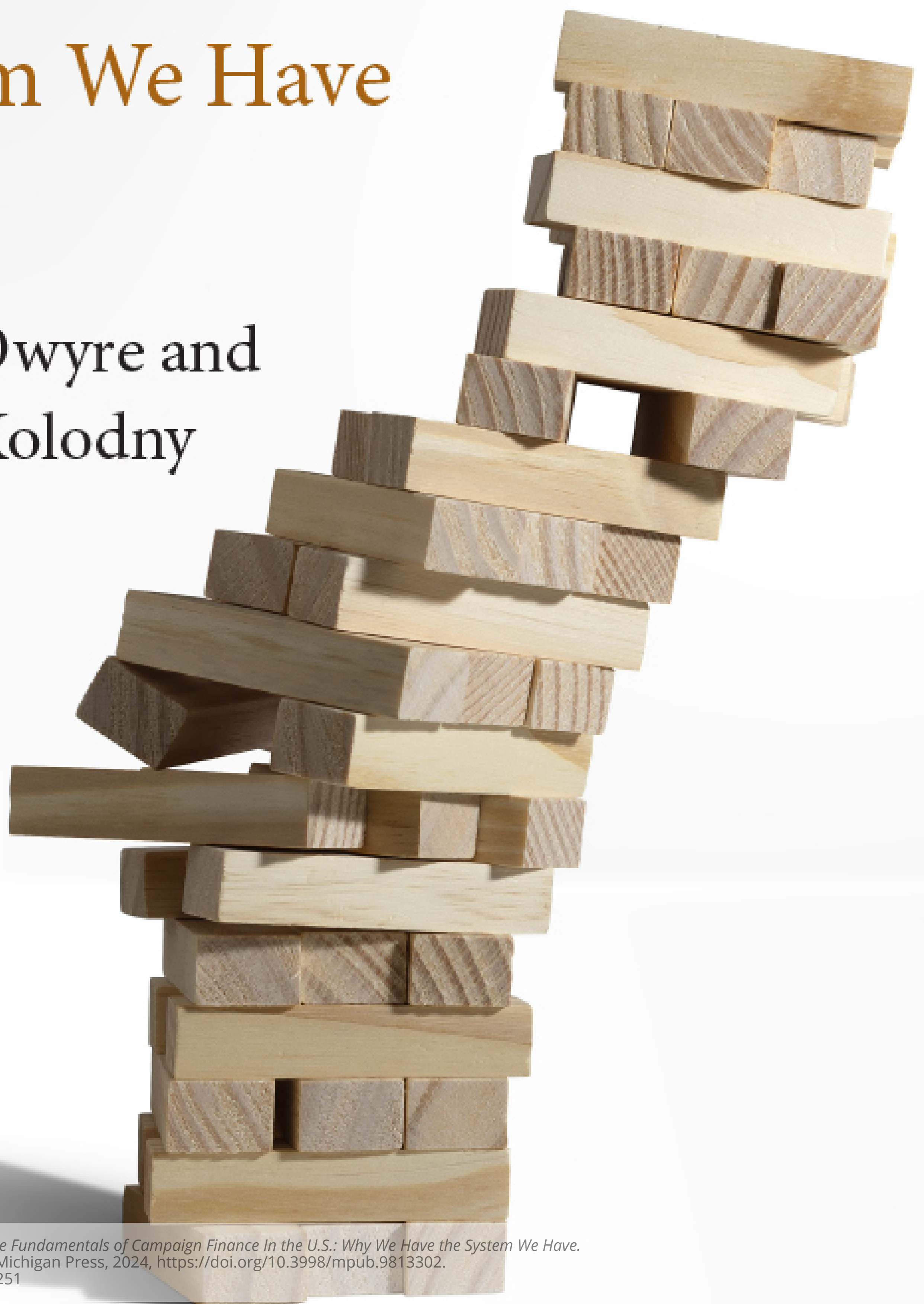
The Fundamentals of Campaign Finance in the U.S.

Why We Have the System We Have

Diana Dwyre and Robin Kolodny



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For my Mom, Paulina
—Diana Dwyre

For my students and my family
—Robin Kolodny

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Contents

List of Figures ix

List of Tables xi

Abbreviations xiii

Preface and Acknowledgments xv

Chapter 1 Democracy and Capitalism 1

Chapter 2 Corruption and Campaign Finance in the U.S. 29

Chapter 3 From Buckley to BCRA: Innovation, Adaptation, and Litigation 64

Chapter 4 The Triumph of Free Speech and BCRA's Undoing 98

Chapter 5 The Players and the Game: Individuals, Parties, and Groups 126

Chapter 6 The Players and the Game: Candidates 180

Chapter 7 Disclosure of Campaign Money and Enforcement of the Laws 228

Chapter 8 Why We Have the System We Have 268

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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Appendix: Major Acts, Regulations, and Court Decisions Mentioned in This Book 295

Notes 313

Bibliography 329

Index 363

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Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
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Figures

2.1	Major Contributors and Spenders in Federal Elections	36
2.2	Supreme Court's View of Contributing vs. Spending	52
3.1	PAC Spending in Federal Elections, 1978–2020	67
3.2	Values Promoted in Select Campaign Finance Laws and Court Decisions	72
5.1	Campaign Money Comes from Individuals—Options for the Individual Contributor	136
5.2	Changes in Individual Contribution Limits, 1974–2024	138
5.3	Sources of National Party Committee Money, 2000–2020	147
5.4	How Much Can an Individual Donor Give to a JFC in 2023–24?	148
5.5	Recipients of Funds Raised by Take Back the House 2020 Joint Fundraising Committee	148
5.6	National Party Receipts from House and Senate Candidates, 2000–2020	151
5.7	Party Spending on House Candidates, 1990–2020	153
5.8	Party Spending on Senate Candidates, 1990–2020	154
5.9	DNC and RNC Spending on Candidates, 2000–2020	155
5.10	Total Federal 527 Expenditures, 2000–2018	174
5.11	501(c) Reported Federal Electoral Spending, 2000–2020	174
5.12	Noncandidate Spending in Federal Elections, 1986–2020	178
6.1	Percentage of Taxpayers Who Checked Box on IRS Tax Form for the Presidential Election Campaign Fund, 1976–2020	186
6.2	Sources of Presidential Candidate Funds, 2008–20	191

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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6.3 Presidential Candidate Joint Fundraising and Total Receipts, 2008–20 194
6.4 Party Receipts from Joint Fundraising, 2008–20 194
6.5 Funding Sources for Senate Candidates, 1984–2020 196
6.6 Funding Sources for House Candidates, 1984–2020 199
6.7 Candidate and Outside Spending in Presidential Elections, 2008–20 206
6.8 Average Receipts of Senate Candidates by Candidate Status and Competitiveness, 2020 208
6.9 Average Senate Candidate and Outside Spending by Candidate Status and Competitiveness, 2020 209
6.10 Average Receipts of House Candidates by Candidate Status and Competitiveness, 2020 210
6.11 Average House Candidate and Outside Spending by Candidate Status and Competitiveness, 2020 212
6.12 Business PAC Distribution of Contributions to Federal Candidates, 2000–2020 219
6.13 Labor Union PAC Distribution of Contributions to Federal Candidates, 2000–2020 219
6.14 Ideological/Single Issue PAC Distribution of Contributions to Federal Candidates, 2000–2020 220
7.1 Number of FEC Commissioners in Months per Year, 1975–2022 247
7.2 FEC Cases Closed, 1977–2022 256
8.1 Top Lobbying Spenders: Lobbying Expenditures and PAC Contributions to Candidates, 2020 292
8.2 Top PAC Spenders: Lobbying Expenditures and PAC Contributions to Candidates, 2020 292

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
Downloaded on behalf of 3.135.194.251

Tables

2.1	Federal Campaign Finance Laws Enacted in the 1970s	47
2.2	FECA 1971 and 1974 Provisions after *Buckley v. Valeo*	54
3.1	Key Findings of Select Supreme Court Cases	74
3.2	Major Provisions of the Bipartisan Campaign Reform Act of 2002	94
4.1	The Gutting of the Bipartisan Campaign Reform Act of 2002	99
4.2	Contribution Limits for Federal Elections, Pre- and Post-BCRA	104
4.3	What *Citizens United* and *SpeechNow* Changed	115
4.4	Contribution Limits to National Party Committees after *McCutcheon* and after the 2015 Appropriations Act	123
5.1	Two Big 2020 Contributors	140
5.2	The Various Organizations of Select Interest Groups and Their 2020 Spending on Federal Elections	157
5.3	Top Spending Super PACs by Type, 2019–2020	166
5.4	Number of and Spending by Super PACs and Hybrid PACs, 2012–2020	173
6.1	Major Party Presidential Candidate Participation in General Election Public Funding, 1976–2020	188
6.2	Ratio of Population to Number of Representatives	198
6.3	Select Campaign Finance Activity of Unopposed House Incumbents, 2020	222
7.1	Select Groups Focused on Campaign Finance Policy and Research	233

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
Downloaded on behalf of 3.135.194.251

7.2 Federal Agencies with Responsibility for Implementation of Campaign Finance Laws 236
7.3 FEC Commissioners, 1975–2022, with Positions before and after FEC Service 249
8.1 When States Hold Elections for Governor 271
8.2 Institute for Free Speech "Grades" of State Campaign Finance Laws from Most to Least Permissive 276

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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Abbreviations

AO	Advisory Opinions
BCRA	Bipartisan Campaign Reform Act of 2002
CIO	Congress of Industrial Organizations
CLC	Campaign Legal Center
DCCC	Democratic Congressional Campaign Committee
DNC	Democratic National Committee
DOJ	U.S. Department of Justice
DSCC	Democratic Senatorial Campaign Committee
FCC	Federal Communications Commission
FECA	Federal Election Campaign Act
FEC	Federal Election Commission
GAO	General Accounting Office (after 2004, Government Accountability Office)
IE	independent expenditure
IEOC	Independent Expenditure Only Committee
IRS	Internal Revenue Service
JFC	joint fundraising committees
MUR	Matter Under Review
MCFL	Massachusetts Citizens for Life
NRCC	National Republican Congressional Committee
NRSC	National Republican Senatorial Committee
PAC	political action committee
RNC	Republican National Committee
SEC	Securities and Exchange Commission

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SMP	single member plurality
SSF	separate segregated funds
WRTL	Wisconsin Right to Life

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Preface and Acknowledgments

We have been writing about political parties for more than 30 years, both independently and together. Neither of us set out to be a campaign finance expert, but as things evolved, especially with political parties' campaign practices, we honestly had no choice. In some very important ways, both of us have been writing parts of this book in our heads for decades. One of us (Kolodny) brought the subject up at an APSA meeting in Washington, DC by the pool of the Marriott Wardman Park Hotel—having taught a class dedicated to the topic of Money and Politics and struggled to find appropriate readings to assign. There was (and is) excellent scholarship, but much of the published works either dealt with only one small part of the campaign finance world or assumed that the reader had familiarity with campaign finance terms, court decisions, and innovations. We relied heavily on this scholarship in this book, and we apologize in advance for not citing some great works—there is a lot going on and we struggled to rein in many tangents. This book is written for the person—student, scholar, journalist, citizen—who has an interest in the topic but feels that they do not know where to begin. Here, we use the lens of democratic systems and the American political and economic landscape to explain the logic, or flow if you will, of campaign finance in the United States.

Many others before us have proposed reforms to the system. Some of these ideas have even been implemented on a limited basis in states and localities. As scholars of political parties, we have studied the parties' reactions to many changes in the campaign finance landscape and found only one constant: adaptation. Neither of us is opposed to reforming the current system. However, we think that our political system is so fundamen-

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tally elastic, and inherently favors private sector priorities, that anything short of radical reform—free airtime for political candidates; an outright prohibition on spending private money in politics; a change from capitalism to socialism—will be accommodated by those interested in influencing public policy.

We owe many people great thanks for getting this project over the finish line. There would be no book without Michael Malbin and the Campaign Finance Institute (CFI). Michael's commitment to creating dialogue between academics and practitioners was enormously important for both of us. His vision for a research-oriented approach to the topic introduced us to a broad network of scholars. CFI's merger with the National Institute on Money in Politics and ultimately OpenSecrets ensures that CFI's focus on evidence-based policy research continues. We also thank Nate Persily of Stanford Law School, who, with support from the Hewlett Foundation, the Democracy Fund, and the Bipartisan Policy Center, brought together many top scholars focused on money in politics in the U.S. as the Campaign Finance Task Force during 2017 and 2018. Working on this project gave us valuable opportunities to exchange ideas with our closest subject matter colleagues and provided very helpful financial support.

We owe thanks to many, *many* students at Temple University, especially to the students of two of Kolodny's Money and Politics classes (spring of 2015 and fall of 2019) who read chapters of the book in development as assigned readings. Some of these undergraduate students read through the manuscript at one point in time or another to help us identify redundancies, omissions, and confusions including Taylor Allen, Daisy Confoy, Ted Foulke, Emily Gabos, Ashley Kolb, and Charlotte Meyer. We owe an extraordinary debt to a Temple graduate of the Master of Public Policy program, Victor Guillen, who came to us as a research assistant at a time when we needed him and his expertise most. Maxwell Serota, now an undergraduate student at Carleton College, read the entire manuscript without any compensation and with very fresh eyes (and he started reading it as a high school student). Many thanks as well to Dwyre's research assistants, Jeremy Markley, Alexis Begin, and Paul Frederici, for their valuable data collection and analysis contributions. All these people helped us make the book clearer and, we think, more engaging.

One of the best things about this profession is the willingness of colleagues to read and critique each other's work. We owe a tremendous debt to the two anonymous reviewers for the University of Michigan Press and

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to Robert Mutch, Tony Nownes, and Bruce Larson. Bruce was especially helpful in giving us detailed comments on each chapter as we finalized them. He also assigned some of them to his students at Gettysburg College. We are grateful to Brendan Glavin, senior data analyst for OpenSecrets, who provided important data and help with analysis. We thank the team at the University of Michigan Press, especially our editor Elizabeth Demers and previous editors Meredith Norwich and Melody Herr. Haley Winkle, Sara Cohen, Kevin Rennells, John Raymond, and the production team helped to expertly polish our manuscript in preparation for publication.

Of course, each of us owe thanks to those who supported us through the long process of writing this book.

DIANA DWYRE: I thank my family, especially my Mom, Paulina Sarullo Dwyre, who passed away as we were completing this book, for she provided a lifetime of unbounded enthusiasm and encouragement. My son, Quinn Picard, who chose physics over political science, inspires and challenges me with his tough questions and deep insights into a wide variety of topics, including politics and money. Finally, and most importantly, I am so grateful for my amazing partner and soulmate, Joe Picard, whose support and patience throughout this project have sustained and motivated me.

ROBIN KOLODNY: I would like to thank Janine Holc who read much of the manuscript at a crucial time in its development. My mother, Sondra Koch, read the entire manuscript with copious notes to help us make sure we were being clear in our explanations (thanks, Mom!). My daughter, Eleanor Gaddy, also read parts of the manuscript and she is still resolved not to be a political scientist. My son, Robert Gaddy, and spouse, Glen Gaddy, have been very patient, especially when I continually got the time wrong for Zoom meetings with my California coauthor and had to bail on dinner. My family has been especially supportive during some stressful moments.

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CHAPTER 1

Democracy and Capitalism

> I hope we shall take warning from the example and crush in it's [*sic*] birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.
>
> —*Thomas Jefferson, "Letter to George Logan," November 12, 1816*[1]

Thomas Jefferson's warning 200 years ago rings true today in many citizens' concerns about the influence of "big" money in American elections. The complaints have grown louder in the wake of the 2010 *Citizens United* Supreme Court case, which gave corporations the First Amendment right to spend unlimited amounts of money in elections.[2] Why does the United States have this campaign finance system? Why are campaigns funded primarily by private money in the U.S., rather than publicly funded by taxpayers? Why are wealthy people and groups permitted to spend so much to influence the outcome of elections? Why are there different campaign finance rules for different elective offices? To answer such questions, it is important to understand the fundamentals of what is often considered to be a complicated and confusing campaign finance system.

Many Americans are easily turned off by the discussion of money in politics, especially the different categories used to describe the ways money is raised and spent. It is not only difficult to tell what is legal and what is not, but the regulations themselves seem to have no clear logic. This is not the case. The U.S. campaign finance system is confusing, but it is not irrational. One reason the public is confused is the piecemeal nature of campaign finance policymaking, implementation, and enforcement.

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Moreover, the focus of campaign finance regulation changed over time from preventing corruption to protecting free speech. Additionally, our federal system of elections has different regulations in place for contests at the national, state, and local levels, even when those contests appear on the same ballot, and the separation of powers within government has led to the development of different campaign finance systems for each type of elective office. Furthermore, the jargon used to discuss how candidates, parties, citizens, interest groups, corporations, trade associations, unions, nonprofit corporations, and other stakeholders participate in financing elections is bureaucratic to say the least.

Most books about campaign finance tell us what is wrong with the system, and some suggest how to fix it. We think it is important to understand *why* we have the campaign finance system we have. The nature of democracy itself, the American capitalist economic system, the content of the U.S. Constitution and how it is interpreted, the structure of our governmental institutions, the competition for governmental power, and the behavior of campaign finance actors all shape the system we have. Understanding why the campaign finance system has developed the way it has allows us to explain, for example, why reform is so difficult and why the reforms that have been adopted often have unintended consequences. We present the U.S. campaign finance system as it is, not as we would like it to be. We are not antireform, per se, but we note that campaign finance reforms have generally not helped to achieve the balance reformers favor, and we argue that the broad characteristics of the U.S. system help us understand why.

In this first chapter, we discuss some of the fundamentals that shape the U.S. campaign finance system and constrain what changes to the system are possible. We begin by assessing the most basic of these fundamentals: democracy. Each democracy chooses an electoral system. A basic element of electoral systems is the decision to ask voters to choose among individual candidates or among political parties. The choice determines how campaigns will be conducted. Next, we evaluate how the economic system influences a democracy, particularly how the system of capitalism in the U.S. provides a campaign finance system based primarily on private sources of money. Moreover, campaign finance in the United States is a unique policy area in which those who make campaign finance laws are the very people who are most affected by the laws—elected officials in the U.S. Congress, state legislatures, and city halls—and who will run

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for reelection under the rules they establish. There is not one correct way to set up a democracy, but clearly these decisions shape the scope of later public policy.

Democracy and Campaign Finance

If you want to live a long, healthy, well-educated, and prosperous life, you should live in a democratic society. Not everyone in every democratic society does well, but on the whole, democracies provide much better options for people than any other type of political regime (Bollyky et al. 2019; Safaei 2006). One of the most studied topics in political science is how countries became democracies, can become democracies, or will likely never transition to democracies. There are numerous definitions of democracy. Freedom House is an independent, nonprofit, nonpartisan organization founded in 1941 to protect democracy around the world. We use their explanation of democracy here:

> Democracy means more than just majority rule, however. In its ideal form, it is a governing system based on the will and consent of the governed, institutions that are accountable to all citizens, adherence to the rule of law, and respect for human rights. It is a network of mutually reinforcing structures in which those exercising power are subject to checks both within and outside the state, for example, from independent courts, an independent press, and civil society. (Freedom House 2022)

Once a democratic society emerges, its members must decide what sort of institutions they will have to ensure that their democracy endures. Here, "institutions" means a set of rules that everyone agrees will provide a government that will follow the will of the people (March and Olsen 1989). After all, the critical part of a democracy is that the people in society will choose those who make and enforce the rules, a necessary requirement for a system to be considered legitimate. However, the rule makers and enforcers do not have unlimited power. Instead, they must explain their actions to the governed or risk losing their ability to make and enforce laws by losing their position at the next election. It is this feedback loop that separates democratic societies from all others. The feedback loop means if politi-

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cians do not act in the best interests of the people, the people may turn to someone else to govern. How exactly that happens varies enormously in the world's 86 democracies (Freedom House 2019). Yet, all democracies have some mechanism for the people to rule, typically through elections.

Next, the society must decide whether citizens will participate in every decision, essentially self-governing (direct democracy), or whether they will choose others to act on their behalf while they focus on their own niche in society (representative democracy). In the modern world, nearly every democracy is a representative democracy. Of course, there is more than one type of representative democracy. The three major types are presidential systems, parliamentary systems, or hybrids of these two known as semi-presidential systems. The difference has to do with the nature of the relationship between the legislative branch (those who make the laws) and the executive branch (those who implement and enforce the laws). Presidential systems, such as in the United States, Chile, and Argentina, separate the two branches and give citizens different ways to hold each branch's elected officials accountable. Parliamentary systems, such as in the United Kingdom and Japan, embed the executive in the legislature (the parliament) and give citizens the opportunity to replace or affirm both branches at one time. Semi-presidential systems mix elements of both systems, often splitting executive responsibilities between a president elected directly by the people and a prime minister selected by members of a parliament. France, Portugal, and Romania have semi-presidential systems. All three types of democratic systems use elections as the feedback mechanism needed between those who govern and those who are governed.

Elections allow citizens to say whether they approve of how politicians are governing the society. The organization and conduct of elections occupy a major branch of political science due in part to the enormous variation we have in the choices societies make to express their nation's sentiments. This seemingly simple device of elections to implement the feedback loop critical to all democracies is not very simple at all. We have discussed and debated the contours of elections for centuries (Katz 1997). The disputes boil down to a few critical elements:

- Who will do the choosing (voter qualifications for participation)?
- What will the choices be (parties or candidates)?
- When will we hold elections (on a regular schedule or not)?
- How will voters (choosers) figure out whether their government

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is doing a good or a bad job, and what are the alternatives to the current regime (a free press, political parties)?
- How will the elected officials explain the decisions they have made to the voters (communication, democratic responsiveness)?

We consider many of these questions to provide some background for the primary focus of our investigation: Who pays for election campaigns in democracies, and does it matter for the operation of the political system?

Who Will Do the Choosing?

In today's democracies, it is generally the rule that all adults should be entitled to vote to choose their rulers, to exercise self-government. There are exceptions to this including age, status as a prisoner (or formerly incarcerated person), whether someone is a citizen or not, and intellectual disability. These exceptions are subject to continuous revision and debate. Once voter eligibility is decided, we then ask whether voter registration is required as an additional step to vote (as in most of the U.S.), or if the state will ensure all eligible voters are enrolled to vote (as in Canada). The more effort required to cast a vote, the less likely citizens are to do so (Downs 1957, 265). Any additional steps required to vote (e.g., acquiring the information needed to understand the process and cast an informed vote, having an approved voter I.D., traveling to the polling place, long lines to vote, applications for absentee or mail ballots) may alter the composition of the electorate by reducing the number of voters least able or willing to pay those information and opportunity costs—mostly those with low levels of education and the poor (Piven and Cloward 2000; Verba, Schlozman, and Brady 1995). Moreover, as strategic political actors with limited campaign resources, candidates, political parties, and groups spend their money to mobilize those citizens most likely to vote—and these voters are older, whiter, wealthier, and better educated than the general public (Soss and Jacobs 2009, 121–22). Thus, the voting public is not representative of all those eligible to vote.

The rules governing who can vote and how voters cast their votes can clearly affect who gets elected, what policies are enacted, and how well those policies represent the wishes of the populace. Deciding these rules has always been contentious in the United States (Keyssar 2009). For

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example, Southern states enacted laws such as poll taxes and literacy tests to keep Black people from voting after the Civil War. More recently, many states enacted voter I.D. requirements, arguing that such a requirement is needed to combat voter fraud (though courts have sometimes stopped their implementation[3]). Critics contend that in-person voter fraud is extremely rare and voter I.D. laws disproportionately impact poor, young, and minority voters (Hasen 2013).

What Will the Choices Be?

The answer to this question depends largely on the type of democratic system selected. Democracies with single member plurality (SMP) systems, where only one candidate is elected from a particular district, as in the U.S., are far more likely to be candidate oriented in electioneering. Voters in these systems tend to think of elections as choices between particular individuals. Democracies with multi-member plurality (MMP) districts, where two or more candidates are elected in a single district, are more likely to have campaigns conducted by a central political party organization that normally selects candidates (sometimes without input from the mass public) who may eventually become officeholders. Voters in those systems tend to see their choices as between political parties and their platforms rather than between candidates. Presidential systems nearly always have single member plurality, and thus are more candidate centered.[4] Parliamentary systems can also have single member plurality (like Canada) or have extreme multi-member plurality (like the Netherlands). However, the distinction between candidate or party centered elections is not so much a dichotomy as it is a continuum. Different systems emphasize individual candidates more than political parties and vice versa.

How candidates get their names on the ballot also influences the degree to which parties or candidates dominate campaigns. Before the 1920s, party leaders (often party *bosses*, who led corrupt political party machines, especially in Northeastern and Midwestern cities) controlled the candidate nomination process in the U.S. These party leaders decided who would run for each office as their nominee—usually loyal partisans who would follow the party's lead on policy decisions once in office. The primary election introduced in the early 1900s, specifically designed to deprive party leaders (many of whom had become quite corrupt and in the service of

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big corporations rather than of the citizenry) of the power to nominate the party's candidates, now gives that decision to the voters in most states.[5]

Primaries allow candidates to appeal directly to voters for their support without requiring explicit approval from the party elites, opening access to government, a major goal of the Progressive movement of the early 1900s. Also, states allow candidates to bypass parties entirely and run as an independent candidate—one not affiliated with a political party. Both developments have made the U.S. system more candidate-centered, yet candidates who are not favored by one of the major political parties and cannot gain the support of the established network of donors, interest groups, activists, and party leaders are not likely to mount a successful campaign. Networks of political actors determine who will and will not be considered a viable candidate, and thus it is not surprising that the parties and their allies continue to play important roles in the campaign finance system (Hassell 2016).

When Will We Hold Elections?

Determining how elections will work depends on how often we expect to hold them. The U.S. has two distinct institutional features that lead to many more elections per year than just about any other democracy: fixed election times and a federal system.

Fixed Election Times

In most presidential systems, like the U.S., fixed election dates are the norm. This means that legislative and executive positions have set terms. In the U.S. Congress, senators have six-year terms and members of the House of Representatives have two-year terms. The president has a four-year term. Elections for these federal offices are held in even-numbered years on the first Tuesday after the first Monday in November. States set their own election dates for their elected offices, and many hold them on the same day as federal elections. This simple fact of fixed election times has enormous consequences for communicating with voters. First, we know the precise date of the election for each federal office for the foreseeable future. By their very nature, the next election cycle begins as

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soon as the previous election has concluded. In the 20th century, this led to what many political scientists refer to as "the permanent campaign" (S. Blumenthal 1982; Nichols and McChesney 2013; Ornstein and Mann 2000), where politicians literally begin their next campaign for office the day after the current election is held. Accordingly, election clock countdowns are common features at political party offices and popular media outlets. Fixed election dates create an environment of anxiety, where politicians are always on the watch for the next opponent in the next election. Today, we find that many politicians continually engage in fundraising and electoral communications even when the next campaign is two or more years away (M. Alexander 2006). Our fixed election schedule and the permanent campaign create a constant need for money to pay for communications and campaign infrastructure.

There are important governing concerns with fixed election times as well. There is no national mechanism to call for elections until terms are up.[6] If a congressional seat becomes vacant due to resignation, death, or impeachment, states are empowered by the U.S Constitution to schedule special elections and do so according to their state laws. If problems arise in the presidency, the constitutional structure provides for succession in the executive beginning with the vice president. Some outside observers are puzzled about why American politicians with low approval ratings (because the public has rejected their policy positions) continue in office. The answer is simple: fixed election times means that each officeholder serves until their "turn" is over, except when extraordinary measures are taken such as impeachment or recall (both are quite rare, and recall is not an option at the national level). This has the potential to create a bit of a lag in the feedback loop, or at the very least a sense among voters that the political system is unresponsive to their disapproval.

Most parliamentary systems have almost the opposite arrangement. There are no fixed terms for the national legislature, though most parliamentary democracies have an outer limit of five years that may elapse between elections. Legislators cannot know if a national election will occur before that time, as elections can be called due to a no-confidence vote in the government (because of differences with the executive), or by government leaders to attempt to shore up popular support and increase or decrease the size of their majority coalition.[7] Once the government leaders decide an election should happen, they set a date according to the electoral laws of their country. Normally, laws require a specific window of time

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between the announcement of an election and the date the election takes place (for example, usually six weeks in the United Kingdom). Thus, most parliamentary systems mandate a specific period of time for campaigning (Friedman 2016). Electoral communications outside this window are either forbidden or, at the very least, somewhat wasted. However, political parties and candidates must be in a perpetual state of low-level readiness because the next election date is *not* fixed. Once an election is called, all party officials, members, and employees are deployed for campaign work. In the U.S., fixed election times mean that the organizational players (candidates, parties, political consultants, contributors, volunteers) know when to gear up for the next contest and can plan accordingly. Moreover, the lack of term limits in some branches of the federal government and in some states and localities means that political actors do not have an incentive to stop campaigning at any given time because they are not restricted by law from running for office (and fundraising) indefinitely.

Federalism

The United States is a large nation with 50 states acting as semi-autonomous political units. Every state has adopted a presidential-style system of government for itself—with an executive (governor) and a bicameral legislature.[8] Each of these offices also has a fixed election time, but not all of them occur on the same date as the national elections. To complicate matters even more, most states use primary elections to determine political party nominees for offices contested in the general elections. The dates for the primary elections are entirely up to the states, and they tend to range from March to September, usually in even numbered years.[9] Also, states may change these dates from one election cycle to the next. Another layer of complexity exists because national and state governments may have different, even conflicting laws about campaign communications and how they may be funded. This can create complications for a seemingly simple activity like a presidential and gubernatorial candidate of the same party campaigning together.

The decentralized nature of the American political system calls for a variety of rules for election contests across the country. Each level (national, state, and local) must avoid violating the rules of the other levels. For example, state and national party organizations are restricted in

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their ability to coordinate their fundraising and spending activities to elect the party's candidates up and down the ballot.[10] We explore further the impact of federalism on campaign finance rules and activities at different levels of government in chapter 8.

How Will Voters Decide?

How will voters figure out whether their government is doing a good or a bad job and what the alternatives to the current regime are? Will they rely on a free press to provide useful information to make an informed choice between parties and candidates? Will there be competing parties that offer distinct plans for governmental policies? Of course, candidates, parties, interest groups, and individuals will all attempt to persuade voters. On Election Day, each voter will cast votes to fill multiple offices and, in some jurisdictions, to support or oppose ballot measures.

Fortunately, many scholars have examined who votes (both who is eligible to vote and who does or does not vote), how the electoral system is structured (whether it is more candidate or party centered), what messages are given to voters (campaign communications), and what voters do with that information (voting behavior, voter choice). John Nichols and Robert McChesney (2013, chaps. 6 and 7) argue that contemporary American journalism can no longer help citizens make sense of the political sphere because journalism itself focuses less on policy positions and more on the "horse race" of elections (e.g., who's ahead, who's behind), and media outlets devote fewer resources (including actual broadcast minutes) to news in favor of privately funded political ads. Rather than being outlets for neutral information to help voters make good decisions, contemporary news organizations depend on the money they make from campaign (and other) ads to stay in business. Moreover, many Americans rely on news from ideologically biased media sources such as Fox News and MSNBC. Younger Americans especially rely on digital sources such as Twitter, Facebook, and TikTok for their news, sources that use algorithms to tailor the news one receives based on the content viewed and shared in the past (Matsa 2022).

Who literally pays for campaign communications in the American democracy? In the United States, politicians and citizens have generally rejected the idea that taxpayer dollars (public financing) should pay for

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learning about the candidates and their policy positions.[11] Instead, private citizens have always made donations to allow candidates to make their case to voters about why they would represent citizens best. The financing of campaigns lies at the heart of a central problem in the feedback loop—can the people make an informed evaluation of the job politicians do if the information conveyed represents the views of those private citizens and groups who pay for publicizing it? Does the source of campaign money interfere with voters' democratic responsiveness?[12] In the U.S., the dependence on private money means, among other things, that those who are wealthy are more likely to get their messages across to voters than those who are poor. Thus, since we know that the wealthy and powerful hold different views than the working class and poor (see, for example, Gilens 2012, chap. 4), the source of funds may indeed shape the content and quantity of information voters receive and thus impact voters' ability to make informed voting decisions consistent with their own policy preferences (Ferguson 1995).

How Will Elected Officials Explain Their Policy Decisions to Voters?

The central concern of elections in a democracy is to have a government that is responsive to the will of the people. At election time, citizens can register their approval or disapproval of the current regime. Therefore, information about the records of current officeholders and the proposed programs of legitimate challengers for electoral office should be communicated to the public. This is where the question of money in elections gets complex. Current officeholders have already proven, in the previous election, that they can convince voters of their fitness for office. They also have a record of actions in office. Some of those satisfied with the officeholder, who wish them to continue in office, will invest in the officeholder's campaign for reelection to maintain the status quo—a central motive of campaign donations. Moreover, part of a representative's job is explaining government actions to those they represent, and taxpayers pay for many of those communications (such as in official newsletters mailed to constituents or to maintain government-hosted web pages, which is paid for by taxpayers, known as the congressional officeholders' franking privilege). Therefore, current officeholders (incumbents) have a structural advantage over their challengers because they do not have to pay for all their communications

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to voters. Moreover, challengers have a tougher time raising enough funds to be competitive against an incumbent, who can call on past contributors (Jacobson and Carson 2020, chap. 3). While voters in a democracy are meant to have meaningful electoral choices in competitive elections, voters generally have less information about challengers to current officeholders than they have about the current officeholders. This uneven supply of information is further magnified by America's free market capitalist system, which prefers private control of economic matters, including the funding of campaigns. Thus, unlike votes, which are distributed equally among all eligible voters in a democracy, in a capitalist economy, some citizens will have more resources than others, and donors who favor certain candidates may use these resources to participate in politics more than citizens with no resources to spare.

Capitalism and Campaign Finance

While the funding of American campaigns is not an economic activity like the manufacture and sale of goods and services or trading on the stock market, American free market capitalism influences *how* U.S. campaigns are funded. In this section, we discuss how capitalism shapes the supply and use of campaign money.

Sources of Money

Democracies choose to adopt rules that allow private money to finance elections exclusively or permit public (taxpayer) money to finance elections with some role for private money. The type of funding a democracy chooses is normally consistent with the economic system of the nation. Capitalist systems are likely to rely more on private money, while socialist systems generally provide some public funding for campaigning. Yet the widely held belief that some democratic systems exclude all private money in elections is untrue (Casas Zamora 2005). Hardly any campaign system relies exclusively on public money. Indeed, most of the nations in Western Europe to which we compare ourselves have a hybrid of public and private funding or, more to the point, sufficient public subsidies to (in theory) minimize the need for outside money. Yet not only does pri-

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vate money seem to flow into these systems too, they also often feature scandals of even bigger magnitude than in the U.S. For example, Italy restricted public funding of political parties in response to major scandals in the early 1990s. This allowed media tycoon Silvio Berlusconi to create a new political party (Forza Italia) that operated with some public funding and extensive support from one corporation—the one he owned (Hopkin 2005, 53).

Some newer democracies, especially in Eastern Europe, do have systems of public funding that are more comprehensive. The Organization for Economic Co-operation and Development (OECD), an international nongovernmental organization, produced a study of how campaigns in democracies are financed in 2016. They show that some countries have elections mostly paid for with public funds (e.g., Greece, 90 percent public funds; Belgium, 85 percent; Sweden, 75 percent) but other countries now have less reliance on public funds and are much more reliant on private support (e.g., United Kingdom, 65 percent private support; Netherlands, 65 percent; Hungary, 40 percent) (OECD 2016, 38). The Institute for Democracy and Electoral Assistance (IDEA), a different nongovernmental organization, hosts a Political Finance Database that allows users to search campaign finance laws all over the world by specific allowances and prohibitions, such as whether political parties can accept private contributions, whether foreign nationals may make contributions, whether donor names are disclosed to the public, and many more (Institute for Democracy and Electoral Assistance 2022). This database is updated frequently, and users may search the database by country, region, or type of regulation. The lesson to be learned is twofold: one, democracies today are more likely to be using private money to run their elections than not; and, two, electoral systems where candidates are selected by political parties are more likely to use a greater proportion of public money while systems where candidates are selected by the voters use more private money. However, public funding does not necessarily address low voter turnout and low levels of citizen trust in the efficacy of democracy in many newer democracies (Kukovic 2013).

Demanding that private money have no role in politics ignores one of the fundamental values of democracies—the right of free expression and association. Tobin Grant and Thomas Rudolph explore this conundrum in their well-titled book *Expression v. Equality* (2004). They demonstrate that Americans want to preserve both freedom of expression *and* equal access to

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the political arena. These two goals conflict. Allowing freedom of expression means that those with ample resources will have the ability to express themselves more than those who have fewer resources, thus creating a system that does not in practice provide equal access to the political arena.

This tension between freedom of expression and equal access, that is, between liberty and equality, influences virtually all debates about campaign finance in the United States. Not all Americans agree about *which* value to prioritize. Those who advocate reforms that would level the campaign finance playing field, such as public funding and spending limits, place equality above liberty. Others prioritize liberty over equality and argue that any restrictions on campaign fundraising and spending threaten freedom of expression. The reality is that campaign finance reforms that promote equality have not been easily enacted or sustained in the U.S., and this is due in large part to the unique American context shaped by the values of a free-market capitalist economy.

Capitalism in the New American Democracy

The U.S. founders designed a representative government that also limited popular rule through mechanisms such as the indirect election of senators, the selection of the president through the Electoral College, and staggered election terms that made it difficult for an organized majority to win control of all branches of government in a single election. Moreover, that the U.S. would have a capitalist economic system was never up for debate. The U.S. founders did discuss how the new representative democracy, based substantially on political equality, could coexist with capitalism, which naturally produces economic inequalities. They recognized that a capitalist economy would result in unequal accumulation of wealth, and that this inequality would be the basis of much of the political conflict in society (Scott 2011, 253–55). The founders were keenly aware of this tension while drafting the U.S. Constitution, as James Madison explains in his *Notes on the Debates in the Federal Convention*:

> In framing a system which we wish to last for ages, we shd. not lose sight of the changes which ages will produce. An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. (Madison 1787)

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In *Federalist No. 10*, Madison provided the answer—it is the responsibility of government to address this "danger" of majority "factions":

> The regulation of these various and interfering interests forms the principal task of modern legislation and involves the spirit of party and faction in the necessary and ordinary operations of the government. (Madison 1788a)

The founders did not intend to use government to level the playing field between the haves and the have-nots in society, but rather to ensure that the inevitably larger number of have-nots (a majority) did not deny the haves (a minority) their right to economic liberty in the free market economy. Likewise, although they did not discuss it directly, it is safe to assume that the founders expected that the money needed to run for office would come from private, not public, sources.

American Capitalism's Place in Politics

The economic system of a nation influences much about its society, including its politics. Charles Lindblom notes that the U.S. free market capitalist system often constrains what policy options are possible (Lindblom 1982). He explains that the "privileged position of business in the political system of all market-oriented societies" is based on the fact that businesses can impose "punishment," such as unemployment, for policies that are perceived as detrimental to their profits (Lindblom 1982, 326). For example, if government imposes costs for polluting (like a fine), businesses will raise the price of goods, lay off workers, or somehow adjust for those costs so as not to diminish their profits. No other groups can impact society so negatively by holding government and citizens "prisoner," because other groups do not control market mechanisms such as the means of production and supply chains. The market thus "imprisons policy making, and imprisons our attempts to improve our institutions," so that "no market society can achieve a fully developed democracy because the market imprisons the policy-making process" (Lindblom 1982, 329).

Consequently, policies that aim to promote equality, such as an increase in the minimum wage or public funding of campaigns, will run up against the negative reactions of business owners who can "punish" society for its democratic urges for a more equitable distribution of resources. As of

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2021, the private sector employs 85.7 percent of all Americans, while federal, state, and local governments employ 14.3 percent (calculated with data from U.S. Bureau of Labor Statistics 2022). So, most Americans depend on the private sector for their economic survival. Business owners are likely to oppose a system of public funding for campaigns that would raise their taxes, as might ordinary taxpayers, but we can expect business owners to pass on those increased costs to consumers or workers, while individual taxpayers have no such recourse. Public funding would also crowd out their own campaign contributions, which would diminish businesses' ability to obtain the privileged access to lawmakers they have now. Yet Lindblom's "market as prison" argument also helps explain why a CEO of a factory in a particular congressional district may not have to give a campaign contribution at all to the district's House member to get what they want from government, or at least that a very modest contribution can appear to reap benefits. All the corporate CEO needs to do is *threaten* to move the factory to another state or country, and the lawmaker will likely act to keep the factory in the district by offering the company tax breaks or other benefits. This can happen on a national scale as well if entire industries suggest the price for keeping jobs in the U.S. is lower taxes, less regulation, or some other benefit for business. Since Americans consistently report the state of the economy as their number one political interest, such threats get attention from voters and officeholders.

Moreover, businesses do spend money on elections and lobby elected officials as well. They do not rely exclusively on their leverage in the marketplace to influence policy, but this leverage is something ordinary citizens do not have. Like Lindblom, Thomas Ferguson contends that the U.S. system of capitalism is an important variable that affects the array of possible campaign finance policy options. He argues that powerful economic actors shape politics and the party system itself, and he proposes the *investment theory* of party competition (Ferguson 1995). Ferguson maintains that parties in the U.S. do not move to the ideological middle of voters' opinions to compete for the mass of voters, as Anthony Downs argues (Downs 1957). Rather highly organized and powerful economic "investors," mostly corporations and business elites that agree on most economic issues, are the parties' real constituencies, and *both* major parties usually align their policies with these "investors" whose support the parties' need for electoral success (Ferguson 1995, 36–37; Bawn et al. 2012). Similarly, Timothy Kuhner (2014, 2) asserts that, because elections are privately

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funded, "politicians and parties compete for funds, and the private sources contributing those funds exploit the situation in order to press their interests." Thus, Ferguson notes, even reformers such as Presidents Theodore Roosevelt and Franklin Roosevelt, leaders who appeared to take on the corporate elite, did not pursue their insurgent policies without the support of powerful business investors (Ferguson 1995, 36). Indeed, party changes, Ferguson argues, are not realignments of the parties' voter coalitions, as the classic theory suggests (Key 1955), but instead the result of an economic crisis that "polarizes the business community" and, in response, "differences between the parties emerge more clearly" (Ferguson 1995, 23).

Businesses also can more easily carry the costs of political organizing than other groups to press government to address their interests. In his classic work, *The Logic of Collective Action*, Mancur Olson explains how large groups of people (like voters) are less able than small groups (like the business community of a single industry) to pay the costs of collective action[13] to press for what they want from government (Olson 1965). Of course, businesses have other advantages, such as the ability to pay the information costs associated with following and influencing legislation and regulations (i.e., lobbying). Consequently, as Ferguson and others argue, business leaders shape the political landscape in ways that confine what policy options are considered, and during elections the parties may "confine almost all competition to noneconomic issues less threatening to elite investors," such as abortion or guns (Ferguson 1995, 37).

While businesses may not be the only ones at the policymaking table, they are members of an elite group that manage to gain lawmakers' attention. As E. E. Schattschneider (1960) noted, when policymaking is confined to a small number of well-organized interest groups that work to keep the "scope of conflict" narrow, those involved are more likely to influence policymaking than those who are outside the scope of conflict. Schattschneider found that organized interests, which are inherently dominated by elites, kept most people out of important discussions about policy. His proposed remedy is to widen the scope of conflict by empowering political parties more than special interest groups, since parties naturally work to appeal to large groups of people to win the most votes in elections. Yet Ferguson argues that the parties cannot offer this remedy because they are, in essence, themselves the creatures of business investors. Similarly, in their 2021 book, *Hijacking the Agenda*, Christopher Witko et al. theorize that there is an important interaction between the structural

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power of economic interests and the "kinetic power" of resources they may use[14] to actively alter the direction of policymaking in Congress. For example, even with strong public pressure, major corporate transgressions, such as the 2008 mortgage finance debacle leading to the global financial crisis, generally result in only minor policy changes around the edges rather than comprehensive reforms (Kane 2012; R. Levine 2012; Stanton 2014). Congress did place some important restrictions on the banking and finance industries with the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act,[15] but these policy changes were relatively minor given the scope of the financial meltdown. Also, no major corporate or banking executive has been convicted for their role in the international financial collapse. Further, in May 2018, the Dodd-Frank controls were significantly rolled back by Congress and President Donald Trump (Lane 2018; Werner 2018). We simply remind you that wealthy individuals and industries can influence politics through many tools, only one of which is campaign donations. The visibility of campaign donations may lead citizens to conclude that the main weapon in corporate America's arsenal is campaign activity. We argue that other tools, such as lobbying, are as or even more important than campaign finance.

Campaign Money from the Founding to the New Deal

We now have a campaign finance system primarily and resiliently funded with private sources of money that stakeholders in policy decisions have helped build. How does this work in practice? Susan Scarrow (2007, 5) categorizes election funding resources as internal, external, or state support. Internal support means that officeholders, party members, and other enterprises flowing from them (such as a party-led fundraising event or sales of party-run newspapers) provide the resources used in campaigns. External support includes donations from and spending by firms, labor unions, other organizations, and individuals from outside the party campaign apparatus (as we see often in the U.S. case), and state support can be direct or indirect subsidies (such as matching funds and tax credits in some U.S. states). In the U.S., campaign funding came first from internal sources, then from external sources. Eventually some state support was added, but it remains a system based primarily on private (external) sources of funding. Here we briefly explore the evolution of campaign

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finance regulation in the U.S and show how the principles of the free market have shaped the policies that emerged and help us understand the persistence of private money to fund democratic electoral competition.

Early American politics was for those who had a stake in society, namely white, male property owners. As Robert Mutch (2014, 3) notes, "wealth-based political inequality had been a feature of American society since colonial days. . . . Unequally distributed wealth had always been easy to convert into political power." Thus, the tradition of a free market in politics based on private resources was already firmly established prior to the Revolutionary War. In early America, elections were "a gentleman's pursuit" for which candidates "stood" for office and paid for their own campaign expenses (Mutch 1988, xv; see also Ostrogorski 1970, 342). So, participation in the highest levels of politics itself was only for those who could afford it.

In the earliest years, it was thought unseemly for candidates to appeal directly to voters for financial support, yet the need for large sums of money to reach masses of people arose by the early 1800s, with the development of the grassroots political party to mobilize voters on a mass level (Hofstadter 1975, 242–44; Key 1958, 221–23). In the age of Jacksonian democracy in the 1820s, a different type of politician emerged—men who were not wealthy and for whom politics was a career rather than a part-time service obligation. These professional politicians could not necessarily pay their own campaign expenses, and their parties relied on assessments levied on government workers who owed their jobs to the party because of the *spoils system* that awarded government positions to loyal supporters (i.e., patronage jobs) (Mutch 1988, xvi). Then, in 1877, the Appropriations Act for government operation[16] prohibited executive officers in the U.S. government from requesting political contributions from workers, and later, passage of the Pendleton Act[17] in 1883 created the civil service and prohibited raising campaign money from the federal workers in these newly created positions. Hence, campaign money could no longer come from government workers loyal to the party in power.

With the loss of funds from government workers, politicians and their parties turned to corporations to fund their campaigns. Party bosses and their political party machines worked to elect candidates who would support policies favored by their corporate benefactors and got voters to the polls by continuing to offer their loyal supporters patronage jobs, government contracts, and services not provided by government such as housing

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assistance, food assistance, road repairs, and educational opportunities.[18] Contributions from railroad, sugar, steel, banking, and other industries fueled campaigns at all levels. By the late 1800s, public opinion against corporate influence was growing, and we saw the first attempts to limit the political influence of large accumulations of wealth that occur naturally in a capitalist society in campaigns. Some states banned corporate campaign contributions, but Congress did not act until controversy arose about the financing of the 1904 presidential election. A New York legislative investigation revealed that President Theodore Roosevelt traded government favors for corporate contributions. This discovery was particularly scandalous because Roosevelt himself was a leading Progressive who ran on a platform of "busting the trusts" (i.e., breaking up corporate monopolies). After these revelations, public pressure built for a ban on corporate contributions. The editors of the Republican-leaning New York *Tribune* articulated the general argument:

> In the United States the government is intended to be a government of men. A corporation is not a citizen with a right to vote or take a hand otherwise in politics. It is an artificial creation. . . . Interference by it with the state and attempts by it to exercise rights of citizenship are fundamentally a perversion of its powers. (as quoted in Mutch 2014, 51)

However, there was little enthusiasm for reform among Republican lawmakers, who controlled both chambers of Congress, or from Roosevelt. Yet eventually Congress passed the Tillman Act[19] in 1907, which prohibited national banks and corporations from making contributions to federal campaigns. The new law provided for very weak oversight. The lack of meaningful enforcement of the new limits contributed to growing pressure for more reform, particularly for public disclosure of campaign finance activities so the public would know who was receiving large corporate donations. Congress responded with the Federal Corrupt Practices Act (1910),[20] which required political parties to disclose their contributions and expenditures related to campaigns for the U.S. House of Representatives. In 1911, Congress amended the Federal Corrupt Practices Act,[21] added disclosure of Senate campaign finance, and required reporting before and after both primary and general elections. The amendments

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also added the first requirement for spending limits for House and Senate campaigns (Corrado 2005a, 14).[22]

The 1922 Teapot Dome scandal brought further public pressure for additional reform. Department of the Interior secretary Albert Fall secretly granted a private oil company the exclusive right to use the Teapot Dome oil reserves in Wyoming. The company's president gave Fall and the Republican National Committee large donations before the rights were granted. Congress passed the 1925 Federal Corrupt Practices Act,[23] which strengthened disclosure rules and increased spending limits for general elections. Yet, as with past reforms, the act did not provide for effective enforcement of the new rules, and they were largely ignored.[24]

The tension between political equality and economic liberty was certainly at work into the 1920s, as demonstrated by the limits placed on the use of corporate money, and by the enactment of contribution and spending limits at the federal level. Despite the early reforms that attempted to address the political impact of the economic inequality produced by the free market (by curbing the role of big money in campaigns), corporations and corporate leaders continued to be the dominant funders of *both* parties, even as the Democrats began to receive campaign support from labor unions.

The Rise of Labor Power and a New Campaign Finance Focus

The campaign finance scandals of the early 1900s stimulated calls for reform from Progressives in both parties, and although business elites could no longer secretly pour unregulated money into elections, they easily adapted to (and often got around) the new system of limits and disclosure. We know from presidential campaign disclosure filings that corporate money continued to dominate federal elections into the 1930s, primarily from the owners and managers of corporations, even though direct contributions from corporate treasuries to candidates and parties had been banned since the 1907 Tillman Act (Mutch 2014, 97–100). However, corporations were about to have some competition in the campaign finance arena.

Early New Deal policies empowered organized labor. For instance, the National Industrial Recovery Act of 1933[25] allowed collective bargaining (i.e., discussions between an employer and their employees to negotiate

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salary, benefits, and working conditions), and the 1935 National Labor Relations Act (i.e., the Wagner Act)[26] required employers to bargain in good faith with a union if supported by a majority of the company's employees. By 1936, labor unions began to use their political power in support of Democrats who had enacted these labor-friendly policies, as business moved more solidly into the Republican camp. Louise Overacker, the leading campaign finance expert at the time, estimated that unions contributed over $770,000 to help reelect Franklin Roosevelt in 1936 (Overacker 1937, 489). She also reported banks significantly reduced their donations to the Democrats in 1936, and manufacturers and wealthy families (including multiple members of the DuPont, Mellon, and Pew families) directed record amounts to the Republicans (Overacker 1937, 498).

While earlier campaign finance reforms focused on the role of corporations in elections, after 1936, the *conservative coalition*, an alliance in the U.S. Congress of conservative members of the Democratic and Republican parties, turned their attention to the growing political power of organized workers and their labor unions. The 1939 Hatch Act[27] prohibited all federal workers, not just those covered by the 1883 Pendleton Act, from engaging in politics, and 1940 amendments to the Hatch Act[28] limited these workers' contributions to candidates and parties, placed spending limits on party committees, and banned political contributions from federal contractors. Then the 1947 Taft-Hartley Act[29] banned labor unions from using their treasury funds for federal campaign contributions, treating union contributions the same as corporate contributions that had been banned since the 1907 Tillman Act. Taft-Hartley also prohibited any *expenditures* by corporations or unions in connection with a federal election to ensure that corporations and unions would not attempt to get around the ban on contributions by spending money independently to help elect or defeat a candidate (Mutch 1988, 154–59). Unable to use their treasury funds for contributions or spending, unions established separate organizations (known as separate segregated funds—SSFs) to collect donations from their members to contribute to candidates and to conduct voter mobilization activities. These new organizations became known as "political action committees" (PACs). The first PAC, the Congress of Industrial Organizations Political Action Committee (CIO-PAC), was formed in 1943 and raised more than $1.4 million for the 1944 federal elections (Corrado 2005a, 18). Businesses did not begin to establish PACs until the 1960s. After the 1947 Taft-Hartley Act, Congress did not seriously consider campaign finance policy again until the 1970s.

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Plan of the Book

Our Perspective

We did not set out to write a book proposing reforms to the campaign finance system because our past research tells us that we should not underestimate the ability of people to adapt to any restriction in the electoral arena. One reason for this is clear: in an economic system where business concerns and privately held wealth are predominant, it is hard to see how we can diminish their influence through campaign finance limitations. Free market capitalism anchors the agendas of both parties, industrial regulations, nearly all legislation, and even citizen's priorities. After all, most Americans consistently report their concerns about the "economy" when evaluating candidates for office.

Our perspective differs from others who study campaign finance in that we are not convinced that a radical transformation (such as purely public financing) would change our political system in the ways that reformers expect. If candidates were not so dependent on private interests to run for office, would they listen to the majority of Americans who do not have the resources to grab their attention now? We explain our view in the pages that follow, which reflects the following fundamentals of American politics:

- **Democracies need elections.** Does private money significantly change the outcome of elections? Do citizens get to choose between candidates in competitive campaigns? Would campaign finance reform change this?
- **Corruption is a concern in democracies because each citizen's concerns should be considered equally.** When some citizens are given favorable treatment before the law because of their donations to lawmakers, we consider this corrupt. Do we know that favorable treatment would not happen if campaign finance rules were different?
- **Freedom of speech was not always tied to the wealth of the speaker as it is today.** Because the courts have decided that the protection of free speech rights—even for corporations—must be protected, can we expect to see a judicial philosophy that would again support limiting campaign activity?
- **Capitalist systems depend on the success of private firms, and**

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these firms provide the livelihoods for most Americans. Firms have multiple ways to influence policy and they may not even need to spend money on elections to pursue their policy goals. Is it reasonable to expect fewer policy demands by firms if we continue to have a capitalist system?

- **Civil society is made up of a constellation of individuals, including donors, candidates, and officeholders.** Each has goals they wish to achieve. The founders believed that ambition could counteract ambition—that is, the open competition in a society would force compromises to emerge. Does our campaign finance system check the political, economic, and social ambitions of those who participate in it? Or is individual ambition a part of the American political system that cannot be checked?

In chapter 2, we continue our examination of the fundamental factors that shape the U.S. campaign finance system with a discussion of how the burst of legislative, regulatory, and judicial campaign finance activity that began in the 1970s was designed to address and combat corruption in the American campaign finance system. In chapter 3, we continue our examination of campaign finance rules as they take a turn after the 1970s toward a focus on protecting the First Amendment right to free speech as the primary gauge for determining the constitutionality of campaign finance limitations. This new focus has narrowed what campaign finance behavior is considered corrupt and therefore subject to regulation. In chapter 4, we explain the more recent, and sometimes confusing, developments in campaign finance techniques that undercut the important reforms of the 1970s. In chapter 5, we examine the various noncandidate players in the U.S. campaign finance system and explain how the rules governing their campaign finance activities matter. In chapter 6, we turn our attention to the candidates themselves. We examine the fundamental institutional features of the U.S. political system, such as the separation of powers, that shape campaign finance rules and activities, and the contextual factors of each election, such as whether a candidate is an incumbent, a challenger, or running for an open seat, and the level of competition, that largely determine how much money is raised and spent in each contest. In chapter 7 we analyze the enforcement of campaign finance rules and the disclosure of donations and spending, functions considered necessary for legitimate democratic elections. Finally, in chapter 8 we evaluate reform efforts at the

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state and local levels and other ideas for changing the campaign system, consider the interactions of state and federal campaign finance rules and players, and revisit the fundamentals that determine much about why we have the campaign finance system we have.

Campaign Finance Lingo: Some Terms Used in This Book

One reason the world of campaign finance seems so confusing is that there are a lot of terms used by politicians, practitioners, and the press. To guide you through the remainder of the book, here is a quick rundown of the main terms.

Individuals provide the money that runs campaigns in one form or another. They are frequently referred to as donors or contributors. Less flattering terms used to denote very rich people who give to political causes are mega-donors or "fat cats" (Kent 1928). If a donor has contributed money up to the full legal limit, we say they have "maxed out" or are a "max out" donor. Any individual who has given less than $200 to a political committee of a candidate, party, or group in an election cycle is known as a **small donor**. Individual contributions over $200 in federal elections are called **itemized** contributions (also large donations), because these contributions must be reported to the Federal Election Commission (FEC), the agency responsible for federal campaign finance regulation, disclosure, and enforcement.

Political parties are the main organizations in the American political system that communicate with potential voters on behalf a wide variety of candidates running for different offices yet all affiliating with the same "team"—typically Republicans or Democrats. Political parties may ask for contributions from individuals, political action committees, other party committees, current officeholders, or candidates. Political parties may give money to candidates for federal office, but these contributions are limited to a small amount. Parties at the national level have a special category of spending called **coordinated expenditures**. This money is spent by the national party committee, but with the candidate's knowledge and consent. Political parties (and other political committees) also may make **independent expenditures**. A party can spend unlimited amounts on independent expenditures, but the party is prohibited from coordinating with the candidate who is likely to benefit from the spending.

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Hard money/soft money. **Hard money** refers to any funds raised and spent according to the legal limits on the amount and source of the funds, and this fundraising and spending are fully reported to the Federal Election Commission. **Soft money** is money that can be raised and spent without limit from virtually any source, including corporations and unions. Soft money cannot be given directly to candidates or parties. Some soft money spending is reported to the Internal Revenue Service (IRS), but it is impossible to know the full extent of that spending.

Interest groups generate the most categories in campaign finance regulation by far. In the 1970s and 1980s, many interest groups wanting to support candidates formed **political action committees**, which we refer to as **traditional PACs** (to distinguish them from other types of PACs, such as super PACs). A corporation or a labor union cannot use corporate profits or labor membership dues for its campaign finance activities. Instead, they establish a **separate, segregated fund** for the PAC. The corporation or labor union may ask its employees or members for contributions explicitly dedicated to electoral activity, but the PAC cannot solicit contributions from the public. However, these types of PACs could use the "parent" organization's overhead (office space, equipment, and so forth) to run the PAC, making it a **connected PAC**, connected to the corporation or union. **Nonconnected PACs** do not have a "parent" such as a corporation or labor union. They are usually organized around a particular set of public policies (e.g., League of Conservation Voters, National Rifle Association). They must pay their own operating expenses, so they can fundraise from the public at large, as they have no natural connected constituency.

A 527 group is a tax-exempt, nonprofit organization created to influence the election, selection, nomination, or appointment of anyone to a federal, state, or local public office.[30] Technically, all political committees are 527 committees, but the label is now used mostly for one type of 527 committee that was organized frequently after passage of the Bipartisan Campaign Reform Act (BCRA)[31] in 2002. These 527 committees can accept unlimited contributions from virtually any source (soft money) and make unlimited expenditures for express advocacy for or against candidates (see below), but, if they do, they must disclose their donors and may not coordinate with candidates or political parties. There are no disclosure requirements if a 527 engages only in issue advocacy (see below).

Section 501(c) (4), (5), and (6) organizations. These nonprofit organizations are governed by section 501(c) of the Internal Revenue Code. They

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may participate in political campaign activity, so long as this is not their primary activity and they do not coordinate their electoral activities with candidates or parties. These 501(c) groups are not required to publicly disclose their donors, which include wealthy individuals and corporations. Thus, these donors can participate in political speech anonymously. The 501(c)(4) groups, such as the NRA Institute for Legislative Action (an organization affiliated with the National Rifle Association), do most of the 501(c) nonprofit electoral spending. Labor unions can organize under section 501(c)(5), and section 501(c)(6) organizations are trade associations or business leagues (e.g., the Chamber of Commerce has a 501(c)(6) group). These 501(c) groups also may contribute unlimited amounts to 527 organizations and to super PACs.

A super PAC is technically an Independent Expenditure Only [Political] Committee (IEOC). The word "only" here means that IEOCs may not make any direct contribution to a candidate or party. Super PACs may only spend independently without any coordination with the candidate they favor or their party. Donors to super PACs are not subject to contribution limits of any kind. All donors (except foreign nationals) are permitted to contribute unlimited amounts to super PACs, including corporations, unions, and 501(c)4 organizations. Super PACs were born out of two 2010 legal decisions: ***Citizens United*** *v. Federal Election Commission* (2010) and ***SpeechNow.org*** *v. Federal Election Commission* (2010).[32] Starting in 2011, groups may now form **hybrid PACs**, which join a super PAC and a traditional PAC in one organization to share overhead expenses while each is subject to different campaign finance rules, and each maintains a separate bank account.

Express advocacy is when a campaign communication, such as a campaign advertisement, expressly advocates for the election or defeat of a candidate for federal office, and such communications must be paid for with **hard money**. If a communication uses certain "magic words" such as vote for, oppose, support, or defeat, it is considered express advocacy.[33] **Issue advocacy** is when a communication features discussion of one or more policy issues but does not expressly advocate for the election or defeat of a candidate for federal office. Because issue advocacy communications are not considered campaign speech or electioneering communications, their sponsors may use **soft money** to pay for them. The line between express and issue advocacy is sometimes difficult to identify.

Advisory Opinions (AOs) are issued by the FEC, the agency respon-

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sible for enforcement and regulation of federal campaign finance law, at the request of an individual or group that wishes to engage in some federal campaign finance activity that is either not mentioned in current law or for which there are unclear guidelines. The individual or organization thus asks if a proposed activity will result in a violation of the law. When a complaint is lodged that a violation of the law has happened, we call this a **Matter Under Review (MUR)**.

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CHAPTER 2

Corruption and Campaign Finance in the U.S.

Because this is a book about campaign finance, you have already been thinking about corruption and are not surprised to see a chapter with this title. Campaign finance involves money, and many think money in the political world is often exchanged under questionable circumstances. As we explained in chapter 1, democracies must hold elections, and someone must pay to inform voters about their choices because communicating with people requires resources. If private individuals (especially wealthy ones) finance the campaigns, we may worry that elected officials can be corrupted by private donors, because lawmakers want to please the donors to continue the funding. Critics presume elected officials vote for or against legislation, write bills, hold specific hearings, and so forth, *because* donors wish them to do so. Hence, some conclude the system is corrupt, but we should examine this assertion a little more closely. In this chapter, we discuss the importance of free and fair elections in a representative democracy and the potential for corruption in such a system. We discuss why people make campaign contributions. We then focus specifically on the approach to corruption in the major 1970s campaign finance laws, federal regulations, and court decisions that are the basis of our current campaign finance system, and we conclude with a discussion of corruption—what it is, if it is systemic, and whether we know it when we see it.

Free and Fair Elections

What does it mean to say, as the United States Agency for International Development (USAID)[1] does, that "a country cannot be truly democratic

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until its citizens have the opportunity to choose their representatives through elections that are free and fair"? (U.S. Agency for International Development 2017). If democracy depends on having free and fair elections, how can we be certain they are both free and fair? In truth, it is impossible to guarantee either notion because we cannot know the full operation of every campaign and election in any society. The "free" part of elections usually means that voters can get to polling places without fear of physical violence, denial of civil rights (by impeding their ability to vote), or intimidation about who to vote for. The "fair" part usually refers to the reality (or perception) of the validity of both the voting process and the counting of the votes. Has everyone who is qualified and wishes to vote been allowed to do so? Have the ballots been free of tampering? Have all the votes cast been properly counted? Is the media independent or controlled by the government, which may favor candidates already in office? If we can say yes to these and other questions about fairness, we label the election "fair."

But if we take a step back from the voting booth, we see that both parts of free and fair elections have broader meanings. Are all qualified citizens free (able) to run for public office? Are the individuals who get elected to office able (or willing) to respond primarily to their constituents' interests? Do narrow special interests have undue influence over officeholders? Do some officeholders abuse the privileges of office for personal gain? If the answer to any of these questions moves away from the ideal of free and fair elections, then we may say the officials or the process, or both, is corrupted. Yet this characterization simplifies matters to say the least. Actual corruption of democracy, such as bribing an elected official to vote a particular way, should be easy to spot. In reality, corruption is hard to identify.

In democracies, governmental officials are supposed to act on behalf of all citizens, not just those who fund their campaigns or those who vote for them. When government officials enrich themselves personally while carrying out their official duties, we believe this to be a corrupt act. For instance, the House Bank scandal of 1992, when over 100 members of the U.S. House of Representatives were found to have "bounced" checks at their congressional credit union without incurring any fees, was an example of widespread abuse of privileges that signified corrupt behavior (for a discussion of the House banking scandal and its electoral impact, see Jacobson and Dimock 1994). However, elected officials bouncing checks to pay their personal bills, while clearly violating ethical norms, did not

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change any legislation relating to public policy. What if someone gives a government official something valuable expecting that the official will alter their policy actions to favor the giver? We do what we can to discourage or prosecute such an act, or both. Clearly, bribery—giving someone money or something of value (sports tickets seem to be popular) in return for a favor—meets the corruption test; it is a quid pro quo (literally meaning "something for something") exchange of something of value for some action by a government official. In fact, most of Washington, D.C.'s political scandals involve some direct transaction. For example, interest groups or big donors giving gifts of cash, trips,[2] or employment for relatives or friends are commonly condemned in this way. But candidates need money to run their campaigns. How is it then that receiving donations to fund one's campaign, in a political system based fundamentally on private resources with nearly no option of public financing, can be corrupting?

Money collected for campaigns is not meant for the personal enrichment of the candidate, at least not since the Ethics Reform Act of 1989 prohibited incumbent members of Congress from keeping excess campaign funds for personal use when they retired from Congress.[3] The money is given to assist candidates in their quest to represent a constituency, usually by purchasing campaign communications. Candidates benefit in the sense that if victorious, they can make decisions on behalf of others, can keep their current elective position if they are an incumbent, and may potentially increase their future earning power because of the influence accumulated by holding high political office. But what about the donors? Are donors making the political system less responsive to the policy preferences of the public at large by giving money to a candidate who is likely to champion the donors' positions on issues? After all, candidates and parties must raise money to run their campaigns if there are no public funds for this purpose. If politicians are motivated to secure the resources that they need to run an effective campaign, why might people donate to these campaigns? Is corruption the only explanation?

Why Do People Give Campaign Contributions?

There are many reasons why an individual might make a campaign contribution. A contribution is defined in the Code of Federal Regulations as "anything of value." Contributions include "a gift, subscription, loan,

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. . . advance or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office . . . [or t]he payment by any person of compensation for the personal services of another person if those services are rendered without charge to a political committee for any purpose."[4] Who gives the money and how much they should be permitted to give has been at the center of various campaign finance reform movements for over a century.

It helps if we discuss the donations from individuals in terms of the contributors' motivations. Note that only a small fraction of Americans actually donates to federal candidates. Less than 2 percent of the U.S. population (4,705,128 individuals) gave more than $200 to federal candidates in 2019–20 (OpenSecrets, Donor Demographics n.d.), though 8.5 percent of the U.S. adult population made a political contribution of any amount to a federal candidate (Bouton et al. 2022, 10–11). We talk more about individual donors' characteristics in chapter 5. Peter Francia et al. (2003) conducted a comprehensive survey of congressional campaign donors asking them to explain why they make contributions. They grouped campaign donors into three categories of motivations: *investors*, *ideologues*, and *intimates*. Journalists and political commentators often assume all donors are *investors*, people with material concerns before government (such as taxing or regulating their industry) who donate to campaigns in hopes of achieving meaningful access to lawmakers that can result in policies favorable to them. Specifically, the money is an investment in a politician who will pursue policies that help the investor prosper. We also refer to this as an "access" strategy because the donors expect some attention from a candidate in return for their contribution (Berry and Wilcox 2009; Brunell 2005). Hence, investors are more likely to focus on incumbent lawmakers running for reelection, as they almost always get reelected. This transactional view lies at the heart of most assumptions about people's motivations for making campaign donations and fuels much of the concern that campaign contributions can lead to corruption, a quid pro quo exchange of a contribution for a policy favor.

