campaign money is preventing quid pro quo corruption. But allowing individuals, including McCutcheon, to spend large sums of money does not fall within that purview: “no matter how desirable it may seem, it is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equalize the financial resources of candidates.’”

In his dissent, Justice Stephen Breyer noted that the decision “creates a loophole that will allow a single individual to contribute millions of dollars to a political party or to a candidate’s campaign. Taken together with Citizens United v. Federal Election Commission . . . today’s decision eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.”

Aftermath: A Torrent of Cash

Not surprisingly, the flow of money into campaign coffers has escalated with each passing year. In 2000, George W. Bush became the first Republican presidential candidate to refuse federal financing for his primary campaign. In 2004, Democrat Howard Dean raised an astounding $45 million, largely from small online contributions, becoming the first Democratic primary candidate to forego federal matching funds. In 2008, Barack Obama and Hillary Clinton raised more money than all their Democratic competitors combined. That fall, Obama became the first major party nominee to forego federal financing of his general election campaign. Four years later, both Obama and Mitt Romney eschewed federal funding of their campaigns. In 2016, Donald Trump and Hillary Clinton did the same, as did Trump and Joe Biden in 2020. Federal funding of presidential contenders—either in the primaries or general election—has become essentially meaningless because candidates can raise so much money from individual donors either in large or small quantities. In 2020, the average donation to the Trump campaign and related party committees supporting them was $71; similarly, the average donation to Biden’s candidacy and related party committees was $76. Because serious candidates are no longer accepting federal funds, there has been a significant decline in the number of citizens checking off the three-dollar contribution on their tax returns—down from 28 percent in 1976 to 4 percent in 2018.

Meanwhile, money continues to flow in other ways designed to evade federal laws. So-called 527 groups, a name that refers to a provision in the federal tax code, are one means. These tax-exempt organizations are not subject to any
limits in the amounts they receive or how they spend them. Citizens United, on the right, and MoveOn.org, on the left, are examples of such organizations. In 2020, progressive 527 groups spent $1.568 billion to advocate or oppose ideologically compatible candidates; conservative organizations spent $1.272 billion.

Campaign money has found several other creative ways to flow like water. So-called 501c groups (also named after a provision of the Internal Revenue Service code), labor unions, trade associations, or social welfare organizations can raise and spend virtually unlimited sums of money so long as it is not their “primary activity” or “major purpose.” The principal difference between 527 groups and 501c groups is that 527s are required to disclose the identities of their donors; 501cs are not. Moreover, 501cs are not required to disclose their expenditures. This so-called “dark money” has become an important factor in campaigns—an avalanche of funds that rivals or even exceeds reported small-dollar donations from individuals. The public does not get to see who is contributing dark money or how it is spent. Some wealthy individuals with strong political interests, like oil magnates and Republican donors Charles and David Koch, find this to be a preferred means of exercising their political influence without making their intentions (or dollars) known to the public.

Dark money flows even when there are no active campaigns underway. As President Biden was seeking congressional enactment of the infrastructure proposals in his American Jobs Plan and Build Back Better plan, dark money groups called Unite the Country Now, Building Back Together, the American Working Families Action Fund, and Real Recovery Now! were planning to spend millions in unreported cash advocating Biden’s plans. Amanda Loveday, one of the Democratic operatives working with Unite the Country Now, said her group intended “to expand our efforts beyond our election work to educating Americans about how President Biden and his administration is getting America back on track and building better opportunities for middle-class Americans.”

Any possibility that either Citizens United or McCutcheon would be overturned vanished when Donald Trump added three conservative justices to the Supreme Court. Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett are all likely to uphold the Court’s position on campaign finance laws. Likewise, Congress has been unable to pass significant reforms that might withstand the free speech issues raised by the Court. Republican-controlled Congresses have blocked any effort to address the effects of money in politics. Democratic-controlled Congresses have suffered a similar fate. Any legislation that would make it to a president’s desk has been blocked by the Senate filibuster.
And should a Republican occupy the White House, any proposed law that might make it there is subject to an all-but-certain veto.

But limited prospects for success have not dampened congressional reform efforts. The “For the People Act,” which passed the House of Representatives in 2021, would ban campaign contributions from foreign nationals, require additional disclosure of outside groups sponsoring political advertisements, ban dark money by requiring all organizations to disclose their large donors, and provide public funds to finance all federal campaigns for office. The measure would also break a longstanding partisan deadlock on the Federal Election Commission, which has all but stopped enforcing campaign law violations, by reducing the number of commissioners from six to five. Federal Election Commissioner Ellen Weintraub has called the agency dysfunctional, as irreconcilable ideological differences between Democratic and Republican commissioners have brought the FEC to a standstill.75

When the For the People Act reached the Senate, all fifty Democrats voted to debate the measure and all fifty Republicans opposed, far short of the sixty votes needed to prevent a filibuster. The future of the bill will turn on the willingness of Democrats to eliminate or modify the sixty-vote threshold and enable the measure to advance to a vote. Outside groups mobilized to pressure senators to act, but the Senate rejected any modification of the sixty-vote threshold needed to pass any reforms. Absent a change of mind, the status quo will remain in place and an ever-higher deluge of dollars will continue its cascade to campaigns and the political parties who sponsor them.