The second type of donors, *ideologues*, care deeply about a particular issue or cause and will donate to candidates whose records or stated campaign positions reflect their beliefs. They also are strategic, donating more in close races (not necessarily to the incumbent) where their favored candidate could *make a difference* in their preferred policy outcomes (Francia et al. 2003, 51). Donors motivated by ideology are not expecting to change

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the behavior of politicians. They are helping candidates attain or retain office who already pursue shared policy goals. Donors whose motivations are issue positions (e.g., curbing climate change) or descriptive representation (e.g., championing a female candidate to advocate for women's issues or an African American candidate to advocate for civil rights issues) are likely to tap into a network of like-minded individuals for information on which candidates to support. But these donors do not expect a quid pro quo exchange. Bertram Johnson finds that ideological donors tend to give small amounts, and this small investment makes their contribution essentially devoid of material concerns (B. Johnson 2013). That is, most people who donate $25 do not expect direct, personal engagement from a candidate. Yet, the more ideologically extreme a candidate is, the more successful they are at attracting small donations (B. Johnson 2013, 103; La Raja and Schaffner 2015). Indeed, Alex Keena and Misty Knight-Finley (2019, 132) found that "a senator's receipts from small donors in previous elections have no effect on their future behavior . . . causality appears to flow from the politicians to the donors. Senators' voting behavior leading up to reelection has a significant effect on the money raised from small donors."

The final type of contributor, the *intimate*, donates for social or personal reasons, to be part of a *cause*, to be a part of their employer's fundraiser, to attend fancy campaign events, or just because they enjoy the political scene (Francia et al. 2003). Those who see donations as a means to a policy end are puzzled that some donors have no issue motivations. Intimates tend to donate every election cycle (i.e., they are habitual donors) because being in the know or mingling with important people is of value to them, which may include having a framed photo of themselves with a prominent politician in their home or office, visible to members of their community. While intimates are interested in their access to lawmakers, they are not thinking of it in the same way that policy-motivated donors do. Some scholars have found strong geographic dimensions to campaign giving so we know that residency (and affluence) creates local ties around political contributions (Cho and Gimpel 2007; Cho and Gimpel 2010; Gimpel, Lee, and Kaminski 2006). For some people, everyone they know gives money to political candidates and causes. The impression given by the transaction, which may be fully disclosed and available on many websites, can be the strongest incentive for some donors to continue giving.[5]

David Magleby, Jay Goodliffe, and Joseph Olsen researched donors to presidential campaigns and found that the motivations discussed above

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are important for presidential donors as well. However, they show that in presidential campaigns, "candidate appeal" is an additional consideration for donors (Magleby, Goodliffe, and Olsen 2018, 93). Donors think about whether a candidate represents their personal issue positions, if the candidate has integrity and is suited for public office, and whether they have a strong negative reaction to the opponent. These considerations are more important to presidential donors than the instrumental motives already described, especially because presidential campaigns need so many contributions that the importance of a single contribution to the candidate is unlikely to be pivotal to their campaign.

Donor motives vary. Donor activity also varies. That is, some donors are happy to make small contributions while others want to contribute as much as they can. If a donor is wealthy enough and interested enough in a candidate, they can find creative ways to give resources to a campaign or to other organizations that pledge to help that campaign. This alone does not make a donor an "investor," but we are certainly more inclined to assume that they are. How can some donors have an outsized role in campaign finance?

How Individuals Contribute to and Spend in Campaigns Raises Corruption Concerns

All campaign money originates from individuals. Citizens can channel their contributions in three ways: on their own behalf (i.e., by giving money directly to a candidate), through a political party organization or an interest group, or spending independently of a candidate to help the candidate win. That is, an individual can choose to make campaign contributions

- directly to a candidate
- to hire an "agent" (a party or interest group) to campaign for them
- or they can purchase political communications themselves.

Contributions: Individual Citizens Giving Directly to Candidates

The most straightforward, and to some the most concerning, method of donation is for an individual to give directly to a candidate's campaign.[6]

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Figure 2.1 shows how individuals (and their agents) participate in the campaign finance system. The individual uses cash, a check, or a credit card to give money to the candidate's campaign committee. Individuals can also give *in-kind* contributions of goods or services, such as sponsoring a fundraising event or paying for printing services. Individuals must assign a monetary value to an in-kind contribution (i.e., a nonmonetary contribution such as some good or service) based on the fair market value of the good or service for reporting purposes (that is, what a candidate would have paid for the printing of campaign materials, an airplane ride, the use of space in an office for a fundraiser, and so forth if the in-kind contribution had been purchased). A cash or in-kind contribution given directly to a candidate raises corruption concerns because the giver (contributor) and the receiver (candidate) have a direct connection. Thus, a relationship is established between an individual who may want something from government and a candidate who may, in the future, deliver what the contributor wants. What is difficult to ascertain, as we discussed above, is whether the government official takes the action the contributor desires *because of* their contribution, or if the official would have taken that action *whether or not* the contributor donated to them. Put plainly, does an elected official act because of a contribution *or* do people give contributions to elected officials who have a record of taking the actions they desire?

Contributions: Individuals Acting through Political Party Organizations and Interest Groups

Contributing to a party or a group is at the heart of *principal-agent theory*, where a "principal" (an individual with self-interest) asks someone with more information or expertise than they have, the "agent," to act on their behalf (Pratt and Zeckhauser 1985). The key is that the principal must trust that the agent understands their interest and will do what the principal desires. Agents have specialized expertise that the principal does not, and the principal must believe that the agent will make a good faith effort to serve the principal's needs. Everyday examples of this principal-agent relationship include when people use mechanics to repair their cars, hire attorneys to take care of legal issues, and engage physicians to improve their health. We assume each of these agents is telling us what services we need, not telling us that we need more services simply to make money. The alternative for the principal would be to train as an auto mechanic, attend

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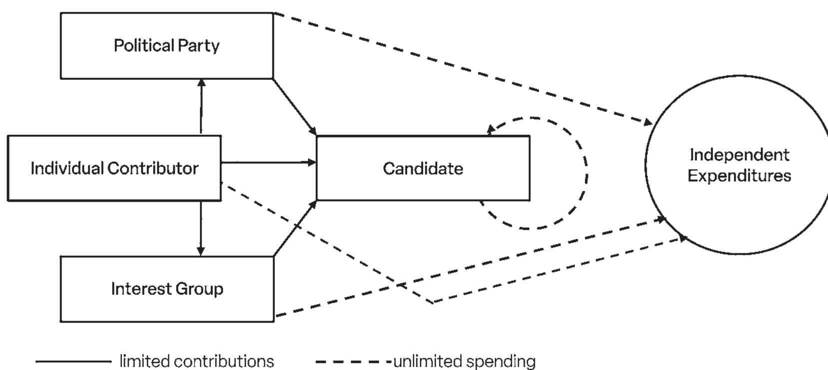

Fig. 2.1. Major Contributors and Spenders in Federal Elections
Source: Created by authors.

law school, or attend medical school. These are not practical options. Similarly, some individuals decide that a political party or interest group will have the expertise and political sense to give money to candidates (or spend money to influence an election) that will best improve the principal's situation. In this scenario, an individual believes that the agent (such as a political party) is in the best position to assess both the loyalty and viability of a candidacy (Pratt and Zeckhauser 1985, 1–35; Jacobson 1989). Figure 2.1 illustrates this option.

Many democratic theorists consider political parties essential to sustaining a healthy democracy, because parties link citizens' preferences to their government (Dalton, Farrell, and McAllister 2011). Parties have a strong position in American politics because they organize the ballot in nearly every constituency (federal, state, and local) under their name. Moreover, many voters use party as their main cue in making voting decisions, so party labels have a great deal of importance (Page and Shapiro 1992; Popkin 1994; Zaller 1992). Political parties are composed of various groups of people, or interests, in civil society that join together to try to take control of the government through elections. In turn, elected officials agree both to implement the policies championed by the party that nominates them and to vacate their office if they lose an election. In many democracies, campaign funds are channeled through the political parties (from private or public sources of money) so that the link via parties between citizens, policies, and elected officials remains clear. In the U.S., most candidates receive a political party nomination (i.e., permission to run under the par-

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ty's label) through primary elections where voters, not party leaders, determine the nominee.[7] Thus, American party leaders have less to offer their candidates than in systems where nominations are closed to the public and nominees are selected by the party, such as in most European countries. Yet parties in the U.S. are attached to a candidate in nearly every general election running under their party label.

Some individual donors may select the political party to which they feel closest to achieve something beyond getting one favored candidate elected: helping their party take control of one or both chambers of Congress, the presidency, and state or local offices. In this scenario, political party leaders would figure out which of the many candidates running under the party's label have the best chance of winning and direct resources to those races with the goal of maintaining or gaining as many seats as they can to achieve majority control of some part of government. If party leaders follow such a strategy, an individual donor could give money to the party in pursuit of their shared goal of majority control.

The other major option for donors to "hire" an agent is with interest groups. The ability to form associations based on common interests is a fundamental feature of every democracy. Americans have been lauded for the vibrancy of their associations. Alexis de Tocqueville (2002, 549) noted in his 1835 *Democracy in America* that "Americans of all ages, all conditions, all minds constantly unite" in associations. It follows that some of these associations would want to see lawmakers in office who agreed with their group's goals. Therefore, interest groups engage with governments. One way is by participating in elections.

Interest groups have policy interests, and a donation from a group to a candidate communicates very clearly why the donation was made. For example, the Human Rights Campaign (HRC) is a lesbian, gay, bisexual, transgender, and queer civil rights organization that supports candidates who have either demonstrated or professed to support public policies that ensure equal rights for the LGBTQ community. For individuals who feel this issue is of considerable importance, giving money to the HRC is a way to communicate this because the group would only choose to support candidates who would further those policy goals. Likewise, someone in a particular profession may choose to donate to a trade association or membership organization (such as the National Association of Realtors, the American Veterinary Medical Association, or the American Beverage Association) to protect their professional livelihoods by sup-

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porting candidates who have already advocated their preferred policies or say they will do so. An interest group can be an effective means for an individual who wants to elect officials who share their policy goals to magnify their impact by combining their contribution with many other individual donors who support the same policy goals. In later chapters, we explain how the opportunities for groups to participate in campaigns have increased since the 1970s.

Independent Spending by Individuals

Individuals also can spend *unlimited* amounts (as opposed to contributions that are limited to guard against corruption) to express their political preferences to the public at large so long as they do not coordinate with a candidate or the candidate's political party. This ban on coordination is the essence of an *independent expenditure*—the expenditure is independent because the spender does not consult with the candidate or their party before making the expenditure (see the dashed lines on figure 2.1—note that parties and interest groups may also make independent expenditures). An independent expenditure is typically an advertisement or other communication that either promotes a particular candidate or urges voters to defeat their opponent. The Supreme Court has ruled that independent expenditures do not raise the same corruption concerns as direct contributions to candidates, because the spender does not directly communicate or coordinate with the candidate or party and thus cannot arrange for a quid pro quo exchange (see our discussion of the Supreme Court's 1976 *Buckley v. Valeo* decision below). While individuals have been permitted to make independent expenditures since 1976, they rarely do it. The Federal Election Commission (FEC), the agency that administers and enforces campaign finance law, requires any individual making an independent expenditure valued at more than $250 to report the activity to the agency (Federal Election Commission 2013). We found only a handful of filings by individuals who made independent expenditures in the 2020 election cycle (out of over 80,000 filings), and, thus, we presume that individuals interested in spending this way would choose to spend through a party or other organization. Political parties and interest groups make most of the independent expenditures.

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A Special Kind of Individual: The "Self-Financed" Candidate

Most candidates fundraise to win office. Sometimes, very wealthy candidates decide to make a run for office without fundraising by paying all or most campaign expenses themselves. When this happens, we refer to it as *self-financing*. One might think that self-financed candidates will have a huge advantage over candidates who are not independently wealthy and who therefore need to invest time in fundraising, because procuring funds takes away precious time from campaigning. Yet, in her extensive study of self-financed candidates, Jennifer Steen finds that self-funded candidates do not win very often; in fact, they tend to do quite poorly with voters (Steen 2006). Adam Brown underscores the central problem with candidates as donors in his study of self-financed gubernatorial candidates: "'investors' and 'ideologues' are carefully strategic when deciding which candidates to fund. But there is one type of donor that doesn't ever seriously ask herself which candidate to give her money to: the self-financed donor" (2012, 27).

One reason that self-financed candidates often lose their elections is that fundraising is a form of campaigning, especially with community opinion leaders, and interaction with donors helps a candidate win votes (Steen 2006). Steen finds that if a self-financed candidate is successful, they never self-finance a second time, having learned important lessons about what fundraising can do. President Donald Trump gave his 2016 presidential campaign $66.1 million, almost 20 percent of all the money he raised for his campaign, but he gave $8,021 (0.00103 percent) to his 2020 reelection bid (OpenSecrets 2017b, 2021d). Steen did find, however, that the presence or rumor of a self-financed congressional candidate in a race does discourage other candidates from running, thereby potentially reducing the level of competitiveness in these contests (Steen 2006). The effect of self-financed candidates is real, but perhaps not in the way we expect.

Individuals Prohibited from Making Contributions or Independent Expenditures

Two types of individuals may not participate in any of the contribution and expenditure strategies discussed above: those who have work-related contracts with the federal government (federal contractors) and foreign

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nationals (Federal Election Commission, Eligible Contributors n.d.). The prohibition against federal contractors donating to federal candidates, party committees, or other political committees is part of a group of laws found at the local, state, and national levels known as "pay-to-play" laws. These laws aim to sever the potential relationship between a contributor (the "pay") and the award of a government contract (the "play") (Norton et al. 2019). The concern is that businesses seeking to be paid by governments to provide goods or services would contribute to incumbent officeholders in the hopes that this would help them secure (or continue) a government contract for those goods or services after an election. Because this is very close to the concerns of quid pro quo corruption, the courts have upheld this ban on contractor contributions. It is important to note that this is a ban for *the contractor*. So, if the contractor is an individual or sole proprietor (they alone own and operate the business), then the ban applies both to them individually and to their firm. But if the contractor is a corporation of some sort, the corporation is banned from participation. Yet individuals who work for the corporation or who may own stock in it have the same rights to contribute or spend as any other individual (Whitaker 2018, 21).

Foreign nationals, citizens of countries other than the United States, are prohibited from participating in the financing of American campaigns at the federal, state, and local levels. They may not make any donations to any candidate, party, or group political committees and may not spend independently for any political cause (Garrett 2019b). However, individuals with permanent resident status (green card holders) are not considered foreign nationals. Therefore, they may make contributions or expenditures in the same way as any U.S. citizen, even though they may not vote in federal elections (Federal Election Commission 2017b). Events during the 2016 election demonstrated how difficult this prohibition is to enforce, as foreign money and Russian Internet Research Agency pro-Trump posts flowed freely to U.S. social media sites such as Facebook and Twitter (Mueller 2019, 14–28).

With this basic understanding of how contributors participate in elections, we now turn to the various laws, regulations, and judicial rulings of the 1970s that fundamentally altered the practice of campaign finance in the United States.

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A Burst of Campaign Finance Reform in the 1970s

From the 1925 Federal Corrupt Practices Act to the 1960s, there was little sustained attention given to campaign finance regulation. Every so often, a scandal would develop that made headlines, but Congress made few meaningful changes to the laws, or, worse, just ignored existing rules that were not being effectively enforced. In the 1950s and 1960s, there were congressional investigations into campaign finance activities, and President John Kennedy established a Commission on Campaign Costs, but these initiatives did not lead to reform. Then, in 1968, Richard Nixon's presidential campaign and over 100 congressional candidates did not disclose their campaign finance activities, and the investigations showed that "big money" was pouring into federal campaigns (Mutch 2014, 130). Reform-minded policy entrepreneurs had long been developing proposals and were waiting for a campaign finance "policy window of opportunity" to open (Kingdon 2003). This window began to open after the 1968 election.

Are Scandals a Catalyst for Reform?

Over the course of American history, political corruption scandals have drawn the attention of citizens, the media, and lawmakers and, in some instances, appear to have pushed politicians to enact major campaign finance reforms, presumably changes they would not have voluntarily made if they did not feel pressured by their constituents to do so (Corrado 1997a, 27–36; Mutch 1988). This idea that scandals are a catalyst for reform is what Raymond La Raja calls the "public interest theory" of reform, that "the status quo should be changed for the benefit of the public" (2008, 24). Yet La Raja does not view scandal as a prerequisite for reform. He argues that the public interest theory does not explain why elected officials enact campaign finance reforms because scandal does not always precede major reforms, big scandals do not always produce reforms, and the public is not greatly concerned about corruption that results from campaign finance activities and thus does not drive lawmakers to enact reforms (85–86). Instead, La Raja argues, reform efforts are best explained by the "partisan theory," that is, by the competitive

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dynamics of the time: "The probability of reform increases . . . when electoral uncertainty increases for one party or subset within a party" (87). We suspect the reasons reforms emerge are more nuanced and recognize that scandals may help create a ripe environment for policy change, whether those changes serve the public interest or the interests of politicians and their parties or both.

Policy ideas for reform are floating around for some time with inadequate support or momentum to get those ideas on the policy agenda *until* something like a scandal opens a "policy window" of opportunity *and* the partisan context allows for passage. John Kingdon explains that "policy entrepreneurs"—advocates for changes in the law or regulations—keep reform options alive and ready for a policy window of opportunity (Kingdon 2003). These policy entrepreneurs are elected lawmakers, leaders of interest groups, and others interested in a particular policy topic who, according to Kingdon (2003, 165), "lie in wait in and around government with their solutions at hand, waiting for problems to float by to which they can attach their solutions."

While the timing of scandals sometimes drives campaign finance policymaking, if reform ideas are not already developed and available, reformers might miss the window of opportunity to act. Indeed, most of the provisions of the 1907 Tillman Act (which banned corporate contributions), the 1910 Federal Corrupt Practices Act and its 1911 Amendments (which required parties to disclose contributions and expenditures, and imposed spending limits), the 1925 Federal Corrupt Practices Act (which strengthened disclosure rules), the 1971 Federal Elections Campaign Act (FECA)[8] and 1971 Revenue Act[9] (which included more disclosure, regulations for primaries, creation of PACs, media spending limits, presidential public funding), the 1974 FECA Amendments[10] (which included contribution and spending limits, presidential primary and convention public funding, the creation of the Federal Election Commission), and the 2002 Bipartisan Campaign Reform Act (BCRA) (which banned unlimited contributions to political parties and regulated advertisements paid for with unregulated money) had been proposed for years but gained little traction until events galvanized support to do something *and* the political environment offered an opportunity to move on those proposals. If no coalition of lawmakers is willing to support the reforms, then reform proposals go down to defeat. Julian Zelizer provides a good account of the reform coalition and the mix of partisanship and scandal that drove the 1971 FECA and its

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1974 Amendments, and Diana Dwyre and Victoria Farrar-Myers detail the coalition that developed to pass the 2002 BCRA (Zelizer 2006, chap. 7; Dwyre and Farrar-Myers 2000; Farrar-Myers and Dwyre 2008). Moreover, while the winning coalition might be partisan, some major reforms, such as the 1947 Taft-Hartley Act and the 2002 BCRA, were enacted by bipartisan coalitions in Congress (La Raja 2008, 89–95).

Watergate is a good example of a scandal that helped open a policy window of opportunity for major campaign finance reform but was not the only cause of it. In the 1968 presidential election, both Republican presidential nominee Richard Nixon and Democratic nominee Hubert Humphrey received large contributions that prompted significant eyebrow-raising, but reform did not immediately follow (Franklin 1972; Martin 2002). The most significant reform of the U.S. campaign finance system since the 1925 Federal Corrupt Practices Act came *before* the Watergate scandal even happened. The Federal Election Campaign Act was a collection of policy ideas that had long been proposed and gained enough support in Congress to pass in 1971 (see table 2.1 below) (H. Alexander 1976, 39–76; see also Corrado 2005a, 20; Mutch 2014, 131–38).

Then, in June 1972, associates of President Richard Nixon (the so-called plumbers) were arrested after they burglarized the Democratic National Committee headquarters located in the Watergate building complex in Washington, D.C. President Nixon and his advisors worked to cover up the break-in, and the burglars were indicted by a federal grand jury, but Nixon still won reelection in a landslide in November 1972. Just days after Nixon was sworn in for a second term in January 1973, the burglars were convicted. Later that year, the 1971 FECA-enhanced disclosure requirements and a good deal of investigating by Common Cause (a pro-reform citizen group) showed the public and the media that large amounts of corporate money, as well as money from wealthy families, continued to flow into federal campaigns, especially to incumbent President Richard Nixon's 1972 reelection campaign (Mutch 2016, 13–14). Nixon's Committee to Reelect the President at first refused to disclose some of its contributions, claiming that such disclosure would be a violation of donors' rights to privacy and would chill political speech (i.e., that public disclosure would discourage contributors from giving), but much of this campaign finance activity eventually came to light (Mutch 2014, 132–34). In February 1973, the Senate established the Select Committee on Presidential Campaign Activities (aka the Watergate Committee) to inves-

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tigate the break-in and the cover-up, as well as 1972 presidential campaign finance activities. The House Judiciary Committee passed three articles of impeachment against Nixon in July 1974, and President Nixon resigned on August 8, 1974 (before the Senate could vote on conviction) (Mutch 2016, 12–13).

The break-in, cover-up, ensuing scandal, and Nixon's resignation, *as well as* the campaign finance revelations, were all catalysts in 1974 that led lawmakers to enact amendments to the 1971 FECA imposing stringent requirements on the conduct of all future election campaigns, but especially for presidential election campaigns. As Zelizer (2006, 118) notes, "The [Watergate] scandal was frequently presented in conjunction with discussions about the campaign finance system." Frank Sorauf (1988, 36) points out "the money that paid the burglars to break into the Democratic headquarters in the Watergate complex turned out to be misused campaign funds . . . [and] . . . stories surfaced of attaché cases stuffed with thousands of dollars, of illegal corporate contributions, and of elaborate 'laundering' processes to hide the origins of substantial contributions." Although Watergate was not primarily a campaign finance scandal (the articles of impeachment against President Nixon addressed the break-in and cover-up), the possibility that the president of the United States may have been involved in such criminal activity, combined with the negative attention already focused on Nixon's campaign finance practices, provided the momentum Congress needed to act. After Watergate, public trust in government reached new lows (P. Bell 2022).

Reform Legislation in the 1970s

During this period (the late 1960s and into the 1970s) many other laws aimed at improving government accountability were enacted. Paul Pierson (2007, 24–28) explains that this era marks the beginning of the "activist state," when the federal government expanded the scope of its regulatory responsibilities in public policy. The enthusiasm for both transparency in government and containing business influence on public policy was not reserved *just* for campaign finance reform. Rather, legislators moved proposals from the idea stage to the enactment stage in several policy realms. These reforms included the Freedom of Information Act (FOIA)[11] of 1967, the Consumer Product Safety Act of 1972,[12] the Budget and Accounting

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Act of 1974,[13] and the Government in the Sunshine Act in 1976.[14] In each instance, organizations founded in the "public interest" wrote parts of and lobbied for these laws. Sidney Milkis (1998, 60) explains the common impetus for these laws:

> Reformers during the late 1960s and 1970s believed that the procedures by which decisions were made in the administrative state were controlled by large business interests that were inattentive to public values—the prominent social problems that dominated the political agenda of the 1970s, such as the despoliation of the environment and the manipulation of consumers, were depicted by reformers as a by-product of the capture of the public sector by corporate interests.

For major campaign finance reform, the window of opportunity opened in 1971, when the FECA and the 1971 Revenue Act both became law. The FECA included a collection of policy proposals that had been discussed for many years including full disclosure of campaign contributions and expenditures, limits on spending for media advertising, and limits on what a candidate or candidate's family could contribute to their campaign.[15]

The political context was ripe for legislative action in 1971, with public attention on large contributions raised by both major party presidential candidates in 1968 and Democratic majorities in both chambers of Congress ready to change campaign finance rules in ways that might help them reduce the fundraising gap they had long endured against the Republicans (La Raja 2008, 96–98). Indeed, Democrats expected the provisions in the 1971 FECA that limited spending and a candidates' use of their own resources would go a long way toward reducing this fundraising gap by leveling the playing field between candidates (Corrado 1997a, 32; Sorauf 1988, 35). The new law also retained the ban on corporate and union direct contributions to candidates and parties, but it did allow corporations and unions to raise voluntary donations from their members or employees. They had to hold those donations in a *separate segregated fund* (SSF) because they could not use their profits or union dues accounts for campaigning. The organizations they established with these donations are called *political action committees* (PACs),[16] which could contribute limited amounts to candidates and parties.[17] Corporations and unions could use their treasury funds (profits and union dues) to establish, operate, and raise those voluntary donations, but not for contributions to candidates or par-

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ties. The new FECA rules also covered primary elections, which had never been regulated by federal law.

The 1971 Revenue Act established a voluntary public funding system for presidential general election candidates who agreed to limit their spending.[18] Citizens could check a box on their tax form indicating that one dollar of their taxes should be used for this purpose (not that their taxes would increase by one dollar). Public funding of campaigns was an effort to level the playing field among candidates. President Nixon threatened to veto the Revenue Act. So, Congress agreed that the presidential public funding program would take effect in 1973, after Nixon's reelection campaign. It was first used in 1976, after the anticipated end of Nixon's second term. Public funding for federal elections had been proposed since the early 1900s, yet this is the first time it was enacted, but only for presidential general elections and the major parties' nominating conventions and for some minor parties retrospectively. Note that members of Congress opposed replacing the system that governed their *own* campaign finance activities with an unpredictable public funding scheme that might impact their reelections. Major party presidential candidates who participated in the voluntary system of public funding would receive a flat grant of public funds in equal amounts in the general election. They also would be limited to the same amount of spending. In chapter 6 we detail how the public funding system worked for a while, and why major party presidential candidates abandoned it entirely by 2012. The Revenue Act, which provided for the general election public funding, also included tax incentives to encourage citizens to make small contributions to candidates, party committees, and some PACs (both were later repealed)[19] (Corrado 1997a, 25–26).

Table 2.1 outlines the main provisions of the 1971 FECA, the 1971 Revenue Act, and the 1974 FECA Amendments, which we discuss next (see also the appendix, which contains a comprehensive list of all the campaign finance laws, regulations, and court decisions referenced in this book).

After Watergate, congressional Democrats were again ready to take advantage of a policy window of opportunity created by the break-in, its cover-up, and the fall of the Republican president. The 1974 FECA Amendments remain the most significant campaign finance legislation ever passed by Congress (see table 2.1). These amendments included limits on contributions and expenditures, an overall contribution cap for individual donors in a two-year cycle, candidate spending limits[20] (which replaced the 1971 FECA candidate media spending caps), political party expen-

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TABLE 2.1. Federal Campaign Finance Laws Enacted in the 1970s

FECA 1971	• Strengthened disclosure • Required presidential candidate disclosure reports go to GAO • Required House and Senate candidates to disclose to their chamber clerks • Required corporations and unions to create "separate segregated funds" (PACs) for campaign finance activities • Prohibited the use of treasury funds (corporate profits or union membership dues) for contributions or spending; allowed treasury funds to establish and operate a separate segregated fund (above) and to fundraise • Limited candidate and candidate's family contributions to a candidate's own campaign • Contribution and expenditure limits were replaced with new limits on candidate media communications spending (later replaced in the 1974 FECA Amendments) • Now covered primary elections
REVENUE ACT OF 1971	• Established voluntary public funding for presidential candidates with required spending limits • Established check-off box on tax forms to direct $1 of taxes to presidential public fund • Implemented public funding for 1976 presidential election • Created a tax credit of up to $12.50 ($25 on a joint return) on half the value of annual political contributions and a tax deduction of up to $50 ($100 on a joint return) on the full value of annual political contributions
FECA 1974 AMENDMENTS	• Limited individual contributions: ▪ $1,000 per candidate per election ▪ $20,000 to a national party committee ▪ $5,000 to other political committees (e.g., PACs) ▪ overall cap of $25,000 annually ▪ prohibited cash donations over $100 • Limited party contributions to $5,000 per House candidate per election, and $17,500 per election to Senate candidates • Limited PAC contributions: $5,000 per election to candidates and to other political committees • Limited independent expenditures by individuals and groups (spending not coordinated with candidates or their parties) to $1,000 per candidate per election • Replaced candidate media spending caps with aggregate candidate spending limits for federal campaigns • Allowed limited general election party coordinated expenditures on behalf of candidates • Expanded public funding to presidential primary elections and parties' national nominating conventions • Strengthened disclosure requirements • Established the Federal Election Commission (FEC) to implement and enforce the law • Increased tax credits and deductions for political contributions

Source: Compiled by authors from various sources.

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diture limits, a new type of party spending—coordinated expenditures,[21] expansion of the presidential public funding system to primary elections and national party conventions,[22] enhanced disclosure requirements, and, notably, establishment of the Federal Election Commission to administer and enforce the law. La Raja notes that although the 1974 FECA Amendments were designed to benefit Democrats and "the reforms were hardly bipartisan," the bill gained bipartisan support—75 percent of Republicans in the House and 41 percent in the Senate voted for it; in the wake of the Watergate scandal, "few Republicans felt they could vote against the bill, even though they believed it was entirely against the interests of the party" (2008, 104–5).

Creation of the FEC put the implementation and enforcement of federal campaign finance laws into the hands of an independent body for the first time. This was a significant step forward, a change proposed since at least the 1950s. Today, the FEC provides electronic access to publicly disclosed campaign finance data (at www.fec.gov), issues regulations, and determines when the law has been violated. However, the structure of the FEC, with three Republican and three Democratic commissioners, has proven to be a recipe for gridlock that stifles its ability to implement and enforce campaign finance law. We explore the role of the FEC further in chapter 7.

Of course, not everyone was happy with these sweeping policy changes to campaign finance law. Those opposed to limits on contributions and expenditures set the stage for an extraordinary battle over which value, equality or liberty, would define the financing of elections in the U.S. for decades to come. The first skirmish happened in the courtroom and resulted in the landmark 1976 Supreme Court decision *Buckley v. Valeo*.[23] This decision transformed much of the law enacted in 1971 and 1974 and fundamentally shapes the campaign finance system we have today.

Buckley v. Valeo: Money and Speech and Corruption

The FECA's spending caps, presidential election public funding, and contribution limits were Congress's attempt to prevent corruption by making the system fairer. The 1976 decision in *Buckley v. Valeo* was the Supreme Court's response that it is more important to protect liberty, namely First Amendment free speech rights, than to assure each citizen can participate

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equitably in the electoral process. The Court asserted the only time speech rights can be limited is when they present a clear, and narrowly defined, potential for corruption. Let us explain.

As soon as President Gerald Ford signed the 1974 FECA Amendments, Conservative Party senator James Buckley of New York,[24] former Democratic senator Eugene McCarthy of Minnesota, the American Civil Liberties Union (ACLU), and others challenged its constitutionality.[25] Their primary argument was that 1974 FECA's limits on contributions and expenditures violated First Amendment free speech and association rights. The plaintiffs asserted: "Since virtually every political communication involves the expenditure of money, expenditures for political purposes are protected by the First Amendment. . . . Limiting the use of money for political purposes amounts to restricting communication itself."[26]

The Supreme Court agreed with some of the arguments made by Senator Buckley and his colleagues but disagreed with others. The justices agreed that "discussion of political issues and debate on the qualifications of candidates" is political speech protected by the First Amendment, and that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[27] During oral arguments, Justice Potter Stewart memorably declared, "We are talking about speech, money is speech and speech is money."[28] However, the justices ruled that the restrictions on direct *contributions* to candidates and parties, the overall $25,000 limit on total contributions by individuals in a two-year election cycle, and public disclosure of these contributions to the FEC were in fact *justified* limitations on free speech rights as "weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions."[29] The justices asserted that the need to prevent corruption, or even the "appearance" of corruption, is a legitimate justification, indeed the *only* justification for government restriction of protected political speech.

Although the justices argued that both the "contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities," they did not apply the same standard of First Amendment protection to both.[30] The justices saw a contribution given directly to a candidate as a potential avenue for bribery and limiting direct contributions to candidates would thus reduce a donor's ability to influence (i.e., bribe) a lawmaker with a large donation. The Court viewed contributions as general expressions of support and that even limited donations still allow

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expressions of support for a candidate: "For constitutional purposes, it was the act of contributing, not the amount of the contribution, that mattered" (Hasen 2016, 23). Contributions are not "direct" speech (i.e., the contributor would not use the funds to communicate with voters, but the candidate would). Therefore, the justices reasoned, contributions did not require the same level of constitutional protection as independent expenditures, which are directly expressive speech from an individual:

> A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his [*sic*] political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.[31]

The Court did not extend their concern about corruption to independent campaign *expenditures*. They agreed with Senator Buckley et al. that money spent *independently* (not in coordination with a candidate or party) by individuals and groups to communicate with voters to influence the outcome of an election is core political speech that should receive greater First Amendment protection than direct contributions given to candidates because the candidate never has any control over the money spent independently of them. The justices argued that *independent expenditures* do not raise the same potential for corruption as do contributions given directly to candidates and parties, because, they reasoned, independent expenditures would not be as valuable to a candidate as a direct contribution. They also noted the importance of encouraging a robust speech environment in elections and argued that FECA's "expenditure limits . . . represent substantial, rather than merely theoretical, restraints on the quantity and diversity of political speech."[32]

This legal reasoning, whereby the Supreme Court distinguished between contributions given directly to candidates and parties and expenditures spent independently of candidates and parties, remains a touchstone of campaign finance regulation almost 50 years later. Campaign money comes from donors (be they individuals, political parties, or interest groups), and the Court saw control over spending decisions as the critical factor. If any single donor gives too much directly to a candidate, the Court's reasoning goes, then there is a potential for the candidate to feel beholden to

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the donor and therefore to be corrupted by the donor's wishes. But if a donor spends money on campaign speech independently of a candidate, the Court did not see the potential for a corrupt relationship between the candidate and the individual or group making the expenditure, as the candidate cannot feel a debt over something they cannot in any way control. Indeed, because there is no coordination with the candidate, some independent expenditure ads have hurt the candidates they were meant to help. For instance, voters sometimes blame candidates for negative campaign ads run by some group or even by their own party that the candidate could not control (Montgomery 2014).

While this distinction between contributions and expenditures may sound clear, the justices took great pains to justify their reasoning. This distinction remains a hotly contested issue today, particularly because independent expenditures are much more common now than they were when the Court considered the *Buckley* case in 1976. Some argue that independent expenditures, especially large expenditures made by corporations, actually *could* make a candidate feel beholden to the spender and thus create the potential for corruption (see, for example, Briffault 2010; Hasen 2016, 26). Soon after *Buckley*, the Supreme Court itself suggested that corporate independent spending on behalf of candidates potentially causes quid pro quo corruption in its 1978 *First National Bank of Boston v. Bellotti* decision.[33]

The Court's logic, that large amounts of money spent independently of a candidate or party cannot corrupt that candidate or party, puzzles some observers who believe that all that money undoubtedly influences the outcome of elections. The potential for the big spenders to influence the lawmakers they help elect seems possible, if not likely, whether those big spenders gave money directly to a candidate or spent it independently to help get that candidate elected. Figure 2.2 illustrates this puzzle—why is one activity, contributing, a possible avenue for corruption while the other, spending, is protected free speech? The groups that petitioned to defend the FECA in court—including Common Cause, the Center for Public Financing of Elections, and the League of Women Voters (Mutch 2014, 140)—made these arguments: "The limit on independent expenditures is necessary to eliminate an obvious means of evading the limit on contributions," and both contribution and expenditure limits were needed to "protect candidates and elected officials against improper influence."[34] Yet the justices rejected these arguments, and the Court has continued to uphold this distinction between lim-

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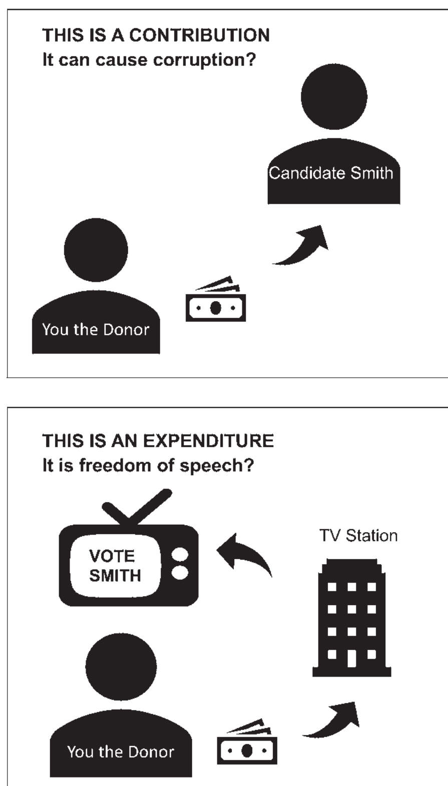

Fig. 2.2. Supreme Court's View of Contributing vs. Spending
Source: Created by authors.

ited contributions and unlimited expenditures. In fact, in 1996, the Court extended the right to make unlimited independent expenditures to political parties[35] and in 2010 to corporations[36] based on the same logic that there is no potential for corruption if the spending is not coordinated with a candidate or party and thus there is no justification for limiting independent speech, regardless of its funding source.

Buckley also struck down FECA's limits on *candidate* spending. First, the Court majority argued, limits on candidate spending were a restriction on free expression and were not needed, because the limits on direct contributions to candidates and mandatory public disclosure of those contributions would combat the potentially corrupting influence of large contributions. Second, the justices agreed with Buckley et al. that FECA stifled competition and protected incumbents: "Victorious challengers must typically spend in excess of the expenditure limits in order to over-

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come the enormous resources available to incumbents as prerequisites of their offices," such as the franking privilege (free mail) and high levels of name recognition.[37] Most justices agreed that attempting to level the playing field among candidates (i.e., to promote equality in the campaign finance system) might be more harmful to less well-known (mostly non-incumbent) candidates. Decades of political science research supports this claim. Challengers do indeed need ample funds to beat incumbents (see, for example, Jacobson and Carson 2020, 67–73).

Consistent with its focus on the First Amendment, the Supreme Court also invalidated the FECA's limit on a candidate's use of their *own* or their family's funds as an undue restriction on a candidate's ability "to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[38] This finding allows candidates to use their personal funds without limit. Later efforts to limit the ability of the wealthiest Americans to spend their own money to support their candidacies for office also failed (see discussion of *Davis v. FEC* 2008 in chapter 4).

Indeed, the Court rejected in unequivocal terms the idea that the government could use campaign finance rules to equalize or level the playing field:

> The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'."[39]

The Court's narrow corruption standard set out in its *Buckley* decision limited which campaign finance activities are subject to any government regulation at all. Table 2.2 illustrates what *Buckley* eliminated and what it left intact in FECA and its amendments.

The Buckley Revolution: The Supreme Court Changes the Subject to Money and Speech

All democracies allow some freedom of expression and criticism of government action, and some have constitutional or statutory guarantees of free

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TABLE 2.2. FECA 1971 and 1974 Provisions after *Buckley v. Valeo*

Buckley v. Valeo (1976)	What's Left of FECA 1971 and 1974
• Struck down limits on independent expenditures • Struck down limits on candidate campaign spending • Upheld contribution limits to candidates, political parties, and interest groups • Upheld aggregate contribution limit • Acknowledged contributions may lead to the appearance of corruption • Directed Congress to change the appointment and confirmation of commissioners on the FEC	**1971 FECA** • Corporations and unions must create "separate segregated funds" (PACs) for campaign finance activities • Prohibits the use of treasury funds for contributions or spending, but allows their use to establish and operate a PAC and to fundraise • Primary elections now covered by FECA • Strengthens disclosure **1974 FECA Amendments** • Individual contributions remain limited, with an overall cap of $25,000 annually • Prohibits cash donations over $100 • Limits party contributions • Limits PAC contributions • Limits general election party coordinated expenditures • Public funding to presidential primaries and national nominating conventions was expanded • Strengthens disclosure • Established the Federal Election Commission

Source: Compiled by authors.

expression. In the U.S., the First Amendment to the Constitution (1791) protects freedom of speech, and the U.S. government limits speech only when there is a compelling state interest, such as when national security is at risk or human life is endangered. The First Amendment argument against limits on political money emerged from conservative legal circles in the early 1970s. Yale Law professor Ralph Winter (1971, 141) asserted that "a limit on what a candidate may spend is a limit on his [*sic*] political speech." In the past, money had been treated as property and campaign finance laws were meant to diminish the impact of unequal wealth (particularly corporate wealth) on electoral politics, but this new argument treated money as speech (not property) that was entitled to constitutional protection (Mutch 2014, 141). Timothy Kuhner (2014, 38) agrees that the *Buckley* Court introduced new thinking about money and speech: "Once

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the Court minimized the differences between money and speech, and consecrated money's enabling effect on speech, limits on money in politics became limits on political expression itself—censorship—and therefore deserving of strict scrutiny." In other words, there must be a compelling government interest to restrict a fundamental constitutional right.

President Nixon's two new appointees to the Supreme Court, Justices William Rehnquist and Lewis Powell (both appointed in 1971), contributed to this shift in the Court's view of First Amendment protection of political spending as speech and helped build majority support for the *Buckley v. Valeo* decision. Rehnquist was a conservative Arizona Republican Party operative who brought his partisan agenda to the Court, and Powell, a wealthy corporate lawyer from Virginia and former president of the American Bar Association, was tapped by Nixon to further promote his "southern strategy" to turn the solid Democratic South Republican (Nichols and McChesney 2013, 69–73). Note, however, most of the liberal justices—William Brennan, Byron White, and Thurgood Marshall—also voted with the 7–1 majority (Justice John Paul Stevens did not participate in the decision), indicating this significant shift in campaign finance jurisprudence was not purely ideological and there was "no simple liberal-versus-conservative split over campaign-finance issues" (Nichols and McChesney 2013, 85).

Indeed, Chief Justice Warren Burger (appointed by Nixon in 1969) dissented from the Court's *Buckley* decision because he thought his colleagues did not go far enough. Burger argued that the First Amendment required there be no limits on contributions, even contributions made directly to candidates, a more extreme view later mainstreamed by future Justices Antonin Scalia, appointed by Ronald Reagan in 1986, and Clarence Thomas,[40] appointed by George H. W. Bush in 1991 (Nichols and McChesney 2013, 70). Likewise, conservative law professor and former FEC commissioner Bradley Smith agrees that the *Buckley* Court was wrong to not grant First Amendment protection to contributions, as the justices had for expenditures (B. Smith 2001). Smith sees little evidence that contributions to candidates may lead to corruption or the appearance of corruption and considers limits on campaign contributions suppression of speech.

The Court majority employed a contorted logic in the *Buckley* decision to achieve the justices' multiple ends, one that coupled the new singular justification for campaign finance regulation—to prevent corruption

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or the appearance of corruption—with a new First Amendment doctrine that applied free speech principles to political money. Yet, to uphold the presidential public funding system Congress created, a voluntary system whereby presidential candidates receive public funds if they agree to limit their spending (clearly designed to level the playing field by promoting equal resources among presidential contenders), the Court characterized public funding as an anticorruption measure "to reduce the deleterious influence of large contributions on our political process," not as an equalizer between candidates.[41]

These differences of opinion about money, speech, and corruption suggest why it is so difficult to find agreement on the rules that govern money in elections. The *Buckley* decision may have made clear that combating quid pro quo corruption is an obvious justification for limits on electoral finance, but what is less clear is how to define and identify corruption.

Can We Pinpoint Corruption?

A key question is whether some people donate to politicians to get them to act in favor of the donor's preferred positions, even if that would be *counter* to the wishes of the voters who elected them. We discussed this earlier from the perspective of donor motivations. If the donor succeeds in changing an officeholder's actions on policy, then we have corruption on our hands, because a donor would be getting in the way of the representative's feedback loop between themselves and their constituents. Yet political scientists have tried in vain for decades to show that campaign contributions "buy" the votes of lawmakers to support legislation *they otherwise would not support* (Baumgartner et al. 2014; Grenzke 1989; J. Wright 1985).

What if a donor gives money to a politician who is already behaving as the donor wishes? The donor is motivated to support elected politicians who already hold issue positions they prefer and have taken action that the donor appreciates and would like that to continue. So, is the contribution corrupting the political process or, instead, reinforcing its existing biases? Showing solidarity with or support for a candidate—through endorsements, campaign activity, or contributions—is not a simple "cause" of a candidate's position taking. The causal arrow may be reversed; that is, a candidate's previous record may convince others who agree with them to

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endorse, donate, or otherwise lend a hand to help the candidate get elected to office.

However, some research has uncovered more nuanced means of influence. For instance, lawmakers may choose to follow the policy preferences of their national donor base, even when those preferences are different from a lawmaker's general and primary election voters (Canes-Wrone and Gibson 2019; Canes-Wrone and Miller 2021). Or contributors may motivate lawmakers to become more involved in the legislative process at the committee level to promote the group's policy preferences (R. Hall and Wayman 1990). We discuss such possibilities in greater detail in chapter 8. For now, take note that contributions and other campaign assistance may work in more subtle ways than outright bribery.

Additionally, the implication always lurks that the more money one raises, the more opportunities there are for corruption. However, Brown (2012, 21) challenges this idea and shows that "the apparent effect of spending on votes is severely inflated by omitted variable bias: the best candidates also happen to be the best fundraisers." Brown finds that campaign donors direct their funds toward the so-called "best" candidates, those who would be likely to win even without beating their opponents in campaign finance receipts because they are well known and well regarded. This suggests that campaigns are about far more than raising money, a theme we will consider again.

Is the System Corrupt?

We return to an idea we discussed in chapter 1, that aspects of the American economic and political systems make it difficult, if not impossible, to level the playing field so that all interested parties may have an equal chance to get their preferred policy outcomes. Because we have a capitalist economic system where private enterprise accounts for almost 86 percent of the employment in the nation, we would expect private producers (firms) to not only want to speak to politicians but also to have the means necessary to make campaign donations (U.S. Bureau of Labor Statistics 2022). Even without campaign donations, we would expect business firms to have access to politicians because of the role they play in local economies, as we discussed with Lindblom's notion of the *market as prison*. In

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Lindblom's analysis, a business owner can threaten to lay people off or worse if an elected official does not support policies favorable to the firm. The lawmaker has no way of knowing for certain if this is an empty threat or a genuine concern, so the process itself is "corrupted" in favor of the firm (Lindblom 1982).

Another way for corruption to occur is through "negative" agenda setting or preventing issues that might pose problems for the interested parties from even getting onto the political agenda at all. Peter Bachrach and Morton Baratz call this the "second face of power." In their classic essay, *Two Faces of Power*, they explain:

> Of course, power is exercised when A participates in the making of decisions that affects B. But power is also exercised when A devotes his energies to creating or reinforcing social and political values and institutional practices that limit the scope of the political process to public consideration of only those issues which are comparatively innocuous to A. To the extent that A succeeds in doing this, B is prevented, for all practical purposes, from bringing to the fore any issues that might in their resolution be seriously detrimental to A's set of preferences. (1962, 948)

To understand how this second face of power might work in the U.S., it helps to consider policies adopted in other democracies that are seldom, if ever, on the policy agenda in the American system. For instance, in some democracies, the government owns a significant national industry (such as an airline, a national bank, a major media outlet, or a manufacturing concern) and uses this state monopoly to regulate a significant sector of the economy. Some democracies have more substantial redistributive policies where the richest in society are taxed more and the poorest receive some of that wealth as a benefit (such as universal healthcare and retirement allowances). Some countries, such as Luxembourg, Belgium, Austria, Germany, and France, give universal child benefits (as a cash grant) to families who have babies to offset the costs of child-rearing and lost parental wages (Matthews 2016). Consider this in contrast to landmark legislation in the U.S. like the Family Medical Leave Act (FMLA)[42] of 1993, which gives Americans the right to take up to 12 weeks of *unpaid* leave to care for a new child or sick family member before losing their job entirely. In the American system, policy proposals such as government grants (*paid*

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leave) for new parents rarely make it onto the policy agenda. A few states have paid family or medical leave plans and federal workers were recently granted paid parental leave in the 2020 National Defense Authorization Act,[43] but there is no nationwide paid family leave benefit for all Americans (National Conference of State Legislatures 2020; I. Smith 2019).

Recall from chapter 1 that Ferguson extends the idea of the second face of power a step further to say that those who "invest" in the political arena (that is, donate significant amounts to candidates and political parties) are buying the second face of power—they want to be sure that certain issues are never seriously discussed but are delighted if other political actors keep busy fighting over issues not related to their interests (Ferguson 1995).

In all the scenarios described above, political and economic systems set the stage for biasing policy outcomes toward those with the money to make economies work and campaigns successful. Some individuals and groups clearly have more resources than others to engage in elections, creating an imbalance in who is most able to change who is in government and to influence those officials. It is easy to see that this is not an effective way to have the voices of poorer citizens heard. However, it is this very right to self-expression, protected by the First Amendment to the U.S. Constitution, which subverts many attempts to equalize political power among citizens.

Detecting Corruption?

Corruption has been difficult to detect except in the most obvious cases. For instance, in 2007, Congressman William Jefferson (D-LA) was sentenced to 13 years in prison for bribery (quid pro quo corruption) after the FBI caught him on tape taking $100,000 from an investor turned informant and found $90,000 in cash in his home freezer. Jefferson said the cash was to bribe Nigerian politicians in exchange for his official efforts to help close a business deal in that country (Bresnahan 2009). This is certainly an example of quid pro quo corruption, but such clear-cut cases are extremely rare (Hasen 2016, 54–55).

Other kinds of corruption involve a more diffuse benefit to the elected official. Dennis Thompson, in *Ethics and Congress*, makes a distinction between institutional corruption and individual corruption (D. Thompson 1995). Individual corruption involves personal gain from political

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acts, such as bribery and extortion as in Congressman Jefferson's case. Institutional corruption is when some practice or action is technically legal but may be improper. For instance, giving members of Congress campaign contributions is perfectly legal and candidates need money to run for office. However, if a contribution influences a lawmaker's vote or some other official action, then that contribution is procedurally improper (it was not given to help the lawmaker win reelection) and may damage the institution and the democratic process itself (D. Thompson 1995, 7; see also Lessig 2013, 553). However, not all "influence" is bad. Sometimes interest groups also bring relevant information to elected officials, who rely on lobbyists to understand both public policy and their group's needs (e.g., immigrant organizations know the state of relief services at the border, AARP knows how many seniors have Medigap insurance). Richard Hall and Alan Deardorff (2006) refer to this as a "legislative subsidy," because of the group's help providing research, legislative language, or coalition support to augment the lawmaker's resources.

There are other ways to corrupt an outcome that flow from the way the legislature is designed to work. If an important contributor receives a *service* from a lawmaker that undermines or subverts the democratic process by responding to the contributor's cause *more* than others without similar access, is that corruption? The nature of the representative system makes this kind of institutional corruption difficult to isolate. If a representative spends a great deal of time with a constituent (who also donates to the lawmaker's campaign), who happens to own or run a large company that employs many other constituents, is that inappropriate representation or responsible representation?

Thompson points to the 1989 Keating Five scandal as an example of institutional corruption (D. Thompson 1995). Five U.S. senators were accused of corruption for pressuring bank regulators to relax savings and loan rules and call off their investigation of Charles Keating, who had made large campaign contributions to the senators. Keating ran a major bank in California whose investments fueled many construction and development projects. A federal oversight bureau investigated him and his bank, and Keating was convicted of racketeering, fraud, and conspiracy for recklessly investing his Lincoln Savings and Loan customers' money in high-risk projects and spending it for personal use and campaign contributions. The bank's collapse cost the federal government $3.4 billion in taxpayer dollars

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to cover Lincoln's losses and was the largest of the over 1,000 savings and loan failures between 1986 and 1995 (McFadden 2014).

The Senate Ethics Committee found that none of the senators had *technically* violated the law, but the scandal certainly contributed to the cynicism many Americans have about politicians and the money they raise to run for office. Indeed, when a reporter asked Keating if his campaign contributions had worked, he replied, "I want to say in the most forceful way I can: I certainly hope so" (McFadden 2014). Senator Alan Cranston, one of the senators investigated, was the ideological opposite of Keating. Cranston was a liberal Democrat from California (Keating's bank was in Irvine, California), and Keating was a conservative Arizona businessman devoted to the free market and Republican Party principles. Keating clearly was not contributing to a liberal senator because he wanted to promote Senator Cranston's and the Democratic Party's policy agenda in Congress. For Thompson (1995, 113), the Keating Five scandal generally, and the Cranston example specifically, point to institutional, not personal, corruption: "a contribution given without regard to the political positions of the candidate only incidentally provides political support; its primary aim is to influence the candidate when in office . . . it short-circuits the democratic process."

The Keating Five senators claimed that there was nothing improper about the constituent service they provided to Keating, but Thompson argues that the way in which the senators provided the service damaged the democratic process and that is why their actions were corrupt. However, this institutional corruption is an expected by-product of a system that promotes representation of citizen concerns but does not assure that all citizens can be heard. Indeed, none of the Keating Five were *personally* enriched by the scandal (i.e., they did not receive trips, sports tickets, or jobs for their relatives), which is why Thompson identifies the scandal as *institutional* rather than individual corruption.

Such subtle activities, especially when it does not concern voting on legislation, which could lead to corruption, are difficult to detect. A moneyed interest, say in a lawmaker's district, may give a paltry sum directly to the lawmaker's campaign but provide extensive benefits in the form of endorsements, press coverage, and campaign labor. So, if we were looking for a quid pro quo (e.g., bribery), we might not find the quid (a big campaign contribution) in campaign finance disclosure records, while we

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could potentially find the quo (some official action such as a policy favor or regulatory intervention). Or a contributor may make a large, disclosed contribution to an incumbent who has long agreed with the contributor's policy interests and the lawmaker votes in ways consistent with the contributor's policy goals. So, we could potentially say that we have identified both the quid (a big campaign contribution) and the quo (votes in line with the contributor's wishes), but there may not be any causal relationship there at all. Or, a contributor might make large contributions to a set of lawmakers on some relevant congressional committee, the quid, but we may never find any specific quo because the contributor's influence may be more subtle through lobbying access to key lawmakers (R. Hall and Wayman 1990) or because the contributor just wants a stable, predictable legislative agenda (recall the "second face" of power) (see also LaPira and Thomas 2017). These examples help explain why political scientists have never found convincing evidence that campaign money buys legislative votes. As Lindblom's "market as prison" theory suggests, a big employer in a lawmaker's district may not have to make any campaign contribution at all to the lawmaker in order to receive policy benefits (the quo), because a business or entire industry need only *threaten* to move a factory and jobs overseas (or just to a neighboring state) to gain tax breaks or regulatory relief from lawmakers (Lindblom 1982).

Conclusion: Now What?

So, when should government intervene to prevent or punish corruption? In *Buckley v. Valeo*, the Supreme Court provided a new criterion for government action: regulation is warranted to prevent corruption or even the appearance of corruption, so long as that regulation does not unduly interfere with First Amendment free speech rights. Yet this framework depends on a distinction between contributions and expenditures that the Supreme Court, not Congress or the president, developed—that direct contributions *can* corrupt but independent expenditures *cannot*. The reform movements that led to the enactment of FECA and its amendments focused on the monetary exchange in the financing of campaigns. These reformers were concerned with limiting all communications of wealthier interests so that less wealthy interests could be heard. Yet the Court disagreed with reformers about spending limits, but

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not contribution limits, and they thus narrowed what corruption (or its appearance) meant in American politics.

Our discussion of donor motivations in a privately financed system for electoral communications shows how hard corruption is to detect. Most donors give based on the demonstrated behavior of officeholders, especially when they give to incumbents. *Buckley*'s finding that the free expression of ideas should have strong protections motivated others to ask the judicial branch to expand expressive rights even more. During a time of greater transparency in many facets of government (the 1970s), campaign finance reform had a brief opportunity to change the fundamentals of campaign conduct in the U.S. However, for democracy to work, freedom of speech is essential. The *Buckley* decision's judicial logic set the stage for even more loosening of campaign spending restrictions, as we explore next.

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CHAPTER 3

From Buckley to BCRA

Innovation, Adaptation, and Litigation

In *Buckley v. Valeo*, the Supreme Court clearly stated that campaign finance rules should prevent corruption, and even the *appearance* of corruption. However, the justices believed limits on campaign finance activity needed to curb corruption might also restrict freedom of expression. In their evaluation of the Federal Election Campaign Act (FECA) Amendments of 1974, the Court allowed limits only on what they saw as the clearest avenue for corruption, *contributions* given directly to candidates, parties, and groups. At the same time, the justices struck down FECA's limits on *expenditures*, citing the need to ensure First Amendment free speech protection to candidates, individuals, and groups. This distinction between the treatment of contributions and expenditures and the Court's focus on free speech in campaign finance policy has remained a defining structural feature of U.S. campaign finance rules.

The whole point of regulation in public policy is to discourage or end practices thought to be undesirable, in this case corruption or its appearance. However, those who had engaged in now forbidden practices (unlimited contributions to candidates, for example) still have political ends they want to achieve. If the practice once used is no longer available, they will innovate in their approach. So, for every limit placed on individual donors, political parties, and interest groups, we should expect they will attempt to find another way to achieve their political goals.

In this chapter, we discuss some of the consequences of federal campaign finance regulation, covering the period from the *Buckley* decision

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in 1976 to the passage of the Bipartisan Campaign Reform Act (BCRA) of 2002. We do not aim to give a comprehensive chronology. Rather, we draw your attention to the most significant innovations in campaign finance tactics that shifted the reformers' focus to new problems.

Initial Challenges in the 1970s

The Federal Election Commission, the new executive agency created to oversee campaign finance laws in the 1974 amendments to FECA, began its operations on April 14, 1975 (H. Alexander 1979, 68). No one, including and especially the FEC, was prepared for the implementation of the new law, as Herbert Alexander explains:

> Not only were candidates forced to proceed with their campaigns during 1975 following regulations that might be declared unconstitutional as a result of the *Buckley* suit, but they had to struggle with a law that had become effective but not yet operative. . . . In essence, the candidates lacked forms, a filing procedure, and guidelines, and no one had determined the expenditure ceilings for each state.[1]

The chaos was just as bad, if not worse, in 1976. The *Buckley* decision was handed down on January 30, 1976, at the start of the presidential nominating season. Moreover, 1976 was the first election to use public financing for major party presidential nomination campaigns. In addition to removing expenditure limits, the *Buckley* decision also struck down the composition of the FEC. In FECA 1974, Congress stipulated that it would have appointment power over four of the six commissioners, allowing the president to appoint two. However, as an executive branch organization (as are all federal commissions), the Constitution requires all appointments be made by the president and confirmed by the Senate. With the *Buckley* decision, the Court gave Congress 30 days to reconstitute the FEC, and when Congress failed to meet this deadline, extended it for another 20 days. Congress missed this deadline as well (stalled by House Democrats), so the FEC did not operate from March 22, 1976 to May 21, 1976 (H. Alexander 1979, 3). This gap may have had important political consequences for the presidential nominations that year, especially on the Democratic side. Gerald Ford (R) was the sitting Republican president

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in 1976.[2] Though he had a primary challenge from Ronald Reagan, most expected the incumbent Ford to be the party's nominee. The Democratic field was wide open. More than 17 candidates[3] built the promise of using public matching funds into their campaign plans. When the FEC stopped disbursing checks for six weeks at a crucial time in the primary season, the candidacies of Oklahoma senator Fred Harris, Washington senator Henry ("Scoop") Jackson, and U.S. House representative Morris Udall of Arizona essentially came to a halt (H. Alexander 1979, 62). The eventual nominee, Jimmy Carter, was able to convince banks to loan him funds to tide him over, but some of the other candidates could not. Thus, *New York Times* reporter Adam Clymer concluded that the Supreme Court, wittingly or not, had a significant effect on the presidential election when it disbanded the FEC (Clymer 2003).

By 1978, FEC records became relatively consistent and organized. In this cycle, we also see the so-called PAC explosion begin, as FECA made it relatively easy for corporations, unions, and groups to form into this new type of organization (see chapter 2) (Sorauf 1988, 80). By the late 1970s, reformers inside and outside of Congress (e.g., citizen groups such as Common Cause and Public Citizen) complained about the tremendous growth in the number and potential influence of these traditional PACs, particularly corporate PACs (H. Alexander 1992, 153–56; Corrado 2005a, 31; Sorauf 1992, 374–77).

Figure 3.1 shows the number of federally registered traditional PACs, and how much they collectively spent on federal candidates from 1978 to 2020. Most PACs are corporate PACs, and reformers were particularly focused on the amount of money PACs gave directly to candidates as contributions, especially to incumbent members of the House, who received the lion's share of PAC dollars (see, for example, Sabato 1985). As the *Buckley* justices asserted, these direct contributions were the most likely avenue for undue influence and quid pro quo corruption. Moreover, PACs' preference for incumbents contributed to the growing incumbency advantage in congressional elections, which may have stifled further reform efforts as incumbent lawmakers rather liked being the beneficiaries of the incumbent biased PAC contributions (Cigler 2004, 236). Because PACs are the electoral arm of lobbying groups, the preference to donate to sitting members of Congress is the essence of the "access" strategy, whereby lobbyists hope to gain access to lawmakers if they support lawmakers' electoral goals (Brunell 2005, 685; Rozell, Wilcox, and Franz 2012, 64). While the

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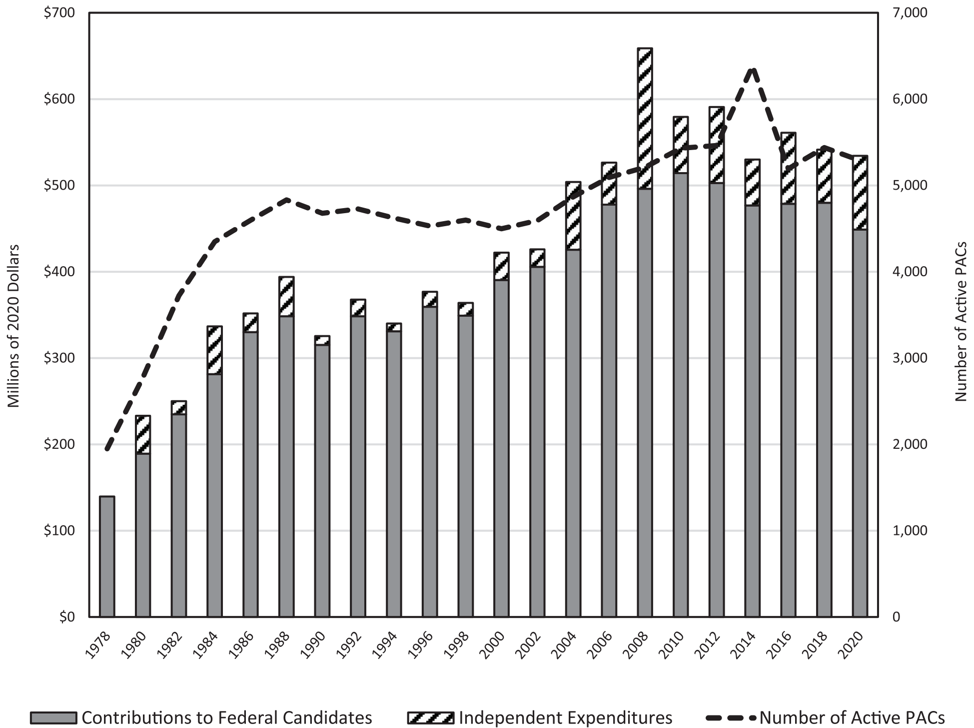

Fig. 3.1. PAC Spending in Federal Elections, 1978–2020 (millions of 2020 dollars)
Source: Compiled by authors from Federal Election Commission data, various years.

Court was concerned about the direct link between corporations/unions and officeholders, PAC creators believed that the FECA limit of $5,000 could not get you all that much in terms of policy outcomes. Instead of a PAC contribution being a quid pro quo, givers thought these donations were more akin to gifts you might give to friends so there would be continued good feelings, such as when the lobbying arm of a PAC desired a meeting with (i.e., access to) the officeholder (Clawson, Neustadtl, and Weller 1998).

By the 1980s, several traditional PACs also made large *independent expenditures*, now unlimited due to the *Buckley* decision, to run mostly negative ads against senators, such as the $3 million the National Conservative Political Action Committee spent against six liberal senators in 1982 (Sabato 1985, 99–100). The rapid success of PACs in channeling money directly to candidates and spending independently to help them

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win may have surprised some observers. Yet lawmakers had little incentive to change much about a system that contributed to their own reelections (Cigler 2004, 236).

Defining Corporate Election Spending: A Confusing Start

Soon after the *Buckley* decision, the Supreme Court waded into the issue of corporate spending in elections. The court approved of corporations spending on elections through a PAC with a separate, segregated fund (SSF), but not from their profits or operating funds. In Massachusetts, a state that allows policy measures to be put on the ballot for voters to decide, corporations had (since the 1907 federal Tillman Act) been prohibited from making political expenditures, except if a ballot measure would have a material effect on its business. A group of Massachusetts banks and corporations (led by First National Bank of Boston) used corporate funds for an advertising campaign against a state constitutional amendment to implement a graduated income tax on individuals. State lawmakers repeatedly argued that a tax on individuals was not of material interest to a corporation, thus the First National Bank and other businesses could not spend to influence voters on the measure. The bankers succeeded in defeating the graduated individual income tax several times, and after each success, lawmakers tried to restrain the banks from further spending. Indeed, the banks won a court case in Massachusetts affirming their right to spend in these specific circumstances in 1972, but in 1975, state lawmakers amended the law[4] to say that corporations could not spend on any measure relating to taxing individuals (Winkler 2018, 305–8). The banks spent anyway, and defeated the measure again, but this time the state found them in violation of the amended law, and the banks and corporations sued the state's attorney general, Francis Bellotti.

The Supreme Court considered the case of *First National Bank of Boston v. Bellotti*[5] in 1978. The Court struck down the state of Massachusetts' limit on independent corporate spending on state ballot measures, finding the limit to be a violation of the bank's First Amendment free speech rights. The justices ruled that corporate independent spending did not raise a corruption concern when that spending was for ballot measures rather than for candidates. In other words, because a corporation cannot corrupt a ballot measure the way it can seek a quid pro quo favor from a

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candidate, corporate expenditures in ballot measure elections did not need to be limited or banned. Thus, the Court validated corporate spending for at least some types of campaigning, cracking open a door that had been legally sealed off.

The Court's *Bellotti* majority opinion was written by Justice Lewis Powell, whose arguments suggested the idea of corporate personhood whereby corporations are entitled to the same First Amendment protection for their campaign spending as are human individuals (Nichols and McChesney 2013, 85). Powell had long been focused on enhancing the voice and political influence of corporations in American society. Just a couple of months before Nixon nominated him to the Court in 1971, Powell sent a secret memo titled "Attack on American Free Enterprise System" to a friend at the U.S. Chamber of Commerce (Powell 1971).[6] In the memo, Powell argued that newly emboldened consumer, environmental, labor, and civil rights activists (that we discussed in chapter 2), as well as the media, university professors, politicians, and even religious leaders were waging a "frontal assault . . . on our government, our system of justice, and the free enterprise system," and he proclaimed "the time has come—indeed, it is long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it" (1971, 6, 9). Powell's memo is a call to arms and reaction to his assessment that business had often responded to this assault "by appeasement, ineptitude and ignoring the problem" (8). He asserted that supporters of the free enterprise system must fully engage in the political arena as well as in social institutions that, according to Powell, have eroded support of that system. Powell challenged the U.S. Chamber of Commerce to mobilize corporate America for this task by, for example, demanding "equal time" for business-friendly speakers on college campuses, pressuring colleges and universities to hire conservative professors and support their research, monitoring media outlets and complaining to them and the Federal Communications Commission when their news and programming are "unfair and inaccurate . . . Equal time should be demanded when appropriate" (22).

On the political front, Powell urged the Chamber and businesses to engage more aggressively in political battles against the labor, consumer, environmental, civil rights, and other interests who he saw as controlling the political agenda. He pressed them to penalize politicians who opposed the free enterprise system and to challenge threats to capitalism in the courts. Powell (1971, 32–33) equated the threat he perceived to the free

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enterprise system as also "a threat to individual freedom" and argued that "denial of economic freedom is followed inevitably by governmental restrictions on other cherished rights."

Much of what Powell encouraged the Chamber to do has indeed occurred. The Chamber of Commerce tripled its budget over six years, and in 1973 the Heritage Foundation was founded to propose legislation at the national level and the American Legislative Exchange Council (ALEC) at the state and local levels. Other think tanks and advocacy groups followed: the Cato Institute in 1977, the Manhattan Institute in 1978, the Federalist Society in 1982, the Koch brothers' Citizens for a Sound Economy in 1984, Accuracy in Academia in 1985, the American Tort Reform Association in 1987, and the Media Research Center in 1987 (Nichols and McChesney 2013, 78; J. Mayer 2016). Corporate traditional PAC spending on congressional races exploded in the late 1970s and into the 1980s, going from $9.8 million in 1978 to $49.4 million in 1986 (Sorauf 1988, 79). The number of lobbyists and lobbying firms serving corporate clients increased significantly, more industrial trade associations moved to Washington, D.C., and more former government employees, especially former members of Congress, became lobbyists, many of them for business interests: "In the early 1970s, 3 percent of retiring [House and Senate] members became lobbyists . . . by 2012 the figure had grown to the 50 percent range" (Nichols and McChesney 2013, 79).

Justice Powell clearly asserted his support for corporate power in the *Bellotti* opinion, arguing that "the inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[7] Thus, business's freedom to spend in elections should not be restricted, because business election spending should receive the same First Amendment protection as spending by individuals.

Powell's fellow conservative on the Court, Justice William Rehnquist, did not agree and wrote in his dissent "the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons."[8] Rehnquist saw the "whole notion of corporate personhood as 'artificial,' not 'natural' in the sense that the founders had believed human beings were endowed with 'natural rights'" (Nichols and McChesney 2013, 85). Eventually, the Supreme Court moved in Powell's direction, but Rehnquist's dissent highlights the tension surrounding the issue of corporate political speech that, in the late 1970s, cut across traditional ideological lines.

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Indeed, in an important footnote (no. 26), the justices made clear that the *Bellotti* decision was not an invitation to remove limits on corporate independent spending in *candidate* elections, signaling that corporate independent spending *could* cause corruption of candidates and officeholders, while ballot measures lacked the ability to be corrupted. This idea seems inconsistent with the Court's assertion in the *Buckley* decision just two years earlier that independent spending *in general* does not present any danger of quid pro quo corruption because the spending is done independently of, and without any coordination with, the candidate. The *Bellotti* decision made a tiny dent in the long-standing prohibition against corporate spending in campaigns and extended the application of the free speech rationale to them. Figure 3.2 illustrates how various campaign finance laws and court decisions since 1907 have shifted from a concern with equality and corruption to a focus on corruption and free speech (beginning with the 1976 *Buckley* and 1978 *Bellotti* cases), and eventually to an emphasis on free speech alone (cases and laws after 1978 in figure 3.2 are discussed below and in future chapters).

What Is a Corporation?

The FECA congressional reformers were deeply suspicious of the motives of any corporation wanting to spend money to influence the outcome of elections. Yet the term "corporation" can include many different types of organizations. Not all these organizations are businesses that desire to make a profit. Corporations are legal entities that are separate from the individuals who own them. A corporation can borrow money, pay taxes, go bankrupt, and be sued in court without directly involving the owners' personal assets.[9] Also, a corporation can be for-profit or not-for-profit. It may have only one shareholder (privately held) or be publicly traded in the stock market and have thousands of shareholders.

States make the laws for setting up corporations, with some making the process easier than others. Delaware is an extremely popular state for creating corporations (many Fortune 500 companies are established there) in part because the state has a separate court for business disputes. The court's decisions are made by a judge, not a jury, and move more quickly than courts with mixed dockets of cases that focus on various aspects of the law (Akalp 2015). Depending on where they incorporate, corporations

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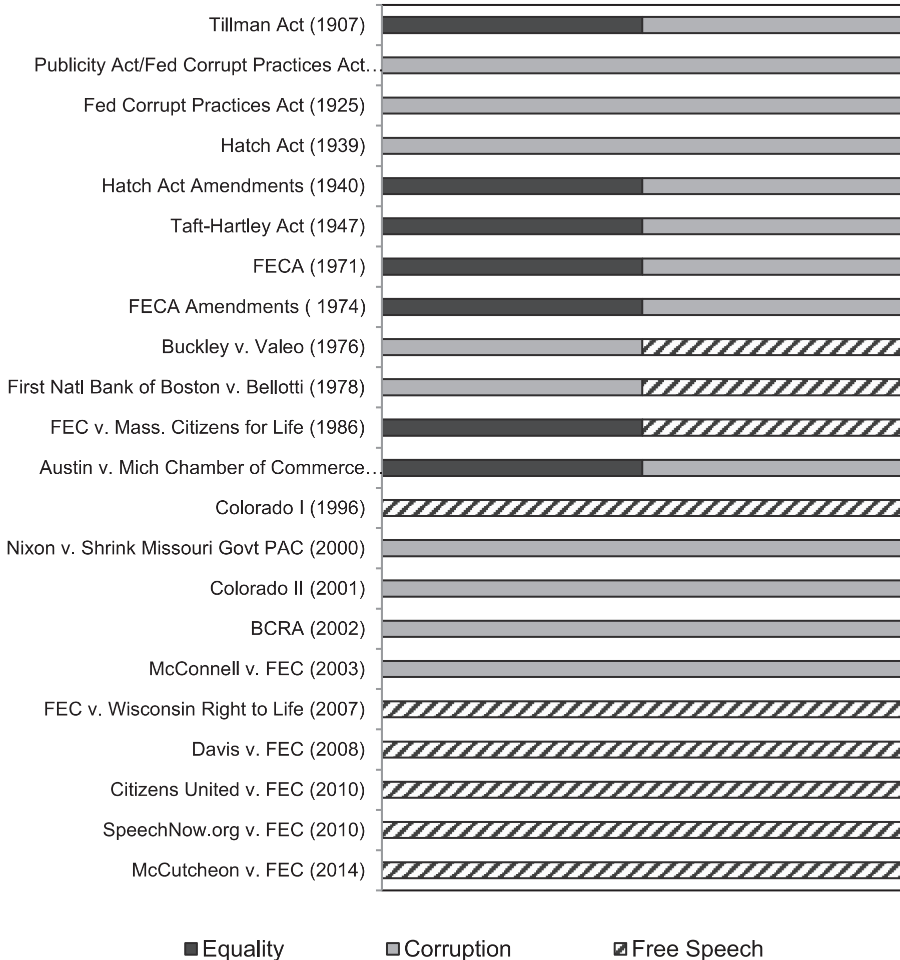

Fig. 3.2. Values Promoted in Select Campaign Finance Laws and Court Decisions
Source: Compiled by the authors.

can keep details of their shareholders and board of directors confidential. Thus, corporations and other groups that want to keep the identities of their investors/contributors confidential would not want to set up a traditional PAC, which requires that all contributors and contributions to the PAC be disclosed publicly to the FEC.

Some organized groups choose to form a corporation to conduct electoral activities rather than a federally recognized traditional PAC. In 1986, in *Federal Election Commission v. Massachusetts Citizens for Life* (*MCFL*),[10]

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the Supreme Court ruled that independent spending by certain *ideological nonprofit* corporations is protected First Amendment speech that should not be limited. They ruled that the "vote pro-life" flyer Massachusetts Citizens for Life distributed to its members *did* violate the FECA ban on corporate spending on federal elections, but that this section of FECA was unconstitutional when applied to ideological nonprofit corporations. The justices said that if MCFL does not receive any money from *for-profit* corporations or labor unions, engages only in political activities to promote its ideas, and does not coordinate with any candidate or party, their campaign spending is constitutional. However, the justices suggested *for-profit* corporate independent spending *could* be limited for a new reason—not because corporate spending might lead to a quid pro quo, but because for-profit corporations may not reflect the public's sentiment:

> resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace . . . the availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.[11]

This was a new rationale for limiting for-profit corporate independent spending: rather than worry about corruption, the government should not allow corporate spending on ideas that are not supported by the public. Was this a renewed concern about equality in access to the electoral arena?

The *MCFL* case inspired others to use the nonprofit corporate form to conduct unlimited spending for their causes.[12] However, in 1990, the Supreme Court upheld a Michigan state law prohibiting corporate independent expenditures in candidate campaigns in *Austin v. Michigan Chamber of Commerce*.[13] The Court ruled that although the Michigan Chamber of Commerce was a nonprofit corporation, it was not an *ideological* nonprofit corporation such as MCFL, because the Chamber engages with many for-profit corporations that could use the Chamber as a conduit to circumvent the limits on corporate expenditures (Ortiz 2005, 99).

In the *Austin* case, the Court argued the ban on for-profit and some nonprofit (but not ideological) corporate independent spending was needed to combat "a different type of corruption . . . the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation

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TABLE 3.1. Key Corporate Spending Findings of Select Supreme Court Cases

Case	Year	Central Finding
Bellotti	1978	Corporate spending on ballot measures is permitted because ballot measures cannot be corrupted like candidates.
MCFL	1986	Some nonprofit *ideological* corporations can spend in candidate elections to promote their ideas but cannot coordinate their spending with candidates or parties.
Austin	1990	For-profit corporations and nonideological nonprofit corporations cannot spend in candidate elections, as they are likely to unfairly influence elections with superior resources that have no correlation with public support.

Source: Compiled by authors.

to the public's support for the corporation's political ideas."[14] In the majority opinion, Justice Thurgood Marshall reaffirmed the corrupting effect of corporate electoral spending, including independent spending not coordinated with a candidate: "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."[15]

So, 14 years after the *Buckley* decision, the Court said at least some corporate independent spending *can* corrupt, which, like the *Bellotti* decision, is in tension with the Court's assertion in *Buckley* that independent spending does not raise corruption concerns. Justice Scalia, one of the Court's conservative members, pointed to this inconsistency in his dissent in the *Austin* case: "that corporations 'amass large treasuries' . . . is . . . not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."[16] We discuss below how this tension was eventually broken in favor of lifting the limits on corporate spending embraced by the Court majority in the *Austin* case. Table 3.1 summarizes the Supreme Court's findings on corporate spending in elections up to 1990.

By 1990, the reform community worried about corporate spending via legitimate traditional PACs and about the way the corporate form was being used to evade disclosure laws and contribution limits. Starting in the mid-1980s, political party organizations began to wonder if they too could be innovative in their thinking about corporate contributions. They succeeded.

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Political Party Adaptation in the Evolving Campaign Finance World

In chapter 2 we wrote about the impression that political scandals "lead to" campaign finance regulation. The signature scandal of the 1970s era was the break-in at the offices of the Democratic National Committee in the Watergate complex by associates of Republican president Richard Nixon's reelection campaign organization. The cover-up of the connection to Nixon's reelection committee led to his resignation in August 1974. As more information was unearthed, public opinion toward political parties, especially the Republican Party, plummeted. In this context, lawmakers wrote significant restrictions on political party organizations into campaign finance law.

The FECA permitted national political party committees to contribute to candidates in limited amounts (like the limits on PAC donations). The 1974 FECA Amendments also created a new category of spending, party *coordinated expenditures*, which also was limited, although the limit would adjust each year to account for inflation. Candidates and party committees were meant to have a conversation about how these coordinated expenditures would be spent by the parties (hence the word "coordinated"). For FECA's architects, this was to be the extent of national party engagement with candidates for Congress and the presidency.

The national parties operate as six separate party committees. First, the Republicans in 1866, and later the Democrats in 1868, established congressional campaign committees to help elect their candidates to the House. Senate campaign committees came later after ratification of the Seventeenth Amendment in 1913 that required the direct election of senators (rather than selection by the state legislatures) (Kolodny 1998). The House and Senate campaign committees are referred to collectively as the Hill committees, because their parent organizations are the parties within Congress on Capitol Hill. The national party campaign committees are the Democratic Congressional Campaign Committee or DCCC (House), the Democratic Senatorial Campaign Committee or DSCC (Senate), the Democratic National Committee or DNC (presidential), the National Republican Congressional Committee or NRCC (House), the National Republican Senatorial Committee or NRSC (Senate), and the Republican National Committee or RNC (presidential).

Because party organizations seek to gain majority control of federal institutions and they might want to spend more heavily in competitive

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races and not at all in secure races, some party officials thought they should be able to spend the way PACs could, by making independent expenditures not coordinated with their candidates. However, the FEC thought parties were not capable of making expenditures *independent of* their nominated candidates, because the parties were so "intertwined" with their candidates through their contributions, coordinated expenditures, and other campaign assistance (Potter 2005, 54–55).

In 1986, the Colorado Republican State Central Committee bought radio ads critical of the *likely* Democratic candidate for an open U.S. Senate seat even though the Colorado Republican Party did not yet know which Republican candidate would win the party's nomination. The FEC ruled that the ads violated the FECA coordinated expenditure limits (see Box 3.1). The case made it to the Supreme Court in 1996, and in *Colorado Republican Federal Campaign Committee v. Federal Election Commission*[17] the justices decided that political parties *could* spend independently of their candidates and allowed political parties to make *unlimited* independent expenditures, as candidates, individuals, PACs, and some ideological nonprofit corporations were already permitted to do. This means a party organization may spend money on campaign advertisements, voter registration efforts, get-out-the-vote (GOTV) mobilization efforts, and other campaign activities without the candidate's knowledge or consent. In this first *Colorado* case, known as *Colorado I*, the Supreme Court went back to its assertion in *Buckley* that independent expenditures were protected First Amendment free speech and should not be limited, and that spending not coordinated with candidates (independent expenditures, or IEs), even spending by their parties, does not raise corruption concerns. Indeed, the parties have an interest in establishing majorities in governmental institutions that exist apart from any particular candidate's desire for office.

Box 3.1. What Happened in Colorado?

Incumbent United States Senator Gary Hart (Democrat) decided not to run for reelection in 1986.

The seat was considered "open" and both political parties needed to nominate a candidate for the general election to be held in November 1986. Primary elections to select nominees were on August 12, 1986.

Tim Wirth, then a sitting member of the U.S. House of Repre-

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sentatives from Colorado's 2nd District, announced his interest in running for the U.S. Senate seat as a Democrat. No other candidates declared their intention to run as a Democrat, so Wirth was slated to be the only candidate on the party's August 12 primary ballot.

State Senator Martha Ezzard, businessman Terry Considine, and Ken Kramer (also a sitting member of the U.S. House of Representatives but from Colorado's 5th District) were battling for the Republican's nomination for this U.S. Senate seat. Kramer received the party's support at the party's convention on June 7, 1986, after the other two withdrew their candidacies. Kramer won the Republican primary election on August 12, 1986, and officially became the party's nominee for the U.S. Senate seat.

Between April 4, 1986, and May 30, 1986 (before the Republican nominee was determined), the Colorado Republican State Central Committee paid to produce and air the following ad on the radio:

> Here in Colorado, we're use [*sic*] to politicians who let you know where they stand, and I thought we could count on Tim Wirth to do the same. But the last few weeks have been a real eye-opener. I just saw some ads where Tim Wirth said he's for a strong defense and a balanced budget. But according to his record, Tim Wirth voted against every major new weapon system in the last five years. And he voted against the balanced budget amendment. Tim Wirth has a right to run for the Senate, but he doesn't have a right to change the facts. (Federal Election Commission 1986b)

Not Yet Nominated
Republican Candidate

U.S. Senator Tim Wirth
Democratic Candidate

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The FEC found that the Colorado Republican Party's ad *did* violate FECA's party coordinated expenditure limits.[a] The party should have declared their spending to the FEC, and that spending should not be more than the limit for that cycle.[b] Yet the Supreme Court reversed the FEC's decision, saying that because no particular Republican candidate benefited, the party was correctly spending independently, and, consistent with their logic in *Buckley*, such independent spending was protected First Amendment speech that should not be limited.

[a] FEC Advisory Opinion 1984-15 (RNC). Also, FEC Advisory Opinion 1985-14 (DCCC) explains that "the Commission concluded that the limitations of 441a(d) [coordinated expenditure] would apply where the communication both (1) depicted a clearly identified candidate and (2) conveyed an electioneering message."

[b] The limit for party coordinated expenditures in the 1986 cycle was $21,810 for the state party organization and another $21,810 for the national party organization (Federal Election Commission, Coordinated Limits n.d.; Federal Election Commission 1986a). Estimates of the spending on these ads ranged from $60,000 to $75,000 (Federal Election Commission 1986b, 4).

The *Colorado* case made its way back to the Supreme Court in 2001 to address the plaintiff's assertion that party *coordinated* spending (spending that *is* coordinated with a candidate) should also receive First Amendment protection and not be limited.[18] However, in this *Colorado II* case, the justices noted political parties could be potential "corrupt conduits" through which contributors could get to government officials in search of favorable policy decisions (Persily 2006, 222–24). The justices made a distinction between party independent spending (*Colorado I*) and party coordinated spending (*Colorado II*) and argued that through coordinated spending donors "can use parties as conduits for contributions meant to place candidates under obligation," and therefore such spending should be limited.[19] If coordinated expenditures were unlimited, wealthy contributors could give money to a political party organization and then direct the party to channel those funds to the candidates identified by the donor.

We have underscored the important, even outsized, role the Supreme Court has played in the campaign finance regulatory system. However, the judicial process is slow. The first part of the *Colorado* case was decided 10 years after the event took place and the second came down 15 years after

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the event. Party leaders did not just sit on their hands during this time. By passing "minor" amendments to FECA, experimenting with new ideas, and persuading the FEC that their goals were appropriate, parties took advantage of a loophole unimaginable to 1970s reformers: soft money.

Pushing the Envelope: Party Soft Money and Issue Ads

Under the 1971 Federal Election Campaign Act and its 1974 and 1979 amendments,[20] national parties could only raise money in limited amounts through contributions from individuals and PACs. They could receive unlimited transfers of money from other party organizations,[21] but not from corporations, unions, federal contractors, national banks, or foreign nationals. The national parties had to fully disclose the contributions and transfers they received to the FEC, reporting the donor, the amount, and how the funds were spent. These restrictions were designed to combat corruption by limiting how much a donor could give and publicly disclosing their giving. Because these donations to the parties are fully disclosed and limited (by their source and amount), this money is known as federal or *hard* money, that is, money raised within the "hard" limits of federal law. Parties spent hard money both on campaign activity and on overhead costs needed to sustain their organizations (such as office rent, office equipment, and staff salaries).

Corporate contributions to parties were prohibited in the 1907 Tillman Act and union contributions had been banned since the 1947 Taft-Hartley Act, as were any contributions from PACs or individuals beyond the law's stated contribution limits. The only exception was for what were called "building fund" expenses, to pay for the actual construction of party headquarters or offices, for which the parties could accept donations beyond the hard money contribution limits from individuals and donations from corporations and unions (Corrado 2005b, 162). This money from otherwise prohibited sources (corporations and unions) and anything given in amounts above the contribution limits is called nonfederal or *soft* money. However, the parties wanted to spend this soft money on their most important activity—electing their candidates.

The FEC actually opened the door to expanded use of party soft money with a 1978 Advisory Opinion (AO),[22] which allowed *state* parties to use corporate and union funds to finance a portion of their voter registra-

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tion and get-out-the-vote (GOTV) operations in states where such contributions were permitted (Mann 2003, 77–78). Then, Congress included a provision in the 1979 FECA Amendments that allowed the *national* parties to spend unlimited amounts of *hard* money on grassroots volunteer party-building activities, such as producing and distributing generic (with no candidate names—like "Vote Democratic") party buttons, bumper stickers, and posters, as well as generic voter registration and get-out-the-vote activities, but not for direct support of federal candidates. The national parties asserted that these activities encouraged citizen participation in the election process. Later in 1979, the national parties argued that they support candidates for federal, state, and local office, and they should therefore also be permitted to raise and spend *soft* money for *nonfederal* (state and local) elections where state law allowed, and the FEC agreed.[23] This is a prime example of how federalism, with different rules at different levels of government, complicates campaign finance law implementation. It is also a good example of campaign innovation to get around prohibitions, a recurring theme in this book. The FEC ruling opened the door just enough to create a loophole for national party committees to use soft money to benefit *federal* candidates, not just for state and local election activity.

Hard money is generally more difficult to raise than soft money, because hard money is collected in small, limited increments and only from individuals, PACs, and other party committees.[24] Yet soft money contributions to parties were unlimited. Both the Republican and Democratic national party organizations raised large amounts of soft money for the 1980 election cycle. Anthony Corrado estimates that Republicans spent $15.1 million in soft money ($123.9 million in hard money) and the Democrats spent $4 million in soft money ($22.4 million in hard money) for the 1979–80 election cycle, but the soft money amounts are likely much higher because the parties were not required to report their soft money fundraising to the FEC until 1991 (Corrado 2005b, 164; Federal Election Commission 1982, 2). To be clear, between 1980 and 1991, the national political parties did raise and spend soft money with no obligation to report it to any government regulator or to publicly disclose it.

The national parties pushed the envelope to spend soft money on things other than the physical structure of the party headquarters, generic party advertising, and state and local candidates. For instance, during the 1980s, Tony Coelho (D-CA), the chairman of the Democratic Congressional

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Campaign Committee (DCCC, the party committee responsible for electing Democrats to the U.S. House of Representatives), used soft money to pay for most of the expenses related to the party committee's communications technology infrastructure. He used hard money to buy mini video cameras, but he used soft money to pay for wiring and permanently installed equipment, as, Coelho argued, they were "infrastructure," part of the building (Jackson 1988, 152). Eventually, both parties attracted negative media attention for raising large sums of soft money. The first effort to ban soft money came in 1984, when the good-government group[25] Common Cause requested that the FEC ban nonfederal funds (i.e., soft money), as parties were raising soft money in connection with federal elections, a violation of federal law (Corrado 1997b, 173; see also Mutch 2014, 163). In 1991, the FEC approved rules for the national parties' use of soft money that required disclosure of soft money raised and spent by the national (but not state) parties and stipulated that the national party committees had to use soft money in conjunction with hard money (a mix to encourage more hard-money fundraising) for party-building and voter mobilization efforts (Federal Election Commission 1991, 75–78; Corrado 1997a, 174).

Public disclosure focused attention on the national parties' controversial soft money fundraising practices. Most notably, while Democratic president Bill Clinton was running for reelection in 1996, news reports surfaced that donors were invited to White House coffees and Lincoln bedroom "sleepovers" in exchange for big soft money donations to the Democratic National Committee, the party committee most involved in electing the party's nominee to the presidency (Corrado 2005b, 164). There were also allegations of illegal foreign contributions to the DNC (Dwyre and Farrar-Myers 2000, 20). By the end of the 1980s, both national parties were using soft money to pay for staff salaries and some of their operating expenses at the party headquarters, which freed up the more difficult-to-raise hard money for direct candidate assistance (Dwyre 1996, 413).

A famous definition of political parties by Downs (1957, 25) puts control of governmental institutions squarely at the center of their purpose: "a political party is a team of men [*sic*] seeking to control the governing apparatus by gaining office in a duly constituted election." In the mid-1800s, party organizations were created to gain control of a particular institution of government (such as the U.S. House of Representatives), leaving other party organizations to worry about controlling different

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institutions (such as the U.S. presidency) (Kolodny 1998).[26] If parties are to gain control of elected institutions, they must adapt to unexpected opportunities and innovate. In this instance, the national party committees transferred soft money to certain state parties that could more freely use these unregulated funds. In turn, the state parties then made hard money contributions to candidates for the U.S. House in close races (Dwyre 1996). For instance, in 1992, the National Republican Congressional Committee (NRCC, the party committee responsible for electing Republicans to the U.S. House of Representatives) gave $236,250 in soft money to the Oregon Republican Party. Soft money was legal in Oregon, so the Oregon Republican Party accepted the soft money and then contributed $110,000 in *hard money* to 23 Republican candidates for the U.S. House in *other* states, where the state party could *not* legally accept soft money from the NRCC (Dwyre 1996, 415–20). Eventually, the parties even found ways to use their abundant soft money dollars to pay for advertisements that featured federal candidates. We discuss how they did that next.

Express vs. Issue Advocacy

Until the 1990s, most of those who ran ads to influence elections assumed candidate-focused communications had to be paid for with hard money. Then, in 1995 and 1996, Democratic Party committees spent approximately $34 million in mixed hard and soft money on television advertisements that promoted President Clinton's policies and accomplishments but did not *explicitly* advocate for his reelection (Mann 2003, 24). The president and his party made a novel legal argument that these were generic party ads, a form of *issue advocacy*, not campaign ads, because they did not explicitly promote Clinton's reelection. Thus, the Democrats argued, the ads were not subject to FECA limitations and could be paid for with a mix of hard and soft money according to the allocation rules established by the FEC for party building expenses.[27] Legitimate issue advocacy ads are protected First Amendment speech that make a statement or discuss some public issue to influence opinions about that issue. Sponsors of legitimate issue ads may spend unlimited amounts from virtually any source,

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including corporate treasuries and union dues because real issue ads are not designed to support or oppose a candidate and thus do not present a concern for potential corruption of an elected official.

The Democratic Party's argument was that their ads were technically *issue advocacy* advertisements, not *express advocacy* campaign ads, because they did not contain what came to be known as the "magic words." The "magic words" standard comes from the Supreme Court's 1976 *Buckley* decision in which the Court ruled that only communications that *expressly advocate* the election or defeat of a clearly identified candidate for federal office are subject to the FECA regulations that require such communications be paid for with limited contributions from allowable sources, that is, with hard money. In footnote 52 of their opinion, the justices gave examples of express advocacy words: "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject."[28] President Clinton and his party argued their ads were not express advocacy (campaign) ads because they did not use such words of express advocacy.

Later in 1996, the Republican National Committee announced its own $20 million "issue advocacy" advertising campaign featuring the GOP presidential candidate, Senator Bob Dole of Kansas, to "show the differences between Dole and Clinton and between Republicans and Democrats on the issues facing our country" (Mann 2003, 25). Both parties ran these so-called *issue ads* in important presidential battleground states, and both also started running issue ads that featured congressional candidates, funded in large part with soft money. Of course, using particular words in an ad is only one standard for evaluating its real purpose. We should also consider when the ads were aired. Would they be broadcast within a few weeks or days of an election? If not, we might accept the purpose was to engage the public in policy issues. If they were broadcast close to an election, we should question whether potential voters would note the absence of electoral "terms" and conclude the message was clearly *not* about how to vote in an election. Box 3.2 contains examples of a party issue ad (which was paid for in part with soft money) and a party express advocacy campaign ad (which was paid for with hard money only) from the 1996 presidential election—see if you can tell the difference.

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Box 3.2. Party Issue Advocacy and Express Advocacy Ads, 1996

Here are examples of an issue ad (paid for with soft money) and an express advocacy campaign ad (paid for with hard money only) run during the 1996 presidential election. Neither of these ads use magic words.

Republican National Committee Soft Money *Issue* Ad: "Pledge"

BILL CLINTON: I will not raise taxes on the middle class.
ANNOUNCER: We heard this a lot.
BILL CLINTON: We gotta give middle class tax relief no matter what else we do.
ANNOUNCER: Six months later, he gave us the largest tax increase in history. Higher income taxes, income taxes on Social Security benefits, more payroll taxes. Under Clinton, the typical American family now pays over $1,500 more in federal taxes. A big price to pay for his broken promise.
Tell President Clinton you can't afford higher taxes for more wasteful spending.

Republican National Committee Hard Money *Campaign* (Express Advocacy) Ad: "Honesty"

ELIZABETH DOLE: Honesty, doing what's right, living up to his word.
My husband has come out strongly to protect the victims of domestic violence, and to make sure a man and a woman who work at the same job get the same retirement benefits.
Bob gets it done. Not for the credit, but because it's right.
And when Bob says he'll cut taxes 15 percent for families, you can count on it because it's right for America, and Bob Dole doesn't make promises he can't keep.
ON SCREEN: Bob Dole will cut our taxes. (Beck et al. 1997, 56; Republican National Committee 1996)

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In spite of controversy that arose around issue ads, the FEC did not challenge the parties' narrow interpretation of express advocacy and declined to take any action on the recommendation of its own audit division that the 1996 issue advocacy campaigns for both parties' presidential candidates should have been considered electioneering and therefore subject to contribution and spending limits (Mann 2003, 27). The FEC's inaction might have seemed puzzling, because the agency had previously decided that a full-page ad that Harvey Furgatch paid for in the *New York Times* in 1980 was election speech even though it contained no magic words. When Furgatch appealed, the U.S. Court of Appeals for the Ninth Circuit upheld the FEC's position, saying express advocacy need only "be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate," that is, an express advocacy ad need not contain any magic words.[29] So, for a while the FEC adopted the *Furgatch* "reasonable person" standard to determine whether a communication was express advocacy. Then, however, the *Furgatch* reasonable person standard was rejected by the First Circuit Court in 1991 in *Faucher v. Federal Election Commission*, saying that *Buckley* provided a "bright-line test" in which a communication is only considered express advocacy if it contains the magic words.[30] These conflicting definitions of express advocacy offered by different courts gave no clear guidance to address both parties' assertion that express advocacy requires the magic words. So, for the 1996 party ads, the FEC followed the more recent guidance from the First Circuit, which required magic words be used for an ad to be considered express advocacy.

The parties continued to run these so-called *issue ads* that did not contain the magic words of express advocacy but made it quite clear which candidate the viewer should support or oppose. However, these "sham" issue ads run by the parties and groups in the late 1990s and early 2000s, especially those run close to Election Day, were clearly designed to influence elections (Dwyre and Farrar-Myers 2000, 202–3). By 2000, 53 percent of the national Democratic Party committees' receipts were from unregulated soft money donations, and soft money totaled 37 percent of the Republican committees' receipts (Federal Election Commission, Party Data n.d.). The national parties had come to rely heavily on soft money until it was banned in 2002 with passage of BCRA. The parties' successful

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use of issue advocacy for electoral purposes in 1996 and beyond motivated interest groups to take advantage of unlimited soft money to run issue ads as well. Indeed, the 2000 election was the first time in modern candidate-centered campaign history that parties and groups spent more money on advertising proximate to a presidential election than the presidential candidates themselves, and the bulk of this spending was for issue advocacy advertising paid for at least in part with soft money (Brennan Center for Justice 2000).

Interest Group Issue Ads

Interest groups advocate on issues so they can convince governmental officials to adopt public policies that will help them achieve their goals. They do this by hiring lobbyists and by advertising generally about what they stand for with true issue advertisements. If groups also want to engage in electoral politics, they must follow campaign finance regulations. From the mid-1970s to the mid-1990s, corporations, labor unions, and other groups primarily used a traditional PAC to make both contributions to candidates and engage in independent expenditure (unlimited spending) campaigns. Legally, they were only able to use hard money for these purposes. However, in the 1990s, many groups wanted to run issue ads during elections, as the parties had done, so they too could use unlimited soft money to pay for the ads. These ads also featured the name or likeness of a federal candidate but did not use the magic words. Many interest groups turned to a particular type of nonprofit organization called a section 527 organization, named for the section of the tax code governing its activities, for this purpose.

A 527 group is a tax-exempt political organization created to influence the election, selection, nomination, or appointment of anyone to a federal, state, or local public office, the election of presidential electors, or the election of someone to an office in a political organization, such as a political party.[31] Section 527 groups can operate at the federal, state, and local levels. A 527 can be both a political organization for IRS tax purposes (i.e., it can be tax exempt) and a political committee that reports its activities to the FEC (e.g., parties, candidate committees, and traditional PACs). Some 527s operate solely as political organizations. If that is the case, they do not file with the FEC and therefore do not have limits on the amount or

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source of the contributions they collect and no limits on the amount they could spend. Miriam Galston explains that while it may seem impossible to conduct election activities that are not reported to the FEC, the IRS has allowed activities such as staff training, conferences for contributors to the 527, and seminars designed to get potential candidates interested in running for office to qualify as exempt functions that do not meet the sort of electoral activities the FEC oversees for political committees (Galston 2005, 66–69). Virtually anyone may contribute *unlimited* amounts to this type of 527, including corporations and labor unions (Garrett, Lunder, and Whitaker 2008, 5). We return to this topic in chapter 4.

Now, for the interesting twist. What if a group's message about legislation or policy that also happens to feature a candidate for office (without magic words) is broadcast one day before an election? Would it be a coincidence that the group chose to criticize a candidate's legislative vote or policy position so close to an election, or is it instead a (thinly) veiled attempt by the group to use unlimited, undisclosed funds to help elect or defeat a candidate—the latter of which would be a violation of campaign finance law? On the other hand, as we discuss in chapter 4, the legislature could be in session debating important policy issues just before an election takes place. It can be complicated.

This tension, between the timing of issue advocacy pleas and their likely goals, brought major reform legislation and later an entirely different approach by the Supreme Court for regulating speech. Like political parties, interest group 527s ran many television and radio issue ads in the 1990s that stopped just short of calling for the election or defeat of a candidate but made it quite clear which candidate they prefer you support on Election Day. Box 3.3 features some of the 1996 issue ads run by various interest groups close to Election Day.

As you can see, these issue ads make it very clear, without using any magic words, which candidates running in the upcoming election the ad's sponsor would like you to support or defeat. Congressional reformers also pointed to the euphemistic sounding names of many of these issue ad groups (e.g., the Child Protection Fund, Americans for Hope, Growth and Opportunity, Citizens for Reform, and Voices for Working Families), which further shielded the identity and intent of their funders from voters. The growing use of ads funded with unlimited soft money by both parties and groups eventually led Congress to enact the Bipartisan Campaign Reform Act.

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Box 3.3. Group Issue Advocacy Ads, 1996

Various groups ran issue ads during the 1996 election that featured federal candidates but did not use the magic words. These ads were paid for with unlimited and undisclosed funds, some of which were from otherwise prohibited sources, such as corporations and labor unions.

AFL-CIO Issue Ad: "No Way"—run in various House districts close to Election Day

CAROLYN: My husband and I both work. And next year, we'll have two children in college. And it will be very hard to put them through, even with the two incomes.

ANNOUNCER: Working families are struggling. But Congressman (insert name)[a] voted with [Republican House Speaker] Newt Gingrich to cut college loans, while giving tax breaks to the wealthy. He even wants to eliminate the Department of Education.

Congress will vote again on the budget. Tell Congressman (insert name), don't write off our children's future.

CAROLYN: Tell him, his priorities are all wrong.

[a] These were cookie cutter ads, ads that were run for or against various House candidates across the country, and the candidate's name was merely inserted into the script. This allowed the ad sponsor to pay to produce just one ad and use it over and over in different campaigns, saving a good deal of time and money.

National Abortion and Reproductive Rights Action League (NARAL) Issue Ad: "Real Story"

ANNOUNCER: Now Bob Dole says he's tolerant on abortion? The real story is he's supporting a platform that would make abortion illegal, take us back to back-alley abortions.

And it was Bob Dole who voted against protecting women from violence outside health clinics. But voted for a constitutional amendment to overturn *Roe v. Wade*.

NARAL is working to make abortion less necessary . . .

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not more dangerous. Join us in opposing Bob Dole's extremist party platform, while we still have a choice.

Women for Tax Reform Issue Ad: "Extreme"

WOMAN: I'm scared. Unless they change the law, the commission Clinton appointed said federal taxes will have to almost double. When Republicans try to cut spending and balance the budget, Clinton vetoes it. When Clinton was running, he promised a middle-class tax cut. Then he raised my taxes. He calls every effort to balance the budget extreme. I'm scared he's going to raise my taxes—again. Call this number for more information on how to ask Clinton to support the tax cut America needs.
[Phone number appears on the screen].

Child Protection Fund Issue Ad: "First Moment"

ANNOUNCER: What you're looking at are newborn babies just moments after taking their first breath. What's hard to believe is only minutes earlier a partial birth abortion could still have been performed. This procedure has the entire body being delivered except the head. An incision is then made into the skull, and the brain is removed. Congress passed a law outlawing this gruesome procedure. Unfortunately, President Clinton vetoed it. Call your Congressman and tell them President Clinton is wrong. (Beck et al. 1997, 11, 44, 66, and 18)

The 2002 Bipartisan Campaign Reform Act (BCRA)

By the 1990s, PAC contributions to candidates (capped at $5,000 per election and not indexed to inflation) paled in comparison to the hundreds of millions of unregulated soft money dollars raised and spent to run so-called issue ads. After 1996, congressional reformers focused on the potentially corrupting effects of soft money. Many lawmakers also were personally tired of the barrage of "sham issue ads" run against them by the opposing party, and by unfriendly groups and individuals (Dwyre and Farrar-Myers 2000, 202–3).

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Congress did debate serious proposals to curb party and group soft money as early as 1990. However, although some bills passed one chamber or the other, none of these reform bills passed both the House and the Senate (H. Alexander 1992, 156–60). As we discussed in chapter 2, policy entrepreneurs keep reform options alive and ready for a "policy window of opportunity" (Kingdon 2003, 165–66). Controversy around the soft money and issue advocacy activities in the 1996 election helped open that window. Campaign finance reform policy entrepreneurs Republican senator John McCain (Arizona) and Democratic senator Russell Feingold (Wisconsin) introduced the Bipartisan Campaign Reform Act in the Senate in January 1997. The bill, commonly known as the McCain-Feingold bill, prohibited soft money contributions to national political parties, restricted state and local party soft money spending on federal elections, identified so-called issue ads that feature federal candidates as *electioneering communications* (even if they did not contain the magic words), brought these ads under campaign contribution limits and disclosure regulations if they were run close to elections, enhanced the FEC's enforcement abilities, and tightened rules for independent expenditures (Dwyre and Farrar-Myers 2000, 40–45).[32] The McCain-Feingold bill came close to passing the Republican-controlled Senate, with seven Republicans crossing the aisle to vote with the Democrats. However, it failed multiple times to get the three-fifths supermajority (60 votes) necessary to overcome Republican filibusters in late 1997 and early 1998 (Dwyre and Farrar-Myers 2000, 45–48).

The House of Representatives considered a version of BCRA sponsored by Republican Chris Shays of Connecticut and Democrat Martin Meehan of Massachusetts. House Speaker Newt Gingrich (R-Georgia) resisted scheduling a vote on the bill, but bad press and public pressure led the Republicans to consider several campaign finance bills, including the Shays-Meehan BCRA bill. After defeating dozens of "poison pill" amendments designed to draw enough support from the bill to defeat it (that is, to "poison" it), the Shays-Meehan BCRA bill passed the House on August 6, 1998 by a vote of 252 to 179, with 61 Republicans voting for final passage (Dwyre and Farrar-Myers 2000, 86–100). Yet, when the bill was sent to the Senate for a vote, it once again failed to overcome a Republican filibuster.

Although most Democrats supported it and most Republicans opposed it, voting on BCRA did not fall entirely along partisan lines. Indeed, DCCC

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chair Martin Frost (D-TX) opposed the bill because BCRA contained a severability clause that would allow sections of the law to remain intact even if other sections were struck down by the courts, and he expected his party would become even more financially disadvantaged relative to the Republicans if the issue advocacy provision was struck down but the party soft money ban remained (Dwyre and Farrar-Myers 2000, 92–93). Republican election law attorneys even joked at the time that BCRA was the "the Democratic Party suicide bill" (Gitell 2003). Some members of the Congressional Black Caucus opposed the bill because many did not raise much campaign money from their relatively less prosperous districts but relied instead on allied groups' issue ads to help them get out the vote, activities that BCRA might limit in the days leading up to an election (Dwyre and Farrar-Myers 2000, 92). A handful of pro-reform Republicans, including BCRA's cosponsors Senator John McCain and Representative Chris Shays, supported the bill against the wishes of their party leaders. Their support allowed the reformers to include the coveted word "bipartisan" in the title of the bill.

While Congress did not pass BCRA or any other comprehensive campaign finance legislation during this round (1998), there was general agreement that some of the campaign finance abuses exposed during the 1996 election were scandalous. Indeed, Republicans in both the House and Senate spent a good deal of time in front of the C-SPAN cameras[33] reporting on their investigations of those abuses and chronicling a litany of Democratic infractions, such as the Lincoln Bedroom sleepovers (U.S. Senate Committee on Governmental Affairs 1998). Unable to pass a comprehensive reform bill, Senators McCain and Feingold did manage to get their colleagues to support a more focused law to require all section 527 groups to disclose their political activities, the 527 Organization Disclosure Act.[34] It also passed in the House, and President Clinton signed it into law in July 2000.

The 2000 Election, Even More Soft Money, and a Different Sort of Scandal

Senator John McCain made campaign finance reform a major focus of his brief campaign for the Republican presidential nomination in 2000 against George W. Bush. This kept the issue alive in the mainstream media,

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as did the record amounts of money raised by all the candidates for president. The big money, however, was the $495 million in soft money raised by the political parties during the 1999–2000 election cycle, with Democratic Party committees almost doubling their soft money receipts over 1996, and Republican committees taking in over 80 percent more (Federal Election Commission 2003). The campaign finance system focused on hard money established in the 1970s was now eclipsed by party and group soft money not regulated by the FEC and largely shielded from public accountability.

McCain and Feingold tried again to pass their reform bill, and on April 2, 2001, the revised McCain-Feingold BCRA bill passed the Senate by a 59–41 margin without a filibuster. In the House, Shays and Meehan worried that amendments added in the Senate would undermine the bill's chances for passage in their chamber (Farrar-Myers and Dwyre 2008, 81–82). Many thought the reform effort was dead until a scandal *not directly related to campaign finance* burst into the headlines in the fall of 2001.

The Enron Corporation was an American energy trading and utility firm that collapsed due to fraudulent accounting practices that misrepresented the company's profits.[35] Although this scandal was not directly related to the company's campaign finance activities, Enron's PAC had given millions in contributions to 73 of 100 senators and 188 of 435 House members (Republicans and Democrats) as well as to President George W. Bush's presidential campaign. Both national parties received a total of $3.5 million in soft money from Enron (Cigler 2004, 246).[36] While Enron's campaign finance activities broke no campaign finance laws, reformers pointed to the corrupting influence of big money like Enron's, which they said BCRA addressed. With attention on the Enron scandal, the House reform leaders forced the bill to a vote. The Shays-Meehan version of the BCRA bill passed the House on February 14, 2002, with a 240–189 vote, with 41 Republicans voting for it and 12 Democrats against it, and the bill was sent on to the Senate.

In another interesting twist, the Senate had switched from very slim Republican control (with a 50–50 split between the parties) to Democratic control when in May 2001 Senator Jim Jeffords (R-Vermont) left the Republican Party to become an independent and voted with the Democrats to give them majority control of the chamber. With the Democrats now in charge, they could bring campaign finance reform to a vote without delay. The Senate passed the House version of the bill with a 60–40

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vote, even though they preferred their own version of the bill, because Senate reformers feared the bill might die in a conference committee between the two chambers (Farrar-Myers and Dwyre 2008, 84–86). Eleven Senate Republicans voted with all but two Democrats to pass BCRA. Calling the bill "flawed," President George W. Bush nevertheless signed BCRA into law on March 27, 2002, to take effect for the 2004 election cycle.

Although there were many legislative compromises that significantly changed the bill's contents, BCRA did address the primary targets of the reform efforts—soft money and "sham" issue advocacy. The major provisions of the law are shown in table 3.2. The new law banned party soft money and categorized any broadcast (TV or radio), cable, or satellite communication run 30 days before a primary or 60 days before a general election that featured the name or likeness of a federal candidate as an *electioneering communication*, eliminating the "issue advocacy" category for any broadcast that featured a federal candidate run during these time frames. Any electioneering communications referring to a federal candidate (in words or images) had to be paid for with hard money. The argument was that these communications clearly advocated for the election or defeat of a candidate, whether they used the "magic words" or not, and thus they should be regulated to prevent corruption. BCRA also required electioneering communications to include a *stand by your ad* disclaimer so that it was clear who was funding the ad. The disclaimer is an audio or written statement stating who was responsible for its content, if the ad was authorized by a candidate, and, if a candidate ad, the candidate's voice and image (if on television) identifying themselves and saying they approve of the ad. Note, however, that BCRA does not regulate internet communications, mail, or telephone calls (Corrado 2005a, 43), and internet campaign communications have become much more common and quite controversial since the mid-2000s. The law also included other provisions, such as increasing and indexing to inflation the limits on contributions to candidates and federal party committees, an allowance for state and local parties to raise up to $10,000 per year from any contributor for state and local party-building activities, a concession to make up for the loss of party soft money, called *Levin funds*, named for Senator Carl Levin (D-MI), the provision's sponsor, and the *Millionaires' Amendment*, which allowed candidates who face wealthy self-funded candidates who spend significant amounts to raise additional funds.

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TABLE 3.2. Major Provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA)

Soft Money
- Prohibits national political parties and federal candidates and officeholders from raising or spending nonfederal money (soft money).
- Limits candidate and officeholder fundraising on behalf of their parties, other candidates, and nonprofit organizations.
- Allows state and local parties to raise no more than $10,000 per year from any contributor (a person, corporation, or labor union) for generic party-building activities (Levin funds). These funds may not be spent for activities or materials that feature any federal candidate.

Electioneering Communications (to address "sham" issue ads)
- Any radio, television, cable, or satellite communication that features the name or likeness or refers to a clearly identified federal candidate and is distributed within 30 days of a primary election or within 60 days of a general election is an *electioneering communication*.
- Prohibits corporations or labor unions from funding electioneering communications.
- Others (individuals, PACs, parties) may only use funds raised under the hard money limits for electioneering communications, and they must report electioneering communications and the sources of the funds used to pay for them to the FEC.
- Electioneering communications require a disclaimer statement indicating whether a candidate authorized the communication. Candidate ads must feature the candidate's voice and image (if on TV) identifying themselves and stating they approve the communication (the "stand by your ad" provision, which we discuss in chapter 7).

Contribution Limits
- Increases the limit on individual contributions to federal candidates from $1,000 to $2,000 per election and indexes the limit to inflation.
- Increases contributions to national party committees from $20,000 to $25,000 per year and indexes the limit to inflation.
- Increases limits on individual contribution to state and local party committees from $5,000 to $10,000 per year.
- Increases overall (aggregate) contributions from one person from $25,000 to $95,000 every two years and indexes the limit to inflation.
- Increases what national party committees may contribute to a Senate candidate per six-year campaign cycle from $17,500 to $35,000 and indexes the limit to inflation.
- Allows a party to make *either* coordinated expenditures *or* independent expenditures for a candidate, not both.
- Prohibits contributions from minors.

Self-Financed Candidates (the Millionaires' Provision)
- Increases the individual contribution limit and the coordinated party expenditure limit for House and Senate candidates competing against a self-financed candidate who spends more than a specified amount of their own funds.

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TABLE 3.2—*Continued*

Federal Election Commission and Enforcement

- Requires the FEC to maintain a website of all election-related reports, and all reports filed with the FEC must be posted within 48 hours.
- Requires the FEC to develop standardized reporting software and for candidates to use it.
- Increases penalties for contribution and expenditure limit violations and increases statute of limitations for investigations from three to five years.
- Strengthens prohibitions against foreign nationals making contributions to or expenditures for federal campaigns and against anyone soliciting, accepting, or receiving such contributions or donations.
- Bans fundraising on government property.

Other Provisions

- Codifies FEC rules on use of campaign funds and permits campaigns to pay candidates a salary.

Source: Compiled by authors.

BCRA Immediately Challenged in Court

As with FECA 1974, opponents wasted no time challenging the constitutionality of the new law. Mitch McConnell, the Senate Republican Minority Leader, and others (e.g., the National Rifle Association and the California Democratic Party) filed 11 complaints against BCRA in the U.S. District Court for the District of Columbia. A three-judge panel combined the complaints into one case and issued its opinion upholding some but not all parts of the law in May 2003. In a special arrangement written into the law, the case then went immediately to the Supreme Court for review before it was even implemented (Corrado 2005a, 38).[37] In *McConnell v. Federal Election Commission*,[38] the Supreme Court upheld virtually all of the law as constitutional, including the party soft money ban and the requirement that electioneering communications run close to an election be paid for with fully disclosed and limited hard money. The Court agreed with the reformers and rejected the narrow "magic words" standard from the *Buckley* decision, thus accepting Congress's attempt to clarify what speech during elections should be considered electioneering communications, and what speech was truly issue advocacy:

> The presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad. *Buckley*'s express

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> advocacy line has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found . . . the components of a new . . . definition of "electioneering communication" are both easily understood and objectively determinable.[39]

The two BCRA provisions the Court struck down were the requirement that parties had to decide to make *either* independent *or* coordinated expenditures but not both for a nominated candidate, and the prohibition on contributions from minors.[40] The Court's *McConnell* decision provided some clarity for those who wanted to spend money to influence the outcome of elections, specifically that electioneering communications should be paid for with disclosed funds raised in limited amounts from permissible sources (hard money).

Conclusion

In this chapter, we have discussed developments since the 1970s reforms and the 1976 *Buckley* decision to the passage of BCRA in 2002. The Supreme Court broadly interpreted what conduct is corrupt and thus should be subject to regulation. Then, in a series of decisions after *Buckley*, the Supreme Court narrowed what conduct it considered corrupt and sanctioned new avenues for campaign spending by corporations and others in the name of free expression. While it appeared there was agreement on what corporate and union spending looked like, the court heard several cases that stretched those definitions into something new.

In addition to corporate innovation, political parties pushed the envelope to create workarounds to FECA. The invention and use of soft money returned federal campaign funding to the pre-FECA days. Political parties, corporations, and unions could once again appeal to wealthy donors—and none of it was illegal. What became abundantly clear by the time BCRA passed in 2002 was that just about every regulated entity in the federal campaign finance system found something they did not like in the FECA framework. Finding ways around campaign finance constraints was not a problem for any *one* political party, ideology, or type of interest group. The system reformers built, and the Supreme Court modified, became so

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complex, and sometimes contradictory, that evasion and adaptation were inevitable.

Just when it seemed that the soft money/issue advocacy explosion was making a mockery of real regulation of campaign finance, Congress and the president did enact a new reform bill 28 years after FECA's 1974 Amendments. Many things had changed since the 1970s. Communications technology became more sophisticated and expensive, and new political alliances made some elections more competitive (especially in the South) than they had been for decades. Competition for control of Congress increased dramatically when the Republicans won the majority in the U.S. House in 1994 after 40 years as the minority party. BCRA was a hard-fought and well-intentioned corrective to the abuses of soft money, but in hindsight, the new law's weakness was that it responded to an unforeseen adaptation—soft money—rather than the structural problem of expression versus equality. The Supreme Court, at the same time, found new workarounds to be acceptable and set the stage for epic shifts in campaign regulation in the 2000s, as we explore in the next chapter.

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CHAPTER 4

The Triumph of Free Speech and BCRA's Undoing

To this point, we have emphasized the profound effect that FECA and its amendments had on campaign finance in the United States. As the last two chapters showed, court decisions, regulations, and clever innovation by campaign entities and finance actors resulted in significant circumventions of FECA. The use of soft money to pay for political party and group issue ads, combined with a tangential scandal (Enron), put pressure on Congress to pass a second major campaign finance reform law—the Bipartisan Campaign Reform Act of 2002. However, unlike FECA, BCRA has not changed the campaign finance landscape as much as its backers hoped. In fact, the responses to BCRA reinforce the importance of several fundamental aspects of American politics: elections are essential to democracy, economic interest groups care deeply about policies, and adaptation (or outright challenge) is a natural response to changes in the political landscape.

Here, we explain the road from BCRA to the landmark *Citizens United* decision in 2010, and from *Citizens United* to the 2020 election.[1] The courts again shifted the rationales of their previous decisions, and hence the constitutionality of the legislation, in unforeseen ways. The unfortunate truth for reformers is that the multiple successful challenges to BCRA brought us to a regulatory situation that is more akin to the virtually unregulated pre-FECA days than to a level campaign finance playing field. Much of what BCRA set out to accomplish was indeed struck down or otherwise thwarted. Table 4.1 shows the major provisions of BCRA and the various subsequent court decisions, FEC rulings, and legislative

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TABLE 4.1. The Gutting of the Bipartisan Campaign Reform Act of 2002 (BCRA)

BCRA Provision	Still in effect in 2022?	If not in effect, how changed?
Soft Money		
Prohibits national political parties and federal candidates and officeholders from raising or spending nonfederal money (soft money).	Yes, but . . .	Party soft money ban subverted by the development of super PACs after ***Citizens United v. FEC*** (2010) and ***SpeechNow.org v. FEC*** (2010). Independent expenditure-only committees (super PACs): • may raise and spend unlimited amounts from corporations, unions, individuals. • may conduct express advocacy at any time. • must not coordinate with candidates or parties. • must file reports of their activities with the FEC.
Limits candidate and officeholder fundraising on behalf of their parties, other candidates, and nonprofit organizations.	**No**	**FEC AO 2011–12 and AO 2015–09**: candidates, their agents, and party leaders: • may appear at fundraising events for super PACs and other committees. • may not solicit more than the contribution limit allows from each individual and PAC.
Creates Levin funds for state and local parties: • for generic party-building activities • spending may not feature a federal candidate • may not raise more than $10,000 per year from any contributor (a person, corporation, or labor union)	Yes	
Electioneering Communications (to regulate "sham" issue ads)		
Defines an *electioneering communication* as any radio, television, cable, or satellite communication that: • refers to a clearly identified federal candidate • **<u>and</u>** airs within 30 days of a primary election or 60 days of a general election.	Not really	***FEC v. Wisconsin Right to Life*** (2007): • weakened BCRA's 30- and 60-day blackout periods. • allows 501(c) nonprofits to run independent expenditure ads so long as the magic words are not used. • FEC regulation (due to *WRTL*) requires disclosure only from those contributors who gave "for the purpose of furthering the reported independent expenditure" (11 C.F.R. 109.20, 2012).

(*continues*)

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TABLE 4.1—*Continued*

BCRA Provision	Still in effect in 2022?	If not in effect, how changed?
Prohibits corporations or labor unions from funding electioneering communications.	No	***Citizens United v. FEC*** (2010): • allows corporations and unions to raise unlimited amounts for electioneering communications ***SpeechNow.org v. FEC*** (2010): • allows independent expenditure-only committees (super PACs) to spend unlimited amounts for electioneering communications. • must not coordinate with candidates or parties. **FEC AO 2010–11** (2010): • groups making only independent expenditures can accept contributions from corporations, unions, and from individuals. ***Carey v. FEC*** (2011): • created hybrid PACs.
Stand by your ad: • electioneering communications require an audio or written disclaimer indicating whether a candidate authorized the communication and, if not, what organization is responsible for the content of the ad. • Candidate ads must feature candidate's voice and image (if on TV) identifying themselves and stating they approve the communication; organization ads must include an audio statement.	Yes	
Contribution Limits (Hard Money) Individual contributions to federal candidates: • raised base from $1,000 to $2,000 per election • limit indexed to inflation	Yes	

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TABLE 4.1—*Continued*

BCRA Provision	Still in effect in 2022?	If not in effect, how changed?
Individual contributions to state and local party committees: • increased from $5,000 to $10,000 per year (not indexed)	Yes	
Increased aggregate contribution limit from one person: • from $25,000 to $95,000 every two years • limit indexed to inflation	No	***McCutcheon v. Federal Election Commission*** (2014): • struck down the aggregate individual contribution limit • maintained contribution limits to each entity
Increased individual contributions to national party committees: • from $20,000 to $25,000 per year • limit indexed to inflation	Not really	**Consolidated and Further Continuing Appropriations Act of 2015**: • created *new national party accounts* for convention, headquarters, and recount/legal expenses with very high limits for contributions from individuals and PACs (see table 4.4.)
Increases national party committee contribution limit to a Senate candidate: • from $17,500 to $35,000 per cycle • limit indexed to inflation	Yes	
Forced political parties to choose *either* coordinated expenditures *or* independent expenditures for a candidate, not both.	No	***McConnell v. FEC*** (2003): • struck down provision requiring parties to make either coordinated or independent expenditures (a return to pre-BCRA practice)
Self-Financed Candidates (the Millionaires' Provision)		
Candidates for U.S. House and Senate who compete against a self-financed candidate who spends above a certain amount may have: • increased individual contribution limit • increased coordinated party expenditure limit	No	***Davis v. FEC*** (2008) struck down Millionaires' provision.

(*continues*)

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TABLE 4.1—*Continued*

BCRA Provision	Still in effect in 2022?	If not in effect, how changed?
Federal Election Commission and Enforcement		
Requires the FEC to • maintain a website of all reports • post reports within 48 hours • develop standardized report software and require candidates to use the software	Yes	
Increases penalties: • for contribution/expenditure/ donation limit violations • increases statute of limitations from three to five years.	Yes	
Strengthens prohibitions on foreign nationals making contributions, expenditures, or donations to federal campaigns and on anyone soliciting, accepting, or receiving such contributions or donations.	Yes	
Bans fundraising on government property.	Yes	
Bans contributions from minors under 17.	No	***McConnell v. FEC*** (2003) struck down provision banning contributions from minors.
Codifies FEC rules on use of campaign funds and permits campaigns to pay candidates a salary.	Yes	

Source: Compiled by authors.

actions that altered or eliminated many of these provisions. This should help you keep track of the events we explain next.

Immediate Responses to BCRA and *McConnell v. FEC*

Let us take a step back to 2002 when BCRA became law effective for the 2004 elections. BCRA banned the use of party soft money. Parties were going to have to learn to live without unlimited large donations from wealthy backers, corporations, and unions to finance their electioneering.

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BCRA also put clear restrictions on issue ads fielded by both parties and interest groups run close to an election that featured the name or image of a candidate for federal office. Additionally, BCRA included a special set of higher contribution limits for candidates facing self-funded "millionaire" opponents, and the new law increased and inflation-adjusted some limits on the amounts individuals could donate to candidates and party organizations. As we noted in chapter 3, most of BCRA was upheld by the Supreme Court in *McConnell v. FEC* (2003), except for the BCRA provision that parties make *either* independent *or* coordinated expenditures but not both for a nominated candidate, and the prohibition on contributions from minors.

A central reason for passing BCRA was to rein in political parties that may have been acting as agents/conduits for wealthy donors, and to limit wealthy donors' role in campaigns via soft money. The law was designed in part to put candidates back in the driver's seat of their campaigns. When BCRA doubled and indexed to inflation the limit on individual contributions to candidates from $1,000 per election to $2,000 per election this meant candidates could ask their wealthiest supporters to double their 2002 contributions in the 2004 election cycle. However, BCRA only adjusted some party contribution limits to inflation, as shown on table 4.2, which displays contribution limits before and after BCRA (inflation adjusted limits are shown with an asterisk).[2] Yet, between 1974 and 2002, inflation reduced the buying power of a $1,000 contribution so much that a candidate would now need to find 4.5 donors for every one they needed in 1974 to raise an amount of equal value. That is, in 2002 dollars, $4,500 was equivalent to $1,000 in 1974. Still, doubling (to $2,000) was better than no increase, and incumbent members of Congress found that it was easier than they thought to raise $2,000 from a donor who previously only gave $1,000 (Magleby 2008; Magleby, Jones, and Lassen 2009; Heerwig 2016).

Many expected political parties and some interest groups to have a tough time raising only hard money post-BCRA because of their dependence on now-illegal soft money in the 1990s. Democratic Party committees had only recently reached parity in fundraising with the Republicans due to soft money (Moscardelli and Haspel 2007, 80). Yet political parties' concerns about fundraising did not materialize as expected, and interest groups found new ways to raise and spend money. Next, we explain the adjustments various political actors made to their resource strategies because many of their common practices were now forbidden. Then we

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TABLE 4.2. Contribution Limits for Federal Elections, Pre- and Post-BCRA

	RECIPIENTS								
	Candidate Committee		**PAC** (SSF and Nonconnected)[a]	**State/District/Local Party Committee**		**National Party Committee**[b]		**Aggregate Limit**	
DONORS	Pre-BCRA (2002)	Post-BCRA (2022)	1976–2022	Pre-BCRA (2002)	Post-BCRA (2022)	Pre-BCRA (2002)	Post-BCRA (2022)	Pre-BCRA (1974–2002)	Post-BCRA (2003–2014)[d]
Individual	$1,000 per election	$2,900* per election	$5,000 per year	$5,000 per year (combined)	$10,000 per year (combined)	$20,000 per year	$36,500* per year	$25,000 per year	$95,000* per election cycle
Candidate Committee	$1,000 per election	$2,000 per election	$5,000 per year	Unlimited transfers		Unlimited transfers		n/a	n/a
PAC (Multicandidate)	$5,000 per election	$5,000 per election	$5,000 per year	$5,000 per year (combined)		$15,000 per year		n/a	n/a
PAC (Non-Multicandidate)	$1,000 per election	$2,900* per election	$5,000 per year	$5,000 per year (combined)	$10,000 per year (combined)	$20,000 per year	$36,500* per year	n/a	n/a
State/District/ Local Party	$5,000 per election	$5,000 per election (combined)	$5,000 per year (combined)	Unlimited transfers		Unlimited transfers		n/a	n/a
National Party Committee	$5,000 per election	$5,000 per election[c]	$5,000 per year	Unlimited transfers		Unlimited transfers		n/a	n/a

Source: Compiled by authors from various Federal Election Commission files.

Note: The 2002 Bipartisan Campaign Reform Act (BCRA) raised the individual contribution limits to candidates and parties and indexed them to inflation.

* limits are indexed for inflation in odd-numbered years.

[a] "PAC" here refers to a multicandidate committee that makes contributions to other federal political committees. Multicandidate committees have more than 50 contributors, have been registered for at least six months, and have made contributions to five or more federal candidates. Separate segregated fund (SSF) committees are affiliated with a corporation, trade association, or union, and nonconnected PACs are not affiliated with any such entity. Super PACs, not included on this table, may accept unlimited contributions.

[b] The DNC, RNC, DSCC, NRSC, DCCC, and NRCC.

[c] Additionally, in 2022, a national party committee and its senatorial campaign committee may contribute up to $51,200 combined per campaign to each Senate candidate. This limit is indexed to inflation and thus increases each election cycle.

[d] The aggregate limit on individual contributions to all candidates, parties, and PACs was eliminated with the 2014 *McCutcheon v. Federal Election Commission* decision.

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show how further direct attacks on BCRA brought on its near-complete evisceration.

Adapting to BCRA

BCRA made no significant difference to the way candidates raised money, except for the increase in contribution limits from individual donors. We discuss candidate fundraising extensively in chapter 6. Yet, by making party soft money illegal and restricting issue ads, BCRA forced political parties and interest groups to quickly alter their tactics. Similarly, individuals, interest groups, corporations, and unions that still wanted to spend money to influence elections had to find new ways to do so. Some of the adaptations to BCRA are consistent with the hydraulic theory of campaign finance reform, which posits that "money, like water, seeks its own level . . . money that reform squeezes out of the formal campaign process must go somewhere" (Issacharoff and Karlan 1999, 1713). Parties and interest groups were raising both hard and soft money in the 1990s, so their choices were to either rely more on hard money or to develop a different way to use large contributions beyond the hard money limits that was not technically "soft." To no one's surprise, the solution was all of the above.

Post-BCRA Response One: Getting Creative with Hard Money

There are two ways to raise money for political campaigning: raise small amounts from a large number of donors or raise large amounts from a smaller number of donors (we detail donor options in chapter 5). Soft money enticed parties and interest groups to tap wealthy donors extensively. The cost of acquiring these donors could be significant—for example, they want time with lawmakers[3]—but so can the potential return. Also, fundraising events could encourage wealthy donors to introduce the parties and groups to other wealthy people who were potential new donors. When BCRA increased the individual contribution limit level to party organizations (but not to PACs), the parties were able to get their wealthiest donors to give even more, so at first large donations made up even more of the national party committees' receipts (Magleby 2011, 220–

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21). For instance, before BCRA in 2000, 9.9 percent of the DNC's and 6.8 percent of the RNC's hard money contributions from individuals came from donors who gave the maximum amount. By 2004 these proportions had reached 12.2 percent for the DNC and 17.7 percent for the RNC.

The other way to raise money is from donors who give less than $200 in an election cycle—and sometimes much less than that. Small donor direct mail fundraising made a bit of a splash in the late 1970s, but the effort often cost more than it took in (D'Aprile 2010). To send a letter (in the pre-internet era) to donors for small donations, you needed to acquire mailing lists of people friendly to your request, produce a mailing they will open, pay for postage, and sometimes pay return postage as well. However, it turns out that small donors will respond more to online appeals than they had to direct mail appeals for contributions, and innovative technological platforms (e.g., email, party and candidate websites, texts, Twitter, Facebook, Instagram) proved to be excellent fundraising vehicles (Malbin 2013, 391–93; Panagopoulos and Bergan 2009). More sophisticated and effective voter and contributor targeting (Issenberg 2012) reduced the expense of finding and contacting these small donors, though it is not cost free (Fischer 2019). Candidates, parties, and groups now collect many more small donations due to the development of partisan online fundraising platforms. The Democrats established the nonprofit ActBlue in 2004 and the Republicans launched a similar platform, WinRed, in 2019 to facilitate small grassroots donations to their candidates, parties, and groups (C. Levine 2018; C. Levine and Overby 2019).

So, contrary to the conventional wisdom that donors expect something specific (like access to lawmakers) for their contribution, there were many donors who wanted to give $10 or $20 to a candidate, party, or group, and these small donors did not expect to have a material payback for their donation. Most were giving based on their ideology (see chapter 2) (Francia et al. 2003; Magleby, Goodliffe, and Olsen 2018). Online platforms such as ActBlue also facilitated "rage donating"—small donations aimed at (improbably) knocking off an incumbent despised by donors (Hersh 2020).

The national party committees now raise an increasing proportion of their money from contributors giving less than $200, called unitemized contributions by the FEC (we discuss this distinction between itemized and unitemized contributions in much more detail in chapter 5).[4] In 2000, 53.1 percent of the DNC's and 47.4 percent of the RNC's individ-

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ual contributions came from donors giving less than $200, but by 2020, 62.1 percent of the DNC's and 74.8 percent of the RNC's individual contributions were unitemized (Federal Election Commission 2004; Federal Election Commission, Party Data n.d.). Losing the ability to raise soft money led to innovation and adaptation in hard money fundraising that expanded the donor base. Candidates (especially for the presidency) often boast that they have raised most of their campaign cash from small donors to demonstrate that they are not beholden to big money interests, as Vermont senator Bernie Sanders did during his 2016 and 2020 campaigns for the Democratic presidential nomination, saying the average contribution to his campaign was $27 in 2016 and $21 in 2020 (Bump 2016; Queally 2020).

Post-BCRA Response Two: Groups Find Other Channels to Raise and Spend Large Sums

Increased Use of Section 527 Nonprofit Organizations (2003–2008)

After BCRA banned soft money donations to political parties, some of that big money gravitated to 527 political organizations, consistent with the hydraulic theory that when squeezed from one place, campaign money will go elsewhere (Campaign Finance Institute 2005; Dwyre 2007). In chapter 3, we explained how interest groups formed new types of 527 organizations that could raise unlimited amounts, even from corporations and unions, and spend without limit, so long as that spending was not coordinated with candidates or parties. These 527s could not use their funds to expressly advocate for the election or defeat of a federal candidate, but they could conduct trainings, seminars, and conferences that supported electioneering efforts. While the political parties could not form these types of 527 organizations, they could get "friends" of the parties to do it for them. Richard Skinner, David Dulio, and Seth Masket conducted an extensive network analysis of 527s active in the 2004 and 2006 election cycles. Using the Internal Revenue Service (IRS) form 8871 that 527s must file, they discovered the names of the officers and directors of the organizations, finding that the people who operated certain high-profile 527s (such as Swift Boat Veterans, Americans Coming Together, MoveOn.org, and the Media Fund) were former political party officials and congres-

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sional and presidential staffers of the "partner" party (Skinner, Masket, and Dulio 2012, 79).

Spending by these federal-related 527 committees surged in 2004 after BCRA took effect, even though Congress passed the 527 Organization Disclosure Act of 2000,[5] which required 527s to disclose contributors who gave $200 or more in a calendar year.[6] Yet by 2006 spending by these 527s had declined, and by 2008, the amount shrunk to half of what it was in 2004 (Mutch 2016, 111–12). The FEC imposed almost $630,000 in fines on three 527 organizations for their activities in the 2004 election (Federal Election Commission 2006)[7] and ruled that these 527s were in fact operating as political committees, because they actually *did* engage in express advocacy during the 2004 election. As such, they should not have accepted donations over the federal contribution limits and from prohibited sources (i.e., soft money) and should have registered with the FEC (not solely with the IRS) and filed disclosure reports as if they were a PAC. These developments made 527 organizations a less attractive option for contributors looking to give big money to influence elections.

Turning to 501(c) Nonprofit Organizations (2008 to present)

As we noted in the previous chapter, some interest groups, corporations, and unions also use nonprofit, tax-exempt groups organized under section 501(c) of the Internal Revenue Code to conduct political activities. When the FEC fined prominent 527s and insisted they file with the FEC going forward, the use of 501(c)s rose considerably. Some 501(c) nonprofit corporations can engage in political campaign activity (and still maintain their tax-exempt status) if this is not their *primary* activity. Yet what constitutes "primary" (i.e., an organization's "major purpose") is not precisely stipulated in the law or by the IRS that regulates these groups, making it difficult to enforce this requirement (C. Miller 2015, 355–59).

These 501(c) organizations can receive unlimited donations from corporations, unions, groups, and individuals, but they cannot coordinate their political activities with candidates or parties. Most were not permitted to make express advocacy advertisements until the 2007 *Wisconsin Right to Life* case (*WRTL*), which we discuss in detail below. Since 2007, many 501(c) groups have run express advocacy independent expenditure and electioneering communications campaign ads. Yet FEC regu-

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lations currently require 501(c)s to disclose the identities of only those contributors who *intended* that their contributions be used to influence elections. Public interest groups have sued the FEC and 501(c) groups to force the FEC to broaden its interpretation of which 501(c) donors must be disclosed.[8] However, the FEC continues to include the "intent" requirement in its regulations, resulting in disclosure of only a small fraction of 501(c) contributors (Galston 2021, 289–95). This ability to give unlimited amounts anonymously to a 501(c) nonprofit organization for election-oriented activities led critics of this practice to call these organizations "dark money" groups.[9]

The use of both 527 and 501(c) groups by friends of the political parties, interest groups, or even wealthy individuals at their own instigation was a workaround for the elimination of soft money. Like issue advocacy ads, communications from these organizations walked a thin line between what was and was not election speech. These vehicles are less convenient than sending large soft money contributions to political party organizations, but functionally they became an opportunity for quick adaptation.

Dismantling BCRA, Step by Step

While some campaign finance actors *adapted* to the new campaign finance landscape under BCRA, others focused on *dismantling* the new law to remove as many restrictions as possible on how they raised and spent money in federal elections. The Supreme Court ended up being a very effective arena to accomplish this despite their initial support of the law in *McConnell*.

Dismantling BCRA, Step One: *Wisconsin Right to Life*

Designed to regulate "sham" issue ads, BCRA's electioneering communications provision deemed any broadcast communication that featured the name or likeness of a federal candidate to be electioneering and thus subject to hard money and disclosure requirements. In 2007, with *Federal Election Commission v. Wisconsin Right to Life*, the Court chipped away at this provision by narrowing what advertisements would be subject to BCRA's source and contribution limitations.[10] Wisconsin Right to Life, a

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501(c)(4) nonprofit corporation advocating against abortion rights, aired three ads in 2004 encouraging voters to *call* (not to vote for or against) two U.S. senators, including BCRA coauthor Democratic Wisconsin senator Russ Feingold, and tell them to stop waging filibusters against President George W. Bush's judicial nominees. These ads aired in the summer of 2004, and, as the issue was unresolved, continued airing into the BCRA 60-day window restriction before the general election (American Center for Law and Justice 2011). The FEC argued that WRTL's ads were BCRA electioneering communications, not pure issue ads, because they were run close to an election, featured candidates for federal office, and were clearly designed to affect an election. However, the justices disagreed and said applying BCRA's electioneering communications financing restrictions to WRTL's ads about judicial confirmations was an unconstitutional restriction of the group's First Amendment free speech rights because the ads were *not* express advocacy, even though they featured a federal candidate within the BCRA 60-day electioneering communications window. The important detail here was that the group explicitly referred to judicial confirmations, which were in fact being considered during the pre-general-election window. The Court ruled that "an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[11] In this instance, one could interpret the ads as messages on judicial confirmations.

This ruling effectively invalidated BCRA's 60- and 30-day blackout periods when any electioneering communications that featured a federal candidate for office was prima facie meant to influence the outcome of an election and therefore must be paid for with limited and disclosed hard money. The Supreme Court's 2007 *Wisconsin* ruling essentially reestablished the magic words test for ads run during elections rejected by Congress in BCRA and the Supreme Court in *McConnell*, which upheld BCRA. So, *WRTL* gutted one of the central purposes of BCRA reform. The *Wisconsin* decision was really the pivotal decision that opened the floodgates for corporate and union spending in elections, not the *Citizens United* decision that came three years later (see below).

After *Wisconsin*, the FEC went even further than the Court's decision and issued rules requiring that corporations and labor unions disclose only those contributions *specifically designated* for electioneering communications, that is, those contributions given "for the purpose of furthering the *reported* independent expenditure" (emphasis added).[12] So, all a corpora-

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tion or union has to do to avoid disclosure of donors who pay for electioneering communications is designate all of its contributions as *unrestricted donations* or *membership dues*.[13] The Supreme Court's decision in *Wisconsin* and the FEC's narrow fundraising disclosure rule left a very large opening for spending undisclosed and unlimited money to influence elections. Indeed, that is what happened. Contributions to and spending by 501(c) nonprofit corporations increased sharply after the 2007 *Wisconsin* decision.[14] Then the rest of the BCRA reforms came under fire.

Dismantling BCRA, Step Two: Free Speech for Millionaires?

Recall that BCRA also addressed the unequal playing field created by self-funded candidates. Candidates who fund their own campaigns are making contributions to themselves, and the Court ruled in *Buckley* that candidate spending on their own campaigns is protected speech and cannot be limited. Some candidates, including incumbent members of Congress, face wealthy challengers who spend massive amounts to defeat them. So, reformers added a provision to BCRA: the "Millionaires' Amendment." This allowed candidates whose opponents spent their own wealth on their campaign (after hitting certain dollar thresholds) to raise additional funds using higher contribution limits, and it allowed their parties to spend above the established coordinated expenditure limits to help them.

The Supreme Court struck down the millionaires' provision in 2008 in *Davis v. Federal Election Commission*.[15] In this case, Jack Davis, a wealthy Democratic congressional candidate in New York, challenged the constitutionality of BCRA's millionaires' provision because it allowed different contribution limits for candidates competing against one another. The Supreme Court agreed and ruled that the millionaires' provision was a penalty on candidates who exercise their First Amendment right to spend their own money to run for office by allowing their opponents to raise money with higher limits to compensate for the millionaire's wealth advantage. John Vile (2009) explains the paradox: "The government cannot assert the goal of eliminating corruption or the appearance of corruption [in *Davis*], because *Buckley* ruled that spending personal funds actually reduces such anti-corruption interests." This was a clear signal from the emerging conservative majority on the Court that the bar to justify regulation of protected electoral free speech was very high, and that the justices were not

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likely to sanction rules that attempted to promote equality or equal access at the expense of free expression.

The 2007 *Wisconsin* decision and the 2008 *Davis* decision illustrate the Court's shifting focus to free speech as the defining value that all campaign finance rules should promote, not just the prevention of corruption or its appearance. Note that these decisions took place only four and five years, respectively, after the 2003 *McConnell* decision left both provisions standing. The changing membership of the Supreme Court contributed to this clear shift in approach to campaign finance cases. Republican president George W. Bush named John Roberts the chief justice in 2005, after the death of Chief Justice William Rehnquist. Rehnquist rejected the idea of corporate personhood and, as chief justice from 1986 to 2005, kept a lid on expanding corporate power in campaign finance. The new chief justice, a conservative corporate lawyer who had helped lead the Washington, D.C. chapter of the ultra-conservative Federalist Society, moved the Court in a very different direction. Nichols and McChesney (2013, 86–87) note:

> Roberts was a Lewis Powell man. . . . Roberts' manipulations to position the Court as not merely a defender but also a champion of corporate influence in politics were every bit as unseemly as Powell's, and far more aggressive.

President George W. Bush's 2006 replacement of retiring Justice Sandra Day O'Connor, who cowrote the majority opinion in the 2003 *McConnell* case, with Justice Samuel Alito also was significant. O'Connor, a moderately conservative member of the Court, was the only justice who had the experience of running for and holding elective office. She tended to focus more on preventing corruption than promoting free speech with campaign finance cases, generally siding with the Court's more liberal justices on these cases (Dwyre 2015, 62–63). In contrast, Alito favors a more expansive application of the First Amendment to campaign finance rules. Alito wrote the majority opinion in the 2008 *Davis* case and said the Millionaires' Amendment "imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right" to spend their own money.[16]

Democratic president Barack Obama appointed liberal justices, Sonia Sotomayor (replacing George H. W. Bush appointee David Souter) in 2009 and Elena Kagan (replacing Ford appointee John Paul Stevens) in

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2010, who have been on the other side of the Court's campaign finance decisions. But by 2010, the Supreme Court had a solid majority that promoted free speech and corporate participation in campaign finance cases: Chief Justice Roberts and Justices Alito, Scalia (appointed in 1986 by Ronald Reagan), Kennedy (appointed by Ronald Reagan in 1988 to replace Justice Powell), and Thomas (appointed by George H. W. Bush in 1991).

Smashing BCRA, Step Three: *Citizens United*

In 2010, the now very conservative Supreme Court majority clearly articulated its view that campaign finance rules should aim to protect free speech above virtually all other goals in its 5–4 decision in *Citizens United v. FEC* (2010).[17] The case was about a 501(c)(4) social welfare nonprofit corporation, Citizens United, which raised some of its money from for-profit corporations. Citizens United wanted to advertise its 90-minute documentary film about 2008 Democratic presidential candidate Hillary Clinton. Titled *Hillary: The Movie*, the film was available early in 2008 via cable television's "video-on-demand" option. Viewers would literally have to select the option to view the film—they could not see it by chance (L. Mayer 2009). The FEC considered the film, and the ad to promote the film, to be an electioneering communication under BCRA because both featured Democratic presidential candidate Hillary Clinton within the BCRA general election blackout period. Thus, the documentary had to be paid for with limited and disclosed hard money (so, not corporate money).

The U.S. District Court of Appeals upheld the FEC decision, and Citizens United appealed to the Supreme Court. The case was argued in front of the court twice, which is highly unusual. The first time, attorneys for Citizens United argued narrowly that the FEC erred in its classification of the film and was not arguing broadly for corporate free speech rights. During the presentation of the case, Justice Alito asked the government's attorney if Congress can stop a campaign ad from airing because it was financed with corporate money, did that mean that Congress could also stop the publication of a book mentioning a candidate for federal office if it was financed with corporate money. The government's attorney said, yes, Congress could do that (Winkler 2018, 354). This exchange was credited with unifying the conservatives on the Court to decide in favor of

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corporate rights more broadly. The liberal justices on the Court objected to ruling on questions that were not even mentioned by the two parties in their arguments and briefs. So, the Court agreed to hear the case again, but as Adam Winkler explains, "this time the lawyers would be instructed specifically to focus on whether the restrictions on corporate expenditures were constitutional" (2018, 358).

After the second set of arguments, the Court majority asserted that limits on corporate campaign spending were an unconstitutional restriction on political speech in violation of the First Amendment. Individuals, PACs, parties, and some nonprofit organizations[18] could already spend unlimited amounts on express advocacy independent expenditures.[19] The *Citizens United* decision now extended this free speech right to *for-profit* corporations and unions as well as to organizations that accept money from for-profit corporations and unions (such as 501(c)(4) nonprofits like Citizens United). The Court's ruling eliminated the distinction created in the 1986 *MCFL* case between ideological nonprofit and for-profit corporate electoral spending (see table 4.3). *Citizens United* also overturned the Supreme Court's 1990 *Austin* decision, which upheld a Michigan state law that prohibited corporate independent expenditures because of "the corrosive and distorting effects of immense aggregations of wealth."[20] Moreover, the justices overturned part of the Court's 2003 *McConnell* decision that upheld BCRA's ban on the use of corporate treasury funds for electioneering communications close to an election, whether they used the magic words or not.

The *Citizens United* decision's reach was extensive because it ended the ban on using corporate money to expressly advocate for or against federal candidates, in place since the 1907 Tillman Act, and the ban on union direct spending in federal elections established with the 1947 Taft-Hartley Act.[21] Recall, however, the floodgates had already been cracked opened three years earlier with the *WRTL* case, which allowed corporations and unions to run electioneering communications close to Election Day. As Stanford law professor Nate Persily (2010) noted, "before *Citizens United*, a corporation or union could sponsor ads with its treasury funds that said, 'Tell Congressman Smith to stop destroying America.' After *Citizens United*, they can add at the end, 'and, by the way, don't vote for him.'"

The Court's conservative majority clearly pronounced that corporate independent spending is protected free speech: "government may not suppress speech based on the speaker's corporate identity" and that "indepen-

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TABLE 4.3. What *Citizens United* and *SpeechNow* Changed

	What Was Affected?	How Affected?
Citizens United v. FEC (2010)	1907 Tillman Act	Ended Tillman Act ban on corporate money in federal elections.
	1947 Taft-Hartley Act	Ended Taft-Hartley ban on union spending in federal elections.
	1986 *FEC v. Massachusetts Citizens for Life*	Eliminated *MCFL* distinction that allowed ideological nonprofit, but not for-profit corporate electoral spending.
	1990 *Austin v. Michigan Chamber of Commerce*	Ended *Austin* ban on corporate independent expenditures.
	2002 BCRA and 2003 *McConnell v. FEC*	Overturned part of *McConnell* that upheld BCRA's ban on use of corporate treasury funds for electioneering communications close to an election.
SpeechNow v. FEC (2010)	BCRA limits on contributions to groups making independent expenditures close to elections.	Ended limits on individual contributions to independent expenditure-only groups.
FEC AO 2010–11: Commonsense Ten (2010)	BCRA ban on use of corporate funds and *SpeechNow* decision lifting limits on individual contributions to independent expenditure-only groups.	Went beyond *SpeechNow* decision and allowed independent expenditure-only groups to accept unlimited contributions not just from individuals but also from corporations, unions, and other political committees, such as 501(c)s.

Source: Compiled by authors.

dent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption."[22] This distinction between contributions and expenditures is consistent with an earlier logic in the *Buckley* decision, that independent expenditures do not raise corruption concerns because they are not received or controlled by a candidate or party. What is new is that *for-profit* corporations and labor unions would now enjoy the same free speech rights as individuals, candidates, parties,

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and traditional PACs to spend without limit to expressly advocate the election or defeat of a federal candidate. Justice Powell's push for more corporate influence and for corporate personhood in the 1970s came to fruition with the *Citizens United* decision. Corporations and labor unions are no longer restricted to using only limited voluntary donations to traditional PACs (SSFs) to conduct electioneering activities.

The *Wisconsin* and *Citizens United* decisions narrowed the sphere of legitimate government regulation of campaign money to cover *only* direct contributions to candidates, parties, and traditional PACs because of their clear potential for quid pro quo corruption. Writing for the Court majority, Justice Anthony Kennedy argued that the "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt" and that "ingratiation and access, in any event, are not corruption."[23]

The *Citizens United* decision initially pleased Republicans but infuriated Democrats. Just days after the decision, President Barack Obama, a Democrat, rebuked the Court in his 2010 State of the Union address. With the Supreme Court justices sitting in the front row of the House chamber, Obama warned that the *Citizens United* decision would "open the floodgates for special interests, including foreign corporations, to spend without limits in our elections. . . . I just don't think elections should be bankrolled by America's most powerful interests" (Greenhouse 2010). Such a public admonition of the Court by a president is quite unusual, especially during a State of the Union address. Many politically left-leaning observers and the four more liberal justices objected to the Court majority's narrowing of what activities would be considered potentially corrupting. In his dissenting opinion, Justice Stevens argued:

> Corruption can take many forms. Bribery may be the paradigm case. But the difference 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. Corruption operates along a spectrum, and the majority's apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.[24]

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However, the 2010 Supreme Court was more conservative than the 2003 *McConnell* Court, and most of the justices no longer saw a corruption danger in corporate independent electoral spending.

Dismantling BCRA, Step Four: *Citizens United* meets *SpeechNow.org*

A few months after the *Citizens United* decision, the U.S. Court of Appeals for the District of Columbia Circuit unanimously decided in *SpeechNow.org v. FEC*[25] that SpeechNow, a 527 nonprofit association making only express advocacy independent expenditures (i.e., expenditures that use the magic words), could not only *spend* without limit in federal elections (as the *Citizens United* decision now allowed) but it also could *raise* money in unlimited amounts from individuals. The Circuit Court found the BCRA limits on individual contributions to independent expenditure groups, such as SpeechNow, to be unconstitutional, *because of* the Supreme Court's decision in *Citizens United*. That is, if independent expenditures do not cause corruption or the appearance of corruption, then contributions *to* groups making only independent expenditures also are not corrupt or potentially corrupting. The Circuit Court argued that

> contributions to groups that make only independent expenditures cannot corrupt or create the appearance of corruption. . . . The Court has effectively held that there is no corrupting "quid" for which a candidate might in exchange offer a corrupt "quo." . . . [Limits on individual contributions] violate the First Amendment by preventing plaintiffs from donating to SpeechNow in excess of the limits and by prohibiting SpeechNow from accepting donations in excess of the limits.[26]

Then, in July 2010, the FEC issued two AOs to implement the *Citizens United* and *SpeechNow* decisions.[27] The first AO[28] codified the *SpeechNow* decision that contributions to organizations that make only independent expenditures are not to be limited for federal elections. The second FEC AO actually went *beyond* the Circuit Court's ruling in the *SpeechNow* case to allow independent-expenditure-only committees to collect contribu-

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tions without limit not just from individuals but also from corporations, labor unions, and other political committees.[29] In November 2010, the Supreme Court declined to hear the *SpeechNow* appeal, thus allowing the D.C. Circuit Court's ruling and the FEC's interpretations to stand. Because of the *Citizens United* and *SpeechNow* decisions and the FEC's AOs, neither the money *raised* nor the money *spent* by independent-expenditure-only groups (commonly referred to as super PACs) is subject to amount or source (except foreign nationals) limitations. Consequently, the types of campaign finance activities considered potentially corrupting, and therefore subject to regulation, were significantly narrowed in the name of free speech. With these decisions, very little of BCRA is left in force (see tables 4.1 and 4.3).

Super PACs!

Within weeks of the *SpeechNow* decision, we saw the emergence of a new type of campaign finance organization, the *super PAC*. These organizations can raise money in unlimited amounts from virtually any source (including corporations and unions, but not foreign nationals) and spend without limit to expressly advocate the election or defeat of a candidate with no blackout periods. The one caveat is that the spending must be truly independent—not coordinated with any candidate or party. Super PACs may not make contributions directly to a candidate or party, as traditional PACs can. They can spend unlimited amounts to help a candidate or party through independent expenditures (IEs), as traditional PACs already could do. Hence the FEC's technical name of these groups is *independent expenditure-only committees* (IEOC).[30]

The rise of super PACs is arguably the most significant campaign finance development since the 1970s. As super PACs began to emerge soon after the 2010 court decisions, former FEC chair Trevor Potter commented that the new super PACs were "the clearest, easiest way to spend unlimited funds on an election . . . pretty much the holy grail that people have been looking for" (Eggen and Furnam 2010). Like a traditional PAC, a super PAC must register with the FEC and report who contributes to it, how much they contribute, and how the super PAC spends those funds on electioneering activities (see chapter 5). However, super PACs also may accept donations from 501(c)(4) organizations and shell corporations.

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Because neither of those entities disclose their donors to the FEC, the original source of these donations remains virtually untraceable and thus secret. So, super PACs are not completely transparent campaign finance organizations, and they can be used (and have been used) as a channel for "dark" money (OpenSecrets 2020). We discuss super PACs in greater detail in the next chapter.

Dismantling BCRA, Step Five: Individual Contributors Challenge Hard Money Limits

In 2014, the Supreme Court further reinforced its narrow view of what counts as corruption in *McCutcheon v. Federal Election Commission*.[31] Alabama businessman and Republican donor Shaun McCutcheon and the Republican National Committee challenged the *aggregate* (overall) limit on how much an individual is permitted to contribute in limited hard money to *all* federal candidates, parties, and PACs in a two-year election cycle. This aggregate limit was established in the 1974 FECA Amendments, which barred an individual from giving more than $25,000 annually ($50,000 in a two-year election cycle) in aggregate contributions to all federal candidates, parties, and PACs (Corrado 2005a, 23). In 2002 BCRA increased the aggregate amount of hard money an individual could contribute to all candidates, parties, and PACs to $95,000 per election cycle and indexed the limit to inflation (see table 4.2 above).[32] Annual limits on contributions to parties were increased as well: the limit for contributions to a national party committee went from $20,000 to $25,000 and are now indexed for inflation.

When McCutcheon brought his lawsuit in 2012, the aggregate limit was $117,000 per two-year election cycle (Federal Election Commission 2011).[33] McCutcheon was not asking to make unlimited contributions. He was asking to make *limited* contributions to as many candidates, parties, and traditional PACs as he wished, arguing that the aggregate limit violated his First Amendment rights. The lower court upheld the aggregate limit as an appropriate means to prevent corruption or the appearance of corruption. However, the 5–4 conservative majority on the Supreme Court overturned the lower court's decision and ruled that the aggregate limit on what an individual may contribute in limited hard money does not serve to prevent corruption and is thus an unconstitutional violation

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of free speech. The Court said, "The Government may no more restrict how many candidates or causes a donor may support than it may tell a newspaper how many candidates it may support."[34]

Now, wealthy contributors may spread their hard money donations around to as many candidates, party committees, and PACs as they wish, within the limits for each contribution. In the majority's plurality opinion, Chief Justice Roberts reiterated the Court's now-narrowed view of what constitutes corruption as only quid pro quo corruption:

> Constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns. . . . Any regulation must instead target what we have called "quid pro quo" corruption or its appearance . . . the notion of a direct exchange of an official act for money. . . . Campaign finance restrictions that pursue other objectives . . . impermissibly inject the Government . . . into the debate over who should govern. . . . And those who govern should be the last people to help decide who should govern.[35]

In his dissent, Justice Stephen Breyer argued that lifting the aggregate contribution limit would allow circumvention of contribution limits and invite corruption. A single donor, he argued, could contribute to multiple state and federal party committees, and because those party committees may transfer unlimited amounts to one another, one or more of the party committees could direct contributions and spending to a candidate whom the original donor had already given the maximum contribution. However, the Court majority's strong assertion that only actual or the appearance of quid pro quo corruption poses a concern for possible undue influence is a clear statement that activities that might have raised corruption concerns in the past no longer do so.[36]

After the *McCutcheon* decision, a wealthy donor could give the maximum amount allowed to as many federal candidates, party committees, and PACs as they wanted. Indeed, one Republican donor gave $2,634,555 in limited hard money contributions to federal candidates, parties, and PACs in 2022, far more than what the pre-*McCutcheon* inflation-adjusted aggregate limit would have been for 2022, approximately $150,000.[37] Justice Breyer's prediction that donors could get around contribution limits by contributing to multiple political committees was realized by the increased

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use of joint fundraising committees (JFCs), which permit political organizations raising hard money to work together in order to approach high dollar donors all at once. We discuss JFCs at length in chapters 5 and 6.

Dismantling BCRA, Step Six: Political Parties Get Some Semisoft Money

New Party Committees and High Limits

The 1974 Federal Election Campaign Act Amendments provided public funding for the national parties' nominating conventions. The major parties (the Democrats and Republicans) received a flat public grant ($2,074,815 in 1976), to be adjusted for inflation in later years. In 2012, the last year these funds were allocated, the Democratic and Republican Parties each received $18,248,300 for their conventions (Federal Election Commission 2021a). Because FECA reformers meant to strengthen political parties, funding the major party conventions was a nod to the perceived importance of these national party meetings. Over time, however, party conventions became grander, made-for-television events, and the costs of mounting them rapidly outstripped the public funds available (Panagopoulos 2007; Shafer 1988).

The major parties came to rely on *host committees*, local civic booster organizations of the cities selected for hosting the conventions, for additional funding. Host committees were allowed to take unlimited donations directly from corporations and unions with a connection to the host city, and they succeeded in funding conventions far beyond the public subsidy's reach. Critics long argued that the insignificance of the public funds relative to private money undermined the idea of public funding of nominating events (H. Alexander and Bauer 1991, 31). Then, in 2014, Congress passed and President Obama signed the 2014 Gabriella Miller Kids First Research Act, which ended the public subsidy for party conventions, diverting the money instead to pediatric cancer research.[38] As we explain in chapter 6, other uses for the public funds created in the 1971 Revenue Act were already being abandoned.

Later in 2014, Congress passed and President Obama signed the Consolidated and Further Continuing Appropriations Act of 2015.[39] The main purpose of the bill was to prevent the government from shutting down because an official budget for fiscal year 2015 had not been passed by the

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regular October 1 deadline.[40] However, this "must pass" bill also included provisions to significantly increase some hard money contribution limits to national party committees, in part to make up for the lost convention funding. The law allowed the national party committees of the two major parties to establish new segregated accounts, each with separate contribution limits that tripled the amount individuals and PACs could give to the national parties under BCRA. These are the new accounts:

- **Convention account:** This account is available only to the DNC and RNC for presidential nominating convention expenses to replace the loss of public funding.
- **Headquarters building account:** All six national party committees (each party's national committee and their House and Senate campaign committees) may each establish an account to raise and spend funds for construction, renovation, and operation of a national party headquarters.
- **Recount/legal account:** All six party committees also may have an account to pay for expenses related to election recounts and other legal proceedings. (Garrett 2015)

Political parties, whose questionable soft money fundraising practices fueled support for BCRA in the first place, once again had legal backing to accept large contributions from wealthy donors. The 2016 and 2020 Republican and Democratic National Conventions were paid for entirely by host committees and the new RNC and DNC national convention accounts. Table 4.4 shows the limits for individual and PAC contributions to the national party committees before and after the *McCutcheon* decision (2012 and 2014) and after the new convention, headquarters, and recount/legal party committees were established. Because of the new special party accounts, a single individual donor could give up to $876,000 combined to the three committees of one national party in a calendar year, and double that, $1,752,000, for the two-year election cycle of 2021–22 (see the last column of table 4.4), far more than the $74,600 an individual could give under the old rules in place before 2015. Traditional PACs can give more to the various accounts of the national party committees as well, and a multicandidate PAC, the most common type of traditional PAC, could potentially give $720,000 ($360,000/year) during the 2021–22 election cycle to a party, more than 10 times the limit before the 2014 *McCutcheon* decision. That is a lot of money from one source!

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TABLE 4.4. Contribution Limits to National Party Committees after *McCutcheon* and after the 2015 Appropriations Act

Contributor Type	2015 Limits after *McCutcheon*	Limits by 2022	New Additional Accounts and Associated Limits after the 2015 Appropriations Act[a]			2022 Total Possible Contributions*[b]
Individual to:	**Contributions***	**Contributions***	**2022 Convention Account***	**2022 Building Account***	**2022 Recount/Legal Account***	**2022 Total Possible Contributions***
DNC, RNC	$33,400/year	$36,500/year	$109,500/year	$109,500/year	$109,500/year	$365,000/year
DCCC, NRCC	$33,400/year	$36,500/year	N/A	$109,500/year	$109,500/year	$255,500/year
DSCC, NRSC	$33,400/year	$36,500/year	N/A	$109,500/year	$109,500/year	$255,500/year
Totals	**$100,200/year**	**$109,500/year**	**$109,500/year**	**$328,500/year**	**$328,500/year**	**$876,000/year**
Multicandidate PAC to:	**Contributions**	**Contributions**	**2022 Convention Account**	**2022 Building Account**	**2022 Recount/Legal Account**	**2022 Total Possible Contributions**
DNC, RNC	$15,000/year	$15,000/year	$45,000/year	$45,000/year	$45,000/year	$150,000/year
DCCC, NRCC	$15,000/year	$15,000/year	N/A	$45,000/year	$45,000/year	$105,000/year
DSCC, NRSC	$15,000/year	$15,000/year	N/A	$45,000/year	$45,000/year	$105,000/year
Totals	**$45,000/year**	**$45,000/year**	**$45,000/year**	**$135,000/year**	**$135,000/year**	**$360,000/year**
Non-Multicandidate PAC to:	**Contributions***	**Contributions***	**2022 Convention Account***	**2022 Building Account***	**2022 Recount/Legal Account***	**2022 Total Possible Contributions***
DNC, RNC	$33,400/year	$36,500/year	$109,500/year	$109,500/year	$109,500/year	$365,500/year
DCCC, NRCC	$33,400/year	$36,500/year	N/A	$109,500/year	$109,500/year	$255,500/year
DSCC, NRSC	$33,400/year	$36,500/year	N/A	$109,500/year	$109,500/year	$255,500/year
Totals	**$100,200/year**	**$109,500/year**	**$109,500/year**	**$328,500/year**	**$328,500/year**	**$876,000/year**

Source: Compiled by authors with material from various Federal Election Commission files; Garrett (2015).

* Limits are indexed to inflation each election cycle.

[a] The new party accounts for headquarters, legal/recount activities, and convention expenses were included in the Consolidated and Further Continuing Appropriations Act, 2015 P.L. 113-235; 128 Stat. 2772.

[b] This is the total direct contribution plus special account contributions the contributor may make to a national party committee per year in 2022. Note that individual and non-multicandidate PAC contributions are adjusted for inflation in odd-numbered years.

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While the special committees' relatively high contribution limits are not a return to unlimited soft money contributions, they undermine BCRA's ban on party soft money and allow the parties to raise what might be considered *semi*-soft money (Dwyre and Kolodny 2019, 257; Garrett and Reese 2016; C. Levine 2015). Yet some scholars favor the new sources of funds for the parties, because, according to La Raja, "[a] greater portion of cash, which is now swishing around outside the formal campaign finance system, will flow instead through highly transparent parties. . . . Making parties the central financiers of elections strengthens their vital role in the political process" (2014b). One thing is clear: the national party committees raise quite a lot of money via these new convention, headquarters, and recount/legal accounts, a total of nearly $321 million for the 2019–20 election cycle (Federal Election Commission, Party Data n.d.). Given the scaled-down conventions for 2020 due to the COVID-19 pandemic, the DNC and RNC did not pressure donors intensely to contribute to their convention accounts (raising just over $39.7 million), though the various committees of both parties raised significant amounts for their recount/legal accounts (over $117.8 million) in preparation for the many postelection legal challenges both sides knew to expect (Ohio State University, Moritz College of Law 2021; Federal Election Commission, Party Data n.d.).

The End of BCRA

It took candidates, parties, interest groups, and the courts about 30 years to do serious damage to the spirit of the 1971 and 1974 FECA laws before legislators tried to remedy some of it through BCRA. It took only 12 years, from BCRA's passage in 2002 to the *McCutcheon* decision in 2014, to essentially gut it. We explained the three significant (and perfectly legal) adaptations BCRA spawned: (1) innovation in hard money fundraising; (2) expanded use of 527 organizations; and (3) use of 501(c) organizations to maintain anonymous donations. Other parts of BCRA were less easily circumvented and these required court challenges.

Conservative entrepreneurial campaign finance actors, including key Supreme Court jurists, pushed to further apply free speech rights to campaign finance rules on behalf of individuals (*McCutcheon*), candidates (*Davis*), interest groups (*Wisconsin*), and even corporations (*Citizens*

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United). By 2022, little remained of BCRA's key provisions. The lawmakers who wrote BCRA certainly never expected the court to first affirm (*McConnell* in 2003) and then dismantle the law's main limits. Neither did they expect so many major court decisions to happen so quickly and so unfavorably against attempts to curb corruption and promote a more level campaign finance playing field.

The fundamentals of the U.S. political system that led us to this point are about the need to conduct elections in a democracy and the expectation that wealthier individuals in a capitalist system would want elected officials to make policy favorable to them. Another fundamental concern was how to prevent corruption in such a system. While the courts at first applauded efforts at corruption control, the opponents of campaign finance regulation objected to how limits on campaign money deprived them of their free speech rights. The Supreme Court's preference of which right to protect most—free speech—won out. Next, we explain how the current system allows donors to participate in elections.

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CHAPTER 5

The Players and the Game

Individuals, Parties, and Groups

In the first half of this book, we explained the evolution of contemporary campaign finance regulation in the United States. We focused primarily on the constraints that FECA and BCRA intended to combat corruption followed by the strategic adjustments and successful court challenges that diminished their affect. The relationship that elected officials have with the people who give money for their reelection efforts is at the heart of the corruption concerns that drive regulatory efforts. In this chapter, we explore the current campaign finance system from the perspective of the individuals, parties, and groups who donate and spend money in federal elections. As we have a privately funded campaign finance system, all money starts with individuals who donate voluntarily. What options do individuals have when they wish to be campaign donors? What motivations do they have? Who participates in this way?

Who Are Donors Anyway?

We refer to the collection of voters in a democracy as the "electorate." Likewise, campaign finance scholars often refer to the collection of donors as the "donorate" (Hill and Huber 2017; Barber, Canes-Wrone, and Thrower 2017; Canes-Wrone and Miller 2021). In chapter 2, we explained that donors have three types of motivations for making contributions: as investors (material interests), ideologues (causes), or intimates (social connec-

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tions). We also explained principal agent theory—that individual donors can chose to send their money directly to their favored candidates or use agents such as political parties and interest groups to make campaign choices for them depending on their goals. As a result, the donorate has multiple channels to contribute to election campaigns to persuade voters to back their favored candidates.

While we have suggested that donors are richer than the average American, we have not discussed any other qualities. When people think about campaign finance, they immediately think about the wealthy donors, the "fat cats" or "large" donors. Unsurprisingly, donors to political campaign organizations in the U.S. are overwhelmingly white, male, educated, wealthy, and older than average citizens (Magleby, Goodliffe, and Olsen 2018). They are not nearly as diverse as the American electorate. This, of course, is precisely the concern of reformers: If only a small elite are responding to the pleas from candidates to fund their campaigns, wouldn't those elites' interests be at the top of politicians' agendas?

Comparing voters to donors makes the case. It is hard to have precise numbers, but Spencer Overton estimated that while 51.3 percent of eligible voters cast a vote in the 2000 election, only 2 percent of the American public donated $200 or more to a federal candidate in that cycle (Overton 2004, 75). In 2020, less than 1 percent of the adult population contributed the maximum to a federal candidate ($2,800) and less than 2 percent contributed over $200 to federal candidates (OpenSecrets, Donor Demographics n.d.). However, a recent study by a team of economists finds that 8.5 percent of the U.S. adult population made a political contribution of any amount to a federal candidate in 2020 (Bouton et al. 2022, 10–11). That still sounds like a low number, but the size of the donorate has mushroomed in just 20 years. Much, but not all, of that growth is driven by people who give small amounts of money.

Just as we think of the American electorate as having frequent voters, occasional voters, and nonvoters, we can think of the donorate as having large donors, small donors, and nondonors. When we discussed donor motivations in chapter 2, we noted that individuals who donate in very small amounts are more likely to be acting as an ideologue (also known as expressive behavior, as in expressing a view) than an investor. People who donate $25 do not expect to be influencing members of Congress to change their policy behavior. We follow both the law and political science scholarship in describing small and large donors.

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Comparing Small and Large Donors

All political committees registered with the FEC (e.g., for candidates, parties, and interest groups) must disclose the name, address, and occupation of individual contributors once the aggregate amount of their contributions to that political committee reaches $200 in a campaign cycle. No committee is responsible for knowing an individual's donor's total contributions to *all* political committees. If a donor gives $200 or more to a political committee, this is called a "large" contribution, and these donors' contributions will be "itemized" in the committee reports. But those who give less than $200 are considered small donors, and their contributions can be reported in the "unitemized" section of the FEC reports with no identifying information such as their name, address, or occupation. Some scholars refer to these donors as "hidden" for that reason (Alvarez, Katz, and Kim 2020, 2). Small donors may eventually become large donors if their aggregate contribution totals $200 or more to a political committee (candidate, party, or group) in a two-year election cycle. Newer technology makes this graduation from small to large donor more likely to happen with the ease of automatic giving online because a donor who gives $10 per month to their favorite presidential candidate in a two-year cycle (24 months) will eventually hit the $200 disclosure threshold.[1] The 1974 Amendments to the FECA require the source of donations of $200 or more be reported. This $200 cutoff has never been indexed for inflation. If it had been adjusted, the cutoff for small donor reporting would have been about $1,020 in 2022 rather than $200 (U.S. Bureau of Labor Statistics n.d.). That means that today's small donor gives very little money indeed!

Until very recently, scholars could rely on information about large donors only. However, the recent use of partisan fundraising platforms has changed this. As we explained in chapter 4, Democrats established the nonprofit ActBlue in 2004 and the Republicans launched a similar platform, WinRed, in 2019 to facilitate small grassroots donations to their candidates, parties, and groups (C. Levine 2018; C. Levine and Overby 2019). As intermediaries (collecting a contribution and then passing it on to a recipient), ActBlue and WinRed must report the amount, donor name, and address for *all* contributions, even the smallest. Using these data, the economists mentioned above studied all donors to federal elections from 2006 through 2020. The number of donations (not donors) rose from 5.2 million in 2006 to a whopping 195 million in 2020, thanks largely to

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ActBlue (especially after 2012). Laurent Bouton et al. explain, "We first observe that the number of contributions has dramatically increased over time. It was nearly ten times larger in the 2018 cycle than in 2006, and it increased again four-fold between 2018 and 2020" (2022, 6). The mean and median contribution amount dropped substantially as well: the mean went from $292 in 2006 to $60 in 2020, and the median from $60 to $15. We now have more donors giving contributions in smaller amounts and this trend coincides with increasing racial, gender, and ethnic diversity in the donorate.

Small donors are frequently considered the solution to a campaign finance system that skews toward the needs of the wealthy (Malbin et al. 2012; Malbin and Parrott 2017; Vyas et al. 2020). If candidates need money to run for office and more of that money comes from small donors, then candidates will pay more attention to them. Many local governments and a few states have experimented with programs to encourage more small donor participation by offering matching funds (public money to match small donations) or voucher programs, which allow citizens to designate which candidates will get a small amount of public funds (meaning that donors do not have to use their own funds at all). We discuss these efforts in greater detail in chapter 8. The idea that candidates should engage with more people to get resources for their campaign has great appeal and was an integral part of the presidential public funding system from 1976 to 2008 (we discuss this in chapter 6). However, other scholars note the increase in small donors since Donald Trump's 2016 campaign and find that many are more ideologically extreme, and thus this expansion of the donorate is potentially polarizing (Pildes 2019; Keena and Knight-Finley 2019; Karpf 2013). The decision to become a donor at any amount is indeed multidimensional.

Donors Are Older

If donors are people who have more discretionary income (wealth), then we would expect donors to be older rather than younger. Adam Bonica and Jacob Grumbach explore what they call the "Gerontocracy" in the United States by analyzing "participation rates by age in four key political activities: primary voting, general election voting, political donations, and candidate entry," finding younger Americans are significantly under-

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represented in all four activities, and these deficiencies "are especially pronounced in primary voting and donating to campaigns (especially for larger donations)—the two forms of political participation that are highly consequential for candidate selection" (2022, 4). The age of the median donor in 2020 was 59, but when weighted for the size of the contribution, the median age rises to 66, and only 9 percent of contributions came from donors 40 and younger (Bonica and Grumbach 2022, 13). Donors are older than both voters and candidates. Might this skew the policy agenda more to the needs of retirees or those planning how their heirs will inherit their estates as a result?

More Money Comes from Men

Another major study of individual donors between 1980 and 2008 focuses on donor gender. Jennifer Heerwig and Katie Gordon find that women were only 20 percent of all individual donors in 1980, but that grew to 37 percent by 2008 (Heerwig and Gordon 2018, 814). Bouton et al. found the percentage of female donors continued to rise between 2006 and 2020, when 54.1 percent of small donors were women (Bouton et al. 2022, 13). Women's participation in the donorate depends on whether a candidate is female, or a political group focused on women's candidacies supports them. EMILY's List, which supports Democratic pro-choice women candidates, is the important donor networking group for many female candidates. EMILY stands for Early Money Is Like Yeast (it makes the dough rise) (EMILY's List n.d.). Their endorsement is highly predictive of donations from Democratic men who value diversity in the party (Swers and Thomsen 2020, 246) as well as donations from women. Michael Crespin and Janna Deitz find that a female candidate's receipts are significantly higher if they are included in this network than if they are not (2010, 589).

Women donors behave differently than male donors in targeting their contributions too:

> Women are far more likely to donate only to presidential candidates, while men are most likely to give to House candidates alone. Perhaps the most striking difference emerges for PACs where an over 20-percentage point gender difference divides giving to indus-

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> try and ideological PACs. The findings underscore the extent to which the government relations operations of corporations seem to be dominated by men, while women more often target their donations to PACs that can amplify the voice of women's interests in electoral politics. Taken together, these differences reflect deep cleavages in the donation strategies of the affluent women and men who participate in the campaign finance system. (Heerwig and Gordon 2018, 822)

The vast array of recipients available to donors can obscure some of the trends Heerwig and Gordon discovered. This gives us even more reason to scrutinize donor behavior by demographic characteristics.

Race and Ethnicity of the Donorate

Jacob Grumbach and Alexander Sahn analyzed large individual hard money contributions ($200 and above) between 1980 and 2012 and found that only 9.3 percent of these donors were minorities, meaning that more than 90 percent of donors to federal campaigns are white. This is in stark contrast to the race of voters, as 29 percent of eligible voters in this same period identify as ethnic or racial minorities (2020, 213). Also, minorities are a larger proportion of elected officials than of the big dollar donor class. This is especially the case with both Blacks and Latinos (Grumbach 2020, 213–14).

Bouton et al. found that of all large individual donors from 2006 to 2020, 37.5 percent were female, 89.6 percent white, 3.7 percent Black, 5.5 percent Hispanic, and 3.0 percent Asian. Only whites made up more of the large donorate (89.6 percent) than of the potential electorate (67 percent). The story is different for small donors who are 54.1 percent female, 82.4 percent white, 6.5 percent Black, 7.3 percent Hispanic and 3.5 percent Asian. Note that both whites (82.4 percent of donors to 67 percent of voters) and females (54.1 percent of donors to 51.5 percent of voters) are a greater proportion of the small donorate than the potential electorate. Blacks and Hispanics are far better represented in the small donor pool than in the large donor pool (Bouton et al. 2022, 14). Michael Alvarez, Jonathan Katz, and Seo-young Kim used ActBlue data to analyze small donations to Bernie Sanders' presidential campaign in 2016 and found

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that hidden donors (those whose identities were not previously itemized in political committee disclosure reports due to the small amounts given) differ in important ways from visible donors—they are more likely to be female, younger, and nonwhite (especially Hispanic) and far more likely to list their occupation as "student" (Alvarez, Katz, and Kim 2020).

While many scholars find that the presence of female candidates improves women's participation in the donorate, Marvin King found this not to be the case for Black donors. He studied the patterns of donations from areas with 85 percent or more Black population to see if the presence of a Black candidate for president, specifically Barack Obama in 2008, increased the number or amounts, or both, of donations from these areas. It did not. King makes a couple of important observations. First, the availability of discretionary income to make donations with is usually associated with the national unemployment rate, but African American unemployment is nearly always higher, by 2.5 percent or more, than aggregate unemployment figures. Second, wealthier zip codes produce more contributions—just as they do for whites. Third, Black participation was up a lot in every other area in 2008—voting and organizing—but not in contributing (King 2009). Some scholars are concerned that the racial composition of the donorate is a significant problem for representative government, but perhaps Black political participation is more effective in arenas such as grassroots mobilization, as King suggests.

Out-of-District Donors

Contributors from anywhere in the country may give to candidates anywhere else in the country. In the 2020 elections, the median percentage of out-of-state contributions to House incumbents was 35.8 percent and 61.8 percent for Senate incumbents (OpenSecrets, In-State vs. Out-of-State n.d.). While representation in Congress depends on the voters in the geographical areas that elected officials represent, candidates may be reliant on donors from across the country. Some call this "campaign finance nationalism" and Eugene Mazo argues this is concerning because

> over time, our campaign finance nationalism moves the policy positions of our legislators away from their median constituents to align

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> more with their median contributors. The wealthy political donors and spenders who influence our elections are not at all representative of the American voting population. These donors tend to be significantly more conservative on economic issues, in their views on social welfare spending, and on issues like affirmative action. (Mazo 2019, 807)

Likewise, Richard Briffault (2015, 31) argues that nonresident contributions encourage candidates to seek resources from both inside and outside their state/district and thus may feel the need to be responsive to two very different groups, constituents and contributors, whose goals may be very different from one another's. Brandice Canes-Wrone and Kenneth Miller find that House incumbents are raising increasingly more of their individual donations from out-of-district contributors (who are usually richer, older, more male, and whiter than their district's citizens), and the more lawmakers rely on out-of-district contributions, the more their roll-call votes are responsive to their party's national donor base than to their district. Moreover, as incumbents become more electorally secure, their responsiveness to the district's opinion declines (Canes-Wrone and Miller 2021, 25–26).

Not everyone agrees with this critique. For instance, Jessica Bulman-Pozen (2014, 1082) argues that permitting citizens from one state to contribute to candidates in another state allows states to counter the influence of the federal government. Anthony Johnstone (2014, 120) argues that contributions from outside electoral districts are consistent with First Amendment rights of speech and association, but that contributions from foreigners or from outside the country should not be allowed. Moreover, congressional lawmakers make policies that impact people across the nation, not just in their states and districts. Major metropolitan areas often have "bedroom suburbs" in multiple states (New York City—New Jersey—Connecticut; Philadelphia—New Jersey—Delaware—Maryland; Boston—New Hampshire—Rhode Island—Connecticut), complicating the argument that out-of-district donors are not concerned with local issues. A donor concerned about issues related to their employer may make an "out of state" contribution motivated by regional events. To date, there has not been a successful effort to limit out-of-state or out-of-district contributions at the federal level.[2]

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Contributions Made by Individuals: Donor Options and Motivations

A person who wants to support a candidate, cause, policy, or political party in an election with a monetary contribution now has a wide range of choices to consider. As we explained in chapter 2, a contribution is a singular transaction. Each time something of value is received, the campaign entity must record and report it. Donors may make several contributions to various candidates, parties, and groups so long as they do not exceed the limit for each type of recipient, if there is one. The donor must consider the following: how much money they would like to contribute; whether they want their donation to be public or hidden; and which donation vehicle to use.

Amount

As we just explained, small donors and large donors have different profiles. Small donors skew younger than large donors and tend to give to highly competitive races with quality candidates (Culberson, McDonald, and Robbins 2019). Both major political parties benefit from this increase in interested, and potentially repeating, new donors. Intermediaries like ActBlue charge $3.95 per transaction to the recipient of the funds (not the donor) and WinRed charges 3.94 percent of the value of the transaction to the recipient (WinRed n.d.). In 2022, the DNC asked for a $10 minimum donation, while the NRCC asked for a $3 minimum. These party committees' websites offer donors an array of small amounts to click on, hoping they will choose a greater amount (like $25) or check the box on the site to give a monthly donation. Given the ease of asking for contributions online, candidates, parties, and groups of all sorts actively approach small donors.

Since the 2014 *McCutcheon* decision, there is no longer a limit on the hard money total a person may contribute to all candidates, parties, and groups. There is no limit on contributions to super PACs or to 527 and 501(c)(4), (5), or (6) nonprofit organizations. That means big givers have many options, depending on how much they wish to give and to whom.

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Transparent or Opaque?

Small donors' identities might not be revealed if they give less than $200 (as they can be listed as "unitemized"), but many political committees, especially those associated with a candidate who touts their affinity with small donors, will reveal these donors anyway. As the organizations must report a donor if their contribution totals eventually hit the $200 level, they typically ask for the donor's name, address, and profession no matter how small the amount given.

Abby Wood (2018, 6) points out a central issue in the current system: wealthy donors can select their contribution vehicles by "disclosure condition." If a wealthy donor is comfortable with their name, address, and occupation being a matter of public record, they will make one or more hard money contributions to a candidate, political party committee, traditional PAC, or super PAC. All these recipients report their financial transactions to the FEC. However, if a donor does not wish to have that information in the public record, they can easily avoid disclosing their personal information by choosing to give to a 501(c)(4), (5), or (6) organization and some 527 organizations, groups that are not required to report their donors. Why do some donors want to remain anonymous? There are a variety of answers, from wanting to avoid harassment due to their political views (B. Smith 2001, 219–21), to avoid repeated pleas for new donations (Dutton 2007), and in the case of a business or its owners, to avoid customer backlash (Tribe and Matz 2014, 219–21).

Individuals Choose Recipients for Their Money

As we explained in chapter 2, if an individual feels very strongly about a candidate, they may make an unlimited independent expenditure (this is spending, not contributing) on the candidate's behalf. This turns out to be a rare event. Most individuals give directly to the candidate they champion. But limits on those donations, or a desire to support a broader goal like party control of Congress, may lead donors to use an agent, chiefly a political party organization or interest group. These agents use the donation to support one or more candidates whose election would further the donor's goals. Figure 5.1 illustrates the many options available to individ-

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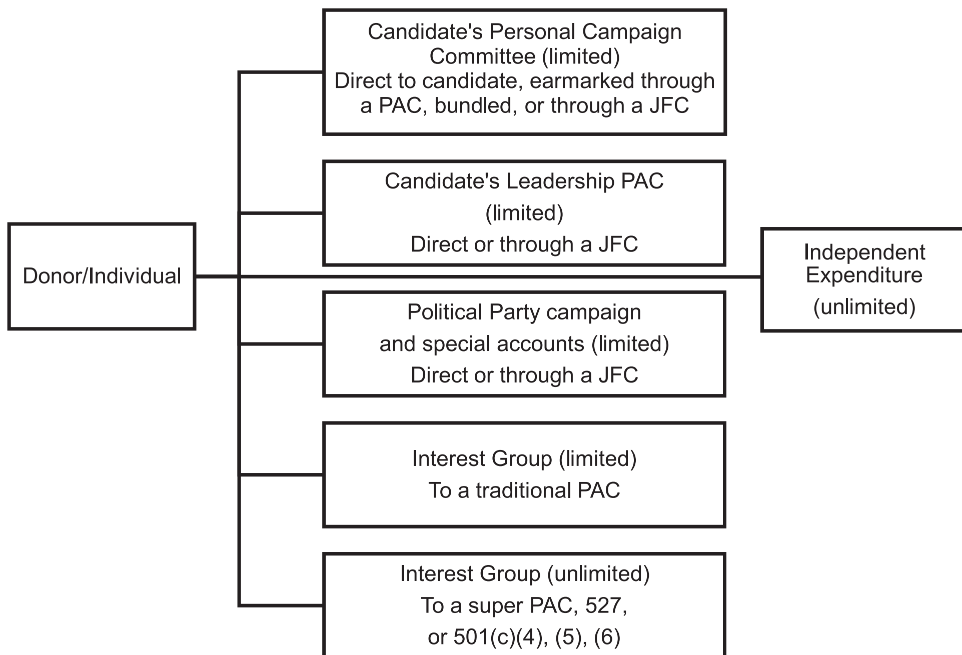

Fig. 5.1. Campaign Money Comes from Individuals—Options for the Individual Contributor (*Note:* If the donor is a candidate, they may give unlimited amounts to self-fund their own campaign for office.)
Source: Created by the authors.

ual donors. Most donors do not use all these paths for their contributions, but here we want to lay out the current options. We explain each in turn.

Option One: Contribute Disclosed Hard Money Directly to One or More Candidates

Making a direct contribution to a candidate's campaign committee is the most popular option for donors, small or large (Heerwig and Gordon 2018, 818). The 1974 FECA Amendments limited individual contributions to candidates to no more than $1,000 *per election*. The per-election provision recognized that in any given election cycle, a candidate could need funds to win their party's nomination through a competitive primary

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election, and then win the seat through a competitive general election.[3] The $1,000 limit was not indexed for inflation, but BCRA increased the limit to $2,000 per candidate per election beginning with the 2004 cycle and provided an inflation adjustment for subsequent election cycles. This means every two years, the limit may increase.

While the limit remained at $1,000 for 26 years (1974 to 2002), the cost of goods and services did not. For example, a loaf of bread cost $0.24, on average, in 1974. By 2002, when BCRA increased the limits, the average price was $0.91, 3.8 times more (Datopian DataHub n.d.). The declining purchasing power of a dollar is why Congress doubled the base contribution amount to $2,000 and created an inflation index for the limit. As our loaf of bread example suggests, the limit should have been closer to four times, not two times, the original limit to reflect the true rise in costs. For 2024, an individual can give $3,300 per election directly to a federal candidate. Figure 5.2 shows how individual contribution limits have changed from 1974 to 2024.

Because lawmakers were worried about donors with great wealth influencing a large number of legislators, both FECA and BCRA set overall *aggregate* limits on individuals making direct contributions in a particular two-year election cycle. As we explained in chapter 4, this limit remained in place until the Supreme Court struck it down in *McCutcheon* in 2014.[4] The wealthiest donors wasted no time taking advantage of the opportunity to increase their hard money contributions. Prior to the *McCutcheon* decision, 476 individuals contributed the maximum amount permitted under the aggregate limits in the 2012 presidential election cycle. In the 2016 presidential election (the first after *McCutcheon*), 1,845 donors contributed more than the previous limit of $123,200, and for the 2020 presidential election, 3,191 individuals contributed more than this amount (Noland 2016; OpenSecrets, Biggest Donors n.d.). Thus, the first post-*McCutcheon* presidential election cycle featured almost four times as many individuals making large aggregate contributions, and for 2020 over six times as many did so.

To illustrate, we examine how two wealthy contributors donated their money in 2020. Each donor gave just over $30 million during the 2020 election cycle—one exclusively to Democratic interests, one exclusively to Republican interests.[5] The amounts they gave to different entities vary, as do the number of organizations they supported. As table 5.1 shows, both

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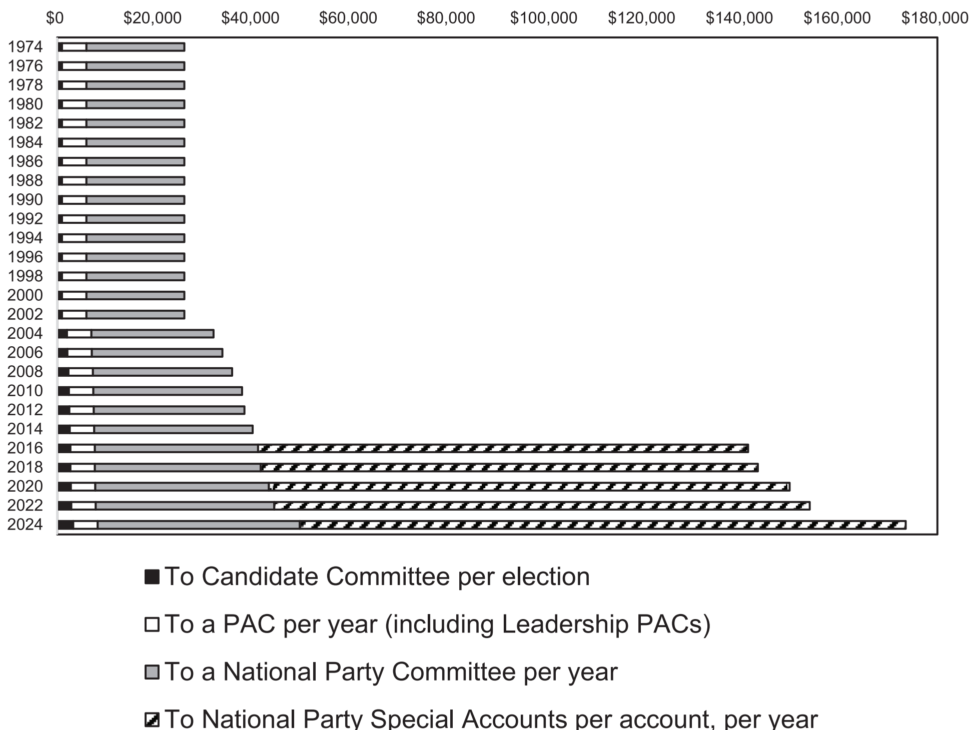

Fig. 5.2. Changes in Individual Contribution Limits 1974–2024 (current dollars)
Source: Compiled by authors from Federal Election Commission data, various years.

donors used option one, giving hard money to candidates for the House and Senate. Only the Democratic donor gave to presidential candidates. Some of these contributions came through intermediaries that we discuss below. The Democratic contributor gave $841,776 to 185 federal candidates. The Republican contributor gave only $185,800 to 45 candidates. Most of these contributions were made at the "maximum" amount allowed in 2020—$2,800 per election for a total of $5,600 (primary + general). Direct contributions to candidates accounted for 2.4 percent of the Democrat's total transparent contributions but only 0.6 percent of the Republican's. Note this is still a considerable number of candidates for both donors to select for support and only possible after *McCutcheon*.

If a donor feels especially strongly toward an individual candidate, they also may give up to $5,000 per year to a federal candidate's leadership PAC, for a total of $10,000 in an election cycle. Federal candidates can establish a leadership PAC, a separate committee not connected to a

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candidate's authorized campaign committee, to contribute to other candidates and pay for some expenses not covered by their campaign committee. We discuss leadership PACs in greater detail in chapter 6. Table 5.1 shows our Republican contributor gave $15,000 to leadership PACs in the 2020 cycle to two candidates for whom the contributor already gave the maximum contribution to their campaign committee. Our Democratic contributor gave $72,200 to 13 candidates, all of whom also received hard money contributions to their campaign committee from the donor (most at the maximum limit).

Option Two: Contribute Disclosed Hard Money to Political Parties

The 1974 FECA Amendments limited the amount an individual may contribute directly to political parties to help elect their candidates. The law did not anticipate the invention of soft money by political party organizations, and, as we detailed in chapter 3, some wealthy individuals made large soft money contributions (sometimes in the millions of dollars and often undisclosed) to the national parties beginning in the 1980s. BCRA ended soft money contributions to the national parties and increased individual limits for hard money donations in 2002, as figure 5.2 shows. In 2015, national parties got an additional boost with new special accounts, so donors have multiple channels to send hard money to the national parties.

Direct Contributions to National Party Organizations' Campaign Accounts

National party organizations try to help candidates win close elections. If a donor's top priority is ensuring that their party wins the majority in the U.S. House, the U.S. Senate, or wins the presidency, they might choose to use a national political party committee as an agent. Political parties tend to have accurate information on which candidates are more or less likely to win, and the party will use their resources with more agility (as races become more or less competitive) than the donor could manage on their own. Moreover, large contributions to the party may help wealthy donors get exceptional access to party leaders and multiple elected officials or invitations to exclusive social events.

The limit for individuals to donate to national party committees for

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TABLE 5.1. Two Big 2020 Contributors

Ways to Contribute	Democratic Contributor	Direct	Earmarked + JFC	Republican Contributor	Direct	Earmarked + JFC
Option One: Contribute Disclosed Hard Money Directly to Candidates						
	$841,776 (N=185)	$92,519	$749,257	***$185,800 (N=45)***	$58,800	$127,000
	2.4%	11%	89%	*<1%*	32%	68%
House Candidate Committees	$590,100 (N=145*)	$50,900 (N=21)	$539,200 (N=125)	$114,800 (N=30)	$33,600 (N=12)	$81,200 (N=18)
Senate Candidate Committees	$156,002 (N=35*)	$21,282 (N=6)	$134,720 (N=30)	$56,000 (N=15)	$25,200 (N=7)	$30,800 (N=8)
Presidential Candidate Committees	$23,474 (N=5*)	$15,337 (N=4)	$8,137 (N=2)	$0	$0	$0
Senate Leadership PACs	$17,200 (N=3)	0	$17,200 (N=3)	$10,000 (N=1)	0	$10,000 (N=1)
House Leadership PACs	$55,000 (N=10)	$5,000 (N=1)	$50,000 (N=9)	$5,000 (N=1)	0	$5,000 (N=1)
Option Two: Contribute Disclosed Hard Money to Political Parties						
	$1,958,100		$1,958,100	***$15,000***		
	5.7%			*<1%*		
Make Direct Contributions to Specific Accounts, as follows:						
National Party Organizations Campaign	$177,500 (N=3)		$177,500 (N=3)	$0		
National Party Organizations' Special Accounts	$785,900 (N=7)		$785,900 (N=7)	$0		

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State Party Organizations Campaign	$994,700 (N=51)		$994,700 (N=51)	$15,000 (N=2)	$5,000 (N=1)	$10,000 (N=1)
Option Three: Contribute Disclosed Hard Money to Interest Groups						
	$15,148			***$5,000***		
	<1%			<1%		
Donate to Traditional PACs	$15,148 (N=6)	$15,148 (N=6)		N=1	N=1	
Option Four: Contribute to Super PACs and Hybrid PACs (unlimited)						
	$24,992,962			***$30,878,000***		
	74%			*99%*		
Hybrids	$5,254,362 (N=12)	$5,254,362 (N=12)		*$0*		
Supers	$19,738,600 (N=20)	$19,738,600 (N=20)		$30,878,000 (N=5)		
Option Five: Contribute to Undisclosed Entities (unlimited soft money)						
	$6,000,000			$0		
	18%					
Option Six: Make Your Own Expenditures						
	$0			$0		
Grand Total	***$33,807,986***			***$31,083,800***		

Source: Compiled by authors from Federal Election Commission and OpenSecrets data. Our totals for these donors differ slightly from the totals reported by the FEC and OpenSecrets in part because contributions made through joint fundraising committees appear twice in the FEC data. We eliminated duplicate contributions in our analysis.

*At least one candidate received both direct and earmarked contributions.

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campaign activities rose from $20,000 per year under FECA (1974–2002) to $25,000 per year in BCRA, a limit now indexed to inflation. As figure 5.2 shows, as of 2024, an individual can contribute up to $41,300 per year to a national party committee, and they may give this amount to *each* committee of a national party, that is, a party's national committee (DNC/RNC), Senate campaign committee (DSCC/NRSC), and House campaign committee (DCCC/NRCC). In 2020, the limit was $35,500 per year per committee, for a total of $106,500 per year for all three national Democratic or Republican committees. Our Republican contributor did not give any hard money to the national party committees in 2020. Our Democratic contributor was generous to the three Democratic national party committees in the 2020 cycle, for a total of $177,500 ($213,000 was the hard money limit in this category for the 2020 cycle).

Individuals may also give up to $10,000 per year to state and local party committees combined[6] for federal election activity, but this limit is still not indexed to inflation. Our Democratic donor gave $994,700 to 51 state party committees (we discuss how in the section on political parties), while our Republican donor gave only $15,000 to two state party committees (see table 5.1).

Direct Contributions to National Party Organizations' Special Accounts

Starting in 2015, individuals could donate to the new national party special accounts we discussed in chapter 4. Contributions to the parties' convention, building, and recount/legal expenses accounts are fully disclosed to the FEC. By 2020, a donor could give up to $106,500 per year to each party committee's special accounts (but only to its national committee for the presidential convention account), $109,500 per year by 2022, and $123,900 per year by 2024. By 2024, one donor can give $1,734,600 to one party's special accounts, plus $247,800 (a grand total of $1.98 million) to the party's national, House, and Senate committees' campaign accounts for the two-year election cycle. Donors are aware that these funds do not go for direct candidate support, but they are attractive options for people whose allegiance to the party's goals is strong. These large amounts also echo party soft money of the past, but with full disclosure. Our Republican donor did not choose to send any money to these special accounts in 2020. Our Democratic donor, on the other hand, gave generously, send-

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ing $795,900 to all seven[7] Democratic national party committees' special accounts in 2020.

Option Three: Contribute Disclosed Hard Money to Interest Groups

Individual donors also contribute to interest groups backing candidates based on a narrower set of goals than majority party control, such as particular public policies. Both FECA and BCRA reformers tried to encourage individuals to use political parties as agents rather than interest groups by setting a higher limit on individual donations to parties than to interest group traditional PACs. Redirection toward giving to a party rather than an interest group may not work for the person who cares deeply about a particular issue, such as the environment or abortion, a profession, or a sector of the economy.

Donating to Traditional PACs

BCRA did not change (or index to inflation) the $5,000 per year limit on what an individual may contribute to a traditional PAC in place since 1974. Since *McCutcheon* eliminated the individual hard money *aggregate* limit, wealthy donors no longer have to choose among limited number of PACs—they can give to as many PACs as they like. Neither of our donors gave very much money to traditional PACs. The Republican contributor gave $5,000 to just one traditional PAC, while the Democratic contributor gave $15,148 to six traditional PACs.

Option Four: Contribute Disclosed Donations to Super PACs or Hybrid PACs, or Both

Contributors have been able to donate to super PACs since they emerged out of the *Citizens United* and *SpeechNow.org* cases in 2010 (see chapter 4). Contributions to super PACs are reported to the FEC, though there is no contribution limit. In the case of our two donors, the overwhelming amount of their total contributions were to super PACs and hybrid PACs (hybrid PACs combine a super PAC with a traditional PAC—we discuss

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them further below). The Democratic donor in table 5.1 gave 74 percent of their money, $25 million, to 20 super PACs (including $14.6 million to Persist PAC, which is a single-candidate super PAC that supported the presidential candidacy of Elizabeth Warren in 2020) and 12 hybrid PACs, while our Republican donor gave 99 percent of their $31.1 million hard money donations to five super PACs, including $21.7 million to Club for Growth Action, which promotes Republican candidates committed to conservative economic principles.

Option Five: Contribute to Undisclosed Entities (Soft Money)

This is an option exercised by those people with enough motivation and wealth to donate in amounts well beyond the hard money limits and who have reason to keep their political giving anonymous. Individuals have long been able to make *unlimited* contributions to some 501(c) nonprofits and 527 groups. However, 501(c)s may contribute to super PACs, giving donors a way to support super PACs anonymously *through* 501(c)s. Contributions to 527s and 501(c)s are disclosed to the IRS, but the IRS disclosure portal is difficult to navigate, and not regularly updated. We come back to this in chapter 7. According to OpenSecrets our Democratic contributor gave $6 million to a single 501(c) organization, and our Republican donor did not give to any of these groups (OpenSecrets, Biggest Donors n.d.). Given the opacity of these donations (i.e., they are not required to disclose their donors or the amounts they give), it is impossible for us to know the total of what they donated in this way and explains why this money is often called "dark money."

Option Six: Make Your Own Expenditures

As we noted earlier, an individual does not have to use any of these routes. The *Buckley* decision in 1976 made clear individuals may exercise their free speech rights by making unlimited independent expenditures (IEs) on their own. But if they do this, they must tell the FEC 48 hours before the campaign communication airs and 24 hours before a broadcast ad is run closer to an election. There are other more attractive vehicles for donors to

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spend on elections by using an agent, as we explain next. Neither of our donors conducted their own IEs.

Donors, Candidates, and the Issue of Control

In elections, we expect to hear from the candidates who need support from voters to win. Candidates decide the content and type of those communications. Candidate control of their campaign communications was at the heart of BCRA's regulation of so-called issue ads. Congress and the courts have agreed that it is appropriate to limit what an individual, political party, or interest group may donate directly to a candidate due to the potential for corruption. Making a hard money, transparent donation to a candidate sends a clear message—the donor appreciates the candidate and wants to be linked with them.

We discussed the motivations of individual donors and the choices they have for contributing their money. Next, we investigate the agents that donors "hire" to support candidates. We discuss how political parties and interest groups raise and spend limited hard money that candidates will receive and control how to spend. Later, we explain the outside spending by these same agents that candidates cannot control.

Political Parties as Agent: Control of Government

Parties solicit small and large donations directly from individuals, PACs, and their own candidates and officeholders. Each party committee raises and spends its own funds, and each may transfer unlimited amounts to other party committees (including federal committees organized by state parties). Since the 1860s, the vast majority of elected officials at every level of government have been Democrats or Republicans (Kolodny 1998). Some of the early campaign finance reforms were aimed at weakening the parties' hold over officeholders and federal employees (such as the Pendleton Act), and the Progressive movement took aim at parties directly by promoting the adoption of primary elections to nominate candidates. By the time modern campaign finance legislation was adopted in the 1970s, parties seemed weak compared to their charismatic candidates. Seeing par-

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ties as somewhat of a hedge against "special interests," reformers sought to help the parties out in the new regulatory system.

Source One for Party Fundraising: Individuals

From the FECA Amendments in 1974 to the early 1980s, individuals could make only limited hard money contributions to national political parties. Then parties discovered ways to raise unlimited soft money contributions (see chapter 3), and their most enthusiastic wealthy backers (including corporations and unions) rose to the challenge. Figure 5.3 shows the sources of national party money from 2000 to 2020. Soft money accounted for a full 44 percent of the national parties' receipts in 1999–2000 (Malbin and Glavin 2018, 16). Responding to political parties' concerns about their viability without soft money, BCRA increased the hard money limit on contributions to parties, and by 2022 an individual contributor could give $36,500 per year to each national party committee for campaign activities (see table 4.4) and $41,300 per year by 2024.

As we explained above, individuals can contribute to federal party committees for campaign activity and to the new special convention, headquarters, and legal/recount accounts established in 2015. The parties had little trouble convincing their loyal donors to give to these new accounts as our Democratic donor illustrated. For 2019–20, the national parties raised $39.7 million for their convention accounts,[8] $163.3 million for their headquarters accounts, and $117.8 million for their recount/legal accounts (Federal Election Commission, Party Data n.d.).

Joint Fundraising Committees

Joint Fundraising Committees (JFCs) allow several party, candidate, and group political committees (which can include candidate leadership PACs and nonconnected traditional PACs) to work together to maximize hard money receipts from wealthy donors. The JFC participants establish agreements to share the costs of fundraising and decide how the proceeds will be divided among the participants (Federal Election Commission, Guides N.d., 151). Available since 1975, JFCs were not used much in federal campaigns until 2004 and their use increased dramatically after *McCutcheon*

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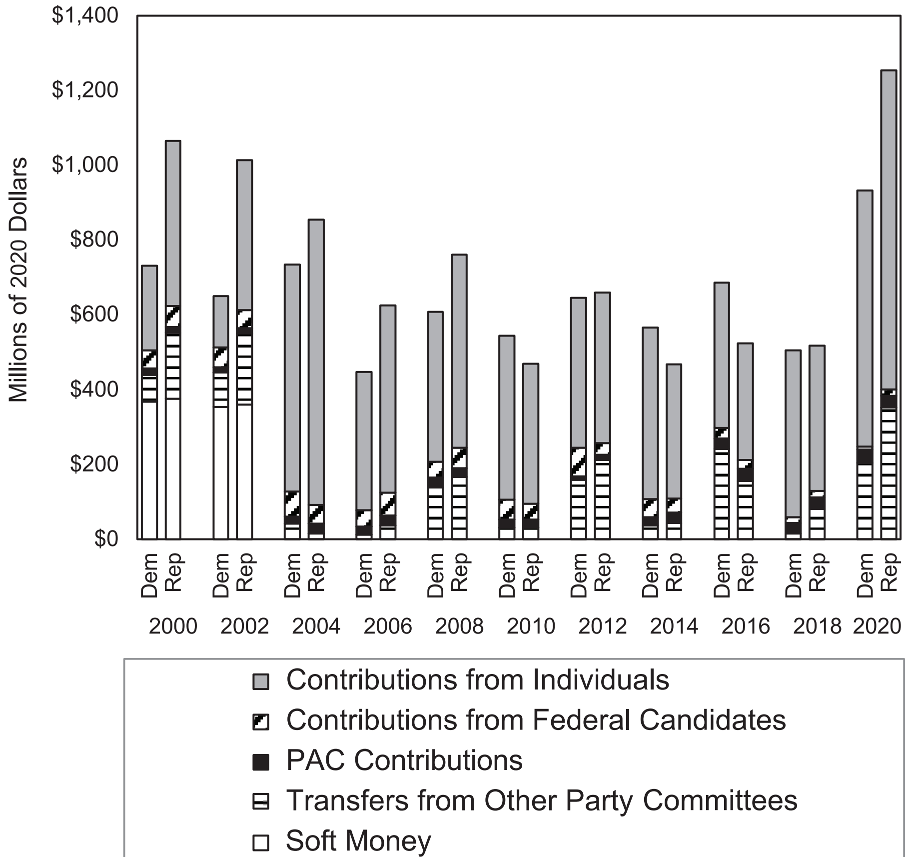

Fig. 5.3. Sources of National Party Committee Money, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from Federal Election Commission, Party Data (n.d.). Data include all national party committees—the national committees (DNC and RNC) and the Hill committees (DCCC, NRCC, DSCC, and NRSC).

in 2014 (Dwyre and Kolodny 2019). The benefit of a JFC is that a single contributor can write one large check to be distributed to the various participants. Often, a JFC is formed (usually with the name "Victory" in the title) around a single high-dollar, high-visibility event. The more contributors who attend the event, the more money each JFC participant can raise. All contributions to a JFC must comply with FECA's hard money contribution limits. Donors may give only up to the maximum contribution amount allowed to each JFC participant.

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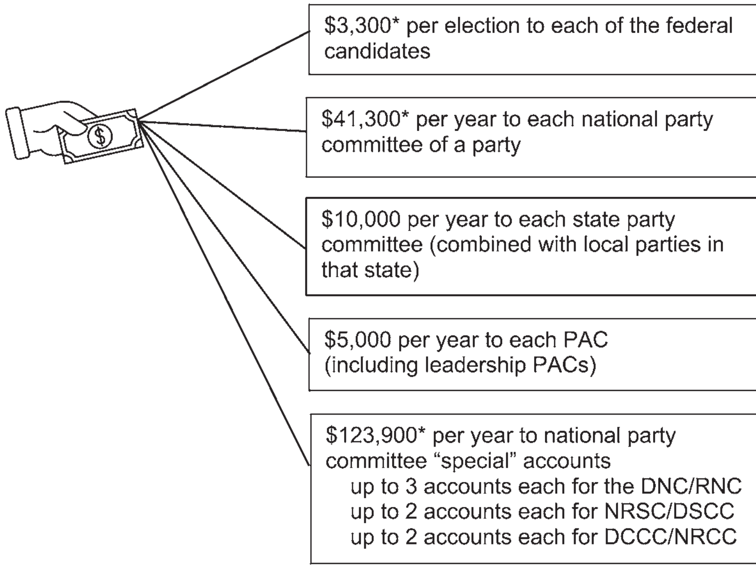

Fig. 5.4. How Much Can an Individual Donor Give to a JFC in 2023–24?
Source: Compiled by the authors. *Note:* * indicates inflation adjusted every two years.

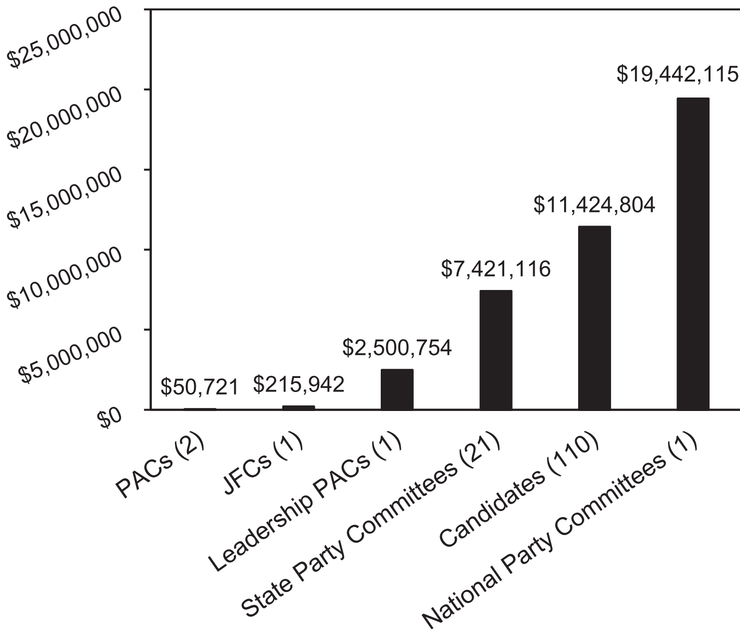

Fig. 5.5. Recipients of Funds Raised by Take Back the House 2020 Joint Fundraising Committee
Source: Compiled by authors with data from OpenSecrets.

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Figure 5.4 illustrates how one donor can give a very significant amount of money by writing just one big check to a JFC, depending on the number of participants. Figure 5.5 shows how one JFC, Take Back the House 2020, allocated the funds it raised among its JFC participants. This JFC was organized to support Republican candidates for the House and its members included House GOP leader Kevin McCarthy ($215,942 to his JFC, the McCarthy Victory Fund, $2.8 million to his campaign committee, and $2.5 million to his leadership PAC, Majority Committee PAC), $11.4 million to 110 individual House candidate committees, $19.4 million to the NRCC, $7.4 million to 21 state party committees, and $50,721 to two PACs (Sheller for PA-07 and Take Back CA-45 Republican Nominee Fund 2020). The NRCC received most of the funds in part because it has higher contribution limits than the other participants and multiple accounts.

When a donor gives to a JFC (or earmarks a contribution through a traditional PAC as we discuss below), the law requires the JFC to report the amounts given to the members from each donor. In other words, the JFC is simply a pass through for a donor to get their money to the JFC participants. Parties have used JFCs very successfully. Revisiting table 5.1, note that our Democratic contributor gave over $1.9 million to 55 party committees. Nearly all these contributions were given through a single JFC, Democratic Grassroots Victory Fund. This JFC included the 50 federal committees[9] of state parties plus the District of Columbia federal committee and the DNC's four accounts (for campaign activity and their three special accounts). Due to the large number of participants, a contributor could give up to $865,000 *per year* in 2019–20 while one group of people figured out the disclosure needs for the donors (Schoffstall 2019). The $865,000 is not considered to be a single contribution, but instead 51 contributions of $10,000 each (to 50 state and the District of Columbia parties = $510,000), one contribution of $35,500 to the DNC's campaign fund, $106,500 to the DNC's convention account, $106,500 to its headquarters account, and $106,500 to its recount/legal account. Both the donor and the recipient must be careful that the donor does not exceed the legal limit each year of the election cycle.

Less complicated JFCs also get the job done for parties. Our Democratic donor gave money to a different JFC, the Nancy Pelosi Victory Fund, which included Pelosi's campaign committee, Pelosi's leadership PAC, and the DCCC. As the DCCC was not a member of the Democratic

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Grassroots Victory Fund JFC (see above), there was no issue with violating hard money limits with a new donation to the Pelosi JFC. Likewise, the Republican donor gave only $15,000 to two federal committees of state parties through two different JFCs formed around federal candidates. One candidate formed a JFC around his campaign committee, his leadership PAC, and the party committee in his state. The other candidate formed a JFC around her campaign committee, the party committee in her state, and the NRCC. Clearly, JFCs are a flexible tool. We discuss JFCs further in the next chapter in the context of presidential candidates, who help their parties raise significant amounts this way.

Source Two for Party Fundraising: Hard Money Contributions from Traditional PACs

Traditional PACs have been able to make contributions to the national party committees in limited amounts since FECA 1971. A multicandidate PAC[10] may give $15,000 per party committee per year for an overall total of $45,000 per year for all three national committees of one party. These contribution limits are not indexed to inflation. Yet, as figure 5.3 shows, PAC contributions made directly to the party committees are not a significant source of national party receipts. In 2020 PAC donations to both the Democratic and Republican national committees totaled just over $65 million, a fraction (about 4 percent) of what individual contributors gave to the party committees—$1.5 billion (Federal Election Commission, Party Data n.d.). When the new special party accounts were created in 2015, traditional PACs also were permitted to donate to them. In this case, they can contribute $45,000 for each of the seven accounts per party per year. Like other PAC donations, these contribution limits are not indexed to inflation.

Source Three for Party Fundraising: Disclosed Contributions from Federal Candidates

The national party committees also receive funds from their own elected officials and candidates who may transfer unlimited amounts to a party committee from their principal campaign committee (the committee a candidate uses to raise and spend money to run for office) and $15,000 per year from their leadership PAC.[11] These transactions are fully reported

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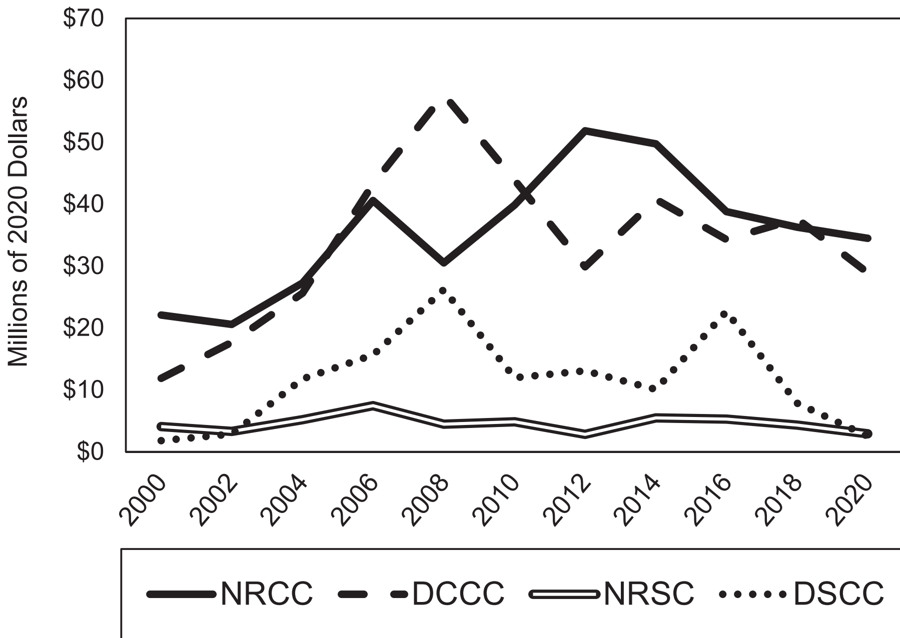

Fig. 5.6. National Party Receipts from House and Senate Candidates, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from Malbin and Glavin (2018); Federal Election Commission.
Note: 2000–2018 includes contributions from members' campaign committees and leadership PACs; 2020 includes only contributions from principal campaign committees.

to the FEC. In 2020, the NRCC received $34.5 million from 137 candidates, the DCCC $28.9 million from 175 candidates, the NRSC $2.9 million from 11 candidates, and the DSCC $2.5 million from 14 candidates. Individual transfer amounts ranged from a low of $1,000 to a high of $12.5 million (Federal Election Commission, Party Data n.d.). Figure 5.6 shows that the House campaign committees have been far more successful than the Senate campaign committees in raising funds from their own candidates.

Political Party Spending for Candidates to Control

Donors to the national parties expect that their money will be used to help the candidates whose victories are most in question—those in competitive

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races. Donors expect that some of this hard money will be given to candidates, or spent on their behalf, as we explain below. But recall that reformers have long been suspicious of political parties as potential conduits for corrupt relationships between donors and officeholders to flourish. This explains why parties are so limited in what monetary assistance they can offer directly to candidates.

Option One for Party Spending: Contributions to Candidates

From 1974 to this writing, party direct contributions to candidates for the presidency and the U.S. House have been capped at $5,000 per election (generally a maximum of $10,000 in a cycle—$5,000 for the primary election and $5,000 for the general election—though special elections also count as a distinct election). This limit is not indexed for inflation. So, a direct contribution from a political party to a congressional candidate is worth less and less over time, and a contribution to a presidential candidate is hardly noticed. From 1974 to 2003, the contribution limit for national political party committees[12] to donate to Senate candidates was $17,500 per cycle. BCRA doubled that limit to $35,000 per cycle and adjusted it for inflation[13] so that by 2024 they could give $57,800 to each Senate candidate per campaign. However, most candidates receive relatively little cash directly from their parties compared to other sources (Herrnson, Panagopoulos, and Bailey 2019, 174; Jacobson and Carson 2020, 97). In recent elections, party direct contributions accounted for less than 2 percent of all contributions for House candidates, and less than 5 percent for Senate candidates (Jacobson and Carson 2020, 91–92), and far less than 1 percent for the major party presidential nominees in 2020. Figures 5.7, 5.8, and 5.9 show the parties give so little in contributions directly to their candidates that party contributions do not even show up on the bar chart for many years.

Option Two for Party Spending: Party Coordinated Expenditures

Parties can spend some money *in coordination with* candidates for items such as a poll, a media buy for a campaign ad, a mailing list, or opposition research on the other party's candidate. Candidates have *some* control over

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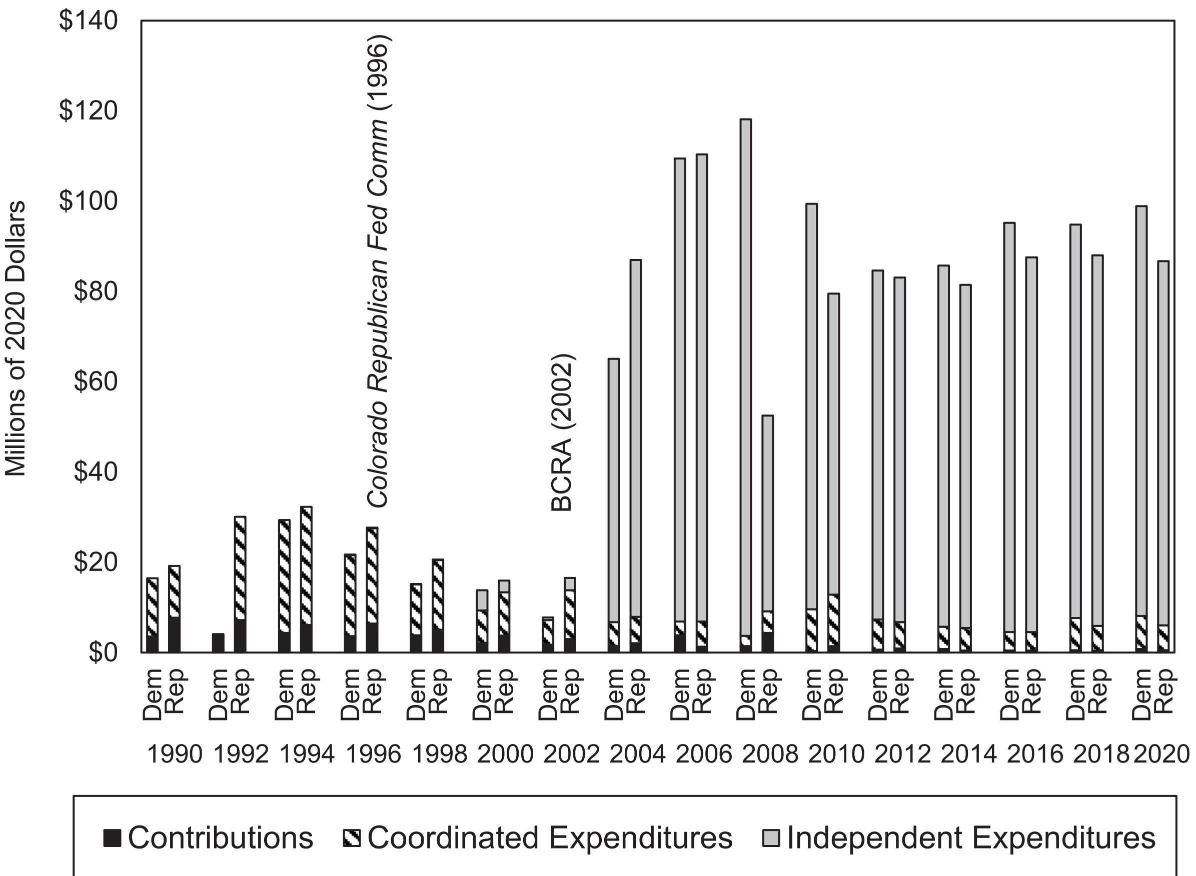

Fig. 5.7. Party Spending on House Candidates, 1990–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from M. Reynolds (n.d.), Table 3-12; Federal Election Commission, Party Data (n.d.).

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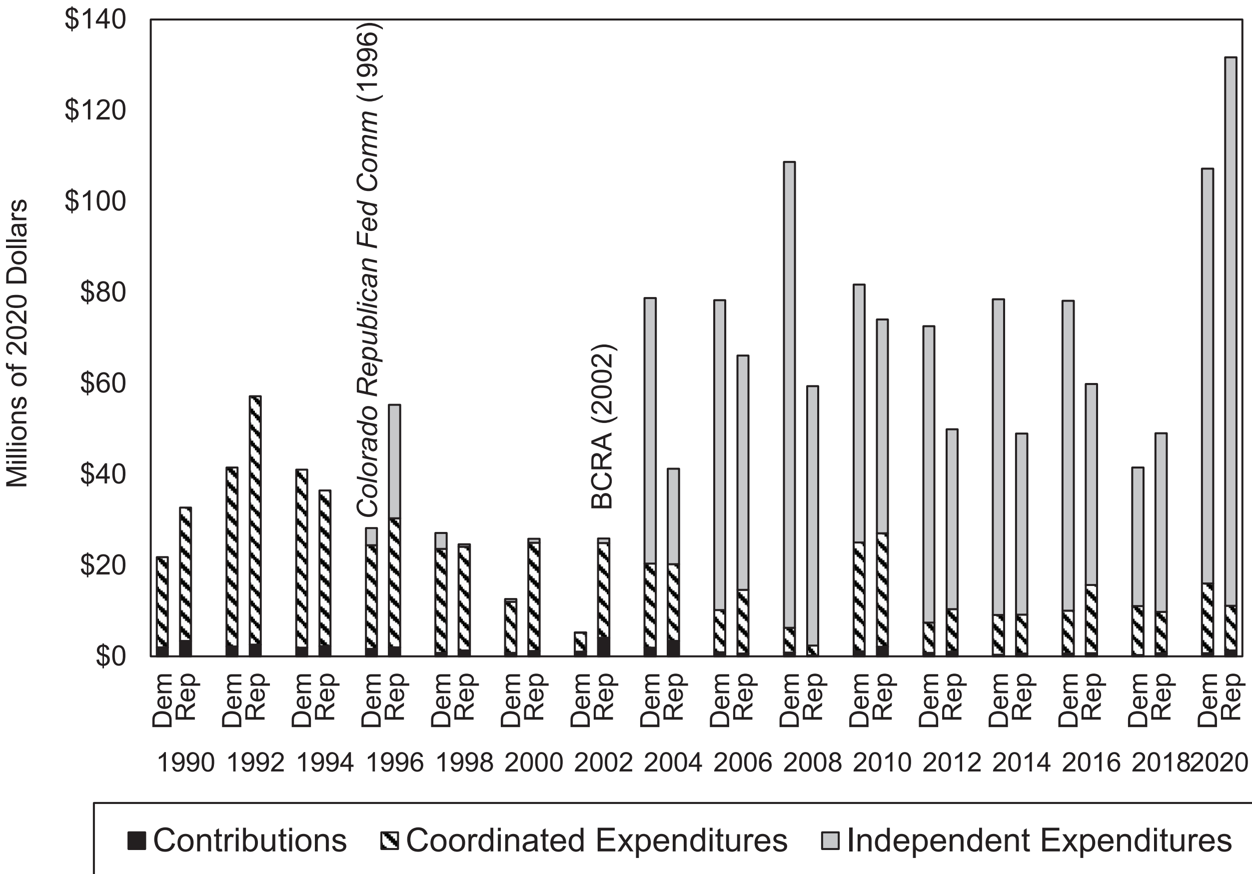

Fig. 5.8. Party Spending on Senate Candidates, 1990–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from M. Reynolds (n.d.), Table 3-12; Federal Election Commission, Party Data (n.d.).

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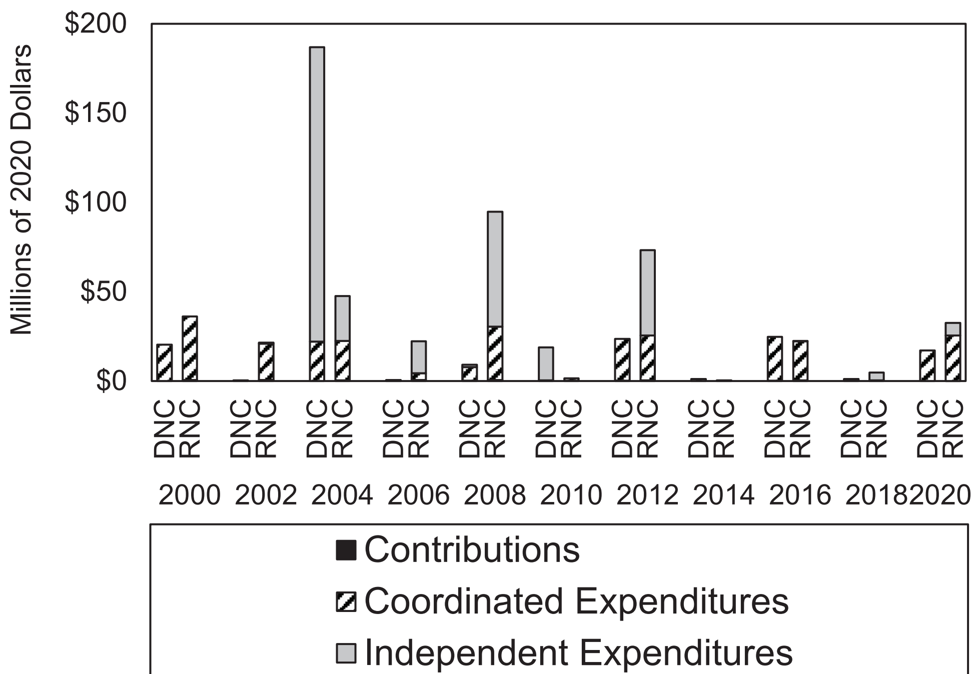

Fig. 5.9. DNC and RNC Spending on Candidates, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from Federal Election Commission.
Note: Most of the spending is on presidential candidates in presidential election years.

party coordinated expenditures. Political parties are fundamentally linked with their candidates because ballots are organized along party lines, so it seems implausible that parties would have no idea about their candidates' campaigns. So, in FECA 1971, lawmakers reasoned that because parties would inevitably be working with their own nominated candidates in elections (and probably should do so), consultative activity should be allowed, but publicly disclosed and limited. FECA labeled this party-funded spending with candidates *coordinated expenditures*.[14]

The 1974 FECA Amendments set different party coordinated expenditure limits for candidates to the U.S. House and Senate, and later in BCRA (2002) for major party presidential nominees.[15] House candidates, who represent nearly the same number of constituents, are treated uniformly, with a party coordinated expenditure limit set in 1974 at $10,000

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per party committee (national and state party committee, for a total of $20,000) but indexed for inflation every two years, reaching $59,400 ($118,700 in states with only one House member) by 2023. Senate candidates have constituencies of varying sizes, so party coordinated expenditure limits are set to a formula based on the voting age population of each state with an adjustment for inflation. No state may have a limit less than a congressional district has, so the limit ranged from $118,700 for Alaska, Delaware, Montana, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming to $3,623,400 for California, the most populous state. The coordinated party expenditure limit for presidential candidates is calculated based on the national voting age population with an adjustment for inflation. In 2020, the limit was $26,464,700 for presidential nominees (Federal Election Commission, Coordinated Limits n.d.).

The parties must use hard money to pay for coordinated expenditures. Figures 5.7 and 5.8 show that the national parties make more coordinated expenditures than direct contributions in congressional elections. Figure 5.9 shows that in recent elections, the DNC and RNC have favored coordinated expenditures for their presidential nominees close to or up to the limit. Yet the House and Senate Hill committees still spend much less on limited coordinated expenditures, over which candidates exercise some control, than they do on unlimited independent expenditures, over which candidates have no control (we discuss this outside spending below).

Nonparty Interest Groups: Influencing Elections and Policy

Corporations, trade associations, labor unions, nonprofit corporations, and interest groups of all types participate in the campaign finance system through a variety of organizational forms: traditional PACs, super PACs and hybrid PACs, 527 organizations, and 501(c) nonprofit corporations. Groups often choose to engage in campaign finance activities using more than one of these organizational forms as they raise funds differently according to the rules in place. This allows them to exercise maximum flexibility during campaign season to benefit their interests while remaining compliant with the latest regulations. Table 5.2 illustrates how five of the most influential groups raised and spent money in the 2020 elections. All five of them have a traditional PAC. Four of them have one or more affiliated 501(c) organizations (only the National Education Association does

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TABLE 5.2. The Various Organizations of Select Interest Groups and Their 2020 Spending on Federal Elections

Interest Group	Traditional PAC	501(c)	Super PAC	Total Federal Electoral Spending
National Association of Realtors	*National Association of Realtors* (C00030718): $12,607,348	National Association of Realtors (C70002563): $3,197,325	*National Association of Realtors* (C00488742): $13,406,493	**$29,211,166**
National Education Association	*NEA Fund for Children and Public Education* (C00003251): $3,842,470		*NEA Advocacy Fund* (C00489815): $25,617,695	**$29,460,165**
US Chamber of Commerce	*US Chamber of Commerce* (C00082040): $701,431	*US Chamber of Commerce—* Independent Expenditures (C90013145): $17,772,818 + *US Chamber of Commerce—* Electioneering Communications (C30001101): $5,747,676		**$18,474,249**
Planned Parenthood	*Planned Parenthood* (C00314617): $918,048	*Planned Parenthood Action Fund* (C90005471): $405,094	*Planned Parenthood Votes* (C00489799): $30,110,244	**$31,433,386**
Service Employees International Union	*Service Employees International Union* (C00004036): $75,441,290	*Service Employees International Union* (C90017955): $225,412 + *Service Employees International Union* (C70003124): $143,715	*United We Can* (C00523621): $3,840,091	**$79,650,508**

Source: Compiled by authors from Federal Election Commission and OpenSecrets data.

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not) or super PACs (only the U.S. Chamber of Commerce does not). It is now commonplace for groups to create several organizations—some of which report the source of their funds and their spending and some that do not. Here, we give an overview of the variety of strategies interest groups can adopt to influence elections and ultimately, they hope, public policy. As table 5.2 illustrates, groups do not necessarily make the same choices.

Nonparty Interest Groups: Raising and Spending Hard Money

Donors who wish for their money to back candidates favorable to their company, industry, ideology, or public policy issue may use an interest group as an agent to get hard money contributions to the right candidates. As reformers are most suspicious of the link between interest groups and candidates, clear limits are in place for hard money contributions to some types of groups and from those groups to candidates.

Raising Hard Money from Individuals: Traditional Political Action Committees (PACs)

Traditional PACs go back to 1943 when the Congress of Industrial Organizations (CIO) created the first one as a response to the Smith-Connally Act,[16] which prohibited labor unions from making campaign contributions with union dues money. The CIO-PAC was a separate organization for making campaign contributions funded by voluntary $1 contributions of union members earmarked for that purpose (Mutch 2016, 62–63). PACs were codified into law in the 1971 FECA, which permitted corporations and unions to establish separated segregated funds (SSFs) of money raised from their immediate constituencies (employees and union members) to in turn make contributions to candidates and parties. Traditional PACs were a clever way around the problem of letting corporations or labor unions have a direct role in the electoral process without allowing them to use monies meant for other purposes (e.g., for corporate profits to be distributed to shareholders or union dues needed for collective bargaining and strike funds).

Traditional PACs are categorized as one of two broad types—connected and nonconnected. A connected PAC, such as the CIO-PAC, Boeing

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Company PAC, or the American Dental Association PAC (a professional/trade association) is part of a larger entity (a labor union, a corporation, and a professional association, respectively) that does not have campaign activity as its primary purpose. Connected PACs use the infrastructure of its parent organization: they do not have to maintain a separate office space or equipment and can freely communicate with the parent organization. However, if a PAC benefits from this kind of connection, then it must restrict its money solicitations only to those who are connected to the parent organization (e.g., corporate executives, organizational managers, stockholders, trade association members, union members). The connected PAC may not ask the general public for contributions, because of the overhead provided from its parent organization. Donors to these traditional PACs are clearly motivated by some material interests.

A nonconnected PAC does not have a "parent" organization. These are groups organized around a particular set of public policies.[17] Examples of nonconnected PACs include the Let America Vote PAC (voting rights), the Equality PAC (LGBTQ), and the Tea Party Express PAC (conservative). Traditional PACs can raise $5,000 per year from each type of contributor, and this contribution limit is not indexed to inflation. Thus, the value of these contributions continues to erode over time. For the 2019–20 elections, 3,035 traditional PACs raised $1.1 billion, with corporate PACs raising 33 percent and labor PACs raising 29 percent of that total, a sizable amount, but less than other types of campaign finance groups, such as super PACs, which we discuss below (Federal Election Commission, PAC Data n.d.).

How Interest Groups Help Candidates Get Hard Money

Groups have several options for connecting their favored candidates with hard money the candidates can control. From the group's perspective, they are interested in having a relationship with candidates who are likely to win and thus be able to govern. Groups also may want to make their issue so central to a campaign that no candidate can avoid taking a position on it. We discuss this relationship more in chapter 6, but here we detail how groups may use their connections with potential donors, based on their common interests, to assist candidates. Not all of these involve direct spending by the group.

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Option One: Make Endorsements

A low-cost way to help a candidate is to offer them your group's endorsement. The value of that endorsement depends on the closeness of the race, the salience of the group's issue, and the size of their attentive membership base (Marty Cohen et al. 2008). Endorsements inform group members, employees, or the public about candidates' stances that mirror the organization's preferences. This may encourage further donations directly to the candidate. Anne Baker investigated whether group endorsements led to increased fundraising for the endorsed candidate and found that they did for major national advocacy groups such as the National Rifle Association, National Right to Life, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the Sierra Club (Baker 2016, 202). So, some groups' endorsements can be quite a financial asset as well as a signal to voters.

Option Two: Make PAC Hard Money Contributions to Candidates

When a group endorses a candidate, they typically follow that up with a contribution to their campaign (Grossmann and Dominguez 2009). The main reason for setting up a traditional PAC is for interest groups to make direct contributions to candidates. The limit for this contribution is $5,000 per election (primary, general, special election), and this amount is not adjusted for inflation. As we discuss in chapter 6, these contributions are more important for candidates for the House than for the Senate or presidency, but PACs can do even more to help candidates maximize hard money, as we explain next.

Option Three: Bundling

Some individuals and groups help candidates, parties, or other committees (including JFCs) by *bundling* contributions from many other donors. This means an individual or group organizes a fundraising event or activates their donor network to collect donations, which are sent directly to the candidate, party, or committee. The "bundle" refers to a pile of paper checks (common in the 1980s when this became a popular

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practice), each made out to the committee of a particular candidate, not to the interest group organization. The person or group that arranges for these contributions then gets credit for organizing financial support for the recipient candidate, who may be grateful for their effort. No single contribution may exceed the hard money contribution limit, but the bundler can certainly attract a candidate's or party's attention by delivering thousands or even millions of dollars in contributions from many donors who were unlikely to be aware of that candidate without the group's intervention as an agent. EMILY's List (Early Money Is Like Yeast), a nonconnected traditional PAC that supports pro-choice Democratic women candidates, is credited with perfecting bundling (Influence Watch n.d.). Their success came from a national network of their creation that on the one hand contributed to a nationalized donorate, which may make candidates less responsive to local issues (Canes-Wrone and Miller 2021), but on the other hand gave many candidates previously overlooked (perhaps because they were women) the resources they needed to be competitive. Many high-profile individuals, such as corporate leaders, also are some of the biggest bundlers (McDonald 2007).

Because many interest groups also lobby elected officials, when they offer to bundle contributions for federal candidates, they have additional reporting requirements. The 2007 Honest Leadership and Open Government Act (HLOGA)[18] requires candidates, parties, and leadership PACs to report bundled contributions from lobbyists or lobbyists' PACs that total $21,800 or more in an election cycle (as of 2023—the amount is indexed for inflation annually) (Federal Election Commission, Lobbyist Bundling n.d.). The FEC issued regulations in 2009[19] creating a new form (3L) for recipient committees to file and defining which bundlers (lobbyist or their PACs) meet the criteria for disclosure.

Option Four: Earmarking Contributions via a Traditional PAC

Groups also can serve as a conduit for contributions that are earmarked for federal candidates. The FEC notes that while this may sound like bundling, it is not the same (Federal Election Commission 2018). The PAC can propose that individual donors give them a hard money donation that will then be passed on to a particular list of candidates. The donation counts against the individual's limits to the *candidate*, not to the PAC acting as

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an intermediary. Soft money entities (corporations, unions, super PACs) are not permitted to act as conduits for earmarks. That leaves traditional PACs (some of them part of a hybrid) to do the job, and many do. Like bundling, earmarking links donors to candidates they would otherwise not have access to while making it clear to the candidate that the group has done them a favor. Both of our contributors in table 5.1 above used conduits for earmarked contributions sent to candidates or other campaign committees. This is a way for donors to signal their strong affinity with the conduit's goals.

Outside Spending: Money Candidates Do Not Control

The big money in campaigns is often the spending done by others that is not coordinated with candidates at all and therefore beyond their control. This independent spending is called "outside spending." It is the kind of expenditure that the Supreme Court decided, starting with *Buckley*, will not cause corruption, because candidates cannot control how the money is spent. Moreover, since the 1976 *Buckley* decision, the free speech rights of the "speaker" are now a more important consideration than they had been. As we explained in chapters 3 and 4, the various ways noncandidate groups seek to express their views have expanded significantly. As a result, we often see competitive races overwhelmed with outside spending, sometimes eclipsing that of the candidates.

Both hard money and soft money fuel outside spending. We begin our discussion of outside spending with hard money independent expenditures which are publicly disclosed. Next, we turn to unlimited independent expenditure campaign communications that are much harder to trace.

Independent Expenditures from Limited Hard Money Contributions

Independent expenditures (IEs) are spending (usually some form of advertising) to help elect or defeat a particular candidate (or slate of candidates) running for office. This spending can be campaigning for or against candidates, but it cannot be coordinated with any candidates or parties (more on this in Box 5.1 below). Independent expenditures must be reported to the FEC, sometimes in advance of the activity.[20] Individuals can make IEs, but as we have said, they rarely do.

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Because parties and groups cannot coordinate their independent expenditures with the candidates they support, such spending may not be as effective and is certainly not preferred by candidates who have no control over how the money is spent. Sometimes, outsider spending can backfire. A candidate's party or supportive group may run a negative ad against their opponent, and, if voters dislike the ad, they may blame the candidate for going negative. Indeed, most of the independent expenditure spending is spent *against* a candidate.

Traditional PAC Independent Expenditures

Traditional PACs have been permitted to make unlimited IEs since the 1970s, when the Supreme Court struck down limits on candidate, individual, and PAC spending as a violation of First Amendment free speech rights in *Buckley v. Valeo*. In 2020, traditional PACs made only 2.8 percent ($86.5 million) of all independent expenditures ($3.1 billion), but spent $448.8 million on direct contributions to federal candidates (Federal Election Commission, PAC Data n.d.). As we discuss below, while traditional PACs were the biggest spenders in the 1980s and 1990s, they now spend relatively little (on contributions and IEs) compared to other noncandidate spenders. Since that time, the groups associated with traditional PACs may have several other accounts as well (see table 5.3).

Political Party Independent Expenditures

The national parties could not make IEs, only limited contributions and coordinated expenditures, until 1996, when the Supreme Court permitted party IEs in *Colorado I* (see Box 3.1 for a refresher). However, as you can see in figures 5.7 (House) and 5.8 (Senate), the national party committees did not fully take advantage of this unlimited spending until 2004, after BCRA eliminated party soft money and, by extension, party issue advocacy ads. Since 2004, the parties have spent more on independent expenditures than on coordinated expenditures and direct contributions to candidates. Party independent expenditures must be paid for with limited hard money, but there are no limits on the amount that can be spent. By 2020, both the Republican and Democratic Parties devoted over 80 percent of their spending on federal candidates to independent expenditures

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(Federal Election Commission, Party Data n.d., table 1). In fact, almost all party hard money spending in House elections is for independent expenditures—92 percent of DCCC and 93 percent of NRCC spending on House candidates in 2020 (see fig. 5.7).

Disclosed Unlimited Money: Outside Campaigning by Super PACs

As we explained in chapter 4, the Supreme Court's 2010 *Citizens United* decision and the *SpeechNow.org* decision later that year allowed interest groups (not candidates or party committees) to engage in unlimited fundraising from corporations, unions, other groups, and individuals using an Independent Expenditure Only Committee (IEOC, known popularly as a super PAC). Super PACs may engage in unlimited spending for express advocacy as long as they do not coordinate with any candidates or parties. Donors know that their contributions to super PACs will be completely transparent, as these committees must file with the FEC. That is how we know that both of our contributors on table 5.1 directed more of their contributions to super PACs than to any other type of recipient.

Did Super PACs Change the Game?

The first super PACs were rushed into operation for the 2010 election cycle soon after the *Citizens United* and *SpeechNow* court decisions, as Election Day was just months away. As it was a midterm year (no presidential election), the focus was on congressional races, especially a handful of highly competitive Senate races. Once that election passed, time allowed all relevant actors to assess the utility of a super PAC for their goals. We now have a typology of super PACs, reflecting the goals of those who created them. The major types are (1) single candidate focused, (2) partisan affiliated, and (3) ideological/issue oriented.

Single-Candidate Super PACs

Single-candidate-focused super PACs (8 percent of super PACs in 2016, 12 percent in 2018, and 14 percent in 2020) form to focus on the elec-

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tion of just one candidate (see table 5.4 below). It is important to note that a candidate cannot establish the super PAC themselves. The super PAC may not legally coordinate with candidates or parties, but elected and appointed officials and party leaders may appear and speak at super PAC fundraisers. While there is technically no limit to the amount an individual can contribute to a super PAC, if the candidate they intend to help solicits the contributions at an event, they may not solicit more than the candidate contribution limit from each individual and PAC (Bresnahan and Isenstadt 2011). The FEC has allowed them to appear as "special guests," even at events for a single-candidate super PAC established for their benefit (Federal Election Commission, Super PAC Federal Candidates n.d.).[21] Table 5.3 shows the activities of the top single-candidate super PACs during the 2019–20 election.

Since 2012, one or more single-candidate super PACs was formed for virtually all candidates vying for their party's presidential nomination.[22] There was at least one single-candidate super PAC for most of the 2020 presidential contenders, including candidates who vocally rejected super PACs, such as Senator Elizabeth Warren (D-MA) (A. Thompson 2020). Our Democratic donor gave $14.6 million to the super PAC supporting Warren's presidential bid. For 2017–18, single-candidate super PACs accounted for only 15 percent of all super PAC spending during the 2018 midterm (nonpresidential) elections, but by 2019–20 single-candidate super PACs were 30 percent of the $2.1 billion in super PAC spending (OpenSecrets, Outside Spending n.d.). Critics of single-candidate super PACs argue that they raise corruption concerns because they allow contributors to direct funds to benefit a particular candidate beyond the statutory hard money contribution limits, though they cannot officially coordinate with the candidate or their campaign organization.

Partisan Super PACs

Like candidates, parties may not establish, run, or coordinate with super PACs, but some super PACs are party aligned. Some of the biggest super PACs focus exclusively on electing candidates from one party to one branch of government, reflecting the separation of governmental powers and the framework of the national party organizations (Dwyre and Braz 2015; Skinner, Masket, and Dulio 2012; Dwyre 2020). The four super

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TABLE 5.3. Top Spending Super PACs by Type, 2019–2020

Single Candidate Super PAC	Party	Supports:	Total Disbursements	Independent Expenditure Spending	Percent of IE Spending *against* Other Party's Candidates
America First Action	Republican	Donald Trump	$149.4 million	$133.8 million	99.9%
Preserve America PAC	Republican	Donald Trump	$104.4 million	$103.0 million	100%
Independence USA	Democratic	Joe Biden	$68.0 million	$56.5 million	4%
Unite the Country	Democratic	Joe Biden	$49.0 million	$39.0 million	4%
Partisan Super PAC	Party	Supports Candidates for:	Total Disbursements	Independent Expenditure Spending	Percent of IE Spending *against* Other Party's Candidates
Congressional Leadership Fund	Republican	House	$165.9 million	$142.8 million	92%
House Majority PAC*	Democratic	House	$160.2 million	$138.9 million	96%
Senate Leadership Fund	Republican	Senate	$476.4 million	$293.7 million	95%
Senate Majority PAC	Democratic	Senate	$372.3 million	$229.9 million	94%
Ideological/Issue Super PAC	Party / Ideology	Supports:	Total Disbursements	Independent Expenditure Spending	Percent of IE Spending *against* Other Party's Candidates
American Crossroads	conservative	Republicans	$83.4 million	$79.5 million	96%
Club for Growth Action	conservative	Republicans**	$71.2 million	$65.5 million	60%
The Lincoln Project	liberal	Democrats	$82.0 million	$49.6 million	83%
Americans for Prosperity Action	conservative	Republicans**	$60.6 million	$47.7 million	19%

Source: Data from Federal Election Commission, PAC Data (n.d.); OpenSecrets, Outside Spending (n.d.), by Group.

* Although originally established as a super PAC, House Majority PAC began to operate as a hybrid PAC during the 2020 election.

** Club for Growth made $11.1 million in independent expenditures against some Republican candidates, mostly in primary elections; and Americans for Prosperity Action spent $93,107 for two Democratic candidates.

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PACs that spent the most in 2019–20 were partisan super PACs focused on electing one party's candidates to the House or Senate: the Senate Leadership Fund (Republican), the Senate Majority PAC (Democratic), the Congressional Leadership Fund (Republican-House), and the House Majority PAC (Democratic). In 2019–20, their independent expenditures constituted 31 percent of all super PAC spending (OpenSecrets, Outside Spending n.d., by Super PAC), and these partisan House and Senate super PACs spent *more* than the parties' Hill committees did (Federal Election Commission, Party Data n.d.). Table 5.3 shows the activities of the top partisan congressional super PACs in 2019–20. Note that most of their independent expenditure spending was *against* the other party's candidates, something the candidates themselves may dislike or be blamed for.

Such partisan super PACs challenge the requirement that super PACs not coordinate with parties and raise concerns that they violate the spirit of BCRA's party soft money ban. Some call these partisan super PACs "shadow parties" and warn that they may move both partisan money and power to organizations that are more lightly regulated and less transparent than the formal party organizations (Gerken 2015; Vandewalker 2018). Indeed, partisan super PAC spending tracks the national party committees' spending to target resources on the congressional contests and presidential states that are most competitive and thus offer the best chance to win majority control of Congress and take the White House (Kolodny and Dwyre 2018; Dwyre and Braz 2015).

Moreover, many partisan super PACs are established and managed by former party officials, congressional staff, and partisan operatives, as 527s were (Herrnson 2009; Skinner, Masket, and Dulio 2013). The revolving door of former party and government staffers in and out of nonparty groups such as super PACs may not be actual coordination, but may amount to "functional coordination," because political operatives most familiar with party and candidate goals and strategies share that intelligence with groups that are not supposed to be coordinating with parties and candidates (Farrar-Myers and Skinner 2013, 111). Moreover, it is not difficult for candidates, and parties, as well as super PACs to make clear what their spending strategies are or will be, and thus to signal to one another so they do not duplicate or contradict each other's efforts. For example, the parties often publicly announce which races they plan to target and when and where they will run ads. Candidates post video footage on the internet, and super PACs or party committees can use the footage and run ads that mimic or amplify the candidate's message. While these

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public communications may not be *actual* coordination, they, like the revolving door of party and super PAC staff, might constitute "functional coordination." Note, however, that super PACs may coordinate with one another and with other nonparty groups, so super PACs targeting the same candidates can divide the labor and "fill in spending gaps" (Jaffe 2012; see also Farrar-Myers and Skinner 2013).

Ideological and Issue Oriented Super PACs

Some super PACs are ideological in focus or organize around an issue. Table 5.3 shows the activities of the top spending ideological/issue-oriented super PACs. Their spending strategies are focused more on getting like-minded people elected to office and less on seeking majority status or electing a single candidate. For instance, in 2019–20, Club for Growth Action made $65.5 million in independent expenditures against both Democrats and Republicans who do not agree with their conservative economic views (and for a few Republicans who do) (OpenSecrets, Outside Spending n.d., by Super PAC). Super PACs, including ideological and issue-oriented ones, have used what is called *b-roll footage* posted by candidates on public websites such as YouTube and Venmo in their super PAC ads. For instance, the American Crossroads super PAC used b-roll footage posted by the Republican challenger Dan Sullivan in support of Sullivan's successful bid to defeat Alaska Democratic senator Mark Begich in 2014 (P. Blumenthal 2014).

By now, you may be wondering how independent super PACs really are. In fact, what is meant by "independence" and "coordination" is imprecise, which leaves room for possible loopholes in this prohibition against coordination with candidates and parties, as the example in Box 5.1 illustrates.

Box 5.1. What Is Coordination?

Much of campaign finance legislation and jurisprudence focuses on whether a speech act is independent or whether it is coordinated with others. If a communication is truly independent, then First Amendment protections apply. If a communication is coordinated, then the monetary value of those activities (known as an in-kind contribution if it is a service and not cash) would count against the hard money contribution limits. Coordination invali-

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dates the defense of personal free speech. Yet coordination is nearly impossible to define or prosecute.

After the *Citizens United* decision, some new super PACs wanted to have elected officials help them raise money. They asked the FEC to clarify what was legal. Sam Garrett explains that in mid-2011, the Commission issued the Majority PAC and House Majority PAC AO (2011–12), finding that federal candidates and party officials could solicit contributions for super PAC as long as they asked for no more than the contribution limits established in FECA (Garrett 2012, 717). American Crossroads, one of the first super PACs created, later asked the FEC if producing and airing an ad with the candidate themselves featured in it (and coordinated with the candidate) would be permissible. The legal staff of the FEC drafted AO 2011–23, saying this behavior was clearly prohibited under the coordination definition, but the commissioners deadlocked with a 3–3 vote (four votes are required for adoption). Hence, while the FEC did not explicitly approve such actions, it did not forbid them either.

The murky status of coordination in campaign finance law became intertwined with a late-night comedy show, *The Colbert Report*, in 2011 and 2012. Comedian Stephen Colbert made several mock forays into politics on his show, but he raised things to a new level by deciding to form his own super PAC, "Americans for a Better Tomorrow, Tomorrow."[a] Later, Colbert announced that he was exploring a run for "President of the United States of South Carolina." As Ilya Shapiro explains: "Colbert could no longer run the Super PAC because otherwise he would be illegally coordinating with himself. Colbert had to transfer control of Colbert Super PAC to someone else. That someone else turned out to be Jon Stewart" (2012, 321). Stewart had previously hosted the comedy news show *The Daily Show*, where Stephen Colbert played a correspondent. The audience got the joke that coordination might be a meaningless concept if you could transfer "control" of a super PAC to someone very close to you (and who would keep the staff of the organization intact) and now claim that you no longer had a relationship with the super PAC you founded. Shapiro again explained, "Colbert wasn't allowed to discuss his political plans

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with Stewart but could continue saying whatever he wanted on his national TV show; those statements, even if Stephen knows that Jon will hear them, don't constitute coordination" (2012, 322).

Colbert and Stewart had help from Trevor Potter, an election lawyer, former FEC commissioner, and leader of the watchdog group Campaign Legal Center (CLC). Potter produced a one-page document that transferred control of the super PAC. To illustrate how easy it still was for Colbert to remain involved, Potter helped Colbert establish a 501(c)(4) nonprofit as a funding source for the super PAC. The CLC explains: "And thus was born 'Anonymous Shell Corporation' which will operate as a 501(c)(4) as 'Colbert Super PAC Shh Institute' so that corporations can give to his political efforts anonymously, since they seem shy of admitting their political activities to shareholders and customers" (Campaign Legal Center 2011).

While Colbert demonstrated that the concept of coordination was a meaningless distinction, more concerning is that when the FEC has had complaints about improper coordination brought to their attention, the agency has never found any of them to be a violation of the law. In a 2–2 vote in 2019, the FEC deadlocked over a complaint from the CLC that coordination had taken place between a super PAC and the Hillary Clinton presidential campaign in 2016. David Brock, the founder of the super PAC Correct the Record, said on a podcast that the group was "a surrogate arm of the Clinton campaign" and later the Clinton campaign admitted to coordination as well (Evers-Hillstrom 2019). The Republican commissioners were the ones voting against enforcement, demonstrating that it is not partisanship, but rather the validity of the term "coordination" itself, that motivated their inaction.

The CLC's director of federal reform, Brendan Fischer, said, that "the split decision could embolden super PACs to further coordinate their efforts with campaigns in what is already an enforcement-free atmosphere" (Evers-Hillstrom 2019). The CLC sued the FEC for its inaction. After a string of legal challenges, the United States District Court for the District of Columbia sided

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with the CLC on December 8, 2022, finding that the FEC's inaction in this instance was "contrary to law" as stipulated both in the statutes (FECA and BCRA) and in the FEC's own rules. The FEC has appealed the decision (Federal Election Commission 2023).

[a] The committee ID number for the super PAC is C00498097, which can be used to search for its filings at FEC.gov.

Super PACs, Hybrid PACs, and Outside Spending

In 2011, the year after the emergence of super PACs, Rear Admiral James Carey and the National Defense PAC asked the FEC to allow the PAC to raise unlimited contributions to make independent expenditures (as a super PAC) while its traditional PAC continued to raise limited $5,000 contributions to donate directly to candidates. Later that year, the Washington, DC District Court ruled in *Carey et al. v. Federal Election Commission* that an existing federal traditional PAC may create a *hybrid PAC*, a single organization that runs both a traditional PAC and a super PAC.[23] The FEC officially calls these hybrid PACs *political committees with non-contribution accounts*, because one of the accounts, the super PAC account, may not contribute directly to candidates or parties. These committees are also known as *Carey committees*, after the lead plaintiff in the case. Some long-established organizations, such as ActBlue, MoveOn.org, and VoteVets, as well as many newer organizations, are organized as hybrid PACs.

Hybrid PACs can save a group from spending on additional administrative costs with only one organization to maintain for campaign activities previously conducted by two separate organizations. Former FEC chairperson Dave Mason said that hybrid PACs "really make it a lot easier to organize your efforts and fundraise. You're looking at a 30, 40, 50 percent savings on overhead and administration alone. . . . You can put that savings into politics, like ads and contributions" (Levinthal 2012). One of the lawyers who argued the *Carey* case, Dan Backer, said: "Any PAC that doesn't become a hybrid PAC is run by idiots. . . . It'd be ludicrous to limit your ability when you have this right" (Levinthal 2012). Pro-reform advocates, however, are less enthusiastic about hybrid PACs. Adam Smith of the watchdog group Public Campaign said the hybrid PAC organizational form "blurs the line between where a campaign committee stops and an

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outside committee begins . . . it illustrates the fiction of campaign limits" (Levinthal 2012).

Since 2012, super PACs and hybrid PACs have done most of the independent spending in federal elections: 64 percent (over $2 billion) of all IE spending reported to the FEC in 2019–20 (Federal Election Commission, PAC Data n.d., table 1). Table 5.4 shows super PAC and hybrid PAC spending from 2012 to 2020 (note we have excluded the fundraising platforms ActBlue and WinRed from the hybrid PAC count and spending data because these groups collect contributions and forward it to candidates, parties, and other groups). As table 5.4 indicates, both super PACs and hybrid PACs spend some of their funds on independent expenditures, generally for express advocacy advertisements, but super and hybrid PACs are engaged in many other campaign activities, such as voter identification and mobilization, polling, opposition research, and fundraising (Dwyre and Braz 2015). Super PAC expenditures may provide a benefit to a candidate for which the candidate might feel some gratitude, and thus potentially raise concern for the appearance of corruption (Farrar-Myers and Skinner 2013, 111).

Unreported Independent Spending by 527 and 501(c) Nonprofits

Super PACs use money from disclosed sources to make independent expenditures, but 501(c) and some 527 organizations use unlimited and often undisclosed soft money to spend in elections, so long as they do not coordinate their spending with any candidate or party. Figure 5.10 shows that after BCRA (2002), 527 spending surged in the 2004 elections as some of the contributors who made unlimited soft money donations to the parties before BCRA found a new outlet for their campaign money (Campaign Finance Institute 2005; Dwyre 2007), but 527 spending declined after the FEC fined some 527s for violating BCRA restrictions during the 2004 elections. Congress also enacted enhanced disclosure rules for 527s.[24]

Corporations, unions, and other groups also can establish a 501(c) nonprofit corporation to engage in political activities: a 501(c)(4) social welfare group, a 501(c)(5) union organization, or a 501(c)(6) trade association or business league, such as the Chamber of Commerce.[25] However, the primary purpose of these organizations shall not be political and they shall not use all or even most of their funds for electoral spending.[26] The

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TABLE 5.4. Number of and Spending by Super PACs and Hybrid PACs, 2012–2020 (millions of 2020 dollars)

	Super PACs (*N*)	Single-Candidate Super PACs (*N*)	Super PAC Total Disbursements (millions $)	Super PAC Independent Expenditures (millions $)	Hybrid PACs[a] (*N*)	Hybrid PAC Total Disbursements (millions $)[a]	Hybrid PAC Independent Expenditures (millions $)
2012	1,251	127	$796.8	$606.8	64	$28.1	$12.9
2014	1,618	110	$687.2	$339.4	104	$38.1	$2.6
2016	2,722	264	$1,805.9	$1,056.5	179	$123.8	$46.7
2018	2,217	256	$1,530.7	$820.5	342	$207.2	$72.9
2020	2,319	325	$3,385.9	$2,117.4	520	$1,149.4	$553.2

Source: Federal Election Commission, PAC Data (n.d.); OpenSecrets, Outside Spending (n.d.), by Single-Candidate Super PACs.

[a] We excluded the two major partisan fundraising platforms, ActBlue and WinRed, from the hybrid PAC count and totals, because they serve as pass-through organizations to collect contributions for candidates, the political parties, and other groups. ActBlue, in 2012, 2014, 2016, 2018, and 20202, and WinRed in 2020 organized as hybrid PACs.

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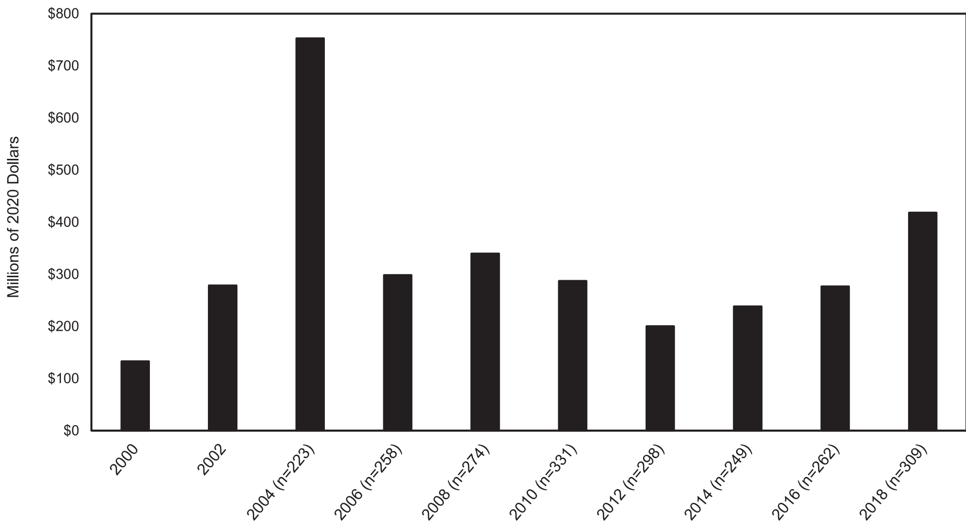

Fig. 5.10. Total Federal 527 Expenditures, 2000–2018 (millions of 2020 dollars)
Source: Data for 2000 and 2002 from Garrett, Lunder, and Whitaker (2008); data for 2004 to 2018 from OpenSecrets, 527s (n.d.).
Note: The number (*n*) of 527 committees not available for 2000 and 2002; data for 2020 527 activity were not available.

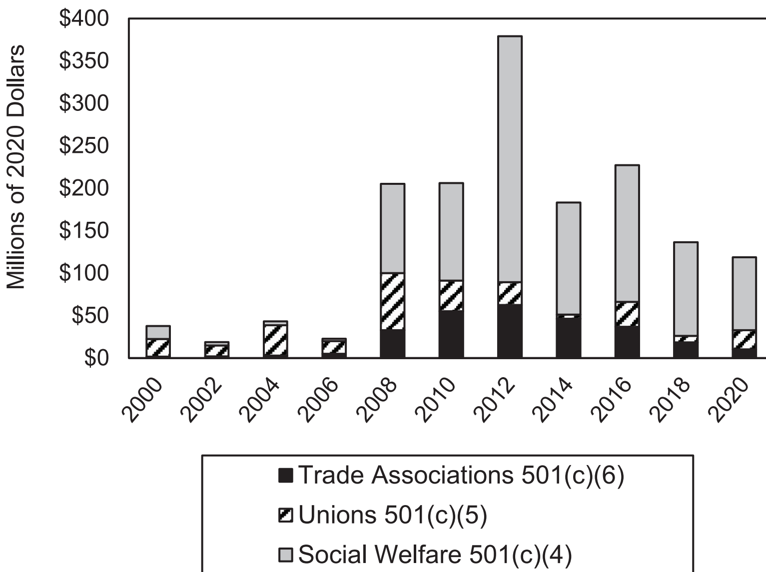

Fig. 5.11. 501(c) Reported Federal Electoral Spending, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets, Outside Spending (n.d.).
Note: Data reported here reflect only political spending reported by 501(c) organizations to the FEC. Other political spending is not disclosed because of vague reporting requirements and lax enforcement.

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501(c)(4) groups now do most of the 501(c) nonprofit political spending. Tax law describes 501(c)(4) groups as "social welfare organizations" and requires they be "operated exclusively for the promotion of social welfare."[27] Yet critics contend that any electoral campaign activity featuring a candidate for office *is* campaigning, not promoting social welfare. This contradiction and the lack of meaningful enforcement have led 501(c)(4)s to push the envelope by "opportunistically drawing the line as close to the 50/50 threshold as possible" (i.e., that politics may not be the majority of their activity) (C. Miller 2015, 356). Figure 5.11 shows that while labor unions have used the 501(c) nonprofit organizational form for electoral spending for some time, 501(c) campaign spending did not really take off until the 2007 *Wisconsin* decision, which loosened the rules regulating their activities (see chapter 4).[28] Yet, because politics cannot be their primary purpose, 501(c)s cannot spend all the money they raise on electoral politics. Thus, 501(c)s are not the most efficient means for raising and spending money to influence elections, and many campaign finance players use other organizational forms, especially super PACs, which can raise unlimited amounts and spend all of it on electoral politics.

Communicate with Employees or Members

Corporations, trade associations, and labor unions may spend unlimited amounts from their treasury funds (not usually from their traditional PAC) to communicate political messages to their "restricted class," that is, to the company's employees or to the union's members (Federal Election Commission, Restricted Class n.d.). Spending on communications costs that exceeds $2,000 for any election must be reported to the FEC. These communications are for messages such as candidate endorsements, voter registration and get-out-the-vote drives, and notices of events for candidates. Unions do most of this communications spending: 81 percent of the $18.2 million in communications cost spending for the 2020 federal elections. Fewer corporations, trade associations, and other groups spend on these communications to their employees and members, but some spend quite a lot, such as the National Association of Realtors, which spent $3.8 million communicating directly with its members for the 2020 elections (Federal Election Commission, Communication Filings n.d.). Alexander Hertel-Fernandez documents how some corporate leaders encourage or pressure their employees to contribute to favored candidates (Hertel-Fernandez 2018). To the extent that these employee donations are known

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to come from a corporate or other entity, they could potentially magnify the importance of the firm's contribution to a candidate's electoral success and perhaps the firm's access to and influence on that lawmaker.

The Rules Matter: Donors and Their Agents

We just reviewed the various ways noncandidate organizations can spend lots of money that candidates cannot control but may influence their elections. Different spenders have different motivations, and donors have a variety of options to express those motivations. Parties pursue majority status by directing resources to the most competitive races, PACs give mostly to incumbents because they want access to lawmakers, and single-candidate super PACs spend to help just one candidate get elected. Changes in the rules over time lead agents to use different vehicles for campaign spending. Thus, donors may adjust their giving accordingly.

To fully appreciate how legislative action and the various court and FEC decisions have fundamentally changed how various campaign finance actors utilize the types of organizations that best allow them to pursue their electoral and policy goals, we analyzed the relative proportion of spending by all noncandidate organizations from 1986 to 2020. Figure 5.12 shows the relative mix of the various noncandidate spenders we describe in this chapter over time by *percentage* of all noncandidate spending in federal elections. As the rules have changed, there have been dramatic shifts in the relative use of the different campaign finance organizational types.

The most significant shifts occurred with traditional PACs (from 84 percent of all noncandidate spending in 1986 to only 9.3 percent in 2020), and the high point for political parties, 64.6 percent of all noncandidate spending in 2000 with both hard and soft money, but by 2020 only 8.4 percent of all noncandidate spending with hard money only. Traditional PACs and parties have been displaced primarily by super PACs and hybrid PACs, which together accounted for 78 percent of all noncandidate spending in 2020.

Parties in particular play a key role in a representative democracy by organizing elections and providing a crucial link between voters and their elected officials—voters can hold politicians and their parties accountable for their actions or inactions at the next regularly scheduled election. That link may be strained if candidates and parties are outspent by groups that do not appear on the ballot where voters can hold them responsible for their campaign finance activities. Indeed, no such accountability mecha-

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nism exists for traditional PACs, 527s, 501(c)s, super PACs, and hybrid PACs.

Might this concern be allayed because much of the spending by these nonparty groups is done by *partisan* super PACs, which spend to help elect candidates from only one party? Partisan groups affiliated with a party organization are often considered part of the broader party network or "partisan web" (Koger, Masket, and Noel 2009; see also Herrnson 2009; Grossman and Dominguez 2009). Parties may even have some influence over how nonparty groups spend their money in elections by "orchestrating" the campaign finance activities of some of their allied groups (Kolodny and Dwyre 2018, 377). Yet this broader party network is a network of groups, some of which have policy preferences that may not reflect the preferences or interests of the voters (Gilens 2012; Bawn et al. 2012). Marty Cohen and his colleagues (2008, 6) define the American party network as "a coalition of interest groups, social group leaders, activists, and other 'policy demanders' working to gain control of government on behalf of their own goals." These "intense policy demanders," such as Republican business interests and Democratic labor interests, influence who the parties nominate to run for office and shape the terms of policy debates during both elections and in government (30). However, these policy demanders exercise their influence without fear of being held accountable for who gets elected and what policies those politicians enact. Thus, their campaign finance strategies, and the topics and tone of their campaign communications, are not constrained by the same sense of responsibility under which candidates and parties operate.

Today, the least accountable and sometimes most secretive groups do most of the noncandidate spending in federal elections. The groups permitted to raise and spend money without limit from sources that often raise corruption concerns (i.e., from corporations, unions, and sometimes anonymous donors—super PACs, hybrid PACs, 501(c) groups, and 527s) made over 82 percent of the noncandidate spending in 2020. Although parties and traditional PACs are permitted to make unlimited independent expenditures, they are subject to strict fundraising limits, making it difficult for them to compete with the other groups whose fundraising and spending are not limited. It matters who funds U.S. elections, because the funders' goals have the potential to influence the behavior of voters, the behavior of our elected officials, and the policies they enact (Ferguson 1995; Gilens 2012).

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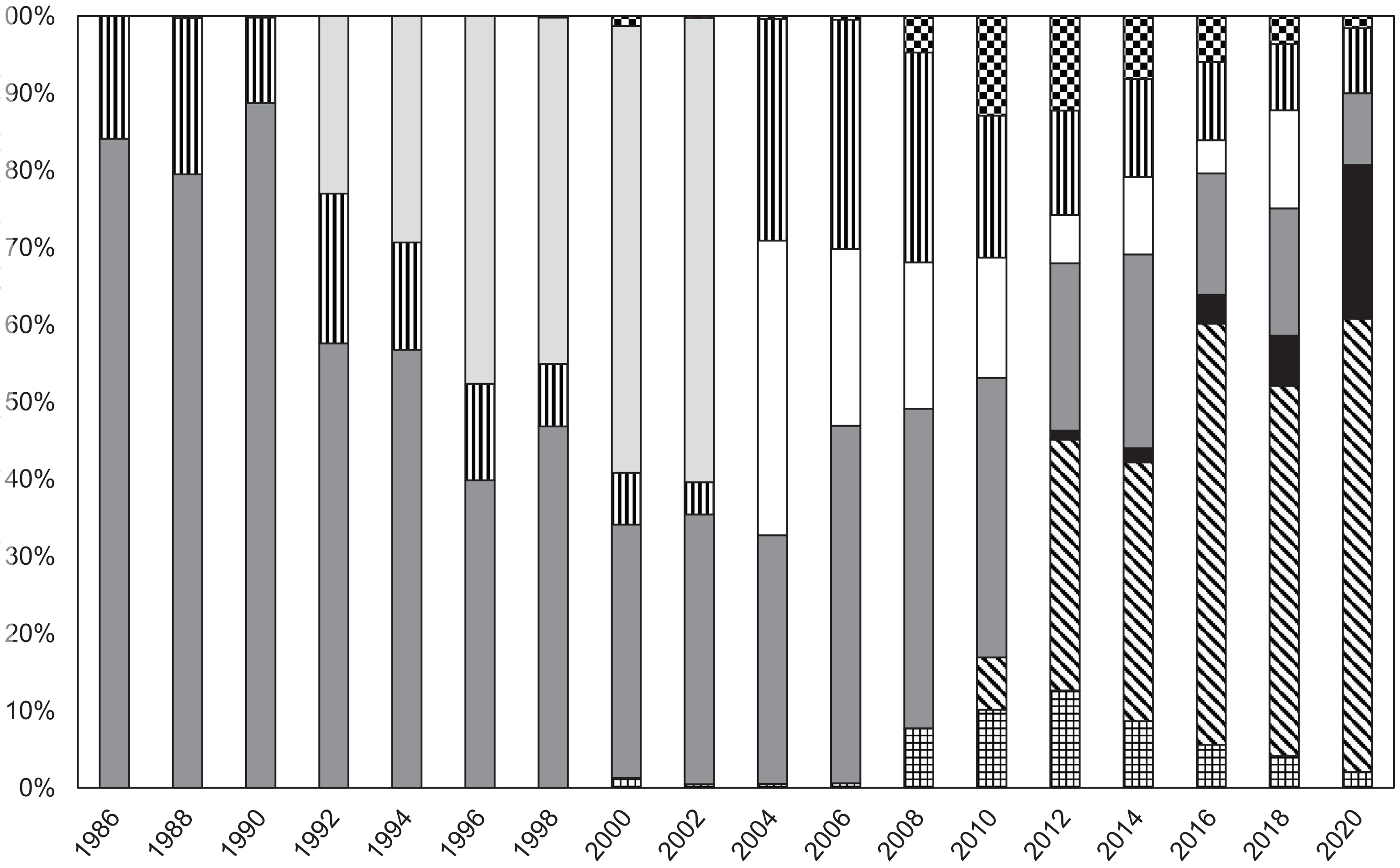

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Independent Expenditures by Persons Other Than Political Committees
National Party Soft Money Spending
Party Contributions, Coordinated & Independent Expenditures
527 Spending
Traditional PAC Contributions & Independent Expenditures
Hybrid PAC Spending
Super PAC Spending
501(c) Nonprofit Spending

Fig. 5.12. Noncandidate Spending in Federal Elections, 1986–2020 (by percent)

Source: Compiled by authors with data from Federal Election Commission and OpenSecrets.

Note: We excluded the two major partisan fundraising platforms, ActBlue (in 2012, 2014, 2016, 2018, and 2020) and WinRed, (in 2020) from the hybrid PAC totals, because they serve as passthrough organizations to collect contributions for candidates, the political parties, and other groups. Collecting money on behalf of and transferring these funds to their client organizations is not ActBlue and WinRed spending and therefore not included here.

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CHAPTER 6

The Players and the Game

Candidates

This is a book about the fundamentals of campaign finance. The first fundamental we discussed is democracy. For democracy to work, we must have people to perform the jobs needed to run government, and for a democracy to be legitimate, the governed must pick those people through elections. In the last chapter, we looked at donors' options to influence the election process. Here, we turn our focus to candidates. We start with a discussion of who runs for federal office and then consider the three types of offices at the federal level, deliberately designed by the framers to be separated.

Candidate campaign finance activity, like the individuals, parties, and groups we considered in the previous chapter, is shaped by the fundamentals of capitalism and a mostly privately funded campaign finance system. Candidate campaigns also are characterized by the status of each candidate (incumbent, challenger, or open seat candidate) and by the competitiveness of their specific election. These factors explain a good deal about the fundraising and spending behavior of both candidates and the parties and groups that aim to influence their elections.

Who Are the Candidates? Descriptive Representation

One of the liveliest debates the founders had was about the delegate (Thomas Jefferson) or trustee (James Madison) theory of representation.

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In the delegate view, a representative would present the views of their constituents in the district they represented. In the trustee view, a representative would take the interests of the nation at large into account, and voters would select a representative whose judgment they trusted (S. Smith, Roberts, and Vander Wielen 2013, 33). The trustee model prevailed, and Americans do expect that elected officials should both listen to them and at the same time be more elite (especially in education and experience) than they are. While we find that candidates are more representative of the public than donors, there is still a clear elitist bent. With one exception (Barack Obama), presidents have been white, male, educated, and older than the average citizen. Members of Congress are more likely to be white, male, college educated, and wealthier than the American public.

As with the donorate, the candidate pool continues to diversify, but we have a long way to go. Women and racial and ethnic minorities are underrepresented in elective office. Women reached the highest representation they have ever had in the U.S. House after the 2022 midterm elections with 124 out of 435 members, 28.5 percent. The U.S. Senate had 25 women in 2023, 25 percent of the chamber (Dittmar 2023), though women are more than half of the U.S. population. Minority representation has increased in the U.S. Congress, as 12 percent of the 118th Congress (2023–25) is Black and 11 percent is Hispanic; non-Hispanic whites account for a full 72 percent of House members and senators but only 59 percent of the U.S. population (Schaeffer 2023).

We know that asking donors for small amounts of money has diversified the donor pool. What might diversify the candidate pool? Because those who have held previous political office are more likely to be elected to Congress (Jacobson and Carson 2020, 57–58), minority underrepresentation in state legislatures reduces the number of politically experienced minority candidates in the pipeline. Kenicia Wright and Ling Zhu (2021, 374) note although "blacks make up 13 percent of the U.S. population and Hispanics account for about 17 percent of the U.S. population, the proportions of state lawmakers with these racial identities are far smaller—9 and 5 percent, respectively." All U.S. House candidates run in single-member districts, and there is a history of diluting minority voting power through partisan gerrymandering by distributing minority voters across more than one district (cracking) or creating districts with a very high proportion of minority voters (packing) and leaving surrounding districts with few such voters (Medvic 2021, 96–97).

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What about resources? Does campaign money (or the lack of it) explain minority underrepresentation? Some scholars find that minority candidates have a tougher time gaining the support of their party, which connects candidates to donor networks (Hassell 2016; Herrnson 2009). Gbemende Johnson et al. examined the dearth of Black candidates for statewide offices (specifically governor and U.S. Senate) from among sitting U.S. House members of color and found that raising more campaign funds increases the probability that a House candidate will run for higher office, but Black House members raise less than nonblack House members (G. Johnson, Oppenheimer, and Selin 2012). Another study of why Black candidates lose to white candidates does not find that campaign finance matters (Tokeshi 2020).

Women's campaign finance resources have been studied extensively. While women are still very much underrepresented in office, campaign finance is not the hurdle it once was. Barbara Burrell (2014, 120–29) concludes that while there have been some differences in the relative dependence on large donors (male candidates have more) and small donors (female candidates have more), on the whole there is not much difference in how male and female candidates finance their campaigns. Michelle Swers and Danielle Thomsen argue that Democratic female candidates experience a surge in female donors and a decline (relative to male candidates) of male donors. They note that gender is not nearly as important as incumbency status, the competitiveness of the race (two factors we discuss below), and candidate ideology in attracting contributions (Swers and Thomsen 2020, 245). Likewise, Eric Heberlig and Bruce Larson (2020) find that when women become members of Congress, they continue to improve their fundraising (relative to men) from small donors and PACs. The relative success of female candidates as fundraisers diminishes when interacted with race though. Ashley Sorensen and Philip Chen (2022, 749) find that when both race and gender interact, Black women candidates raise only 70–80 percent of what their white female colleagues can.

Working class people are also very underrepresented in Congress. Nicholas Carnes argues that working class candidates are not any more afraid of campaign fundraising than their wealthier counterparts (Carnes 2018; see also Carnes and Sadin 2015). However, working class citizens have a particular problem that others in the traditional candidate pool do not have, and it is not about fundraising per se:

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> Everyone hates fundraising. The concerns that are *unique* to workers seem to be more basic concerns about paying the bills and taking care of things at home. That is, the workers in this sample weren't deterred *at higher rates* than professionals by how much campaign money they might have to raise; they were deterred at higher rates by how much income and time they would have to give up. (Carnes 2018, 85)

Concentrating on campaign fundraising overlooks the problem that it is hard to run for office if you need a paycheck every week just to live. People in professions such as law, business, and real estate have a great advantage when it comes to candidacy, as they can take a leave from work and then return without much professional consequence. They also are more likely than working class people to have the savings needed to meet their basic costs of living. This is a different kind of resource problem, something the FEC has considered more than once. While using campaign funds for personal expenses is clearly forbidden, what is less clear is whether certain expenses that seem to be personal in nature are necessary to campaign effectively. Does running for office require expenses that would *not* otherwise be needed? The FEC has declared that using campaign funds to purchase security equipment for a candidate's home (Detrow 2017), childcare expenses (Sairam 2021; Kurtzleben 2018), and even a salary for a candidate (Bowman 2020) are all appropriate.

Nonwhites, women, and the working class are underrepresented in government in part because they face fundraising challenges that impact their inclination to run for and ability to win office. At the heart of the concern about descriptive representation is what this underrepresentation in Congress and state legislatures means for their interests to be represented in the policy arena, which itself is not designed to guarantee equal representation.

Separation of Powers in the Constitution

Because of numerous compromises and the desire to separate the different centers of power in government, the U.S. Constitution stipulates different selection plans for the executive and the two houses of the legislature. The

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House of Representatives has always had direct elections (they are elected by the people). They serve for two-year terms with no term limits. The U.S. Senate originally had indirect elections (they were appointed by their respective state legislatures until 1913, when the Seventeenth Amendment was adopted, requiring senators to be directly elected), but are now popularly elected to six-year terms without term limits. Senate elections are staggered so that one-third of the Senate is up for election every two years. The president is selected through an indirect device, the Electoral College, to this day. Since 1951 (with ratification of the Twenty-Second Amendment) presidents are limited to two four-year terms.

The system of the separation of powers with staggered elections and different electoral methods is meant to guard against one faction (i.e., a political party) taking over the entire government in a single election and dominating at the expense of all others (Madison 1788b, No. 51). The legislature was designed to separate power (i.e., it is bicameral) and ensure that no one faction could easily take control of both legislative chambers.[1] Thus, even when candidates for president, the Senate, and the House of Representatives belong to the same political party, the system of separate powers and distinct terms of office means that their electoral fates are not inherently tied to that of the others,[2] and each may wage a separate campaign to win votes.

As a result, we have essentially three different campaign finance "subsystems"—one for presidential elections, one for Senate elections, and one for House elections. The same donors—individuals, political parties, and various groups—can engage in the campaigns of each type of candidate simultaneously. One individual could give separate donations to a presidential candidate, a Senate candidate, a House candidate, and multiple political party committees and groups,[3] or they can support many or all of them at once through a joint fundraising committee (JFC). Yet candidates running for each type of federal office depend on some types of donors more than others.

The Presidency and Its Campaign Finance System

As the focal electoral office in the United States, the role of presidential elections in American politics is all-encompassing. If voters know anything about elections, it is likely to be who the presidential candidates are and

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what party label they wear. Their opinion of the presidential candidates and their parties often extends to all other candidates on the ballot at all levels of government. Similarly, presidents (and non-incumbent presidential candidates) are a critical part of campaign fundraising writ large. Indeed, Brendan Doherty's book on the subject is titled *Fundraiser in Chief* (2023).

Throughout American history, presidents have been attached to one set of backers or another (an industry, a social movement, and so forth). As we have already detailed, presidential campaign finance excesses in the 1960s and 1970s led to adoption of the 1971 Federal Election Campaign Act and the 1971 Revenue Act (see chapter 2). The Revenue Act established a voluntary partial public funding system for presidential candidates who agreed to limit their spending in the general election to the amount of the public subsidy. The 1974 FECA Amendments extended a public financing option to presidential primary candidates and provided public funding to the major political parties for their presidential nominating conventions.

From 1976 to 1996, this public funding system for presidential primaries, nominating conventions, and general elections was used by every serious presidential candidate. However, contests for the House and the Senate remained financed exclusively with private funds. Next, we explain what happened to the presidential public financing options to illustrate both the promise and the limits of public financing in the United States and to explain the role that its downfall had in soaring levels of fundraising by candidates for all federal offices.

Public Financing of Presidential Elections, 1976–2008

The idea of providing taxpayer money to subsidize elections has never been popular in the United States,[4] so campaign reformers came up with a clever device: a voluntary opt-in by each individual taxpayer. Rather than name a specific dollar amount from the federal treasury for the presidential campaign public funding program, the 1971 Revenue Act provided for a check-off box on the individuals' annual federal income tax form asking if the taxpayer wished to designate $1 of their tax obligation to the Presidential Election Fund. Taxpayers would not pay any additional tax, but they could choose whether $1 of their taxes would go to this fund instead of to any other government program. Nevertheless, many Americans were confused about whether or not this device raised one's taxes

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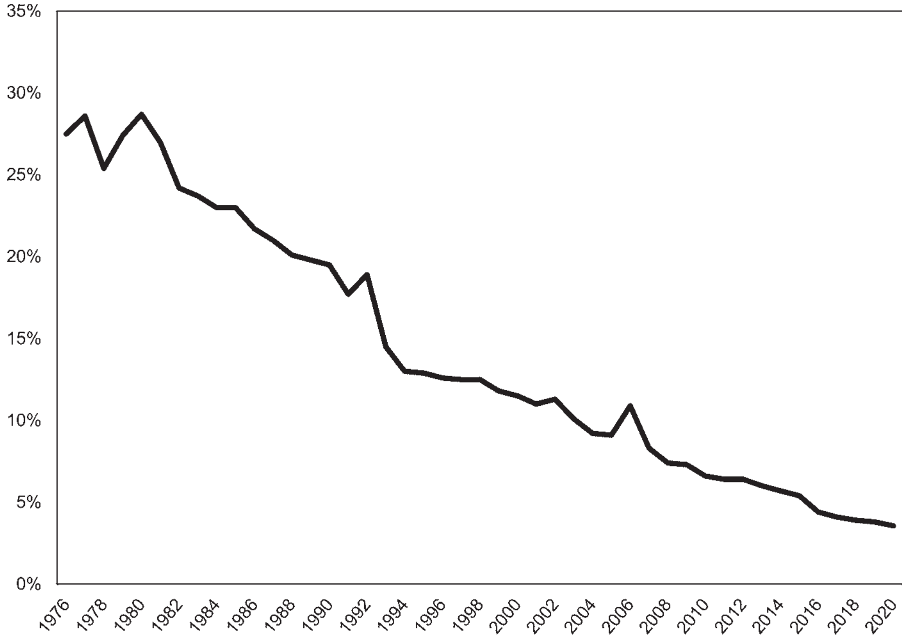

Fig. 6.1. Percentage of Taxpayers Who Checked Box on IRS Tax Form for the Presidential Election Campaign Fund, 1976–2020
Source: Compiled by authors with data from Federal Election Commission, Public Funding Presidential (n.d.).

(Campaign Finance Institute 2015). The amount of money in the fund depended entirely on the approval of the American taxpayer, so an interesting feedback loop was built into this system. Participation from citizens was relatively robust at first and then began to decline, driving Congress to raise the tax check off amount from $1 to $3 in 1993. Figure 6.1 shows the dramatic decline in taxpayer participation in the Presidential Election Fund through the IRS check-off since it was established in 1976, with only 3.56 percent of taxpayers opting to direct $3 to the Fund in 2020 (Federal Election Commission 2021b).

These funds paid for the grant given to major party presidential candidates to use in the general election, for a grant given to the two major parties for their presidential nominating conventions, and for the public matching funds provided for qualified candidates seeking the major party nominations beginning in 1976. Minor parties and independent presidential candidates could also be awarded these funds provided they met specific measures of public support.[5]

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Presidential Primary Matching Funds

To run for president, a candidate must first find a way to get their name on the general election ballot. The two best ways to do this are to secure the nomination of a major political party (that already has a spot on the ballot) or to run as an independent candidate in all 50 states. To open up the presidential nomination process for the two major parties to voters and not just party activists (a reaction to events in 1968 and 1972; see Nelson 2011), FECA 1974 created a public matching fund system for presidential primaries. Candidates seeking a major party's nomination could receive public money to match each dollar, up to the first $250, of any *individual's* donation. The candidate needed to show evidence of eligible donations, file paperwork with the FEC, and then receive matching funds from the public fund. Wary that frivolous candidates might try to solicit public matching funds, the law provided a complicated qualifying formula requiring candidates to raise at least $5,000 in each of 20 states before they could request any matching funds for a primary election bid (Federal Election Commission 2021a). Once deemed eligible for matching funds, a presidential candidate for a party's nomination must maintain a "viable" status: public funding would be terminated if a candidate received less than 10 percent of the vote in two consecutive primary elections.[6]

In exchange for the public funds, candidates had to agree to a spending limit in each state where a candidate wished to compete for convention delegates (what a candidate needs to secure a nomination at their party's convention) through a primary or caucus and an *overall* spending limit for the entire primary season (ending with the presidential nomination acceptance speech at the party's national convention, usually in July or August before the November general election). Spending caps were based on each state's voting age population and were adjusted for inflation. The law had no consideration for the timeline of primary events. So, candidates could only spend two cents per voter whether the primary or caucus was the first or the 30th event in the nominating season. Additionally, the overall spending limit for the nomination phase was less than the sum of all the state limits. This was an implicit acknowledgment that the timing of the primaries did change candidate spending—later contests meant less (Norrander 2019, chap. 4). As the modern presidential primary process began to weed out candidates very early on in the calendar year, significant spending in early primary states became essential. Primary spending limits in low population but early primary and caucus states like New Hamp-

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TABLE 6.1. Major Party Presidential Candidate Participation in General Election Public Funding, 1976–2020

Year	Took Primary Matching Funds?		Took General Election Funds?	
1976	Ford (R)	Yes	Ford (R)	Yes
	Carter (D)	Yes	Carter (D)	Yes
1980	Reagan (R)	Yes	Reagan (R)	Yes
	Carter (D)	Yes	Carter (D)	Yes
1984	Reagan (R)	Yes	Reagan (R)	Yes
	Mondale (D)	Yes	Mondale (D)	Yes
1988	Bush, GHW (R)	Yes	Bush, GHW (R)	Yes
	Dukakis (D)	Yes	Dukakis (D)	Yes
1992	Bush, GHW (R)	Yes	Bush, GHW (R)	Yes
	Clinton, WJ (D)	Yes	Clinton, WJ (D)	Yes
1996	Dole (R)	Yes	Dole (R)	Yes
	Clinton, WJ (D)	Yes	Clinton, WJ (D)	Yes
2000	Bush, GW (R)	*No*	Bush, GW (R)	Yes
	Gore (D)	Yes	Gore (D)	Yes
2004	Bush, GW (R)	*No*	Bush, GW (R)	Yes
	Kerry (D)	*No*	Kerry (D)	Yes
2008	McCain (R)	*No*	McCain (R)	Yes
	Obama (D)	*No*	Obama (D)	*No*
2012	Romney (R)	*No*	Romney (R)	*No*
	Obama (D)	*No*	Obama (D)	*No*
2016	Trump (R)	*No*	Trump (R)	*No*
	Clinton, HR (D)	*No*	Clinton, HR (D)	*No*
2020	Trump (R)	*No*	Trump (R)	*No*
	Biden (D)	*No*	Biden (D)	*No*

Source: Compiled by authors with data from Federal Election Commission, Public Funding Presidential (n.d.).

shire and Iowa meant that candidates either had to pull clever tricks to keep under the spending limits or, as George W. Bush did in 2000, decline primary public matching money entirely so that he could raise and spend as much as he felt he needed to. Table 6.1 shows that Al Gore in 2000 was the last presidential candidate who won a major party nomination to take primary matching funds, making this part of the public funding system effectively dead by the 2004 presidential primary season.

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General Election Public Funds

To keep major donors out of the presidential *general* election phase, the presidential public funding program made an incredible offer: an outright grant of public money in the same amount for both major parties' presidential candidates to run their general elections. Again, the catch was that candidates could not raise any additional money on their own (except for funds needed for legal and accounting compliance costs), so they were limited to spending only what was given to them from the taxpayer supported fund. Candidates were permitted to spend up to $50,000 of their own (personal) money, and their national party committees could also make limited coordinated expenditures on their behalf. The public fund grants were set at $20 million in 1974 and adjusted for inflation, so that by 2020 the general election grant was $103.7 million. However, no candidate has accepted the general election funds since John McCain in 2008 (Federal Election Commission, Public Funding n.d.).

In 2008, Democrat Barack Obama was the first major party presidential nominee to forego public funding for both the primary and general elections. Obama believed (correctly, as events would show) that he could raise substantially more money within the hard money contribution limits for the general election (by increasing his small donor base) than he would receive in public funds. His Republican opponent, Senator John McCain, a top proponent of campaign finance reform in the U.S. Senate (and cosponsor of the 2002 McCain-Feingold Bipartisan Campaign Reform Act—BCRA), opted out of the primary federal matching funds (raising $210.6 million for his primary contest) but *did* accept the public funds for the general election in 2008, $84.1 million. Obama raised $456 million for his primary and an additional $291 million for the general election (a total of $747 million) (Federal Election Commission, Presidential Data n.d.). Obama's success in both fundraising and vote getting made bypassing the public funding system the only reasonable option for presidential contenders going forward.

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How Presidential Candidates Raise Funds in the 2020s

Now that no major party presidential candidate accepts any form of public funding (even though the laws that established these systems are still on the books), they raise hundreds of millions of dollars for their own campaign committees. The 2020 Republican presidential nominee Donald Trump raised $774 million, and Democratic nominee Joe Biden raised over $1 billion (OpenSecrets 2021c). Where does all this money come from?

Figure 6.2 shows the sources of campaign funds for each major party presidential nominee in the 2008, 2012, 2016, and 2020 elections (adjusted for inflation in 2020 dollars to show the real value of the candidates' receipts over time). As you can see, major party presidential nominees raise most of their money from individual contributors, and quite a lot of it from small donors. For the 2020 presidential contest, almost 77 percent of Joe Biden's (D) campaign receipts were from individual contributors, as were 62 percent of Donald Trump's (R) receipts (Federal Election Commission, Presidential Data n.d.). In 2016, Hillary Clinton (D) raised 69 percent of her money from individual contributors, but only 38 percent of Donald Trump's (R) receipts were from individuals that year (Federal Election Commission, Presidential Data n.d.).[7]

Traditional PACs and political parties give so little to presidential candidates as hard money contributions that their donations are not even listed on figure 6.2. In 2020, Joe Biden received $563,064 in "other committee" contributions, most of which is from traditional PACs, and Donald Trump raised $895,558 from "other committees" (Federal Election Commission, Presidential Data n.d.). Similarly, for the 2020 election, Joe Biden received only $8,200 in direct contributions from political party committees, and Donald Trump collected no party contributions at all (Federal Election Commission, Presidential Data n.d.).

Presidential candidates sometimes receive financial support from other federal candidates and officeholders, but this also constitutes very little of their total receipts. For the 2020 election, Donald Trump received $766,796 from other federal candidates: $254,397 from candidate campaign committees (more than any other federal candidate in 2020) and $512,399 from their leadership PACs. Joe Biden received $329,125 from the leadership PACs of fellow federal candidates and officeholders (OpenSecrets, Most to Other Candidates n.d., Leadership PACs n.d.).

Sometimes candidates donate their own funds to their campaign or

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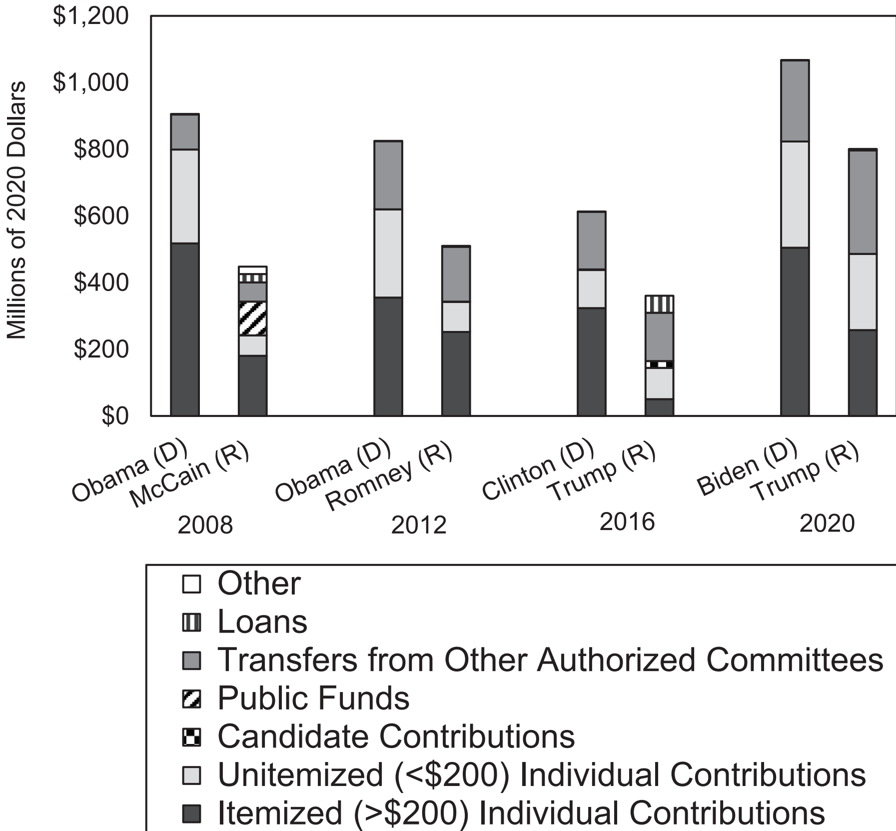

Fig. 6.2. Sources of Presidential Candidate Funds, 2008–20 (millions of 2020 dollars)
Source: Compiled by authors with data from Federal Election Commission, Candidates for President (n.d.).
Note: John McCain's receipts in 2008 are for the pre-nomination period only. McCain accepted full public financing for the general election. The unitemized receipts for Obama in 2008 are estimated because the FEC did not report unitemized receipts for Obama.

secure a personal loan, as John Kerry did by mortgaging his home to stay in the 2004 Democratic primary contest (PBS NewsHour 2003). *Buckley* invalidated FECA's limits on how much of their own money a candidate could spend, calling it an unconstitutional limit on free speech. Thus, federal candidates are permitted to use as much of their own money as they want to try to win their elections. Donald Trump was the first major party

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general election presidential candidate to spend significantly on his own campaign and win the nomination and the presidency (see fig. 6.2 above). In 2016, Trump contributed to and loaned his own campaign $66.1 million, almost 20 percent of his 2016 campaign receipts. In 2020, he gave only $9,000 (0 percent) to his 2020 reelection bid (OpenSecrets 2017b, 2021d; Federal Election Commission, Presidential Data n.d.).

Some presidential hopefuls who paid for their own campaigns include independent candidate Ross Perot, who spent $63.5 million of his own money on his 1992 general election candidacy, and Steve Forbes (of the *Forbes Magazine* family) spent over $37 million of his own money on his unsuccessful bid for the 1996 Republican presidential nomination (D. Weber 2011; Evers-Hillstrom 2020). In the 2020 Democratic primaries, hedge fund billionaire Tom Steyer self-financed 98 percent of his campaign with $341.8 million, and former New York City mayor and billionaire Michael Bloomberg beat all records by almost fully funding his bid for the 2020 Democratic presidential nomination with $1.1 billion (OpenSecrets 2021a, 2021b).

Presidents as Fundraisers?

In the mid-1990s, President Bill Clinton and other presidential candidates helped their political party organizations raise soft money, which they trusted would be spent on issue ads to benefit their own campaigns as well as those of their party's candidates for the House and Senate. Presidential candidates have always had an important role in raising money for the parties at all levels, but their role became outsized between 2000 and 2004. Two important changes explain it.

First, Republican George W. Bush declined public matching funds in 2000 for his primary race. In 2004, Bush declined the primary public money again as did his eventual Democratic opponent, Senator John Kerry. As Doherty explains, the decision to raise money in larger amounts encouraged presidential candidates to hold many more fundraising events than they would have previously because the "match" only applied to donations of $250 or less. Bush became president in 2001 and began raising money for his 2004 reelection in 2003. Compared to President Clinton's fundraising in 1995–96 (for the 1996 election), Bush held three times as

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many fundraisers in the last two years of his first term. Bush raised $270 million for his renomination (he was unopposed) and Kerry raised $235 million (Doherty 2023, 36). Second, BCRA eliminated soft money for political parties effective for the 2004 elections. As unlimited donations flowed to 527s and then to 501(c)4 nonprofits, presidential candidates needed to change tactics. Doherty discovered that the Bush/Cheney reelection committee teamed with the RNC to host 21 "Victory" events using JFCs to raise funds from multiple contributors (Doherty 2023, 38–39). This was before the 2014 *McCutcheon* decision to remove the aggregate individual contribution limit made JFCs irresistible.

Recent major party presidential nominees have raised millions for their own campaigns, for their national party committees, and for some state parties, mostly in key battleground states, using JFCs.[8] Figure 6.3 shows they have raised quite a lot of their individual and PAC contributions using JFCs. For 2020, 23 percent of Joe Biden's and 36 percent of Donald Trump's total receipts came from donations raised through JFCs (see fig. 6.3). Moreover, much of the money raised by presidential JFCs went to their national party committees as we see in figure 6.4. Fueling the national party committees this way reaps benefits for presidential candidates and the balance of the party's ticket. Use of fundraising tools like JFCs means that some contributions are listed as "transfers" from other committees. For presidential campaigns, the ability of party organizations to transfer unlimited amounts among themselves motivates candidates to headline more major fundraising events run through JFCs.

The Congressional Campaign Finance Systems

Attempts to establish public funding of congressional elections (first proposed by President Theodore Roosevelt in 1907, tried again in the 1950s, and actually passed by Congress but vetoed by President George H. W. Bush in 1992) have not been successful (Garrett 2011; Michael Miller 2013, 16–17). Congressional candidates have always relied exclusively on private money to finance their campaigns even when they designed a public funding system for presidential candidates. How they raise campaign funds depends on which chamber they seek and their candidate status.

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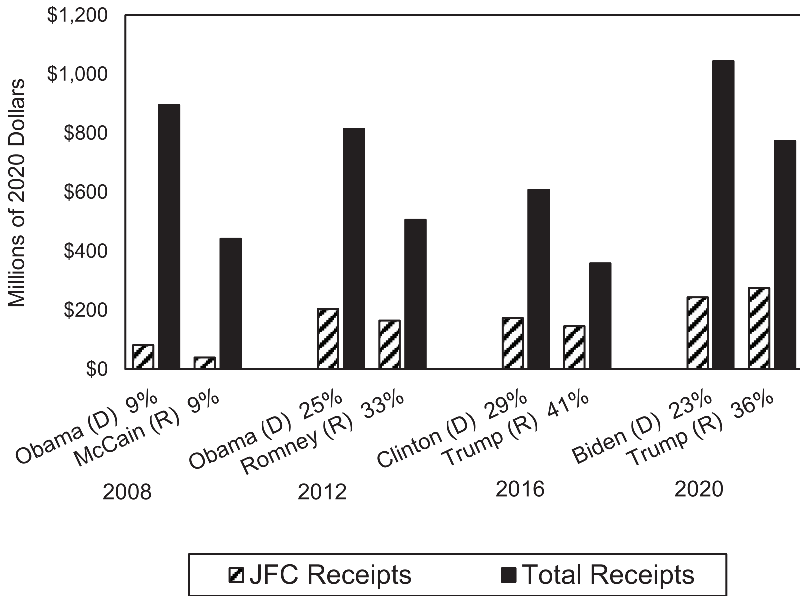

Fig. 6.3. Presidential Candidate Joint Fundraising and Total Receipts, 2008–20 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets, JFC Recipients (n.d.); OpenSecrets, Presidential Elections (n.d.).
Note: The percentage under each candidate's name is the percentage of total receipts raised via joint fundraising committees.

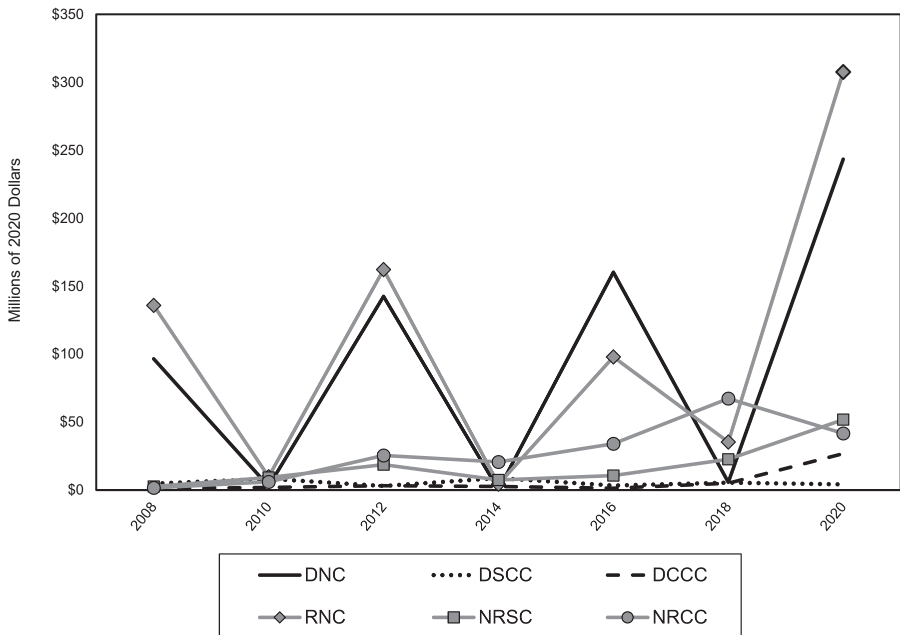

Fig. 6.4. Party Receipts from Joint Fundraising, 2008–20 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets, JFC Recipients (n.d.).

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The U.S. Senate and Its Campaign Finance System

The Senate has six-year terms and staggered elections. Out of 100 senators, 33 or 34 of them have an election campaign each two-year cycle. This also means that two-thirds of the Senate will not face an election in presidential election years, and a senator elected in a presidential year will face reelection in a midterm (nonpresidential) election. Senators represent entire states, thus campaigning across large areas and working to communicate with many more voters than most House candidates, who represent smaller districts, requires more campaign funds. Clearly, Senate candidates have unique fundraising environments and, given the six-year term, they have a longer time to figure out their strategies.

As figure 6.5 shows, Senate candidates also raise the overwhelming majority of their funds from individual contributors, a full 86 percent of all Senate candidate receipts in 2020 (Federal Election Commission, Congressional Candidate n.d.). An individual could give a Senate candidate $2,900[9] per election (primary and general) in 2022 and $3,300 per election in 2024. Because Senate campaigns are generally costlier than House races (but the contribution limit is the same for candidates for both chambers) Senate candidates must ask many more individuals to donate to their campaigns than most House candidates. In 2020, Senate Republican candidates raised 30 percent of their funds from individual contributors giving $200 or less, and Democratic candidates raised almost 37 percent of their funds from these small donors. However, both parties' Senate candidates raise about 50 percent from large individual contributions (OpenSecrets, Where Money From n.d.). Like presidential candidates, Senate candidates do not rely heavily on traditional PAC contributions (see fig. 6.5). In 2020, both Republican and Democratic Senate candidates raised less than 9 percent of their funds from PACs (OpenSecrets, Where Money From n.d.).

Both FECA and BCRA allow special limits for national political party contributions to Senate candidates *only*. Under FECA, the national party committees combined (not each party committee) could donate $17,500 directly to a Senate candidate from 1974 to 2002. This limit was not originally indexed for inflation, but beginning with the 2004 election cycle, BCRA doubled the party contribution limit to $35,000, and indexed it for inflation (Cantor and Whitaker 2004). By the 2021–22 election cycle, the limit for national party (national committee and senatorial committee combined) direct contributions

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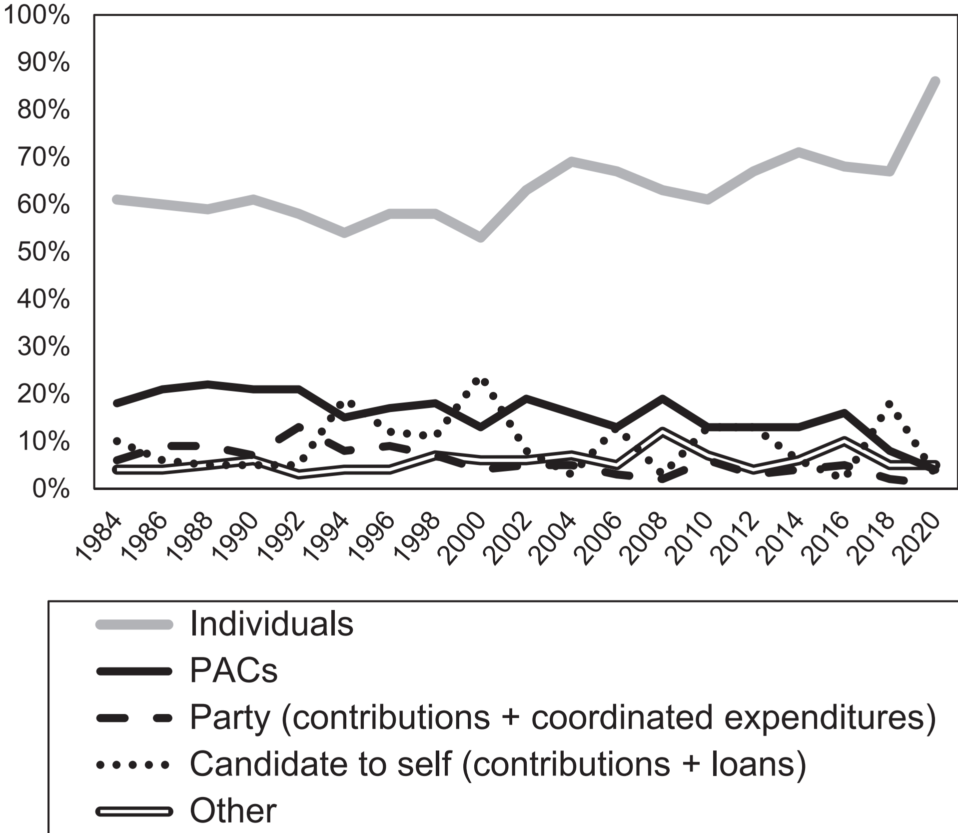

Fig. 6.5. Funding Sources for Senate Candidates, 1984–2020 (by percentage)
Source: Compiled by authors with data from M. Reynolds (n.d.), Table 3-8; Federal Election Commission, Congressional Candidate (n.d.).

to Senate candidates had reached $51,200 in a two-year cycle and $57,800 by 2024 (Federal Election Commission, Contribution Limits n.d.). Additionally, both the national and state party could make between $109,900 and $3,348,500 (depending on the voting age population in the state, adjusted for inflation) in coordinated party expenditures for a general election in 2022. Yet, given the high cost of Senate campaigns, especially in large states, these expanded party contribution and spending limits do not help as much as one might think, as figure 6.5 indicates.

Senate candidates may give $2,000 per election from their campaign committee and $5,000 per election from their leadership PAC to a fellow

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federal candidate (in the Senate or the House), though figure 6.5 shows they do not provide much financial help to their colleagues. This is very different from what happens in the U.S. House, as we discuss in the next section.

When it comes to using their own money, some Senate candidates spend millions. Former U.S. senator Jon Corzine, a Democrat from New Jersey, spent $43 million of his own money to win his election in 2000. Others, however, are not successful. Wrestling entertainment executive Linda McMahon twice ran and lost both elections for the U.S. Senate in Connecticut. She spent $50.2 million in 2010 and was defeated by Richard Blumenthal who spent $8.7 million, and then, two years later, McMahon spent $49.5 million and lost to Christopher Murphy who spent only $10.4 million (OpenSecrets 2010). All 11 self-funded Senate candidates in 2020 lost their elections, and eight lost in the primary elections. Senator Kelly Loeffler (R-GA), the Senate candidate who gave the most to their own campaign that year ($23.7 million), lost one of the two incredibly close run-off elections for the U.S. Senate seats from Georgia held in January 2021. Yet Loeffler raised $68.5 million from other sources, thus her own funding constituted only 25.7 percent of her total receipts (OpenSecrets, Self-Funding Candidates n.d.).

The House of Representatives and Its Campaign Finance System

Because members of the U.S. House have two-year terms, the entire body is subject to public approval every other year, and, in theory, every member in the chamber could be replaced at the same time by losing their elections. House members can serve for as many terms as the public will select them (they remain without term limits as of 2024), but it was not until the late 19th century that congressional careers were desirable enough to warrant repeat campaigning (Kernell 1977).

The Apportionment Act of 1842 required states to designate individual districts for each elected official (SMP) instead of at-large districts with many representatives. The districts are drawn within state boundaries and the number of districts allotted to each state depends upon the size of the state's population. The Constitution set an initial size for the House at 65 members, and a ratio of no more than one House member for every 30,000 persons (of those who were to be counted) to determine how many House members each state would elect and send to Congress. Every 10

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TABLE 6.2. Ratio of Population to Number of Representatives

Year	Number of Representatives	Population per House Member
1789	65	~ 30,000
1790	105	34,436
1800	141	34,609
1810	181	36,377
1820	213	42,124
1830	240	49,712
1840	223	71,338
1850	234	93,020
1860	241	122,614
1870	292	130,533
1880	325	151,912
1890	356	173,901
1900	386	193,167
1910	435	210,583
1920	435	*No apportionment in 1920*
1930	435	280,675
1940	435	301,164
1950	435	344,587
1960	435	410,481
1970	435	469,088
1980	435	519,235
1990	435	572,466
2000	435	646,952
2010	435	710,767
2020	435	761,169

Source: Compiled by authors with data from Stanley and Niemi (2015), table 5-1; U.S. Census Bureau (2021).

years, the U.S. government is required by the Constitution to take a census of the population for the explicit purpose of determining the need for reapportionment, a redistribution of House seats depending on population growth and shifts among the states. The House has the power to change both its size (the total number of members) and the ratio of population to each member. They did periodically adjust both measures until 1911, when the size of the House was frozen at 435 (Kromkowski and Kromkowski 1991). Now, only the ratio of citizens to members is adjusted after each census, and each House member represents a larger number of constituents over time as the U.S. population continues to grow (Stanley and Niemi 2015; U.S. Census Bureau 2021). Table 6.2 shows the increases in the number of people each House member has represented. As of the

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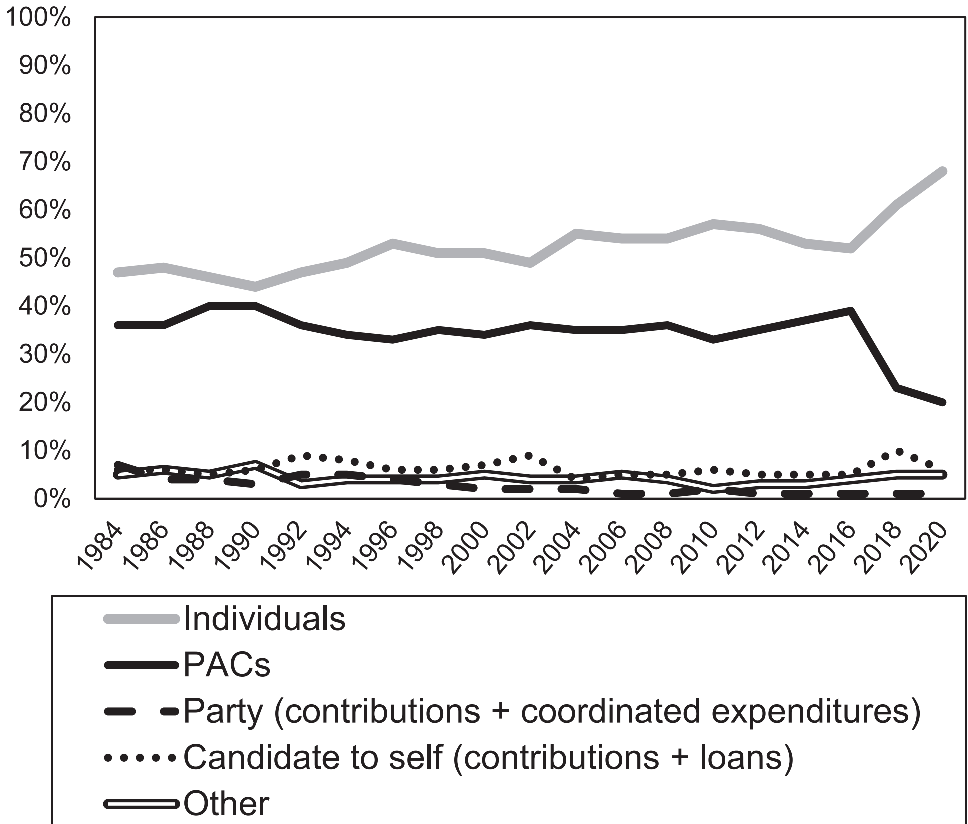

Fig. 6.6. Funding Sources for House Candidates, 1984–2020 (by percentage)
Source: Compiled by authors with data from M. Reynolds (n.d.), Table 3-8; Federal Election Commission, Congressional Candidate (n.d.).

2020 census, each House member represents over 760,000 persons, a far cry from the 30,000 maximum envisioned by the founders. Every increase in the size of a member's constituency means candidates need to communicate with more voters to win their seats on Election Day.

Figure 6.6 shows the funding sources for House candidates. As with presidential and senatorial candidates, most of the money House candidates raise comes from individual donors, and mostly in large contributions (greater than $200). In 2020, House Republican candidates raised 22 percent of all their funds from small donations (less than $200) and 40 percent from large individual contributions, while House Democratic

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candidates raised just under 17 percent in small donations and 50 percent in large donations (OpenSecrets, Where Money From n.d.).

Traditional PACs are an important source of funds for House candidates, unlike for Senate and presidential candidates. PACs may contribute more ($5,000, not adjusted for inflation) than individuals ($2,900 for 2022; $3,300 for 2024, adjusted for inflation) and they tend to have headquarters in and around Washington, D.C. This allows incumbent candidates to hold a fundraising event across the street from the Capitol building while they are at work in Washington. They expect PACs to attend and contribute (Herrnson, Panagopoulos, and Bailey 2019, chap. 6). Challengers also ask for PAC donations, but since they are more likely to be back in the district campaigning, they do not have this ready access to PACs. We explain how PACs distribute their donations in more detail later.

National party committees may contribute up to $5,000 per election to a House candidate, and make $55,000 (in 2022, adjusted for inflation) in coordinated expenditures in consultation with the candidate (and $109,900 for House nominees in states with only one House representative). Before the 1990s, the parties' congressional campaign committees (aka the Hill committees—the DCCC, NRCC, DSCC, and NRSC) did not have the resources to assist very many of their candidates, and party money was not generally distributed efficiently to the most competitive races but instead often given to incumbents in safe seats (Jacobson 1985). Yet, in the 1990s, real competition for partisan control of Congress emerged after four decades of Democratic Party control. The Hill committees then became quite efficient by strategically directing spending to the most competitive races—those that offer the best opportunity to increase the party's numbers in Congress (generally fewer than 50 of the 435 House contests) (Jacobson and Carson 2020, 101–5). Yet, as figure 6.6 shows, party contributions and coordinated expenditures provide very little support for House candidates compared to individual donors.

House candidates receive more funds from fellow candidates (especially incumbent lawmakers) than either senatorial or presidential candidates. House party leaders and committee chairs can raise more from traditional PACs and individual donors than rank-and-file lawmakers (regardless of the competitiveness of their race), and they often share the wealth with their partisan colleagues and party organizations. Candidates may donate directly to another candidate for federal office from their own campaign committee's funds (from what the FEC calls their authorized committee),

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up to $2,000 per election, a limit not adjusted for inflation. They also may give up to $5,000 per election to a fellow candidate from their leadership PAC. For instance, in 2020 House Speaker Nancy Pelosi gave $1.8 million to fellow candidates from her campaign committee and leadership PAC, and Minority Leader Kevin McCarthy gave $2.6 million to fellow candidates (OpenSecrets, Most to Other Candidates n.d.).

Few House candidates give or loan their campaign significant amounts of money (Jacobson and Carson 2020, 110–11). Only 989 of 2,083 House candidates gave or lent their campaigns $5,000 or more for the 2020 elections, far less than is needed to mount a serious race. Only 60 House candidates gave or lent their campaigns over $500,000 in 2020—46 were Republicans and only 6 were incumbents (Federal Election Commission, Congressional Candidate n.d., table 7). OpenSecrets reports that in 2020, 10 of the 22 self-funded House candidates who gave over $1 million to their campaigns lost their primary elections. Of the remaining 12, 4 lost the general election, and 9 won—a 41 percent success rate (OpenSecrets, Self-Funding Candidates n.d.). Only one of them was an incumbent, David Trone (D-MD), who won reelection. His $2.5 million donation to his own campaign constituted over 86 percent of all his receipts. The biggest House candidate self-funder, Republican Kathaleen Wall of Texas, gave her campaign $9.2 million, 99.8 percent of her total receipts, and lost in the Republican primary run-off election (OpenSecrets, Self-Funding Candidates n.d.).

In sum, federal candidates pull from the same sources, but their reliance on each is quite different. Individual contributions matter most for all of them, but especially for presidential and senatorial candidates. Traditional PACs matter most for House candidates who are also more likely to attract funding from their colleagues. None of these candidates expect much in the way of party contributions, but as we explained in chapter 5, many of them benefit from party coordinated expenditures and independent expenditures. Some candidates fund themselves, but this path is not very common or successful.

What Are Campaign Costs?

In chapter 1, we wrote about the feedback loop that democracies need to have between citizens (voters) and the candidates who wish to hold elected

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positions to make our public policies. Communication costs are at the heart of this feedback loop. Citizens want to know what decisions politicians have made in the past and what proposals non-incumbent candidates champion. So, candidates need to raise and spend money to engage in this communication and run a campaign operation. In the U.S., politicians have their own campaign organizations apart from the party organizations that nominate them, which costs a lot. Paul Herrnson, Costas Panagopoulos, and Kendall Bailey (2019) explain campaign spending by candidates, parties and groups in the U.S. in the broad categories of overhead, research, and communications. What do these tasks entail?

Overhead

Overhead is the second biggest cost for candidates in the U.S., after communications expenses, an average of 43 percent of all expenditures for House candidates and 31 percent for Senate candidates in 2018 (Herrnson, Panagopoulos, and Bailey 2019, 81–84). Federal laws expressly forbid incumbent officeholders from using the office space they rent to serve constituents in the district (or state) with taxpayer dollars for campaign purposes.[10] Other laws make it difficult for candidates to work efficiently with their local party organizations.[11] The candidate must pay to rent campaign office space and for what goes into that space, such as furniture, phones, computers, and office supplies. Candidates also must pay for their full-time staff's expenses, including salary and health insurance. Campaigns do have a great deal of voluntary and hourly labor, but one of the natural consequences of more professionalized campaigns is the need for one or more experienced people to run them well—and full time (Nassmacher 2009, 64).[12] Political consultants are often hired to complete work on a project basis, reducing a candidate's need to retain many full-time professional staff (Kolodny and Dulio 2003; Kolodny and Logan 1998). However, consultants are not cheap, and we see presidential candidates and competitive candidates for the House and Senate use them. Political parties and interest groups use consultants extensively.

These overhead costs are largely invisible to observers of campaign finance, which is a problem when we discuss why campaigns cost so much. As *New York Times* reporter Derek Willis observed, in the case of fundraising events in particular, much is made about the amount of money raised without considering the expenses needed to bring in that money (Willis

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2014). The "net" the campaign committee is left with to spend on actual campaign expenses can be quite small after accounting for the costs of room rental, food, invitations, and labor.

Research

Modern campaigns require many different types of research. In the candidate-centered U.S. system, the first phase of campaign research involves digging into the record of the opponent. Dennis Johnson, a political scientist who was himself a researcher for political campaigns, explains that campaigns hire political professionals to conduct opposition research, including private investigators (D. Johnson 2007, 57–86). Campaigns also research potential voters to identify and mobilize those most likely to support their candidate, and the digital databases they use, such as VoteBuilder (used by Democratic candidates) and GOP Data Center (used by Republican candidates), are an additional expense.

Communications

Communications techniques used by candidates, parties, and groups include broadcast advertising on television or radio (both producing the ads and paying for the airtime), sending mail to potential voters (both producing the mail piece and paying the U.S. Postal Service for postage),[13] sending email and using social media advertising to attract voters and donations (paying for high-quality lists of voters and for technical professionals to design and deliver messages to those voters), having canvassers visit potential voters at their homes (payroll, transportation, and food), and holding events to attract press coverage, gain new supporters, or raise funds. Donald Green and Alan Gerber (2019) found in their extensive research on the effects of campaign communications on voter turnout that personal contact is the most effective way to convince people to vote who are not already habitual voters. However, those needing to communicate with the largest constituencies, such as Senate and presidential candidates, must use broadcast advertising on television or radio because of the difficulty in reaching all voters by other means, such as meeting them at their homes (door-to-door canvassing). The amounts spent on all forms of communication eat up the majority of candidate spending and the overwhelm-

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ing majority of outside spending by others (more below). For the 2020 presidential contest, Democratic nominee Joe Biden spent $839.1 million on media, over 79 percent of all his campaign spending, and Republican nominee Donald Trump spent $544.6 million on media, over 68 percent of his spending (OpenSecrets 2021c). Herrnson et al. estimate that communications account for 51 percent of a typical House campaign and 62 percent of a typical Senate campaign (Herrnson, Panagopoulos, and Bailey 2019, 81–84).

Candidate Classifications: Candidate Status and Competitiveness

To this point, we have treated candidates for federal office as if they all have the same considerations when raising and spending money in elections. In contemporary presidential elections, candidates can expect an enormous amount of attention whether they are an incumbent running for reelection, a challenger to an incumbent, and even more if there is no incumbent running. However, candidates for the U.S. House and Senate (and those for state and local offices) differ in two distinct dimensions that are very important for donors and spenders: the candidate's status as a sitting officeholder (or not) and the competitiveness of the race.

Incumbents, Challengers, and Open Seat Candidates

Candidates for the House and Senate who are already in office and running for reelection are incumbents. If someone wishes to run against a sitting member of the House or Senate, they are a challenger. If there is no incumbent member, normally due to the member declining to run for reelection,[14] we refer to both major party candidates as open seat candidates. Because we have already established that most donors wish to influence policy outcomes to some degree, candidate status matters a lot. Incumbent members seeking reelection are very likely to win again. For instance, 94.5 percent of House incumbents and 100 percent of Senate incumbents who ran for reelection in 2022 won (OpenSecrets, Reelection Rates n.d.). Incumbents have a legislative record, prior relationships with donors, and a track record with voters. Challengers who run against incumbents generally have the hardest time attracting donors unless the incumbent is vulnerable to defeat because, for example, they were involved

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in some sort of scandal or redistricting gave them a new district with fewer of their party's voters. Open seats (with no incumbent in the race) tend to attract a lot of attention because, in some cases, these contests can produce a switch in party control of the seat and possibly of the chamber. If, for example, a seat is open because a Republican member retires, we generally assume that the Republican candidate would have an advantage. However, if the district is not overwhelmingly Republican or the Democratic candidate is well known to the electorate, the election is likely to be competitive and the outcome may be in doubt.

Competitiveness

With all the attention paid to the increasing amount of money spent on elections, we would expect that campaign spending has risen across the board. This is not the case. The expectation of a race's competitiveness is key to understanding much about U.S. campaign finance. Some races are all but ignored by donors of all stripes because the outcome of the race seems certain, while others see an extraordinary amount of money donated to candidates or spent on their behalf, whether those candidates want such outside spending or not. Outside spending, spending by parties and groups done independently of and not controlled by the candidate, is especially common in highly competitive races and presidential contests.

We consider the outside money spent in presidential, Senate, and House elections *relative to* what the candidates themselves spend. One byproduct of unlimited spending by parties, super PACs, 527, and 501(c) organizations is the potential for outsiders to spend as much or more on a campaign as the candidates themselves. Heavy spending by outside groups generally only takes place in races that are already expected to be exceptionally close.

Campaigning for the Presidency

As we explained above, presidential candidates have outsized influence in the fundraising for their own campaigns, their party organizations, other candidates running at the same time, and for super PACs. How do all these elements play out in the final campaign?

Since the demise of the presidential public funding system, major party

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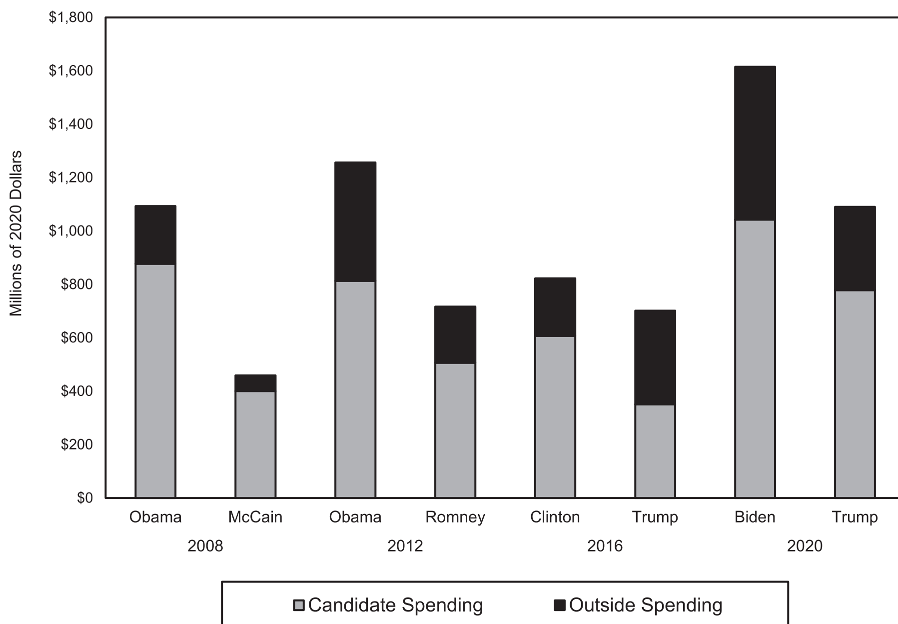

Fig. 6.7. Candidate and Outside Spending in Presidential Elections, 2008–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets, Presidential Elections (n.d.).

presidential candidates raise stunning amounts of money for their campaigns, especially if they have competition in both the primaries and the general election, as figure 6.2 above shows. Parties and groups also take a big interest in presidential elections. Figure 6.7 shows spending by the major party presidential candidates and by all outside spenders (parties and groups) for and against them in recent elections. A quick look reveals that presidential candidates themselves do most of the spending, though outside spending is significant.

Super PACs, tax-exempt 501(c) nonprofits, and other nonparty groups spent over $1 billion in the 2020 presidential election, $60.6 million of it during the primary elections, and all of it spent independently of the presidential candidates themselves. Political parties made an additional $47 million in independent expenditures in the 2020 presidential election (OpenSecrets, Outside Spending n.d.). Among these outside spenders, there were several single-candidate super PACs and hybrid PACs[15]

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focused solely on electing a particular presidential candidate. Twenty-one super PACs spent $247.8 million and seven hybrid PACs spent $25.1 million on independent expenditures to support Trump, while seven super PACs made $3 million in independent expenditures to oppose Trump. Thirty-three super PACs spent $200.8 million and four hybrid PACs spent $275.4 million on independent expenditures in support of Biden, but no super PACs or hybrid PACs organized solely to oppose Biden (compiled by authors with data from (OpenSecrets, Outside Spending n.d.: by Single Candidate Super PAC and by Group). Note that these figures represent only the spending reported to the FEC, but there is other spending, especially by 501(c) organizations, that is underreported or not reported at all in IRS filings so the actual total is likely far greater (Oklobdzija 2023). Figure 6.7 shows that both candidate and super PAC outside spending has grown since *Citizens United* was decided in 2010. Presidential candidates today can expect a lot of spending from outsiders, but it also seems as if they are preparing for it by maximizing their own campaign receipts.

Senate

Senate races are generally more competitive than House races, and thus often feature higher quality challenger candidates with prior political experience and the ability to raise sufficient resources for a statewide campaign (Jacobson and Carson 2020, 104, 147–49; see also Lublin 1994; Squire 1992). The key here is the word "competitive." The more a race's outcome is uncertain, the more likely a challenger will run who can raise money because of their experience or celebrity, or who can fund the campaign themselves. Sometimes, all three qualities are present.

Figure 6.8 breaks down the average receipts for 2020 incumbent, challenger, and open seat Senate candidates by the closeness of the race on Election Day. We define competitive contests as those where the winning candidate won with 55 percent or less of the two-party vote.[16] By this standard, there were 18 races where the incumbent senator was not competitive (one ran without an opponent), 13 races where the incumbent's victory was in doubt (competitive races), and four open seat races. Only one of those open seat races was considered competitive. In the most competitive races, both challengers and incumbents raised significant amounts. Vulnerable incumbents raised on average over three times what

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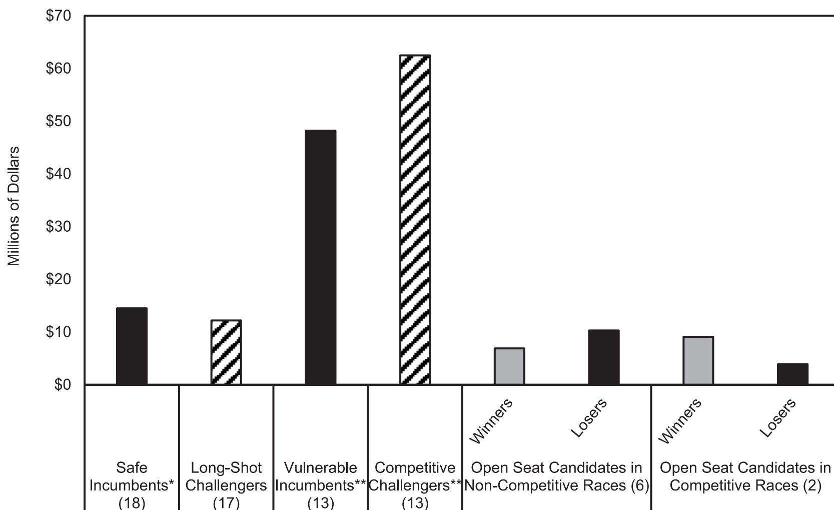

Fig. 6.8. Average Receipts of Senate Candidates by Candidate Status and Competitiveness, 2020 (millions of dollars)
Source: Compiled by authors with data from Federal Election Commission and OpenSecrets.
Note: Competitive contests are those where the winner won with 55% or less of the two-party vote.
* Includes one incumbent who ran unopposed, Tom Cotton (R-AR). ** Includes the two extremely competitive Senate contests in Georgia and one in South Carolina.

safe incumbents raised ($48.2 million to $14.5 million). Competitive challengers raised $62.5 million on average compared to the $48.2 million raised by the incumbents they hope to defeat. In 2020, a major portion of the money raised in these competitive incumbent-challenger races was in the two hotly contested Georgia races, both of which went into run-off elections held in January 2021. The four candidates raised $472.3 million combined. The few open seat Senate candidates, even those in competitive races, raised on average less than incumbents and challengers. Candidate fundraising and spending in Senate elections also depends on which states are having elections. In 2020, the four open seat races were in Kansas, New Mexico, Tennessee, and Wyoming, all states with low populations and inexpensive media markets. The only competitive race was in New Mexico, where the winner (a sitting member of the U.S. House from the state) spent nearly three times what his competitor did.

Outside spending also gives us a view into the significance of competi-

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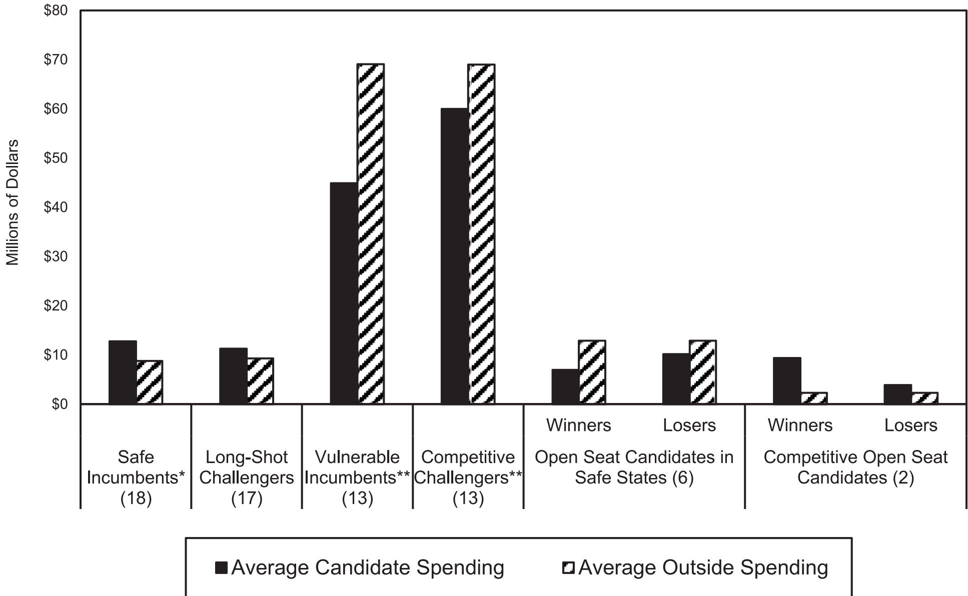

Fig. 6.9. Average Senate Candidate and Outside Spending by Candidate Status and Competitiveness, 2020 (millions of dollars)
Source: Compiled by authors with data from Federal Election Commission and OpenSecrets.
Note: Competitive contests are those where the winner won with 55% or less of the two-party vote.
* Includes one incumbent who ran unopposed, Tom Cotton (R-AR). ** Includes the two extremely competitive Senate contests in Georgia and one in South Carolina.

tiveness. Super PACs, tax-exempt nonprofits, and other nonparty groups spent $1.3 billion on disclosed independent expenditures, electioneering communications, and communications costs in Senate elections for 2019–20. Political parties spent an additional $247.8 million apart from their candidates in 2020 Senate races (OpenSecrets, Outside Spending n.d.: by Race). As figure 6.9 indicates, almost all this outside spending was concentrated on the 13 competitive incumbent-challenger Senate races, such as the two Georgia Senate contests. There were six Senate contests in 2020 where the candidates in some of the most competitive races were outspent by outsiders (OpenSecrets, Outside Spending Exceeds Candidate n.d.). Competitive challengers on average spent more than their incumbent opponents. Yet outside spending was about equal for both challengers and incumbents in the most competitive Senate races. In less competitive

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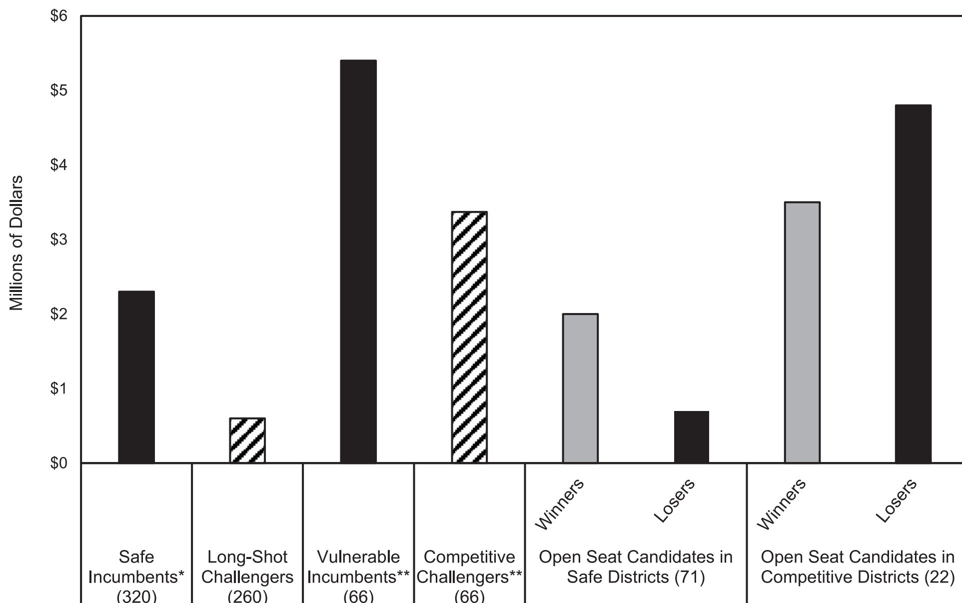

Fig. 6.10. Average Receipts of House Candidates by Candidate Status and Competitiveness, 2020 (millions of 2020 dollars)
Source: Compiled by authors with data from Federal Election Commission and OpenSecrets.
Note: Competitive contests are those where the winner won with 55% or less of the two-party vote.
* Includes 18 incumbents who ran unopposed. ** Includes the MN-7 race, where incumbent, Collin Peterson (D) lost with 42.7% of the two party vote and his challenger, Michelle Fischbach (R), won with 57.3%.

races, outside spending trailed that of the candidates, as those investing in outside spending saw little chance of influencing the outcome.

House

In 2020, 386 out of 435 incumbents competed in the general election. That means that 49 incumbents did not run for reelection and their seats were open. Thirteen incumbents lost in the general election, so 373 incumbents, 96 percent of those who ran, were reelected. Of those successful incumbents, 320 (86 percent) of them won with 55 percent or more of the two-party vote and thus were considered safe. That left 66 vulnerable

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incumbents producing 66 competitive challengers. Challengers have the hardest time raising money unless they are in a competitive election:

> The better a candidate's prospects, the more contributors of all kinds are willing to invest in the campaign. The connection for non-incumbents between spending and votes is therefore at least potentially reciprocal: money may help win votes, but the expectation that a candidate can win votes also brings money . . . the higher the incumbent's expected vote, the less money flows into the campaign. (Jacobson and Carson 2020, 67)

Comparing the bars on figure 6.10 for the average receipts of safe and vulnerable incumbents makes the case. On average, vulnerable incumbents raised more than twice what safe incumbents did. While all candidates in competitive races raise significant amounts, figure 6.10 clearly shows *safe* House incumbents raise far more than the challengers who ran against them, and likely far more than they needed to secure reelection.

Open seats are another matter. While there were 49 of them, only 11 were considered competitive (producing 22 general election candidates). There were 5 open seat races with only 1 general election major party candidate who ran unopposed, so only 33 of the 38 races in this category had a challenger. This explains why the bars for open seat candidates running in safe districts fundraising totals are so low in figure 6.10.

Figure 6.11 shows candidate and outside spending in 2020 House races, by candidate status and competitiveness. Super PACs, 501(c) organizations, and other nonparty groups spent $522 million on independent expenditures, electioneering communications (broadcast, cable, or satellite communications run close to an election), and communications costs (communications from corporations to their executives, stockholders, and their family members, or from labor unions to union members, executives, and their family members) in 2020 House elections, and this spending was concentrated on some of the closest House races in the nation, especially the 22 competitive open seat contests (OpenSecrets, Outside Spending n.d.: by Race). Six of the 10 races with the most nonparty independent spending were rated as "toss-up" contests in early October 2020 by the *Cook Political Report*, meaning either candidate had a real chance of winning, and the remaining four were rated as close races (Cook Political Report 2020, October 8 ratings).

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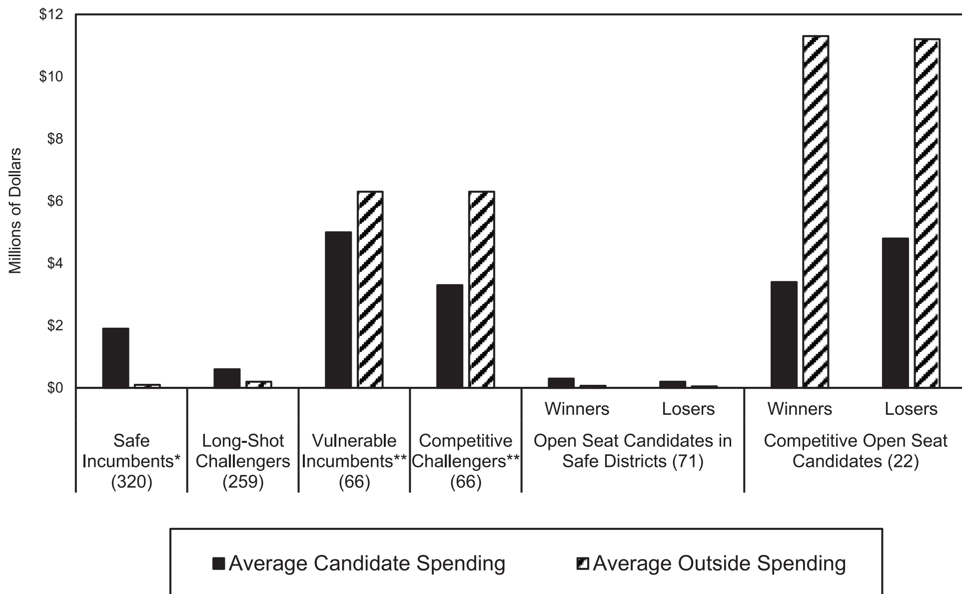

Fig. 6.11. Average House Candidate and Outside Spending by Candidate Status and Competitiveness, 2020 (millions of dollars)
Source: Compiled by authors with data from Federal Election Commission and OpenSecrets.
Note: Competitive contests are those where the winner won with 55% or less of the two-party vote.
* Includes 18 incumbents who ran unopposed. ** Includes the MN-7 race, where incumbent, Collin Peterson (D) lost with 42.7% of the two party vote and his challenger, Michelle Fischbach (R), won with 57.3%.

Outside independent spending (by parties, PACs, super PACs, hybrid PACs, 527s, and 501(c) nonprofits) surpassed the candidates' spending in 28 of the most competitive House contests in 2020 (OpenSecrets, Outside Spending Exceeds Candidate n.d.). The rationale for outside spending can be puzzling given that it concentrates on the most competitive races and where voters already have an abundance of communications. And since both sides tend to escalate in response to each other, we would not expect increased investment to buy a surge in support for the preferred candidate—perhaps an edge at best. Neilan Chaturvedi and Coleen Holloway found that, yes, outside spending does get heard by prospective voters, but candidate spending matters far more. As most outside spending

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spins negative, they found that outside group spending helped incumbents more than challengers (Chaturvedi and Holloway 2017, 264). We do not have much, if any, data that proves that outside spending determines the outcome of competitive races, though experimental studies suggest that if voters are aware of significant outside spending, it can harm the candidate the group wants to help (Dowling and Miller 2014).

Congressional Candidate Campaign Finance: Campaigning for What?

Our discussion of campaign expenditures and competitiveness makes it clear that some candidates work very hard to raise the money they need to communicate with their potential supporters, especially if the race is competitive and there is likely to be outside spending. In that case, candidates need to be prepared that outside help may not always be helpful. We expect all competitive candidates to be spending on campaign activities or for the overhead needed to support them. We would expect most open seat candidates and challengers do such spending as well, even if their race is not considered especially competitive—otherwise, why be a candidate in the first place? But what about incumbents in noncompetitive races? Do they continue to raise money and if so, why?

Incumbents: It's Complicated

Certainly, some incumbents run in very competitive races. These contests tend to see very big fundraising totals, but this is not actually good news for most incumbents. With House incumbents, the more they spend, the worse they do:

> For incumbents, spending a great deal of money on a campaign is a sign of weakness rather than strength. In fact, the more money they spend on the campaign, the worse they do at the polls. . . . Spending money does not cost them votes, to be sure; rather, incumbents raise and spend more money the more strongly they feel themselves challenged. The more their opponents spend, the more they spend. Challengers evidently get more bang for their buck; therefore, the

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> more spent by both the challengers and the incumbent, the greater the challenger's share of the vote, and the more likely the challenger is to win the election. (Jacobson and Carson 2020, 70–71)

Many scholars and some Supreme Court justices conclude that limiting fundraising or amounts spent in campaigns would offer incumbents a huge advantage. Troubled incumbents attract strong challengers, and those challengers attract funds and robust political discourse, but 86 percent of congressional incumbents were not in competitive races in 2020. Yet an incumbent never knows for certain whether their next race will be competitive, so they behave as if it might be. Thomas Mann (1978) labeled this state of uncertainty as "unsafe" at any margin. It is reasonable for candidates to think that strong challengers might want to oppose them, even if they won by a wide margin in the past, or that redistricting or a partisan wave against their party might make their next contest tougher. As House members have two-year terms, the length of time between campaigns is so short that House incumbents raise money constantly. In fact, many members start fundraising for their next election days after the last one has concluded. This phenomenon is called the "permanent campaign" (S. Blumenthal 1982; Ornstein and Mann 2000). It is no wonder House members generally say they spend more time fundraising and doing campaign activities than they would like (Congressional Management Foundation 2013, 24; Langhorne 2019; O'Donnell 2016). Yet when it comes to general election season, most of those hypothetical strong challengers never materialize. Indeed, House members have other reasons to keep their campaign finance operations stoked. First, let us discuss their options for raising and spending money.

Personal Campaign Committees (PCCs)

To this point, we discussed contribution limits in terms of how much a donor can give to a candidate per election. When we say this, we mean the candidate's authorized campaign committee. When a candidate for federal office declares their candidacy and begins fundraising, they must contact the FEC and file the appropriate paperwork to declare this and receive a

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unique committee number. Candidates file reports on a schedule explaining who their donors are and how they spent their funds. In addition to spending funds on campaign expenses as we described above, candidates may donate $2,000 per election to other federal candidates, donate to state and local candidates for office if their state law allows, and transfer unlimited amounts to charities, and to national, state, or local party committees.[17] They also may make contributions to super PACs in unlimited amounts.

Leadership PACs

Many House and Senate candidates (mostly incumbents) also raise money from the same donors who give to their campaigns for their leadership PAC, a type of nonconnected PAC that is a separate committee not connected to a candidate's authorized campaign committee. Nearly every incumbent member of Congress has a leadership PAC: 90 percent of House members and 96 of the 100 senators, according to one recent count (Beckel 2021). The overwhelming majority of contributions to leadership PACs comes from traditional PACs—$79.8 million, 93 percent of all contributions to leadership PACs in 2020 (OpenSecrets, Leadership PAC Contributors n.d.).

Leadership PACs are hard money traditional PACs. The same PACs that donate to a candidate's PCC ($5,000 limit per election) may also donate to their leadership PAC (also a $5,000 limit but per year). To be a multicandidate committee (the status most traditional PACs use to donate the maximum allowed by law), the PAC must donate to a minimum of five federal candidates. So, House and Senate candidates may contribute up to $5,000 per election from their leadership PAC to a federal candidate (but not to their own campaign committee), and up to $15,000 per year from their leadership PAC to a national party committee (as for other PACs, these limits are not adjusted for inflation) (Currinder 2009, 24–31). Reformers see leadership PACs as a loophole around donor limits and have proposed that the same personal use prohibition on a candidate's primary campaign committee be extended to leadership PACs (Ratliff, Beckel, and Gonsalves-Brown 2021).

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Why Incumbents Raise More Money Than They Need to Campaign

As we have noted, many incumbents raise far more money than they need to win reelection. They are motivated to do so to help their party gain seats in Congress, to promote their own ambitions within the chamber, or to run for a higher office. Often, these three goals are intertwined, and the laws give members a lot of latitude to use their campaign committees and leadership PACs in creative ways. Keep in mind that elections are meant to allow citizens to choose who they want to govern. The idea is that resources are needed to campaign. Yet the 320 noncompetitive incumbents raised money anyway, often quite a lot of money.

Helping the Party

Before the 1994 elections, incumbent members of Congress worried very little about how their colleagues' campaigns were doing. After all, Democrats had held a majority in the U.S. House for 40 years and the Senate was also in Democratic hands most of that time. But the increase in competition for control of each chamber of Congress since the 1990s led congressional party leaders to insist that incumbent lawmakers hand over some of their campaign cash to help the party maintain or secure majority status. Since 1994, control of the House has changed hands five times (1994–2023). Members who liked being in the majority responded to their leaders' mandate, one of many things that changed about how Congress worked as a result of the new competitiveness (F. Lee 2016).

Eric Heberlig and Bruce Larson (2012) found that House members began to contribute noticeably to their party's campaign committees starting in 1994. House party leaders assess "dues" on their elected lawmakers to make transfers (which are without limit) from their personal campaign committees to their relevant party Hill committee. Incumbents in powerful positions—the top party leaders, committee chairs, and members of so-called prestige committees (e.g., the Appropriations, Budget, Ways and Means, and Commerce Committees), for example—are expected to give more to support this collective party goal than ordinary members. Member transfers to both the House and Senate party committees grew again in 2004, after BCRA ended the parties' ability to raise soft money and doubled the limits on individual contributions to candidates (which meant incumbents could potentially raise more from the same donors).

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Helping Yourself by Helping the Party

Lawmakers who aspire to important committee or party positions within Congress also give to their party and directly to colleagues who can vote for them for these posts, an expectation that is more intense in the House than the Senate (Bernhard and Sulkin 2018; Heberlig and Larson 2012). Several scholars have analyzed how incumbent members of Congress transfer or donate funds to their party or to other candidates for federal office, or both (Cann 2008; Currinder 2009, 2003; Goodliffe 2005; Heberlig, Hetherington, and Larson 2006). Heberlig and Larson (2012) show that House members in party leadership positions give significantly more campaign money to other candidates than do rank-and-file members. They investigate whether these new financial commitments mean that members must raise more money than they did before 1996. They find the answer is a definite yes, meaning that to get ahead in the House, members must spend more time fundraising so that they have extra money to transfer to their party and give to their colleagues. Members are more dependent on business traditional PACs and wealthy individual donors to provide the extra cash (Heberlig and Larson 2012).

Running for Another Office

Other incumbents raise extra money to run for another office in the future or, in some cases, for the current election cycle. This was the situation in 2020 for Senator Cory Booker who was both a candidate for the Democratic presidential nomination and for his own reelection as U.S. senator from New Jersey. As these were two different campaign committees (one for the presidency and one for the Senate), donors could give the maximum contributions to both in the same election cycle. Candidates with multiple campaign committees also may transfer unlimited sums between them. Several senators considering a run for the presidency in 2020 transferred large sums left over from their 2018 Senate campaign committees to their presidential campaign committee in early 2019: Elizabeth Warren (D-MA) transferred $10.5 million, Kirsten Gillibrand (D-NY) transferred $ 9.6 million, and Bernie Sanders (D-VT) transferred $12.7 million (Federal Election Commission, Presidential Data n.d., table 1). Likewise, senators use their leadership PACs to cover the administrative costs of testing the presidential waters. Connor Raso found that most expenditures are

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administrative in nature, supporting the presidential ambition hypothesis: "PAC money can be used to fund crucial portions of a presidential bid such as travel, equipment, overhead expenses, polling, mailings, and PAC staff" (2008, 38).

Who Gives to Noncompetitive Incumbents?

Even incumbents with no political ambitions and those not terribly concerned with majority status also may raise far more money than they need to defeat their challengers (if they even have one). Many donors, usually business and labor PACs, will give to incumbent candidates (especially House incumbents), even if the candidates do not need many resources to run for reelection, because access-oriented PACs tend to support likely winners (Snyder 1990). In 2020, 86 percent of traditional PACs' direct candidate contributions went to incumbents, 7.7 percent to challengers, and 6.1 percent to open seat candidates (OpenSecrets, PAC Dollars n.d.). This contribution strategy reflects the fact that most traditional PACs are attached to organized interests with public policy goals, and the relationships with lawmakers matter most for them. Giving to incumbents is a good long-term investment for PACs because incumbents enjoy reelection rates over 90 percent in the House and 80 percent in the Senate (Holyoke 2014, 255–56; Nownes 2013, 162).

In contrast to the Senate, House incumbents who raised the most are not those who were in the most competitive races. None of the 10 House candidates who raised the most from individual contributions were in a race rated as a "toss-up" by the *Cook Political Report* just before the 2020 election (Federal Election Commission, Congressional Candidate n.d., table 8b; Cook Political Report 2020). Among them were many party and committee leaders, including Speaker of the House Nancy Pelosi (D-CA), Minority Leader Kevin McCarthy (R-CA), and high-profile national figures such as Alexandria Ocasio-Cortez (D-NY) and Steve Scalise (R-LA).

Most PACs value incumbency even more than party affiliation (Fouirnaies and Hall 2014). Although business PACs have historically been more ideologically congruent with the Republican Party, many give to candidates of both parties to ensure access to as many sitting and likely future lawmakers as possible, as you can see from the business PACs featured in figure 6.12—the National Association of Realtors, the National Beer Whole-

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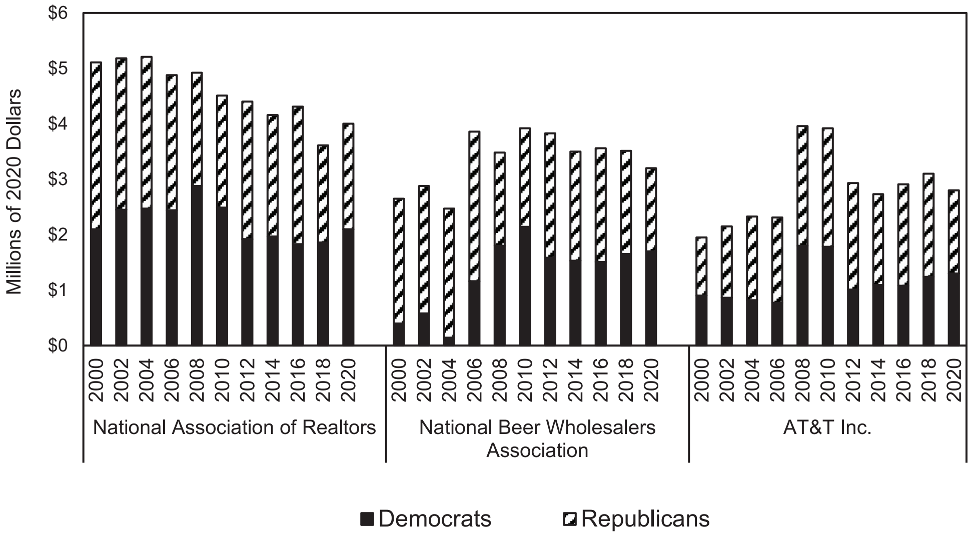

Fig. 6.12. Business PAC Distribution of Contributions to Federal Candidates, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets.

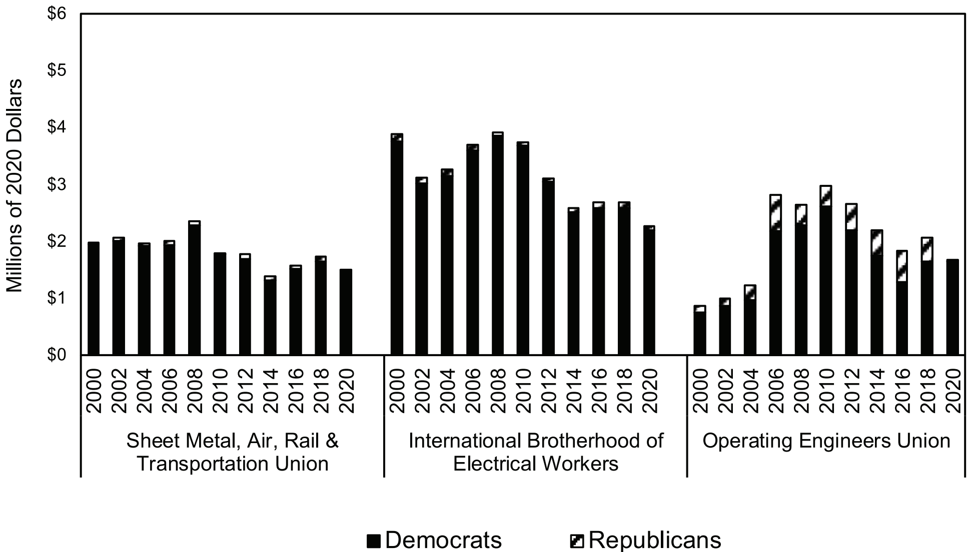

Fig. 6.13. Labor Union PAC Distribution of Contributions to Federal Candidates, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets.

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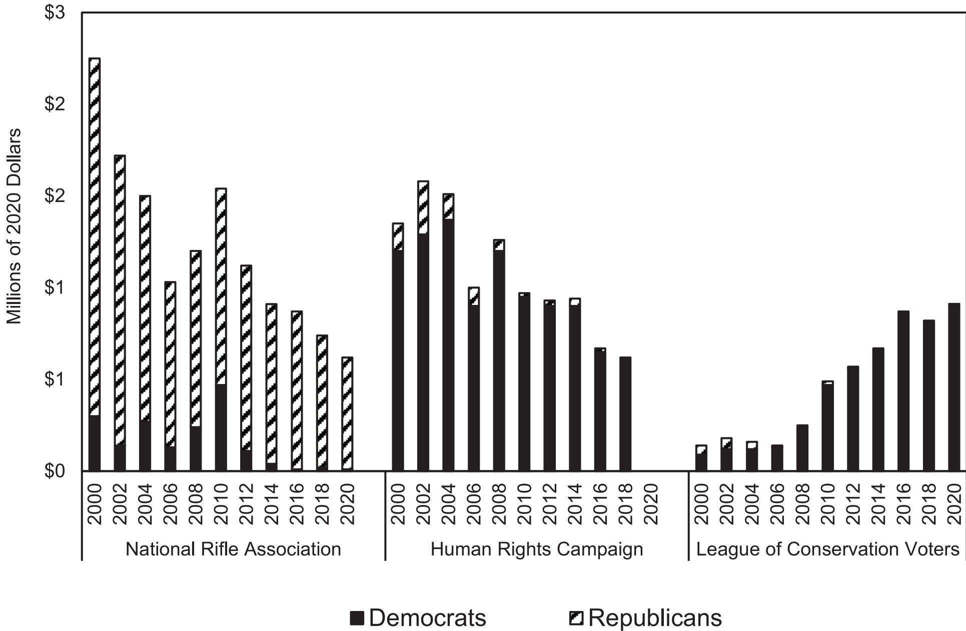

Fig. 6.14. Ideological/Single Issue PAC Distribution of Contributions to Federal Candidates, 2000–2020 (millions of 2020 dollars)
Source: Compiled by authors with data from OpenSecrets.

salers Association, and AT&T Inc. (Holyoke 2014, 253–54; Rudolph 1999; J. Wright 1989; Crosson, Furnas, and Lorenz 2020; Brunell 2005). Moreover, business PACs tend to shift contributions to incumbents of the party likely to be in the majority when party control seems likely to change hands (Jacobson and Carson 2020, 95–96; Rudolph 1999). All three of our business PACs shifted more of their contributions to Democrats in 2008 when they seemed likely to and then became the majority party in both the House and Senate.

PACs connected to labor unions also give mostly to incumbents: 82 percent in 2020 (OpenSecrets, PAC Dollars n.d.). Labor PACs such as the Sheet Metal, Air, Rail and Transportation Union, the International Brotherhood of Electrical Workers, and the Operating Engineers Union in figure 6.13 are generally more ideologically compatible with the Democrats and tend to direct almost all their contributions to sitting Democratic lawmakers. Although they generally favor incumbents, both business and labor PACs give generously to candidates of their preferred party in *competitive* open seat contests (Brunell 2005; Jacobson and Carson 2020, 95–96).

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Ideological and single-issue PACs are far more likely to invest in races where the electoral outcome is less certain and there is an opportunity to elect more lawmakers who agree with them on their policy issue. These PACs are more likely to give to nonincumbent candidates as they pursue a "sincere donations" strategy to shift the partisan or ideological composition of government (Brunell 2005, 684). Indeed, figure 6.14 shows three ideological and single-issue PACs (that is, nonconnected PACs)—the National Rifle Association (gun rights), Human Rights Campaign (gay and lesbian rights), and the League of Conservation Voters (pro-environment)—that directed most of their contributions to candidates from one party, the party most ideologically aligned with the group's policy positions. Figure 6.14 also shows their preferences for one party have increased alongside partisan polarization in recent decades. Still, 62 percent in 2020 and 63 percent in 2022 of ideological/single-issue PAC contributions went to incumbents (OpenSecrets, PAC Dollars n.d.). So, even the PACs most motivated to elect more lawmakers who agree with them recognize incumbents are difficult to beat and will give to incumbents who support their policy goals.

The Safest Incumbents Make the Case

Some candidates need to spend very little on their election campaigns: incumbent members of the House who have no major party opponent. Most candidates have a challenger, but some have no opponent at all. Others have only a minor party opponent. In 2020, there were 18 incumbents who won their elections with 100 percent of the two-party vote. Table 6.3 shows these candidates raised a total of $31.5 million for their campaign committees (an average of $1.7 million per candidate) and an additional $3.3 million in their leadership PACs (an average of $207,000). What is more telling is the composition of these receipts: 44 percent of the funds raised for their campaign committees were from PACs, and 53 percent were from individual contributors. A full 70 percent of the total these candidates raised for their leadership PACs came from traditional PACs.

When we break this down by party of the incumbent, we find that the percentage of funds from PACs to their campaign committees does differ: Democrats received 41 percent and Republicans 51 percent from PACs. The share of receipts from individual contributors was nearly identical—43 percent for Democrats and 44 percent for Republicans. For leadership PAC fundraising, 70 percent of Democrats' funds came from traditional

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TABLE 6.3. Select Campaign Finance Activity of Unopposed House Incumbents, 2020 (as Percent of Totals)

	Total Raised	Total from Individuals	Total from PACs	Total Spent	Total to Federal Candidates	Total to National Party Committees
Principle Campaign Committee Total	$31,585,085	$16,773,811 (53%)	$13,854,914 (44%)	$24,453,722 (77%)	$723,829 (3%)	$3,095,638 (13%)
Total by Dems	$23,427,832	$12,992,201 (55%)	$9,695,899 (41%)	$18,886,954 (81%)	$456,029 (2%)	$2,226,163 (12%)
Total by Reps	$8,157,253	$3,781,610 (46%)	$4,159,015 (51%)	$5,566,768 (68%)	$267,800 (5%)	$869,475 (16%)
Leadership PAC Total	$3,310,707	$569,970 (17%)	$2,309,175 (70%)	$2,760,317 (83%)	$1,324,848 (48%)	$510,250 (18%)
Total by Dems	$2,457,051	$402,707 (16%)	$1,719,975 (70%)	$1,934,590 (79%)	$848,776 (44%)	$389,500 (20%)
Total by Reps	$853,656	$167,263 (20%)	$589,200 (69%)	$825,727 (97%)	$476,072 (58%)	$120,750 (15%)
Overall Totals	**$34,895,792**	**$17,343,781**	**$16,164,089**	**$27,214,039**	**$2,048,677**	**$3,605,888**

Source: Compiled by authors with Federal Election Commission and OpenSecrets data.

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PACs, while 69 percent of Republicans' funds did. This is significantly different from the mean percentage of all House candidates' receipts from PACs—20 percent in 2020 (see fig. 6.6 above).

Given that these candidates literally had no need for campaign communications (or at least very little) because they had no opponent, why did the candidates solicit contributions and what did they do with the money? First, there is certainly no requirement that a candidate spend all the money they raise in a campaign cycle. As we explained above, it is easy for a candidate to transfer funds from their campaign committee for one federal office to a campaign committee for another federal office, so that when one election finishes, candidates can roll over their balance for their reelection (or for House members, to seek election to the Senate and for Senators, to seek election to the presidency). If you look at the first FEC reports a candidate files, you will see them declare the amount of cash-on-hand, reflecting the rollover. These 18 incumbents only spent $24.4 million of the $31.6 million they raised, 77 percent. This is another way to say that 23 percent of the money was retained by these incumbents for another election. These candidates' leadership PACs spent a bit more—83 percent—but still not everything.

What about the rest of their money? We know that candidates are likely to have at least one of the goals detailed above. All of these candidates transferred money from their campaign accounts and leadership PACs to other federal candidates ($2 million) or to their related national party committees ($3.6 million). That accounts for 20 percent of all the funds spent by these uncontested candidates. The rest of the money was spent for campaign messaging and fundraising expenses, staff salaries, and donations to their state parties, state and local candidates from the area they represent, JFCs, or super PACs. Not only do donors clearly understand that these members are returning to office, they understand that much of the money will not be spent to campaign. Why do they give to them then?

Donor Access Strategies and the Legislative Process

Our brief set of examples sets the background for one of the more troubling outcomes of campaign finance: the impact donor access strategies have on the functioning of the political process. We may all have concerns about the amount of money raised and spent and the ways in which out-

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side spending highlights issues of concern to the wealthy people who can afford to make substantial donations. We also know from our discussions about corruption that there is no solid evidence that contributions buy votes. Yet political scientists know a lot about the link between contributions (specifically PAC contributions) and various aspects of the political process. It turns out that there are many other ways (all hard to measure) for legislators to do favors for their friends. Our discussion of the second face of power points to what is *not* on the agenda, which, although certainly hard to measure, is relatively easy to accomplish given the limited amount of legislative change that can be passed in a two-year Congress. Lindblom's market as prison argument helps us to see how certain issues will rise to the top of the agenda—which is not the same as changing a lawmaker's position on a particular policy.

With all our focus on campaign money, you might think that all members of Congress do is fundraise. Many have concerns that the time required to meet with donors undermines the integrity of the legislative process (M. Alexander 2006). Yet our example of members who won with 100 percent of the two-party vote shows that some members need to spend very little time at all in fundraising. Some engage in fundraising out of uncertainty or due to their own ambition. But members of Congress clearly do more than fundraise. Lawmakers vote on legislation, propose legislation, find witnesses to testify in front of committees, consult regularly with the executive branch—just about anything you can think of concerning public policy.

In terms of simple access, Joshua Kalla and David Broockman (2016) revealed that donors are more likely to get appointments with congressional offices than those who did not donate to the lawmaker. Richard Hall and Frank Wayman (1990) found in a very important study that interest groups may be "buying time" rather than the votes of lawmakers by motivating them to become more involved in the legislative process at the committee level to promote the group's policy preferences. That is, a member may already be voting as the group wants but might now advocate more for consideration of new legislation (or stopping the consideration of legislation that may be harmful to the donor). Hall and Deardorff (2006) also found that interest groups help members by providing research, legislative language, or coalition support to help lawmakers with their policies—they call this a *legislative subsidy*. If a member does not have the staff available

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to do the research required to write legislation, the group can do it for the member, a practice that is very common and has a long history.

A member could also cosponsor a bill the group champions. Michael Rocca and Stacy Gordon argue that bill sponsorship is not something members do to please voters per se but for the more "attentive" public of interest group advocates. Bill sponsorship led to more PAC contributions from groups with active interest in the bill's contents (Rocca and Gordon 2010). In another study, Rocca and Gordon found a strong relationship between a member's delivery of an "earmark" to defense contractors and the contractor's PAC contributions to the member. Earmarks stipulate that a particular project in a specific location receives funding. Such project funding can be very valuable to defense contractors, and Rocca and Gordon find the relationship a troubling commentary on our legislative process (Rocca and Gordon 2012). Still, this is not quite the quid pro quo the Court's corruption definition requires.

Both chambers of the U.S. Congress have a committee system that divides the work of writing legislation by policy area. As interest groups have particular policy areas of interest, they logically focus on the committees that legislate on issues of concern to the interest group. Consequently, members of Congress who serve on those committees attract even more donors from those groups' traditional PACs. Eleanor Powell and Justin Grimmer (2016) found that the link is real, but only while members serve on that committee. If the member changes committees (or is forced off), some PACs will turn their attention to the member that replaces them. Amy McKay (2020) found that interest group contributions to Senate Finance Committee members in 2009 correlated with amendments added to healthcare legislation in 2009 favored by those groups. These committee-level findings suggest that interest group contributions targeted to specific lawmakers at the committee level may pay dividends.

Conclusion

At the national level, the varying term lengths and constituencies of each institution (president, House, and Senate) explain why we have different campaign finance rules and practices for different offices. The pressure to campaign for frequent House elections (with inadequate allowance

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for inflation) means those candidates must constantly be looking for new funders. This also explains why House incumbents appreciate the efficiency traditional PAC contributions provide, because they can raise funds from many PACs in Washington, D.C. Senate candidates have more time between elections than House members do, but the sheer size of many states and the more competitive nature of Senate elections means that Senate candidates also spend a lot of time and energy raising money for their campaigns.

From the late 1970s to 2000, presidential candidates had incentives to focus on small donors around the country to satisfy the requirements for receiving pre-nomination public matching funds, but the voluntary nature of the matching fund system (and its imposition of spending limits) almost demanded that serious candidates abandon it when winning early nominating contests became the norm in presidential nominations. Today, presidential hopefuls raise most of their money from individuals, and some raise quite a lot in small donations. Presidential candidates spend more time fundraising now than they did even in the 1990s, and they often do it with their political party organizations using JFCs to maximize receipts.

Competitive elections draw enormous attention from candidates, parties, and outside groups. A small number of races each cycle account for the lion's share of spending. Some outside groups will outspend one (or both) of the candidates. But candidates without electoral competition still raise money and use it to leverage their position within their chamber or for higher office. Thus, a kink happens in the feedback loop where safe members collect donations to transfer back to the electorally vulnerable ones. The donors who give these donations (who are not likely thinking about what the candidate does with their money) hope to meet with members and encourage them to spend some of their time working on initiatives they already champion, or perhaps move those policies higher up on the agenda. Thus, many PACs support the campaigns of sitting lawmakers, especially powerful congressional committee chairs and party leaders.

We have seen all types of groups, even those most focused on ideology or a particular policy outcome, direct most of their PAC donations to incumbents, and business PACs give to incumbents of both parties. These groups want access to the most likely winners. So, they give to incumbents, giving them an even bigger money advantage over their challengers, which contributes to very low levels of competition, especially in House elections. Without meaningful competition, because the incumbent will

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almost always win, voters do not have a real choice on Election Day, removing the people from choosing who will govern. This is another and very consequential kink in the feedback loop. While this kink does not prove that campaign donations determine policy outcomes, it does suggest that citizens play a small role in determining who is elected to office to make policy. In chapter 8, we consider this relationship between campaign contributions and lobbying. Before that, in the next chapter, we examine disclosure of campaign finance activity and enforcement of the laws governing those activities.

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CHAPTER 7

Disclosure of Campaign Money and Enforcement of the Laws

In the previous six chapters we have used the word "disclosure" many times. We have not yet examined exactly what disclosure is or how it may lead to enforcement of campaign finance laws. Disclosure of campaign finance activities has been a bedrock principle of campaign finance regulation and rhetoric. It is supposed to discourage corruption by exposing donor-candidate connections publicly, thereby giving voters relevant information about who is backing the candidates asking for their votes. Once we have detailed information about campaign finance transactions, we should be able to enforce the law too. Those who violate the law should be subject to some punishment (usually a fine), but effective disclosure should discourage all filers from violating the law in the first place. In this chapter, we deal first with the contradictory dimensions of disclosure, the mechanics of how it happens, and the extent to which enforcement of the laws is achievable.

What Do We Gain from Disclosure? What Do We Lose?

If we reveal the sources of fundraising and the targets of spending, the logic goes, then unsavory actors should be deterred from behaving badly. In fact, some opponents of campaign finance donation limits (mostly on the political right) argue that if donations are disclosed, limits on contributions are not necessary (B. Smith 2001; Sullivan 1996). Political scientists have consistently found that voters suspect that a candidate is "bought"

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by a particular interest group that donates to them. Conor Dowling and Michael Miller (2014, 100) found that when voters were told a candidate was supported by interest group or super PAC spending, they were less likely to vote for that candidate because voters felt they would serve special interests once in office. So, if the aim of contribution limits is to lessen the dependence of one candidate on one donor, then public disclosure makes that relationship plain. The voters can decide if they want a representative who they suspect is indebted to a particular interest group or wealthy individual. In this theory, both donors and voters preserve their rights of free expression. Donors signal their support for particular candidates and voters get the benefit of knowing who funds the candidates and deciding what they think of that connection.

The campaign finance disclosure system has a problem—some donors disguise their identities because of their desire for privacy. The right to privacy has ambiguous constitutional standing, but it still has a significant effect on who participates in the campaign finance system and how they do so. Disclosure requirements have been in effect at the national level since passage of the 1910 Federal Corrupt Practices Act, but these requirements were not sufficiently enforced and thus were generally ignored. It was not until the 1971 Federal Election Campaign Act and its 1974 amendments that disclosure was both required and enforced by the newly established Federal Election Commission. What happens if free speech rights allow a person (or a group of individuals) to create a political committee using a name that obscures the interests (and sometimes the identities) of the donors? In chapter 5, we explained that donors choose whether they want their support to be fully disclosed or not. If groups whose funders are secret (not disclosed), such as 501(c) organizations, spend to promote their favored candidates, then we do not really have meaningful disclosure at all. Some committees deliberately take on anonymized identities (e.g., American Crossroads and Future Forward USA) to conduct independent expenditure campaigns. Obscuring a group's identity might manipulate voters into thinking that a "neutral" source sponsored the political message at hand, giving that source more credibility than it would otherwise have (C. Weber, Dunaway, and Johnson 2011).

Today, there is growing disagreement over the need for individual donor disclosure, especially for relatively small donations (recall that federal disclosure requirements kick in once someone has given $200). Disclosure was, until very recently, one of the few aspects of campaign finance

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policy on which Democrats and Republicans could agree. Conservative Supreme Court Justice Antonin Scalia wrote in the 2010 case *Doe v. Reed* that running a democracy "takes a certain amount of civic courage" and that "part of the reason" disclosure is important is "so you can be out there and be responsible for the positions you have taken." Scalia noted that "requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."[1] In this case, transparency, specifically disclosure of a donor's identity and the candidates or causes the donor supports, is critical to prevent corruption. When Americans think about this potential for corruption, they generally imagine that big business firms or labor unions are making contributions or spending with the expectation that they will get something in return. However, when individuals are asked to disclose their employer and their home address, in addition to the amount of their contribution and its recipient, they are ambivalent at best about the right of the public to know that they are backers of particular candidates or political groups.[2] According to one group of scholars, "the lens of CFD [campaign finance disclosure] has turned from campaigns and candidates to [include] donors" (D. Johnson, Regan, and Wayland 2011, 6). La Raja cites instances whereby public disclosure data on donors was used to make death threats, commit vandalism, and boycott local businesses because their names and addresses were easy to access (La Raja 2014a, 754).

Some favor removing disclosure requirements altogether to protect the privacy of contributors. They argue that contributors should not be vulnerable to harassment or *outing* because they exercise their constitutional right to free speech by making a campaign contribution (McGeveran 2003; Mitchell 2011). Disclosure also may have a chilling effect on potential contributors, particularly those who may be discouraged from donating to unpopular or controversial groups or candidates. The Supreme Court has recognized the possibility that disclosure could put a burden on First Amendment rights if it exposes a donor to harassment or threats, such as in the 1958 case *NAACP v. Alabama ex rel. Patterson*, the 1976 *Buckley v. Valeo* case, and the 1982 case *Brown v. Socialist Workers '74 Campaign Committee*.[3] While some disclosure proponents contend not enough information is disclosed in filing reports and opponents claim that too much information is required, neither one of these concerns has been fully realized for the simple reason that enforcement of disclosure laws is conducted unevenly or not at all. Moreover, some experts argue that most voters do

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not have the resources (such as time or background information) to interpret the spotty information about campaign contributions in a way that is helpful to them (Cain 2014). In fact, intermediaries, such as journalists, candidates, organized interests, and political parties, are the major consumers of campaign finance disclosure data. They communicate information about campaign finance that they hope creates interest in the topic or candidate, leading to demands for more coverage.

The Availability of Campaign Finance Data

A most profound change in campaign finance in the U.S. is the availability of information about how money is raised and spent in campaigns. Until 1976, when federal candidates first submitted their campaign finance reports, they had no expectation of accountability for what was on those forms. The law was not enforced, and the records were not publicly available. The creation of a new independent executive agency, the FEC, put enforcement in the hands of the executive branch. The law also demanded the agency make those records public. Now, reports were examined for accuracy and completeness. When a report was wanting, filers could expect fines and more importantly bad press for disregarding the law.

While it is true that campaign finance filings were now available to the public, in truth from 1976 until the public availability of the internet in the mid-1990s, getting this information meant showing up in-person to the FEC's offices in Washington, D.C., or arranging to purchase photocopies of requested files. Still, this enabled several Washington, D.C.-based journalists and interest groups that lobbied for campaign finance reform laws (and us as graduate students) to monitor campaign finance activity and the law's implementation and enforcement. When we entered the internet age, access to campaign finance information exploded. This was mostly thanks to organizations that repackaged FEC data for easier interpretation. OpenSecrets led the way.

Once the data were easy to get, reporting about campaign finance became a regular feature for political reporters. Much of the FEC's website caters to journalists, with a special section devoted to explaining the law and a diverse collection of detailed press releases on a variety of topics. Some journalists produce briefing papers to instruct other journalists on how to understand the jargon of campaign finance law and disclosure

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and where to find relevant data (Trilling 2017; Tucker 2016), and several have become well known for their understanding of the law and reporting which campaign activities are violations of current law and which activities are legal but sneaky.[4] Of course, there are still many journalists who have a poor understanding of campaign finance rules and how the system works, which results in general confusion about the extent of the law's violation (Ansolabehere, de Figueiredo, and Snyder 2003).

Several new "watchdog" groups emerged, and many continued to push for further reforms, especially public funding for campaigns. Some provide users with powerful search tools to investigate the role of money in federal and state politics (e.g., OpenSecrets), and citizens throughout the country now have at least some access to campaign finance information. Several foundations, both liberal (e.g., the Brookings Institution) and conservative (e.g., the Heritage Foundation), also developed programs evaluating campaign finance as a policy issue, released policy briefs, supported scholars to conduct research on campaign finance, and worked to influence federal and state policy on the issue. Table 7.1 is a list of some of the most active of these advocacy groups and foundations.

Access to extensive disclosure data with each new election cycle and all this attention suggests that we can really know what is going on with much of the money raised and spent in U.S. elections. Yet the quality of the data, the lack of information about some campaign finance actors, and the disjointed system of disclosure and enforcement make it difficult to fully comprehend all facets of the campaign finance system in the U.S.

Problems with Inputs in the Disclosure System

The early computer acronym GIGO (garbage in, garbage out) also applies to campaign finance disclosure. If filers do not understand the law (or perhaps understand it too well), then we have an immediate problem: the data may be wrong. You cannot have meaningful disclosure or effective enforcement without compliance with the law's mandates. Many of the court cases and new regulations we explained in previous chapters created new rules for "filers" (those who are required to disclose their campaign finance activities) to follow.[5] Staying informed about the laws' mandates is increasingly tougher to do. We begin with a hypothetical situation of how bad information can be unwittingly reported.

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TABLE 7.1. Select Groups Focused on Campaign Finance Policy and Research

Group	Year Established	Operational in 2022?	Web Address
Advocacy and Watchdog Groups			
American Civil Liberties Union	1920	Yes	https://www.aclu.org/
Common Cause	1970	Yes	https://www.commoncause.org/
Public Citizen	1971	Yes	https://www.citizen.org/
James Madison Center for Free Speech	1975	Yes	https://www.jamesmadisoncenter.org/
Center for Responsive Politics/OpenSecrets.org	1983 / online 1996	Yes	https://www.opensecrets.org/
Institute for Justice	1992	Yes	https://ij.org/
Brennan Center for Justice	1995	Yes	https://www.brennancenter.org/
Democracy 21	1997	Yes	https://democracy21.org/
Campaign Legal Center	2002	Yes	https://campaignlegal.org/
Institute for Free Speech	2006	Yes	https://www.ifs.org/
Issue One	2014	Yes	https://issueone.org/
Foundations and Think Tanks			
Carnegie Corporation of New York	1911	Yes	https://www.carnegie.org/
Brookings Institution	1940	Yes	https://www.brookings.edu/
Committee for Economic Development: Money in Politics Project	1942	Yes	https://www.ced.org/
American Enterprise Institute	1944	Yes	https://www.aei.org/
Pew Charitable Trusts	1948	Yes	https://www.pewtrusts.org/en/
Joyce Foundation	1949	Yes	https://www.joycefdn.org/
William and Flora Hewlett Foundation	1966	Yes	https://hewlett.org/
John D. & Catherine T. MacArthur Foundation	1971	Yes	https://www.macfound.org/
Heritage Foundation	1973	Yes	https://www.heritage.org/
Cato Institute	1977	Yes	https://www.cato.org/
Open Society Foundations	1979	Yes	https://www.opensocietyfoundations.org/
Campaign Finance Institute[a]	1999	Merged 2018	http://www.cfinst.org/
National Institute on Money in Politics / Follow the Money[b]	1999	Merged 2021	https://www.followthemoney.org/
Bipartisan Policy Center	2002	Yes	https://bipartisanpolicy.org/
Center for Political Accountability	2004	Yes	https://www.politicalaccountability.net/
Democracy Fund	2014	Yes	https://democracyfund.org/

Source: Compiled by authors.

[a] Merged with the National Institute on Money in Politics in 2018, and then the National Institute on Money in Politics merged with the Center for Responsive Politics to form OpenSecrets in 2021.

[b] Merged with the Center for Responsive Politics to form OpenSecrets in 2021.

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Say that you are a first-time candidate for Congress. Maybe you hold a state office, but that hardly prepares you for the very different federal requirements, forms, and deadlines you now must follow. Your retired uncle volunteers to be the campaign treasurer. You love this idea because he used to be a bookkeeper and you do not have to pay him! Your uncle has access to the FEC guidebooks, and perhaps he even attends an online training seminar. But will your uncle be sure that if a donor sends a check from their small business checking account (not their personal checking account) that he must return it to the donor and not deposit it, because corporate donations to candidates are not allowed? Will he keep track of the total contributions from each donor in the *two-year cycle* to be sure the donors do not exceed the contribution limits per election?[6] Let us imagine that a small event in a park brings in cash donations of $5 or $10 per attendee. If your uncle puts the $400 collected in a drawer and leaves for the day, will he know that the field director thought it was petty cash and used it to buy pizza for the campaign volunteers, therefore it does not get reported as unitemized (under $200) contributions? These are the sorts of issues that were suggested by election law attorneys in a symposium in *Campaigns & Elections* magazine (2014). Disclosure is only as good as the understanding of the law by each campaign treasurer.[7] If a campaign violates the law, journalists especially attribute this to malice, when incompetence or ignorance is more likely to be the case. It is even harder to evaluate the worth of in-kind (nonmonetary) contributions[8]—campaigns tend to take the donors' declarations of value without question. That may not always be the wisest practice. Indeed, the regulation governing how in-kind contributions should be valued is rather vague:

> [The] usual and normal charge for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and usual and normal charge for any services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.[9]

Taren Kindree and Patrick Schmidt (2019) argue that campaign treasurers were meant to be gatekeepers in campaigns, much as lawyers and accountants are for business transactions. However, this view of campaign

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treasurers assumes most money in elections would flow through candidate campaigns, not through outside political committees. In the candidate-treasurer scenario, the treasurer would hold the campaign to the letter of the law, though in practice campaign staff, not the official treasurer, often assemble the records. As they explain: "Though the FEC has, even in recent years, reasserted its intention to hold treasurers liable in their *personal* capacity, that sword has mostly stayed in its sheath. The costs for mistakes are very low, both for campaigns and treasurers" (2019, 155–56).

Concern for gatekeepers' competence is not an issue for larger or permanent groups such as political parties and established interest groups, as they normally hire an election law attorney (or several) to deal with FEC compliance issues. This route is very expensive, but it does tend to ensure better quality disclosure and reduce the likelihood of violations. Because of the expense, it would be very difficult for newcomers (such as first-time candidates) to find and retain such professional assistance, which means that lack of compliance can (and has) become a campaign issue in and of itself, a further burden to new candidate success (Federal Election Commission, Enforcement Statistics n.d.).

What Is Disclosed—and to Whom?

At present, four federal agencies collect data about federal campaign finance activity: the Federal Election Commission (FEC), the Internal Revenue Service (IRS), the Federal Communications Commission (FCC), and the Securities and Exchange Commission (SEC) (Franz 2020). Additionally, the Department of Justice (DOJ) is responsible for criminal enforcement of campaign finance law. Table 7.2 shows the campaign finance responsibilities of each of these offices.[10] Of these five agencies, only the FEC exists for the express purpose of collecting information about campaign financial transactions for public dissemination and legal enforcement. Other agencies with a campaign finance regulatory role (the IRS, FCC, and SEC) have seen their jurisdictions expand to include some form of campaign activity disclosure through new federal regulations or court decisions. This makes federal campaign finance disclosure highly fragmented. We discuss the federal campaign finance oversight authorities, starting with the smallest in scope.

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TABLE 7.2. Federal Agencies with Responsibility for Implementation of Campaign Finance Laws

Agency	Federal Campaign Finance Responsibility	Who Reports to Agency
Securities and Exchange Commission (SEC)	• Monitors contributions from those who manage public pension funds to public officials in excess of $300 (pay-to-play).	• Investment advisors of public pension funds report political contributions to the SEC
Federal Communications Commission (FCC)	• Requires political advertisement sponsors to disclose their identity and advertising activities publicly. • Enforces BCRA (2002) requirement that the FCC deny federal candidates the lowest unit rate from broadcasters if ad does not include a "stand by your ad" statement. • Enforces a 2012 regulation requiring television stations airing political ads to make their public files available on the internet.	• TV and radio stations that sell ads to political candidates, groups, or organizations
Internal Revenue Service (IRS)	• Grants nonprofit status, and thus tax exemption, to organizations engaged in political activities. • Collects information from nonprofit groups engaged in campaign activities, such as 527 and 501(c) nonprofits.	• 527 committee officers • 501(c) committees provide basic information to determine nonprofit status

(*continues*)

Securities and Exchange Commission (SEC)

The SEC's mission is to protect potential investors from receiving misleading information from companies and to ensure the United States has fair and efficient markets (Securities and Exchange Commission n.d.). It collects and examines financial statements from firms with an eye to the accuracy of their claims. The SEC requires publicly traded companies and investment professionals to file information about their business practices.

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TABLE 7.2—*Continued*

Agency	Federal Campaign Finance Responsibility	Who Reports to Agency
Federal Election Commission (FEC)	• The primary campaign finance regulatory agency for federal elections established with the 1974 FECA amendments. • Collects and makes public information filed by candidates, parties, groups, corporations, labor unions, and individuals. • Enforces federal campaign finance law subject to civil penalty; assesses fines. • Issues regulations and AOs. • Forwards criminal violations of campaign finance rules to the Department of Justice. • Provides guidance and assistance for political committees to comply with campaign finance law.	• Candidate campaign committees • National party committees (and state/local parties for federal election activity) • Political action committees (connected PACs with separate segregated funds, nonconnected PACs, super PACs, and hybrid PACs) • Some 501(c)(4), (5), and (6) independent expenditure and electioneering communication spending and disclosure of some donors[a]
Department of Justice (DOJ)	• DOJ Election Crimes Branch of the Public Integrity Section handles criminal campaign finance cases, where violations are "knowingly and willfully" committed and involve amounts over $2,000.	N/A

Source: Compiled by authors.

[a] Because FEC rules require disclosure of only those contributions made with the *intent* of influencing the outcome of an election, the identities of only a small fraction of contributors to 501(c)(4), (5), and (6) nonprofits are disclosed.

Investors who have lost money may report companies to the SEC if they believe their losses are due to some type of fraud or misrepresentation.

Since the *Citizens United* decision in 2010, investors/shareholders became interested in the political spending conducted by firms out of their general funds, which had not previously been permitted. The SEC does not collect information about political spending by corporations. The IRS does have some of this information, but shareholders are not

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entitled to examine IRS filings. Some corporate contributions and spending are reported to the FEC, but the agency's own rules allow much of this political activity to go unreported if the spending is through a 527 or 501(c) organization. The SEC proposed a rule to collect and report data on publicly traded firms' corporate political activity. However, in 2013, SEC chair Mary Jo White took the proposal off the agenda in response to congressional pressure (Bebchuk and Jackson 2015), and in 2015, Congress passed a rider in an omnibus budget bill[11] prohibiting the SEC from issuing the rule, a clear encroachment on executive regulatory authority. In early 2021, the SEC signaled it would revisit the issue, but to date the SEC has not acted on this proposal (Hong, Miles, and Bakhshi-Azar 2022).

In the wake of the January 6, 2021 attack on the Capitol and the Supreme Court's decision ending the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization* (2022),[12] shareholder interest in the political activities of the companies they own significantly increased pressure on several large companies to be more transparent (Hudson 2023). Some firms are voluntarily disclosing their campaign finance activity in partnership with the Center for Political Accountability (CPA). Beginning in 2015, the CPA began asking Fortune 500 companies to disclose both the actual amount of their political spending and the decision process used to evaluate whether those contributions help the firm's bottom line. This information is publicly shared with investors and used to create its CPA-Zicklin Index. In the 2022 CPA-Zicklin Report, 351 of the Fortune 500 companies volunteered some of their political spending information as did 511 of the Russell 1,000 firms (not counting those firms also in the Fortune 500) (Center for Political Accountability 2022, 21–26). As this is a voluntary and privately funded data source, the public and shareholders do not have access to electoral spending data by all publicly held corporations.

The SEC did pass a rule in 2010 to discourage "pay-to-play" behavior, that is, prohibiting political contributions in amounts more than $300 from investment advisors to candidates for office who would have decision-making power to award those advisors contracts to manage public pension funds (Securities and Exchange Commission 2010). These public pension funds (usually for police officers, teachers, and municipal workers) are nearly always managed at the state and local levels of government. Indeed, the SEC found firms guilty of violating this rule in several high-level cases in New York, Pennsylvania, and Ohio, among others (I. Bell 2015, 6–9). This rule became important in the Republican presidential nomination

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process of 2016 because a donor who secured a public pension contract in their state is prohibited from making contributions for a period of two years from the date of that contract. So, governors running for president (including Wisconsin governor Scott Walker, New Jersey governor Chris Christie, Ohio governor John Kasich, and Louisiana governor Bobby Jindal—all candidates for the GOP presidential nomination) could not ask certain investment advisors or their employees for significant contributions at that time (I. Bell 2015, 3). In December 2022, the SEC charged Samuel Bankman-Fried, chief executive officer of the crypto currency firm FTX Trading, with defrauding equity investors by diverting their funds to another company, purchasing lavish real estate, and making large political donations (Securities and Exchange Commission 2022). In February 2023, the DOJ filed additional charges in this matter, revealing that 40 percent of members of the 118th Congress had received donations from FTX and staff or potentially benefitted from spending by affiliated super PACs (Reilly 2023). In November 2023, a jury convicted Bankman-Fried of fraud, conspiracy, and money laundering. Bankman-Fried's conviction may lead to more SEC oversight of campaign finance activity.

Federal Communications Commission (FCC)

The Federal Communications Commission regulates media outlets in the U.S. One area of their authority is making political advertisers disclose their identity publicly. This is not a new function for the FCC. They have long required ad sponsors to disclose their identity on the political ads they place, as stipulated by the Radio Act of 1927[13] and the 1934 Communications Act[14] (Moran 2017, 4702). Because advertising is the main expenditure by candidates, parties, and political committees, campaign finance spending data for this purpose is managed by both the FEC and the FCC.

It is easy to confuse the terms used for what the FEC and FCC regulate. As Paige Whitaker (2019, 1) explains in a Congressional Research Service brief: "The term *disclosure* refers to periodic reporting to the FEC of funds received and spent, and the term *disclaimer* refers to an attribution statement that appears on a campaign-related communication." Disclaimers refer to the "stand by your ad" statements in broadcast advertising, such as "I am Thomas Jefferson and I approve this message," or the box on written communications about who paid for the ad or message. In fact, the 2002

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Bipartisan Campaign Reform Act (BCRA) directly referenced the FCC by amending section 315 of the Communications Act of 1934 to state that the FCC should deny candidates for federal office their right to the lowest unit rate[15] guarantee from broadcasters if their ads did not include a four second statement with the relevant information (Scherer 2020, 5). When the FEC issued regulations on enforcing BCRA's mandate that ads aimed at an audience of more than 50,000 people (and reference a federal candidate within prescribed time periods) be considered 'electioneering communications' and were therefore subject to disclosure and disclaimer requirements, they directed filers to the FCC's website to determine the size of the broadcasting audience. The regulations embed FCC decisions into the FEC's enforcement mechanism.[16]

In 2012, the FCC issued new regulations to require television stations airing political ads to make their public files available on the internet. Previously, these files were available for inspection by any member of the public but only on paper at each station's office. This meant those interested in viewing this information, such as researchers and enforcement agents, had to travel to the station in person. Radio, TV, and cable broadcasters' public files include invoices to political organizations containing the prices paid for advertisements, the number of ads aired, and the TV or radio programs on which they were aired. The powerful National Association of Broadcasters, the trade association representing TV and radio stations, sued to prevent these rules from coming into effect, arguing that the measure would require them to reveal their advertising rates, information they considered proprietary. The court disagreed, and since 2012, public files of political advertising are available online (J. Smith 2012).

While the Online Public Inspection Files rule is a promising step in the direction of transparency, Rachel Moran's 2017 analysis highlights significant problems. She explains that the FCC requires the following information about each political ad from candidates or political committees (political parties and interest groups): the specifics of advertising time sold (the program on which the ad should appear, the time of day and its frequency during a particular week—every day on the local news, for instance), a list of the chief executive officers or executive members of the sponsoring entity (if not a candidate), and whether the ad concerns an issue of *national* importance or a candidate for *federal* office. The FCC does not have a particular form that advertisers must use to transmit this information. Instead, the National Association of Broadcasters created a form that

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most stations use. Moran's analysis of filings for the 2016 elections found that only 10 television stations out of 240 provided complete information as required by law (Moran 2017). The most common error (65 percent of all errors) was incomplete identification of key sponsoring individuals followed by checking the box for "not of national importance" in error (15 percent), and no accompanying ad buy details (13 percent) (Moran 2017, 4704–10). Accountability is even harder to achieve when groups with anonymized identities do not have to reveal their backers to either the FEC or the FCC. Still, much better information is now available about who advertises in elections and to what extent. The FCC has received some praise for its efforts, although it cannot enforce the law effectively against nonfiling stations, and the information is not available in an easily searchable format (Carney 2015).

While the FCC's mandate for ad disclosure has persisted since 1934, the technology on which ads are aired has changed significantly. The FCC expanded the reporting regulations to cover small broadcasters and cable broadcasters in 1972. In 1997, the FCC issued rules requiring ads on satellite digital audio radio services (SDARS) to be disclosed, followed by direct broadcast satellite (DBS) television operators in 1998 (Scherer 2020, 6). However, two of the fastest growing advertising platforms in the 2020s, connected TV (TV connected to the internet streaming content from providers such as Netflix) and AVODs (advertising-supported online video-on-demand services such as YouTube and Peacock), remain (as of April 2023) entirely exempt from reporting requirements (Scherer 2020, 15). As campaigns accelerate their use of platforms like Hulu and Roku (Romm 2020), both disclosure and disclaimers will decline unless new legislation is passed. This is the same problem with online advertising that is primarily on websites and email, as we discuss below.

Internal Revenue Service (IRS)

The IRS is the nation's tax collection agency, so we would not normally expect this agency to have a role in overseeing campaign finance. However, the IRS has been examining some organizations' "political activities" since 1917, when Congress first allowed individual donations to charities to be exempt from federal tax as an incentive to get people to engage in charitable giving (Arnsberger et al. 2008, 106–7). Americans pay federal

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income tax on the money they earn. However, some of that income can be exempt from tax if the individual uses it to promote behaviors that are considered beneficial for American society (e.g., giving to charities, purchasing a house). Money spent (donated) this way may be subtracted from the taxpayer's income, which could lower the amount of tax paid. Nearly immediately after such deductions were allowed, people demanded clarity on what constituted a *charitable* organization (Colinvaux 2011, 692). Groups organized as *charities* began to advocate for the enactment of legislation, motivating Congress to clarify in the Revenue Act of 1934[17] that using propaganda for influencing legislation made the organization something other than a charity, meaning that donors would not enjoy the benefit of tax-deductibility of their contributions (Colinvaux 2011, 693–94).

The law clearly prohibited charities from engaging in lobbying, but campaign activity was not addressed until 1954 when Senator Lyndon Johnson of Texas introduced an amendment to the Internal Revenue Code of 1954, now known as the Political Activities Prohibition (or popularly as the Johnson Amendment), which bars tax-exempt charities from engaging in political activity. Johnson was reacting to a Texas foundation, established as a charity under federal guidelines, which campaigned against him in the primary election (Colinvaux 2011, 690–91). The amendment passed, putting the IRS in the position of figuring out what constituted "political activity" long before FECA 1971. The IRS monitors whether the organization is a legitimate charity. If it is not, then donations to the organization are not tax deductible on donors' personal income taxes, and, depending on the amount donated, the donor may be subject to a gift tax on their contribution (Colinvaux 2018, 485–90).

Political organizations (those that engage primarily or exclusively in campaigning) disclose their contributions and spending to the FEC, as we discuss shortly. When it comes time to pay federal taxes, political organizations, such as political parties and political action committees (PACs), which organize under section 527 of the tax code (created in 1975, after FECA 1974 was enacted), enjoy the same tax-free status as charities do. However, political parties and PACs are not considered charities, so donations to them are not tax deductible. Recall from chapter 4 that many groups engaged in election related activities form as 501(c)(4), (c)(5), or (c)(6) organizations. Under these tax classifications, groups are free from taxes and can make explicit political statements to influence the outcomes of elections *so long as* this political activity is not the *primary* function

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of the organization, a designation that current law and regulations make easy to avoid (see chapter 4). These section 501(c) groups have the added advantage of being able to accept unlimited contributions from corporations and labor unions. Vague rules and lax enforcement make it possible for 501(c)s to disclose the identity of only a fraction of their donors, while some 527s (those deemed political committees engaged in federal election activity) are required to disclose their contributions and expenditures to the FEC. This distinction has led many observers to refer to 501(c) groups as "dark money" groups.[18]

The IRS is expected to collect information on 527 and 501(c)(4), (5), and (6) committees. However, as an organization formed to keep the personal information on citizens private, the IRS has essentially failed as an oversight agency for disclosure and enforcement of federal campaign finance laws (Carney 2002). In July 2000, Congress passed P.L. 106–230, the 527 Organization Disclosure Law,[19] requiring 527s to give the IRS information about their activities, officers, contributors, and expenses. In 2002, House Ways and Means Committee chairman Bill Thomas (R-CA) asked the General Accounting Office (GAO) to evaluate how the IRS was implementing this law. The subsequent report revealed that the IRS was either unable (or unwilling, or both) to meet the deadlines for reporting information submitted by 527s to the public. The IRS could not confirm that 527 organizations filed required forms accurately and by the stated deadlines and did not impose any penalties on 527s not adhering to the requirements. The IRS gave a written response to the GAO's report, agreeing that the bulk of the findings were correct in fact. However, IRS officials argued that Congress did not give the IRS any increased staff capacity to enforce the law. Further, the IRS questioned whether they should be faulted for omissions of detail by Congress because the law requires the IRS to make forms public, but it does not require those forms to be posted on the internet. So, by the law's mandate, the IRS was literally in compliance, contrary to the GAO's conclusions (U.S. General Accounting Office 2002, 60–63).

In 2013, the IRS was accused of giving extra scrutiny to conservative groups that had applied for 501(c)(4) tax-exempt status. While the IRS is charged with ensuring that political activities are not the *primary* activities of these civic and social welfare organizations, as we noted in chapter 4, there is no clear definition of what constitutes *primary* in the law. Starting in 2011, the unit that scrutinized these applications admitted they used

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a set of key words such as "patriot" or "tea party" to determine which applications to flag, though they later were found to be doing the same thing for "progressive" groups (McKinnon 2013). Conservative politicians blamed the Obama administration for trying to interfere with their free speech rights, but a report by ProPublica argues that the new attractiveness of using a 501(c)(4) organization after *Citizens United*, combined with significant IRS staff cuts, forced the agents to use shortcuts to determine which groups to examine first (Maya Miller 2019). One group that the IRS determined had violated the spirit of the law was Crossroads GPS. Over the course of four years, the group argued with the IRS about its 501(c)(4) status until, ultimately, the group asked for tax exempt status and received it (Maguire 2016). To the present day, the IRS does not operate as an effective gatekeeper that it was meant to be to ensure that 501(c)(4), (5), and (6) organizations are following the law.

The Federal Election Commission (FEC)

The 1971 FECA required presidential candidates to report their campaign finance activities to the General Accounting Office,[20] while House and Senate candidates were to report to the clerk of the House and the secretary of the Senate. These officials were charged with investigating violations of the law, and the attorney general of the United States, head of the Department of Justice, was to discipline those who violated the law. The 1971 FECA's enhanced disclosure requirements were generally seen as effective. Indeed, disclosure reports filed after the law took effect during the 1972 presidential election revealed that big donors to both parties' presidential candidates used multiple political committees and shell organizations to get around having to pay a gift tax for large contributions. The Senate Watergate hearings later revealed that the Nixon campaign received over $780,000 in illegal corporate contributions for his 1972 reelection campaign (Potter and Morgan 2013, 414).

Congress recognized the need for tighter restrictions and an independent campaign finance regulatory agency. The 1974 FECA Amendments closed the loophole that allowed candidates to have multiple committees, required them to have only one campaign committee for all contributions and expenditures, and created the FEC. It is the main agency responsible for the disclosure of campaign finance activity at the federal level. The

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FEC both gathers the information reported to it for public use *and* polices violations of the law by scrutinizing this information and responding to complaints. The FEC is far more successful at achieving the first mission than the second.

The FEC is where prospective candidates and political committees get information about how to set up a legal campaign organization. It is the civil enforcer of federal campaign finance law, while the DOJ handles criminal enforcement. The FEC promulgates regulations to make implementation of the law possible, issues Advisory Opinions (AOs) on whether planned campaign activities by political committees would violate the law or not, and decides whether to investigate accusations of violations. If a violation is found, the FEC levies penalties or fines. This is a significant range of responsibilities. However, the FEC receives a great deal of criticism for its inability to implement and enforce the law effectively. This ineffectiveness is due at least in part to the design of the FEC, which was determined by Congress, where many of the regulated candidates hold office.

FEC Composition

Veteran political journalist Jeffrey Birnbaum expressed a commonly held view of the FEC in his book *The Money Men*:

> Here's a bold statement and, for the most part, a true one: The Federal Election Commission is the most ineffective agency in Washington. On purpose. No lawmaker worth his voting card wants a powerful regulator overseeing his [*sic*] election. So Congress and a long series of presidents have arranged not to have one. (Birnbaum 2000, 15)

The 1974 FECA Amendments established the FEC as an independent executive agency to enforce the new law, largely to avoid the problems of leaving enforcement up to employees of the institutions they nominally regulated (the clerk of the U.S. House and the secretary of the U.S. Senate). Having an independent FEC would presumably make enforcement more likely. However, the law called for congressional appointment of FEC commissioners, not executive appointment followed by congressional confirmation. In *Buckley* the Supreme Court declared this appointment mechanism uncon-

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stitutional as a violation of the separation of powers and ordered Congress to fix it, and it ultimately did in the FECA Amendments of 1976. Now, the president appoints FEC commissioners with Senate approval (Garrett 2020, 4). Congress mandated that the FEC have a total of six commissioners—and no more than three from one major political party. The chairperson of the FEC is chosen from among its six commissioners and rotates annually. With an even number of commissioners, if enforcement matters are of a partisan nature, the FEC is likely to have a stalemate. A tie preserves the status quo because a majority (four of six) is required to change a regulation or mete out penalties for violations of the law.

Commissioners' terms are for six years, and their terms are meant to be staggered like those of U.S. senators—two commissioners should end their terms every two years. This assumes that as the terms of FEC commissioners expire, the president and Senate will work to appoint new commissioners swiftly. Since 2007, though, commissioner vacancies have sometimes remained open for a period of months or years. FEC commissioners whose terms have expired can keep their position with full administrative powers until their successor takes office (Garrett 2020, 6). When a commissioner's term is set to expire, and no new appointment is forthcoming, the incumbent can remain until their replacement is named and confirmed. Some commissioners chose to remain on the job in "holdover" status, especially in recent years.

Remarkably, no FEC commissioners were confirmed by the U.S. Senate from June of 2008 (Garrett 2020, 2) to May 19, 2020 (M. Lee 2020), a span of 12 years. On that date, the U.S. Senate approved the appointment of James E. "Trey" Trainor III, an election law attorney nominated for a Republican seat on the Commission in 2017 by President Donald Trump. Upon Trainor's swearing in, the FEC had the four commissioners it needed for a quorum, which is required for the agency to take any action. The quorum lasted only one month as Commissioner Caroline Hunter resigned July 3, 2020, returning the FEC to only three commissioners. Figure 7.1 shows that from 1976 until 2008 the FEC maintained a quorum of at least four commissioners, the minimum needed to take any action. In recent years (2018, 2019, and 2020), the agency operated without a quorum, unable to make any decisions, and thus was gridlocked.

On December 9, 2020, the Senate approved three commissioners, bringing the FEC's total membership back up to six (M. Lee 2020). Some of these commissioners were nominated months earlier yet no Senate vote

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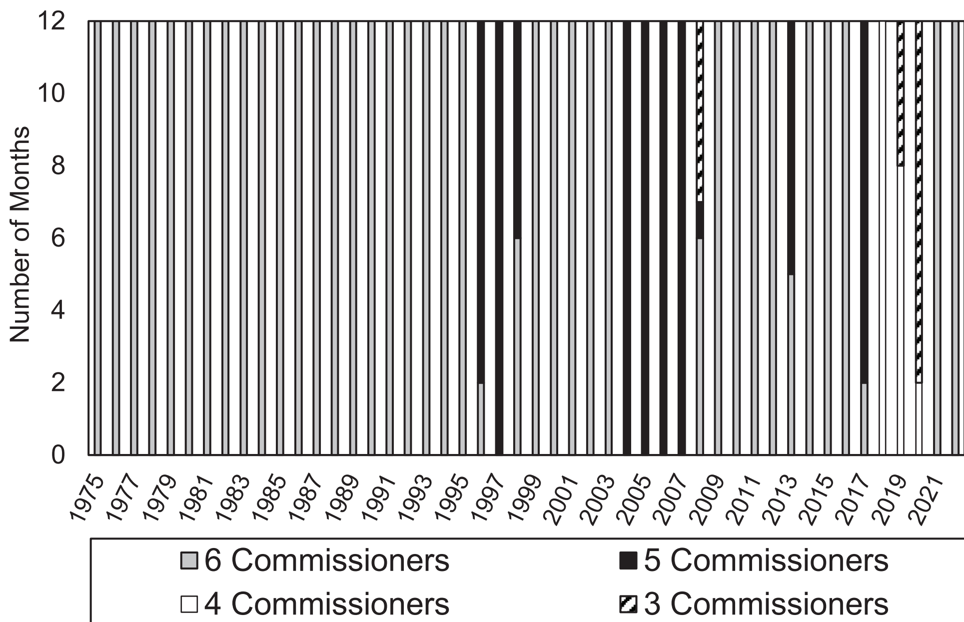

Fig. 7.1. Number of FEC Commissioners in Months per Year, 1975–2022
Source: Compiled by authors with data from Federal Election Commission, Leadership (n.d.).

was held to install them. The confirmations happened during a lame-duck session of Congress in the waning days of the Republican Trump administration. If the Senate had not confirmed these appointments, incoming Democratic President Biden surely would have nominated, and the Democratic Senate confirmed, his own nominees. Since December 2020, the FEC has had six commissioners (one appointed by President Biden in February 2022 and confirmed in May 2022). As of this writing in 2024, the FEC has six commissioners.

The Changing Pipeline for FEC Commissioners

When the FEC began in 1975, four of the six original commissioners were former members of Congress. As Birnbaum says, Congress was not interested in creating a very strong enforcement mechanism (Birnbaum 2000, 15). After 1978, no former elected officials were nominated to be

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FEC commissioners. As table 7.3 shows, the most common background of commissioners after 1978 was congressional staffer or interest group attorney. The FEC commissioner candidate pool still includes congressional staff and attorneys for interest groups and political parties, but now it also includes staff members of the FEC itself. From 1976 to 1986, when commissioners finished their service on the FEC they mostly retired from professional pursuits. Then, the career trajectory changed. For instance, when Commissioner Thomas Josefiak left the FEC in 1991, he joined a law firm specializing in exactly the sort of political law decided by the Commission. Of the 20 departed commissioners appointed to the FEC since 1986, nine of them have joined political law firms. Three of the six current (as of 2023) commissioners came to the FEC directly from private political law firms and one was on the FEC's professional staff immediately prior to her appointment.

It seems the FEC has developed its own revolving door of public officials moving into the private sector, and private sector employees moving into government jobs. Soon after FECA and its amendments passed in the 1970s, the fledgling practice of election or political law grew to include campaign finance concerns. The major political parties and interest groups had attorneys on staff and often hired outside counsel. The market responded in two ways: the proliferation of election law attorneys and the birth of firms dedicated to offering services for easier compliance and strategic advice on navigating the new and changing rules such as the current requirement that all committees must file their reports with the FEC in their approved electronic format. Some of these election law lawyers began to challenge those very rules at the FEC and in court mostly to loosen the restrictions on raising and spending money in campaigns, and many of the court decisions we have discussed in this book resulted from such challenges. The **bolded** position titles on table 7.3 show that after the mid-1980s, most FEC commissioners went on to use their campaign finance expertise gained at the FEC in the private sector as attorneys in political law firms, where they are likely to represent clients before their former colleagues at the FEC.

FECA's authors did not anticipate that politicians would sabotage the enforcement abilities of the Commission by either denying the Commission the quorum (of four commissioners out of six) it needs to operate or by appointing members who view the law itself as inconsistent with free speech principles. Both happened in the mid-2000s and have now been

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TABLE 7.3. FEC Commissioners, 1975–2022, with Positions before and after FEC Service

Year Appointed	Commissioner	Party	Prior Position	Position after FEC	Year Departed	Years on FEC
1975	Curtis	R	Elected Official	Retired	1976	1
1975	Staebler	D	Elected Official	Retired	1978	3
1975	Thomson	R	Elected Official	Retired	1981	6
1975	Tiernan	D	Elected Official	Retired	1981	6
1975	Harris	D	Interest Group Attorney	Retired	1986	11
1975	Aikens	R	Electoral Party Organization Staff	Lobbyist	1998	23
1976	Springer	R	Elected Official	Retired	1979	3
1978	McGarry	D	Congressional Staff	Retired	1998	20
1979	Friedersdorf	R	Congressional Staff	White House Staff	1980	1
1981	Reiche	R	State Election Staff	Retired	1985	4
1982	Elliott	R	Electoral Party Organization Staff	Retired	1999	17
1982	McDonald	D	State Election Staff	Retired	2006	25
1986	Josefiak	R	Electoral Party Organization Staff	**Private Political Law**	1991	5
1986	Thomas	D	FEC Staff Attorney	**Private Political Law**	2006	20
1991	Potter	R	Government Attorney	**Private Political Law**	1995	4
1998	Wold	R	**Private Political Law**	Attorney	2002	4
1998	Sandstrom	D	Congressional Staff	**Private Political Law**	2002	4
1998	Mason	R	Congressional Staff	Retired	2008	10
2000	Smith	R	Law Professor	Law Professor	2005	5
2002	Toner	R	Electoral Party Organization Staff	**Private Political Law**	2007	5
2006	von Spakovsky	R	Government Attorney	Interest Group	2007	1
2006	Lenhard	D	Interest Group Attorney	**Private Political Law**	2007	1
2008	Bauerly	D	Congressional Staff	State public official	2013	5
2008	McGahn	R	Electoral Party Organization Staff	**Private Political Law**	2013	5
2008	Peterson	R	Congressional Staff	**Private Political Law**	2019	11
2008	Hunter	R	Electoral Party Organization Staff	Interest Group	2020	12
2013	Ravel	D	State Election Staff	Law Professor	2017	4

(*continues*)

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TABLE 7.3—*Continued*

Year Appointed	Commissioner	Party	Prior Position	Position after FEC	Year Departed	Years on FEC
2013	Goodman	R	**Private Political Law**	**Private Political Law**	2018	5
2020	Trainor	R	**Private Political Law**	Incumbent		
2006	Walther	I	State Election Staff	Retired	2022	16
2003	Weintraub	D	**Private Political Law**	Incumbent		
2020	Cooksey	R	Congressional Staff	Incumbent		
2020	Dickerson	R	Interest Group Executive Director	Incumbent		
2020	Broussard	D	FEC Staff Attorney	Incumbent		
2022	Lindenbaum	D	**Private Political Law**	Incumbent		

Source: Compiled by authors from Federal Election Commission data and other sources.

a persistent feature of FEC politics. In an October 2019 interview, FEC chair Ellen Weintraub explained that even when the FEC has a working quorum, some commissioners refused to find any credence to allegations of campaign finance law violations, whether those accused of wrongdoing were their political friends or foes.[21] If the enforcers refuse to enforce, the law's regulations are meaningless. The strategy of actively undermining the FEC's authority began in 2007 when the Senate refused to confirm nominees to give the FEC a working quorum. Once the quorum was restored in 2009, the rate of deadlocked votes (tie votes) rose from 1 percent annually between 2003 and 2008 to 16 percent in 2009 and 11 percent in 2010 (Kroll 2011). The commissioners were now less inclined to come to agreement and more often split along partisan lines.

The Work of the FEC

In its annual report, the FEC describes its work in three categories: (1) provision of campaign finance data; (2) to promote compliance; and (3) to interpret the law (Federal Election Commission 2020, 202).

Providing Campaign Finance Data to the Public

Of the three areas of FEC responsibility, dissemination of public data is the most successful. The FEC's own data demonstrate its high rate of

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posting materials on the internet within the required 48 hours (upwards of 95 percent) (Federal Election Commission 2021c, 32). Of course, given the short turnaround time, the filed reports cannot possibly be checked for accuracy, but they are there for us to see. While we can locate an abundance of data, many studies have demonstrated its shortcomings, particularly with the disclosure of individual contributors. As Jennifer Heerwig and Katherine Shaw explain, the FEC gives us contribution information, yet the data are poorly positioned to identify contributors to several campaigns or even to the same campaign several times. This is due partly to the lax enforcement of contributor information disclosure. Contributors are supposed to supply their full legal name, address, occupation, and employer when they donate. If a contributor leaves one or more of these fields blank or enters nebulous terms such as "retired" or "self-employed" for occupation, the FEC merely asks the campaign to make a "best effort" to obtain the correct information (Heerwig and Shaw 2013, 1480). The FEC has better luck with its reporting of expenditure data, but something as minor as a spelling error can lead to incomplete or inaccurate information about donors.

Each expenditure reported must declare the purpose of the disbursement. Unfortunately, filers use vague or simplistic categorizations on spending reports. To improve the interpretability of the disclosure, the FEC clarified in 2007 and 2013 what acceptable purpose codes look like (Federal Election Commission, Purpose Codes n.d.). Still, there is no mechanism to force filers to use these codes meaningfully. As a result, the codes themselves have not kept up with the times. For instance, the difference between using the term "media" and "online ads" is significant (Williams, Gulati, and Zeglen 2020, 323–25). Worse still, when Scott Limbocker and Hye Young You analyzed spending reported from FEC records from 2004 to 2014, they found the records replete with mistakes and omissions. In fact, only 36 percent of spending items included the suggested FEC purpose codes in 2004, rising only to 44 percent in 2014 (Limbocker and You 2020, 115–16). To complete their analysis, the authors had to fill in gaps with data from OpenSecrets, and even that left a significant number of records incomplete.

Even if the reported information is accurate, we take a big leap if we assume that a "typical" voter can access the information captured by the FEC and make their own decisions about candidates and their backers. Heerwig and Shaw (2013, 1486) detail what one would need to do to examine these data:

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> The bulk of existing disclosure data, including information about the sources from which a candidate has received money over time, is also available for download on the FEC website in the form of "detailed files" listing each contribution a particular candidate or committee received in an election cycle. The files are formatted as raw text files—to the untrained eye, they appear as long rows of jumbled letters and numbers. Using the files involves downloading thousands or possibly millions of records, having access to a software program capable of reading a large amount of data (generally beyond the capacity of Microsoft Excel), and then creating a corresponding "data dictionary" for the disclosure information to be properly formatted. After this tedious process, the user must then analyze the data—a task that potentially requires not only technological know-how, but also some understanding of statistics. As a result, most voters are dependent on informational intermediaries to clean, code, and analyze the FEC data. Voters thus have no unmediated understanding of the disclosure data. Instead, what voters learn of patterns of influence in the campaign finance system is filtered through the interpretive lens of informational intermediaries.

Indeed, these "intermediaries" act as the key to making sense of FEC data for most people. Early internet use by political journalists transformed campaign finance data reporting. The main reason journalists could make good use of these data was because of OpenSecrets.org, the website created by the nonprofit Center for Responsive Politics. They published paperbound reports on the financing of the 1988, 1990, 1992 and 1994 elections. Then, the OpenSecrets.org website was launched in 1996 (May, Graf, and Thompson 2002, 23–24).

The Center for Responsive Politics intentionally focuses their repackaging of the FEC data to fit the needs of journalists. The FEC data are presented to reveal certain activities or connections. For example, Albert May, Joseph Graf, and Jason Thompson (2002, 26) explain that "the center also has done what others have shied from doing—grouping individual and political action committee contributions into industrial or ideological blocs of money that can be tracked and correlated to issues." When former FEC general counsel Larry Noble was the center's executive director, he

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said of the organization, "We're nonpartisan and we're not a campaign finance reform advocacy group, while we definitely have a view about how money buys access" (May, Graf, and Thompson 2002, 26).

In 2017, the FEC announced a major overhaul of its website, making the user interface more intuitive. When the project's implementation was announced, FEC chairman Steven T. Walther said, "We believe that improved access to this information will increase public confidence in and engagement with our democratic process" (Federal Election Commission 2017a). This statement supports the view that disclosure and transparency can fulfill the requirements of government openness. However, an analysis of several government databases (including the FEC's) concludes that "regulation by disclosure" is both a path of least resistance from the regulated and easier to do than conventional regulation tactics without actual enforcement actions, which we discuss below (Cortez 2018, 28).

Promoting Compliance

The FEC approaches compliance with the law as two processes: educating/informing filers on how to comply with the law and holding filers to account with enforcement actions. Many would agree the FEC does the first better than the second.

Educating Filers

The FEC provides extensive educational services for those who must potentially file their forms with the agency. Their *Guides* are provided online, are free of charge, and are organized by filer type (Federal Election Commission, Guides n.d.):

- Candidates/Authorized Committees
- Political Party Committees
- Corporations and Labor Organizations
- Political Action Committees (PACs)
- Other Filers (certain independent expenditures, express advocacy, and electioneering communications)

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Additionally, the FEC has video instructions as webinars or short videos on the FEC YouTube Channel (https://www.youtube.com/user/FECTube). If requested, the FEC also provides one-on-one or group trainings free of charge. The FEC reports user "satisfaction" with all their training programs at a 4.45 on a 5-point scale, but no information is given on the number of users (Federal Election Commission 2020, 31–35). However, combined with the frequent mentions of the toll-free telephone number for the FEC, email addresses, archives of newsletters, and more, most motivated campaign committee administrators can find the information they need in a variety of formats.

Enforcement

One of the main functions of bureaucracies is to enforce the law they were designed to implement. Currently, the FEC enforces the law by investigating cases brought before it from one of four sources: audits, complaints, referrals, or self-submission (i.e., catching your own mistake before the FEC does) (Federal Election Commission, Enforcing Law n.d.). The FEC conducts random audits of a select few campaign committees' filings. Complaints about suspected campaign finance violations can be filed by *anyone* (even political opponents) who file a "sworn complaint" explaining the allegations. Other government agencies can refer suspected violations of the law to the FEC. Finally, individuals can report themselves as violators with a self-submission, which Adam Bonica and Jenny Shen (2013) call the "self-auditing" or "self-regulating" model of enforcement.

Registering complaints against opposing groups or candidates is the most common way investigations start. Complaints go to the FEC's Office of General Counsel (OGC), which assesses the completeness of the filing. Then, the complaint is issued a "Matter Under Review" or MUR number and the OGC recommends a course of action. At this point, the FEC has several options: it can dismiss the complaint, it can refer the complaint to the Alternative Dispute Resolution (ADR) Office (for minor or routine matters), or it can continue its investigation. If the FEC wants to pursue the MUR, the commissioners will vote to say there is a "reason to believe" that an unlawful event occurred. If four commissioners agree to investigate, the political committee named in the complaint has an opportunity to respond to the allegations (Federal Election Commission 2012, 10–

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12). If the FEC finds a violation has occurred, it will offer a conciliation agreement to the violating party stating the law has been violated and recommending "an agreement to pay a civil penalty and/or possibly take corrective actions, such as refunding impermissible contributions, amending reports, hiring compliance specialists, or attending FEC educational seminars" (Federal Election Commission 2012, 17). At this point, the FEC and the respondent attempt to negotiate a settlement.

From the FEC's founding in 1975 until 2000, all enforcement matters were examined by the entire Commission. This meant that most of the cases in front of them were minor and even procedural. In 2000, the FEC added two other enforcement paths besides the MUR: Administrative Fines and Alternative Dispute Resolution. In an analysis of the FEC's enforcement programs, Todd Lochner, Dorie Apollonio, and Rhett Tatum (2008, 217) refer to the Administrative Fines program as "a parking ticket type model of enforcement for late filing offenses that shifts the burden of persuasion onto the respondent." Generally, an FEC "parking ticket" is issued for a missing or late report. A table that categorizes the fines for various offenses states the amount levied. ADR allows filers who admit to a violation to resolve the problem expeditiously, and usually with a reduced fine (Federal Election Commission, Administrative Fines n.d.).

All reported potential violations are investigated by the Reports Analysis Division of the FEC, whose staff handle the Administrative Fines program. The Reports Analysis Division:

> monitors the filing of disclosure reports filed with the Commission by federal political committees and other reporting entities, reviews their contents for compliance with the federal campaign finance laws, and, when necessary, sends written requests for further information, clarification, and sometimes correction of potential inaccuracies that appear on disclosure reports. (Federal Election Commission 2012, 7)

Having three administrative structures to handle complaints should mean that MURs are dealt with efficiently because only the most serious violations are brought to the full Commission. But a study of the results found otherwise. On the plus side, more cases received fines, but this was due entirely to the ADR program's successful pursuit and resolution of small-scale violations (Lochner, Apollonio, and Tatum 2008, 225). As figure 7.2

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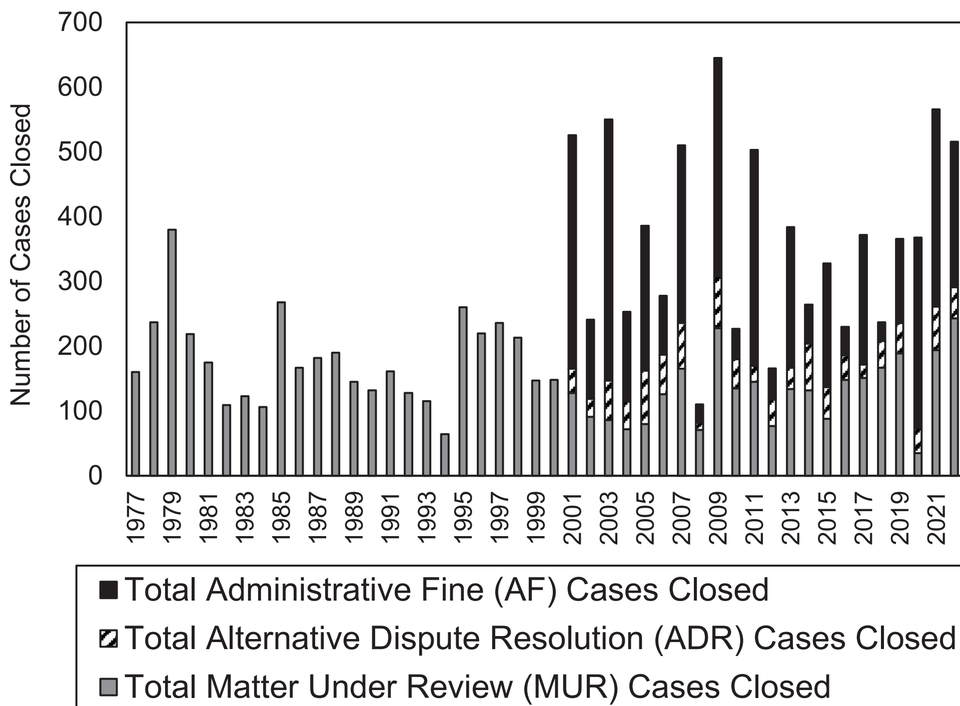

Fig. 7.2. FEC Cases Closed, 1977–2022
Source: Compiled by authors with data from Federal Election Commission, Enforcement Statistics (n.d.).
Note: The ADR program began in October 2000, and the AF program began in July 2000.

shows, more cases were considered and closed once FEC staff started processing cases through the ADR and administrative fine programs in 2001. However, more serious MURs filed with the Commission did not increase the number of cases closed, perhaps due to the gridlock baked into the FEC's structure where six commissioners can cast a 3–3 vote, which means an investigation will not continue.

Many FEC observers have pointed to the 3–3 composition of the FEC as inviting partisan gridlock, and hence nonenforcement of the law. Daniel Tokaji (2018, 177–84) discusses this critique at length in his evaluation of the FEC's performance. However, he argues that early charges of partisanship hobbling the FEC were overblown as only a trivial number of decisions were stalled this way until 2008 (as shown by Michael Franz 2020). Former commissioner Ann Ravel explained that, after 2008, bipartisan

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gridlock steadily increased, leading to fewer investigations of MURs, thus allowing for questionable practices to continue unabated (Ravel 2017).

The FEC and the Department of Justice

When federal campaign finance law is violated and the FEC cannot come to a resolution through one of the channels detailed above, lawsuits are another remedy. If the case involves civil litigation (as opposed to criminal charges), the FEC staff attorneys prosecute the case. If the case involves criminal litigation, the Election Crimes Branch of the Public Integrity Section of the Department of Justice prosecutes the case. Almost all enforcement actions are civil in nature, which means that while some aspect of the law was violated, the violation did not meet the conditions for criminal investigation. Civil prosecution may result in payment of a fine or other monetary punishment, while a criminal conviction may result in incarceration. According to the DOJ's Election Crimes Branch's handbook, FECA stipulates conditions for criminal investigation: "Section 30109(d) generally requires that two elements be satisfied: the violation must have been committed 'knowingly and willfully,' and, with certain exceptions, the amount involved in the violation must aggregate $2,000 or more in a calendar year" (Pilger 2017, 152). Penalties for violating the law under FECA were notoriously weak until the BCRA strengthened criminal penalties to prevent "the corruption and the appearance of corruption arising from FECA violations, and the consequent adverse effect on the proper functioning of American democracy" (Pilger 2017, 151).

It is very difficult to find good information on the number and types of enforcement cases the FEC and DOJ handle for campaign finance violations. A GAO report commissioned by Senator Amy Klobuchar (D-MN) in early 2020 has very good estimates. The GAO reports that from 2012 to 2017, the FEC investigated 1,164 alleged violations from 843 MURs, or an average of 233 per year (U.S. Government Accountability Office 2020, 20–21). More than a quarter of these alleged infringements involved violations related to reporting requirements, 15 percent were for prohibited contributions (from corporations and others), 11 percent for disclaimer violations, 7 percent for excessive contributions, and a smaller number for contributions in the name of another, personal use of contribution funds, soft money, and other alleged violations (U.S. Government Accountability Office 2020, 22).

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By contrast, the DOJ, through its Public Integrity Section, filed 23 FECA related charges from 2010 to 2017, or 3.3 charges per year (U.S. Government Accountability Office 2020, 34). The DOJ can also prosecute cases through U.S. attorneys, but the data on these actions are sparse. The DOJ and FEC have a memorandum of understanding that specifies procedures for cooperation in investigations. However, from 2002 through 2017, the FEC referred only six cases to the DOJ for criminal consideration (U.S. Government Accountability Office 2020, 37). The DOJ and U.S. attorneys may begin criminal investigations without referral from the FEC if they become aware of potential crimes based on informants and other investigations they may be conducting. For instance, the DOJ brought charges against former president Trump's personal attorney Michael Cohen for making payments in 2016 to two women who said they had extramarital affairs with Trump. Because the payments were intended to influence the outcome of an election, the Justice Department said the payments were unreported campaign contributions in excess of the contribution limit, and Cohen pleaded guilty to these charges in 2018 (Day and Tucker 2018). As the DOJ is not required to disclose their ongoing investigations to the public, it is impossible for us to know if the FEC's inaction on an allegation is due to their own gridlock or because they have been asked to put their investigation on hold while DOJ finishes theirs. For instance, the DOJ very publicly asked the FEC to halt any investigations into the 2022 campaign of Congressman George Santos (R-NY) and to provide the DOJ with documents they need for their ongoing investigation into his campaign (Stanley-Becker, O'Connell, and Brown 2023).

Interpreting Campaign Finance Law

To implement laws, executive agencies must answer new questions about the law's application and reach. The FEC does this by issuing regulations pertaining to the laws and issuing AOs.

Issuing FEC Regulations

As an executive agency, the FEC must issue regulations on occasion. Executive agencies use regulations to fill in the details of how laws will be imple-

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mented and enforced, especially since Congress cannot anticipate every question that thousands of political committees might have. All executive agencies follow a transparent process to add new regulations. When a new law is passed (or a court case invalidates or reinterprets part of a law), the implementing agency, in this case the FEC, issues regulations drafted internally. The draft regulations are then posted in the Federal Register and a public comment period commences. The FEC may revise the regulations in response to public feedback (Carey 2013, 2). The FEC then will vote on the final regulation. Next, the regulation goes to Congress for its review. If Congress accepts the regulation, it becomes part of Title 11 of the Code of Federal Regulations. However, a legal challenge to the regulation can also derail its adoption. That can happen before or after implementation. The FEC has a comprehensive list of all regulations it has issued on its web page, as well as their fate (adopted, rejected, or challenged).[22]

Regulations issued by federal agencies can have great impact. For instance, after the 2007 *Wisconsin Right to Life* decision, the FEC issued new regulations to comply with the decision. The FEC went beyond the Court's mandate, narrowing the disclosure requirements for corporations and labor unions. As a result, they were now required to disclose only contributions specifically designated for electioneering communications, a rule that made it easy to avoid disclosure altogether (see chapter 4 for a detailed discussion of the *Wisconsin* case).

Issuing Advisory Opinions

The FEC supplies extensive directions and training for potential filers about how to navigate the reporting process as we explained earlier, but not every question is covered. The FEC is one of many executive agencies set up to issue AOs. This is how agencies advise the individuals, organizations, or firms they regulate about whether a practice they are considering is consistent with current law or not. For example, given how quickly technology changes, new methods of campaign communication are often available before the legislative or executive branches have a chance to respond. Candidates, parties, and groups often ask the FEC for an AO before trying a new method.

Anyone can ask for an AO from the FEC. The request must refer to a particular action the requestor plans to implement. AOs are not for hypo-

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thetical situations or on behalf of someone other than the filer. The FEC will issue an AO within 60 days of a request if four commissioners vote to approve it. If fewer than four approve, no AO can be issued. AOs are generally issued during open meetings of the Commission and the requestor of the AO is invited to attend (Federal Election Commission, Advisory Opinions n.d.). Usually, AOs are minor announcements, but sometimes they can attract quite a lot of attention either because of the issue at hand or because of who may be requesting the AO. One good example of both conditions was when comedian Stephen Colbert sought an AO about his super PAC "Americans for a Better Tomorrow, Tomorrow" in 2011 (see chapter 5 for context). Colbert wondered if asking for donations for the super PAC on his nationally broadcast television show, *The Colbert Report* (Steinberg 2005), would mean that his network (Viacom's Comedy Central) would be making a campaign contribution. As Sam Garrett of the Congressional Research Service explains, the event provided a teachable moment about both campaign finance law and the FEC's AO process:

> The Colbert Super PAC posed . . . a . . . prominent set of questions—prominence that was bolstered by Colbert's appearance before the Commission and a televised rally afterward. Essentially, the issue in the Colbert request was whether the comedian could promote his super PAC on The Colbert Report. If so, would doing so constitute in-kind contributions from Colbert Report distributor Viacom and related companies? Colbert also asked whether these contributions would be covered by the FEC's press exemption.[23] The FEC determined that coverage of the super PAC and its activities aired on the Colbert Report would fall under the press exemption and need not be reported to the FEC. If Viacom provided services referencing the super PAC for air in other settings, however, they would be disclosed as in-kind contributions. Viacom would also need to report costs incurred to administer the PAC. (Garrett 2012, 717)

This example, and the unanimous AO issued, shows how a new activity can be approved by the FEC in advance of a potential complaint. While an AO is not a bureaucratic regulation, by explicitly stating that an activity is consistent with the law, it may have the same effect. Campaign groups pay attention to AOs because when a new activity meets

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approval, it is a signal that they may engage in the same activity legally. AOs also can lead to fewer MURs as there are fewer questions about what activities are illegal.

In a study of FEC AOs from 1977 to 2012, Franz finds that the number of AOs requested from and decided by the FEC was between 60 and 120 per year in 1977–82, its highest level ever. Since that time, the number of AOs has declined steadily (Franz 2013, 742). Our own analysis of the number of AOs issued after Franz's study concluded in 2012 shows that the number of AOs has declined even further, to around 15 per year.[24] Franz finds that the AOs became increasingly complex over time, partly because of the need to cite more precedent and partly because of the issues. He also found that interest groups ask for AOs most often, followed by candidates, and finally political parties (Franz 2013, 744–48). Questions about issue advocacy and express advocacy have been constant since 1977. Since 2000, several new issue areas have emerged, three of which are of great importance to interest groups: internet use, bundling, and rules for 527s and 501(c) groups (Franz 2013, 746).

Defending the Law in Court

Just because the FEC or the DOJ move to enforce the law does not mean those who are regulated accept punishment passively. Sometimes they sue the FEC for its decision or they complain that a rule the FEC issued or the original law itself is unconstitutional. In all these situations, the Office of General Counsel of the FEC is obligated to defend the FEC and the law in court. The FEC can also sue filers who do not comply with penalties the FEC brings against them. The many campaign finance court cases we discussed in chapters 2, 3, and 4 came about through one of these processes.

Can Campaign Finance Law Be Enforced?

As you can see, we cannot be confident that federal campaign finance law is adequately enforced. A few of the problems are obvious. There are many federal agencies or offices that are meant to take some form of action related to disclosure, enforcement, or both. In several cases the responsibilities the

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IRS and SEC now have are largely tangential to their central missions. The FEC is better at data disclosure than at compliance or defending the law. On top of that, the six-person composition of the Commission with commissioners from opposing parties means that it is difficult, if not impossible, to get a clear consensus on many disputed issues brought before the agency. In the case of the FEC, a 3–3 vote results in no investigation or other action and thus maintenance of the status quo, and this happens quite often.

But is a rebuke from the FEC the only way to get candidates to adhere to the law? Ben Gaskins et al. (2019, 1004) consider whether campaign finance law compliance is "self-enforcing." That is, do politicians fear the reaction of the voters to campaign finance violations? If voters react negatively to violations, then it doesn't much matter what the FEC does if the candidate is defeated. To assess this, Gaskins et al. examined both media coverage of campaign finance violations and voter reaction to it. They found that the media do cover the most serious charges (about half of all MURs), though they are not as interested in covering the eventual outcome (whether the charge is dropped or enforced). They next conducted an experiment with voters using hypothetical examples of violations based on those they discovered in the media analysis. They varied the type of violation, its severity, whether the candidate was found guilty or not, and the candidate's party affiliation. Prospective voters were bothered by serious violations—in particular, using campaign funds for personal expenses and their own tax evasion (not a campaign finance violation). Voters had a moderately negative reaction to illegal coordination with a super PAC and to illegal excessive contributions, but no reaction to being late with filing deadlines. Gaskins et al. (2019, 1027) conclude: "We have clear results as to why campaign finance violations decrease voters' support for a candidate. The main culprits are lowered trust and perceived ethicality rather than changed perception of ideology. In other words, character trumps politics in the face of campaign finance scandal." Perhaps if the media followed up with stories about the outcome of campaign finance violation cases, voters might be better equipped to hold candidates accountable for breaking campaign finance law.

Next, we discuss two contemporary campaign finance issues that may be unsolvable—social media regulation and the foreign money ban—and which push us to ask if technology and global economics makes campaign finance law enforcement impossible.

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Social Media Regulation

After literally years of inaction, the FEC issued new regulations on internet advertising disclosure on December 19, 2022, which took effect March 1, 2023.[25] The problem's origins are relatively simple: no such technology existed when FECA 1974 was written, and the technology was still nascent when BCRA was written in 2002. As Sam Garrett (2019a, 2) explains, "FECA defines public communications as 'a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising'." There was no mention of the internet, social media, or digital advertising.

The agency details its long journey to the new regulations in the Federal Register (Federal Election Commission 2022). The FEC briefly included the internet in a 1994 regulation and did comment on fundraising on the internet in 1995 (Fowler, Franz, and Ridout 2020, 118), but the agency did not officially include digital media in their definition of public communication until 2006 (Haenschen and Wolf 2019, 3). The 2006 FEC regulations clarified that individuals who were volunteering their time and computer skills on behalf of a candidate were not considered to be making in-kind contributions to those campaigns.[26]

The heart of the problem in digital advertising has to do with the disclaimers, or "stand by your ad" provisions that require producers of electoral communications to say who paid for the ad and if the ad was produced independently of any other source. Most people recognize this from the quickly flashed writing and the rushed reading of this language at the end of a television or radio campaign ad. See Box 7.1 for examples of disclaimer statements. But what do we do with a text message, or a tweet, or a small ad posted on Facebook or Google?

Erica Fowler, Michael Franz, and Travis Ridout (2020, 118) explain that prior to the December 2022 FEC internet advertising regulation, issues surrounding digital communications were haphazard and contradictory. The FEC allowed an exemption from ad disclaimers for text messaging and mobile banner ads under the "small items" category, such as ballpoint pens and skywriting, where space limitations preclude a full disclaimer. Facebook and Google (and others) argued that digital media should qualify for both the "small items and an impracticable exemption," or be allowed to direct the audience to a website containing the disclaimer

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Box 7.1. Disclaimer Statements for Campaign Ads

The FEC provides guidance and sample disclaimer notices for various types of campaign communications. The guidelines state: "All disclaimers must be clear and conspicuous regardless of the medium in which the communication is transmitted. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked." For instance, television and radio ads require a "stand by your ad" disclaimer. The advertisement must contain both an audio statement and a readable written statement of approval. Here are some examples:

Candidate Ad

Audio: I am Abraham Lincoln, a candidate for the House of Representatives, and I approve this advertisement.
Written: This message was approved by Abraham Lincoln and paid for by People for Lincoln.

Political Committee, Corporation, Union, Individual or Group Electioneering Communications and Independent Expenditure Ad Not Authorized by a Candidate

Audio: Paid for by the Court Jesters Union PAC (www.jesterspac.net) and not authorized by any candidate or candidate's committee.
Written: Paid for by the Court Jesters Union PAC and not authorized by any candidate or candidate's committee. The Court Jesters Union PAC is responsible for the content of this communication.

Source: Federal Election Commission, "Advertising and Disclaimers," https://www.fec.gov/help-candidates-and-committees/advertising-and-disclaimers/ (Federal Election Commission, Advertising and Disclaimers n.d.). For the guidelines, see this source under the section "Advertising and Disclaimer Information and Examples for Federal Campaign Committees, Parties and PACs."

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(Haenschen and Wolf 2019, 3). This social media loophole created a perverse situation in the 2016 presidential campaign, as Young Mie Kim et al. (2018, 516) explain:

> No law adequately addresses political campaigns on digital platforms. Thus, the [2010] *Citizens United* ruling, the lack of adequate law, as well as the lax disclaimer policies for digital platforms altogether created multilevel loopholes for campaigns run by anonymous groups, which potentially includes foreign countries' disinformation campaigns.

Hence, the problem of direct foreign spending in U.S. elections is linked to the failure of Congress and the FEC to create a clear set of guidelines for online communications.

The FEC online communications regulations took effect in 2023. They change both the definition of "political communication" to include internet communications and specify disclaimer requirements for online ads that now prevent advertisers from hiding behind the small items' exception. The FEC makes clear that only communications where a fee is involved (i.e., it cost to post or send the communication) and the message is carried by a third party are regulated. Individuals can post messages on social media platforms without having to claim them as ads. The new criteria for disclaimers clearly state that they must be visible "without taking any action," as in directing someone to click on a link to the disclaimer. The regulations stipulate the font size of the type for the disclaimer, contrast and color backgrounds, length of appearance if in video format (four seconds), and audio requirements if audio is used without video (Federal Election Commission 2022). These new regulations will generate requests for AOs and give the FEC one more item to enforce starting with the 2024 election cycle.

Foreign Donations and Spending in US Elections

The 2016 elections brought up an issue that had been on the backburner of campaign finance policy for decades: foreign campaign activity in U.S. elections. Foreign campaign money has long been prohibited in American elections, and the FECA bans foreign nationals from "'directly or indi-

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rectly' making contributions or donating any 'thing of value' in any federal, state, or local election; and prohibits contributions to political parties and other political committees" (Garrett 2019b). Donors must be US. citizens, permanent residents of the U.S., or a committee of American interests. One country trying to influence another's internal politics has a very long history, especially between Russia and the United States during the Cold War era (Lukito 2020, 242). From 2015 to 2017, Russian officials, through their Internet Research Agency (IRA), took advantage of indecision over regulation of campaign activity online to champion the presidential candidacy of Donald Trump (Masters 2018).

The IRA's strategy was twofold: use paid advertisements on Facebook, and separately test unpaid messages on Reddit. The messages that worked best on either platform were then repeated on Twitter (Lukito 2020). This division between paid and unpaid campaign activities by foreign nationals illustrates the FEC's role in enabling the IRA to operate without detection. As we noted above, the FEC does not regulate unpaid internet communications. So, a subversive tweet that is retweeted is outside the FEC's purview. However, as Pichaya Winichakul explains, it is on the paid side where the FEC fell down. The IRA clearly violated every general campaign finance principle the FEC is meant to regulate—the IRA did not register as a political committee (required once a group raises and spends more than $1,000 on federal elections), report its political activity, or disclose electioneering communications run close to an election (Winichakul 2018, 1393–94). With the new 2023 FEC internet advertising regulations in place, foreign interference in our elections is less likely, at least for paid advertising.

Conclusion

We have spent six chapters of this book explaining the rationale for campaign finance laws and practices currently in place—why we have the system we have—and this chapter explains why these laws are not always enforced. While it is certainly true that the FEC is the most effective information gathering and enforcement agency we have ever had in campaign finance regulatory history, that is different from saying that it can carry out its enforcement functions well. Moreover, the piecemeal way campaign finance laws and regulations are made, with Congress, the courts,

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and multiple federal agencies all involved, and the fragmented regulatory system, with many agencies responsible for interpreting and enforcing different parts of the law, means the resulting rules that the various players in the campaign finance system must follow are sometimes inconsistent or even contradictory. This regulatory landscape also may allow those looking for ways to raise and spend more to do so under the disclosure radar to skirt the intent of the law by operating within the cracks of this fragmented system.

Enforcement and disclosure force us to reflect on several of our fundamentals. Can we have a responsive feedback loop between voters and elected officials if public records are incomplete or hard to use? It is not easy to find the full extent of anyone's campaign finance activities in the present regulatory system. So, is it possible to prevent corruption in this system? It is clear we cannot quite know the answer to that question. But as free speech supplanted corruption prevention as a fundamental constitutional concern, we see that filers have little problem supplying partial information.

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CHAPTER 8

Why We Have the System We Have

Citizens need information to make decisions about who should represent them in elective office. If they do not get that information, then we cannot claim to have an effective feedback loop between elected officials and the constituents they represent, and we cannot hope to have a healthy democracy. At the same time, our political campaigns are funded entirely with private money. If private citizens (and the groups, corporations, and unions they form) are the only ones who can provide the resources candidates need for elections, then we must ask if our political system's outcomes are still fair to those who cannot provide the resources.

About 50 years ago, earnest reformers set out to regulate the money behind successful candidates to both level the playing field for all candidates with limits on contributions and spending and to expose narrowly interested individuals and groups that reformers thought had far too much influence in our political system. Many of the provisions they enacted have been amended, altered, or taken down by court decisions, or circumvented by clever campaign actors. We explained the significant reforms legislated in the 1970s and the Supreme Court's interpretation of competing claims to rights to free speech and the desire to prevent corruption. Further reform legislation (BCRA in 2002) tried to reclaim limits on campaign-donor influence only to be unraveled by the courts.

We explained how the evolving campaign finance system gives the donorate a variety of options to provide resources to political candidates and committees. Donors are not at all representative of the American public, even if the pool of donors who make small contributions is diversifying. But the energy is with the wealthy donors who now have so many options available to them that limiting their participation in campaign

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finance, or forcing it out into public view if they prefer anonymity, is basically impossible.

Then, we discussed how candidates for office need to persuade donors that their campaigns are worthy of investment. We explained the rise and fall of the presidential public funding system and how its demise, along with the passage of BCRA, led to increased efforts by elected officials to pursue more hard money funds. Candidates for office find themselves in very different fundraising situations by their status (incumbent/challenger/open seat) and the competitiveness of their election. Due to the variation in donor motivations, we now have a situation where access-motivated givers care more about establishing connections with long-term incumbents than about maintaining a healthy feedback loop between lawmakers and those they represent. Moreover, both candidates and donors are aware that fundraising to help others is important for a member of Congress's career advancement—either to a more powerful position or to a higher office. It is at this point that we begin to see how elected officials are reliant on the support of wealthy donors, and we grow concerned about how that shapes the policy they generate.

Disclosure in this system is dissipated and violations of the law are rarely prosecuted. Federal campaign finance rules are particularly fragmented because different governmental bodies developed the rules incrementally. To be fair to the enforcers, campaign finance law attempts to regulate the corruption (or its appearance) that might exist between donors and candidates while keeping a privately funded system intact, a difficult task. And yet voters do seem to care about campaign finance violations, and this can act as a deterrent. Still, campaign finance regulation is not a self-enforcing policy. Contemporary reformers continue to try to change the system, but the political landscape, the narrow focus on protecting free speech rights, and the lack of clarity about what is and is not corruption all make it difficult to address many of the concerns we have discussed. We consider these efforts in this chapter, but first we examine the wide variety of campaign finance regulations and activities in the states and various state-level efforts to address some of those same concerns.

Campaign Finance in the States

One dimension of campaign finance in the U.S. we have only touched upon has to do with what happens in the 50 states. U.S. Supreme Court

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Justice Louis Brandeis famously called states "laboratories of democracy" as states can experiment with new policy ideas while still operating within the macro structure (capitalism, representative democracy) of the nation at large.[1] Some states and localities have tried a variety of modifications to their campaign finance systems in response to the problems our national system produces as well as to their own histories and practices.

We have two important dimensions to consider. First, states do operate within a system where the federal government's policies are privileged if state and federal practices clash. Second, public financing has been tried in several areas. We begin with the first issue—can the states do much in the way of experimentation?

Federalism and Campaign Finance

Federalism is the balance and sharing of powers and responsibilities between the states and the federal government. Yet the U.S. Constitution and the federal campaign finance legislation discussed in this book say virtually nothing about how state and local elections should be run or how they may be funded. Indeed, the 13 original colonies had been running their own executive, legislative, and local elections when they formed into the United States. As on the federal level, states have a "presidential" system of government, with an executive (governor) and a bicameral (two-chamber) legislature (except Nebraska's unicameral body). States have fixed election times for these offices, and most have primary elections to choose party nominees. As table 8.1 shows, 11 states hold their major statewide elections in presidential election years, 36 states hold gubernatorial elections in midterm years (nonpresidential even-numbered years), and five states (Kentucky, Louisiana, Mississippi, New Jersey, and Virginia) hold elections in odd-numbered years for a variety of historical reasons (Ballotpedia n.d.). States that hold elections in odd-numbered years hold federal elections in even-numbered years as well (meaning their citizens vote a lot).

Each state adopts campaign finance rules that apply to candidates for governor, state legislature, other offices, and, if they have them, ballot measures. Some have different rules at the county and city levels. State campaign finance laws range from those that place no limits at all on contributions from individuals, parties, PACs, corporations, and unions to candidates (e.g., Alabama, Nebraska, Oregon, Utah, and Virginia), to

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TABLE 8.1. When States Hold Elections for Governor

Presidential Years	Midterm Years	Odd-Numbered Years
DE, IN, MO, MT, NH,* NC, ND, UT, VT,* WA, WV	AL, AK, AZ, AR, CA, CO, CT, FL, GA, HI, ID, IL, IA, KS, ME, MD, MA, MI, MN, NE, NV, NH,* NM, NY, OH, OK, OR, PA, RI, SC, SD, TN, TX, VT,* WI, WY	KY, LA, MS, NJ, VA

Source: Compiled by the authors with data from Ballotpedia, Governor (State Executive Office) (n.d.).

* New Hampshire and Vermont have two-year terms for governors.

some that restrict or prohibit these contributors (e.g., Alaska, Colorado, Maine, Montana, and New York), and some that place limits on some but not all types of donors. Thirteen states have a version of public financing for candidates (National Conference of State Legislatures 2023a).

When state and federal elections do align in a locality, candidates who appear on the same ballot, their affiliated political parties, and the people and groups that support and oppose them are often operating under multiple campaign finance rules, because the election is happening on the same day and on the same ballot. For instance, while a corporation or union may contribute directly to a candidate running for the state legislature in Utah, that same corporation or union is prohibited from making a contribution directly to a candidate for the U.S. House, Senate, or the presidency who appears on the same ballot there (National Conference of State Legislatures 2023b). Moreover, many (but not all) states allow citizens to vote on legislative and constitutional changes through ballot measures, which are not used at the national level. These initiatives and referendums appear on the same ballot as candidates and are often subject to different fundraising and spending rules than those covering candidates (National Conference of State Legislatures, Initiative and Referendum States n.d.).

Party Coordinated Campaigns

Political party organizations can work together across all relevant levels. The law recognizes all party committees under the same party label as con-

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nected and thus allows, for example, party committees to transfer unlimited amounts to and from one another. In the early 1900s, state party organizations, fueled by patronage jobs and control of candidate nominations and their campaigns, were the centers of political power in the American political system. By the 1960s, party-controlled patronage jobs had all but disappeared. Candidates could win the nomination in a primary election without their party's help or approval, and state and local party organizations had become service-oriented organizations that worked to help their candidates win in this new candidate-centered environment (Bibby and Schaffner 2008, 112–13; see also Herrnson 1988).

Today, both national parties participate in robust coordinated campaigns that are run mostly by the state party committees, especially in presidential battleground states. The state parties generally hire experienced campaign operatives to manage the coordinated campaign for the election cycle. These coordinated efforts focus mostly on voter identification, voter registration, and get-out-the-vote (GOTV) activities aimed at electing all the party's candidates on the ballot in a particular locality.

Different rules also present opportunities for creative campaign finance practices. For instance, party organizations at the national level mastered the art of money laundering soft money with state party organizations in their party's family in the 1990s (see chapter 3). Depending on the state laws, soft money could be transferred from a national party committee to a state party committee, which could in turn spend money in ways that helped *federal* candidates win their elections, even though the law prohibited national parties from using soft money for federal candidate support (Dwyre 1996, 415–19; see also Kolodny and Dwyre 2003). Federalism makes it possible for states to treat soft money differently, and candidate and party campaign finance strategies are thus shaped by such differences in state laws.

Then, BCRA (2002) banned national party committees from raising soft money. But BCRA also included a provision to allow state and local parties to raise limited soft money called *Levin funds*, after Senator Carl Levin (D-MI), to pay for certain party-building activities, such as voter registration, voter identification, get-out-the-vote drives, and generic party campaign activity, but not for anything that refers to a federal candidate (Federal Election Commission, FEA n.d.). Corporations and labor unions may make Levin fund donations to a state party up to $10,000 per donor (if the state law allows them to donate to state parties). Levin funds were

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to be a partial replacement for the soft money the national parties could no longer raise and send to their state and local parties to help them engage in party-building activities, which are important to a thriving representative democracy. Yet state and local party committees have not engaged in much Levin fund activity. All Democratic and Republican state and local party committees raised only $6.7 million in Levin funds for the 2014 elections, $5.2 million for the 2016 elections, $5.3 million for 2018, and $3.8 million for 2020 (Federal Election Commission, Party Data n.d.). Perhaps the parties have concluded that raising money through joint fundraising committees is more effective than using Levin funds, which have restrictions on their use.

The Long Arm of the Federal Law

The supremacy clause of the U.S. Constitution means that federal law will likely trump a state law that contradicts it. Montana passed a Corrupt Practices Act in 1912 that banned independent corporate political spending in the state.[2] After the Supreme Court's 2010 *Citizens United* decision, which permitted unlimited corporate and union independent spending in candidate elections and led to the emergence of super PACs, a conservative nonprofit group, American Tradition Partnership, challenged the state's continued enforcement of the law in light of the new federal interpretation. The Montana Supreme Court ruled against American Tradition Partnership, but they appealed to the U.S. Supreme Court. In *American Tradition Partnership v. Bullock* (2012)[3] the Court found that *Citizens United* did indeed apply to Montana and that the state's ban on independent corporate spending was an unconstitutional restriction on protected free speech.

In 1997, the state of Vermont overhauled its state-level campaign finance laws. They instituted an expenditure limit for candidates for state offices (though challengers could spend more than incumbents), declared that independent expenditures in excess of $50 (including by political parties) would count against that spending limit, and lowered the individual and party contribution limits in state races to the lowest in the country (BeVier 2006). Some Vermont voters and political activists challenged the law's constitutionality, saying that spending limits and low contribution limits violated their rights as protected in *Buckley*. They also charged that

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the law denied a party's right to make independent expenditures protected in *Colorado I*. One court struck down the law, while the next (the Second Circuit Court of Appeals) upheld it, so both sides appealed to the U.S. Supreme Court. In *Randall v. Sorrell* (2006),[4] the Court first invalidated Vermont's expenditure limits as a violation of the *Buckley* ruling that campaign spending is protected First Amendment speech, then it struck down independent expenditure limits, and finally it struck down Vermont's extremely low contribution limits ($200–$400 per candidate, the lowest in the nation) as an unconstitutional restriction that might prevent candidates from campaigning effectively, especially challengers.

Some states' disclosure requirements have been affected by federal court decisions. For instance, both North Carolina's (2008) and South Carolina's (2010) disclosure requirements were ruled unconstitutional (in separate cases). The courts ruled their definitions of "campaign committees" and "political committees" were considered too broad because they included nonprofit groups such as North Carolina Right to Life and South Carolina Citizens for Life (Kulesza, Miller, and Witko 2017, 473).[5] Yet some states have successfully *strengthened* their disclosure rules in response to the 2010 *Citizens United* decision. Colorado established a system of independent expenditure disclosure that kicks in once a group spends $1,000, and the groups must also disclose donors who give them $250 or more (Kulesza, Miller, and Witko 2017, 480; National Conference of State Legislatures 2018).

Some states have tried to limit nonresident contributions and spending, a restriction that does not exist for federal candidates. Oregon in 1994, Alaska in 1997, and Vermont in 2012 passed laws to bar nonresidents from making campaign contributions to candidates running in their states by limiting the proportion of contributions from outside the state a candidate could accept, and Alaska banned contributions from groups organized outside of Alaska (Mazo 2019, 790). These state laws were struck down by federal courts, which ruled that they restricted First Amendment free speech and freedom of association rights (Mazo 2019, 790–97).[6]

A number of states allow candidates to use campaign funds for campaign-related childcare expenses. California and Idaho have taken the lead in prohibiting a foreign government or entity from contributing or spending in connection with a state or local candidate or ballot measure (Frulla, Hunter, and Hatahet 2022). Other recent state-level campaign finance changes include restrictions on the use of unspent campaign funds,

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electronic filing and reporting requirements, increased contribution limits, and enhanced penalties for violations of campaign contribution and disclosure laws (Frulla, Hunter, and Hatahet 2022).

What Is Campaign Finance Like in the States?

The constellation of state-level systems reveals the variety of choices in constructing a campaign finance system. How we decide which ones are better or worse depends on what values we wish to maximize. For instance, former FEC commissioner Bradley Smith founded the Institute for Free Speech, a conservative watchdog group and think tank that advocates for a less restrictive campaign finance system. The institute published a study in 2018 about campaign finance laws in the 50 states called "Free Speech Index: Grading the 50 States on Political Giving Freedom" (Institute for Free Speech 2018). A summary of their assessment is in table 8.2. The fewer restrictions a state had on campaign donations, the higher "grade" they received. Eleven states had no donation limits and earned "A" grades. The states with failing grades have very low contribution limits, and, according to the Institute for Free Speech, burdensome reporting requirements, which, they argue, restrict free speech (e.g., Alaska, Kentucky, Massachusetts, Oklahoma, and West Virginia). Given everything we have discussed here about the restrictions on contributions at the national level, particularly that contributions to candidates are the most direct potential avenue for quid pro quo corruption, most people would be surprised to learn that in Alabama, Nebraska, Oregon, Utah, and Virginia (as of 2023), all campaign finance participants, including corporations and labor unions, may make unlimited direct contributions to candidates (National Conference of State Legislatures 2023b).

Experimenting with Public Funding in the States

Reformers remain committed to the *holy grail* of public funding as the answer to much of what is wrong with American politics, although scholars have produced an array of mixed evidence on the effects of campaign money. Yet the prospect of government funding of campaigns has not been popular with the American public (Garrett 2011, 48; Weissman and Has-

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TABLE 8.2. Institute for Free Speech "Grades" of State Campaign Finance Laws from Most to Least Permissive

A+/A	B	C+/C/C–	D+/D/D–	F
Alabama	Wyoming	Arizona	Arkansas	Alaska
Indiana		Florida	California	Colorado
Iowa		Georgia	Delaware	Connecticut
Mississippi		Idaho	Kansas	Hawaii
Nebraska		Illinois	New Hampshire	Kentucky
North Dakota		Louisiana	New Jersey	Maryland
Oregon		Maine	New Mexico	Massachusetts
Pennsylvania		Michigan	Ohio	Missouri
Texas		Minnesota	South Carolina	Oklahoma
Utah		Montana		Rhode Island
Virginia		Nevada		West Virginia
		New York		
		North Carolina		
		South Dakota		
		Tennessee		
		Vermont		
		Washington		
		Wisconsin		

Source: Compiled by authors with data from Institute for Free Speech (2018).

san 2005). The height of support for public funding was in 1980 when the presidential public funding system convinced 28.7 percent of taxpayers to check *yes* to dedicate $1 of their paid taxes to the public fund (Federal Election Commission 1993).[7] But even that was not a true instance of government support, as the system depended heavily on the matching of privately obtained contributions for presidential nominating contests. Then, as we discussed in chapter 6, the attraction of receiving public matching funds with conditions (spending limits) became unworkable in a front-loaded presidential primary process. The last presidential candidate to accept any form of public funding was Republican John McCain in 2008.

A growing number of states and localities have experimented with various public funding programs where candidates for certain offices (such as the state legislature or governor) may receive some (or most) of their funding through public funds. There are a variety of public funding systems around the country. They are all voluntary and there is no guarantee if a candidate participates in the program that their opponents(s) will as well. The public funds are often available only to candidates for certain offices within a state. Here are the various broad types of programs that use public money to help fund candidates' campaigns:

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Matching Funds: gives candidates some amount of matching public funds for each eligible small private contribution they raise, as in Delaware, Florida, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, New Mexico, and West Virginia. New York City, San Francisco, Los Angeles, Portland, Oregon, and other cities have various types of matching fund systems, such as New York City's program that provides up to a 9:1 match for qualifying small donations from local citizens.

"Clean" Elections: (full public financing) gives candidates full funding for their campaigns up to the spending limit if they demonstrate public support by collecting small (usually $5) contributions from a significant number of individuals (e.g., in Arizona, 200 $5 donations for a candidate for the state legislature, and 4,000 $5 donations for a candidate for governor), and the recipient candidate agrees to limit their expenditures, as in Arizona, Connecticut, New Mexico, Maine, and Vermont (Arizona Citizens Clean Elections Commission 2023).

Tax Credits and Deductions: gives donors a tax credit or deduction for a small donation to a candidate, as in Arkansas, Ohio, Oregon, and Virginia. A tax credit of typically $50 is given for qualifying contributions to certain candidates.

Political Party Funding: Alabama, Arizona, Minnesota, New Mexico, Rhode Island, and Utah provide public money to political parties for their conventions and other activities, such as voter registration.

Vouchers: In Seattle, Washington, voters established the first public funding voucher program in 2015, whereby each eligible resident receives four $25 vouchers to distribute to one or more candidates for city council. The candidates redeem the vouchers for public funds for their campaign and agree to limit their overall spending (City of Seattle 2022).

What have we learned from these efforts?

Peter Francia and Paul Herrnson (2003) outline some of the reasons reformers advocate for public funding. First, public funding could encourage more candidates (and more diverse candidates) to run and to challenge incumbents. Second, public funding would enhance electoral competition by leveling the financial playing field between incumbents and challengers. Third, because public funding requires candidates who participate to

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limit their campaign spending, it would reduce overall electoral spending. Fourth, public funding should reduce the amount of time candidates spend raising money and the importance of money in elections (Francia and Herrnson 2003, 521). Others argue that public funding also will increase voter turnout in elections (Gross and Goidel 2003). As evidence of success, advocates of public funding point to increased electoral success for publicly funded candidates, enhanced candidate diversity, candidates raising more from individuals than from interest groups, smaller contributions, and increased participation by donors who had not given previously and by small donors, including low-income donors (Millard and Paez 2022). Has public financing of campaigns achieved these outcomes?

Candidate Emergence

Raymond La Raja and David Wiltse (2015) studied both recent candidates and potential candidates before and after the adoption of a public money plan in Connecticut, which provides full grants to participating candidates who agree to limit their spending. They found that after the adoption of public financing there was no increase in the number of people running for office. While some potential candidates stated that fundraising was less of a deterrent than before, the actual number of candidates declined in Connecticut over time. Their conclusion was that the funding scheme has had *no* effect on candidate emergence in Connecticut (La Raja and Wiltse 2015). Kenneth Mayer and John Wood (1995) also found that Wisconsin's public funding system (grants to candidates with spending limits) did not increase the number of challengers. However, a study of the Seattle voucher program found a significant increase (86 percent) in the number of candidates per race who ran for city council (Griffith and Noonen 2022). Some advocates of public funding often argue that it will increase the number of women and nonwhite officials elected to office (Vyas, Lee, and Clark 2020). Yet, to date, there is no evidence that this is the case.

Increased Competition

There is some disagreement about whether public funding increases competition. One study found competition increased in Arizona and Maine

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(both have full grants with spending limits) in districts where challengers accepted public funding (Malhotra 2008). However, another analysis of Arizona and Maine found that while more incumbents faced a challenger after public funding was instituted, this increase was most prevalent in safe districts where challengers faced long odds, adding little to the overall number of competitive contests (Michael Miller 2013, 86–87). Patrick Donnay and Graham Ramsden (1995) found that very early in the life of Minnesota's public financing system (partial grants to candidates who agree to limit their spending), candidates (both incumbents and challengers) in competitive races did not accept the public money because it came with spending limits that they thought would get in the way of their victories (this is what killed the presidential public financing system). Challenger performance did improve with public money, but the amount was too little to help them defeat incumbents (Donnay and Ramsden 1995, 357, 363).

Mayer and Wood (1995) report a similar null effect on competition in Wisconsin. After the introduction of public financing, incumbents were reelected at a higher rate and with larger vote margins, leading them to conclude that strategic opportunities in contests, such as whether an incumbent is vulnerable to defeat, explain competitive campaign contests more than the amount of money raised by the participants (K. Mayer and Wood 1995, 79). Alan Griffith and Thomas Noonen (2022) found the Seattle voucher program resulted in a decreased probability that incumbents ran for reelection and a decrease in incumbents' share of the vote, but their analysis showed no statistically significant decrease in incumbent reelection.

Thus, even though it appears as if some public funding systems improve competition while others do not, we do not know what it is about those systems that makes their elections more competitive, or if, perhaps, it is something about that state's political culture, processes, and traditions that combines with public funding to enhance competition.

Reduced Electoral Spending?

The evidence is also mixed on whether public funding reduces overall spending. Public funding usually narrows the spending gap between incumbents and challengers, but this is often because challenger spending increases due to the public funds, thus increasing overall spending. Yet Mayer and Wood (1995, 80) found that overall electoral spending increased less in

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Wisconsin than spending growth in other states without public funding. Jeffrey Kraus (2011, 168, 158) examined eight election cycles under New York City's public funding system (1989–2009) and found that the reform slowed the growth of spending in citywide elections, but in city council races, spending actually increased. Although systems of candidate-based public financing with spending limits are most likely to reduce candidate spending more than other systems, this is "highly contingent on the level of those limits, defying blanket assertions about the effects (or lack thereof) of spending limits and public financing" (Gross and Goidel 2001, 188). Indeed, Michael Malbin, Peter Brusoe, and Brendan Glavin (2012, 19) argue that reducing overall electoral spending should not necessarily be the goal of a public funding system, because spending limits discourage some candidates from participating in the system: "For them, the price of accepting public money is the suicidal bargain that they have to agree to keep their spending too low to win."

Less Time Spent Fundraising by Candidates

Francia and Herrnson found that when candidates accept *full* public financing of their campaigns, their time devoted to fundraising declines by over 50 percent, but *partial* public funding has no impact on the time candidates spent raising money. They suggest full public funding would "redirect modern campaign efforts away from the 'money chase,' freeing time for other campaign activities" (Francia and Herrnson 2003, 535) and to spend more time with voters rather than wealthy donors. Indeed, fully publicly funded candidates in Arizona, Connecticut, and Maine (but not partially funded candidates in Wisconsin) "reported devoting significantly lower percentages of their campaign time to fundraising than those who opted out . . . and higher mean levels of field activity" (Michael Miller 2013, 54). Spending less time fundraising from wealthy donors and more time with voters would potentially reduce the influence of wealthy special interests on policymaking, something most observers would see as a positive change. Yet, as we discussed in chapter 2, because fundraising is a form of campaigning, candidates who do less fundraising (such as self-financed candidates and those who get public funding) miss out on opportunities to interact with local donors and to win votes (Steen 2006).

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Voter Engagement and Turnout

The Campaign Legal Center states in its 2018 report on the adoption of public financing in states and cities that the main motivation to adopt these systems is to increase citizen engagement and encourage newcomers to run for office, with corruption reduction a secondary concern (Kelley and Graham 2018, 11). Some supporters of reform link these two ideas and believe *any* money in politics hints at corruption and reduces interest in campaigns, thereby reducing voter turnout (Gross and Goidel 2003, 86). In states with public financing for gubernatorial candidates, voter turnout increased by 3 percentage points, controlling for many other factors (Gross and Goidel 2003, 92). Most would consider increased voter turnout to be a positive impact of public funding, though it is not clear that public funding for state legislative or U.S. House elections would likewise increase voter turnout.

Encouraging Small Donor Participation

Public funding matching programs, such as New York City's, are designed to encourage greater participation of donors making small contributions to focus the attention of elected officials on the concerns of ordinary citizens, not just on wealthy contributors. As Michael Malbin and Michael Parrott (2017, 247) argue, "Tools designed to bring more small donors into the system are meant to enlarge the table—to help give more people, and different kinds of people, a meaningful voice. They work by giving those who do have the resources to mobilize—candidates, parties and other donor mobilizers—an incentive to pay attention to those who do not." They find that New York City's matching fund program, when compared to Los Angeles's matching fund program, did increase the number and diversity of small donors in city council elections due to its more generous matching fund rate, fairly low contribution limits, and its requirement that qualifying contributions be raised from local voters (Malbin and Parrott 2017, 244).

Matching fund programs encourage people to give their own money (a small amount) to candidates and campaigns. Voucher programs use public funds, not the donor's own funds, for citizens to distribute. The goal of

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both approaches is to engage voters who cannot or will not use their own money or who can only use a very small amount to support candidates and to encourage politicians to engage with a more diverse group of donors, not just wealthy donors. The Seattle voucher program first deployed in 2017 did increase the number of donors who used their vouchers compared to the number who previously made a cash donation, but the number of voters who used their vouchers was still small (less than 5 percent) and those who did were wealthier and older than the general population but still more representative of the electorate than cash contributors (McCabe and Heerwig 2019, 330, 336). The voucher use rate was higher in 2019 but less than 10 percent (City of Seattle 2022). Because 90 percent of voters did not designate their vouchers for any candidates at all, factors other than personal wealth clearly deter political engagement.

Perhaps public financing of campaigns will improve the quality of representation by making elected officials less beholden to donors who do not reflect the interests of their constituents. Yet, an analysis of decades of full public financing in Arizona, Connecticut, and Maine found the opposite to be true: "State legislative candidates using full public campaign financing are more ideologically extreme and less representative of their typical constituent" (Kilborn and Vishwanath 2022, 742; see also A. Hall 2014). They caution that their findings apply only to the three states they examined whose public funding programs and the state's political processes and culture differ from one another, and different types of public funding programs, such as Seattle's Democracy Voucher system or New York City's small donor matching program, may produce different results related to representation and candidate polarization. An analysis of legislative roll call voting in New Jersey before, during, and after public financing found negligible effects on legislator behavior under private and public funding regimes (Harden and Kirkland 2016).

What Have We Learned from the States?

The case we have presented to this point certainly makes it seem like campaign finance creates a host of problems, and indeed it does. Yet our survey of the hopes attached to public financing shows that it may create a more diverse candidate pool, stimulate more competitive races, decrease the resource gap between incumbents and challengers, and free candidates from

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the time constraints of fundraising. So far, these effects are relatively modest in scope. On the other hand, public financing does not seem to increase a rotation in officeholders (incumbents still win) or increase voter turnout. Programs designed to encourage new small donor participation do so only modestly and may in fact attract those with the most extreme views, fueling polarization. Could it be that isolated attempts at public financing cannot overcome the fundamental constraints of American politics?

Recent Efforts at the State and National Levels to Change the Campaign Finance System

Policy entrepreneurs are ready with various policy ideas in the event the policy window of opportunity opens enough to get campaign finance on the political agenda. The 2010 *Citizens United* decision and its aftermath focused reformers on possible solutions. These include efforts to enact a constitutional amendment to overturn the decision, proposals by Democrats to enact comprehensive federal campaign finance reform, and proposals by Republicans to further relax fundraising, spending, and reporting requirements.

Several Democrats in the House and Senate have introduced amendments to the U.S. Constitution to reverse some or all of *Citizens' United*'s findings. The We the People Amendment has been introduced in Congress since 2013, most recently by Rep. Pramila Jayapal (D-WA). This proposed constitutional amendment states that the Constitution protects the rights of "natural persons" only rather than finding that corporations have such rights (Matt Cohen 2023). Rep. Adam Schiff (D-CA) and 80 cosponsors have introduced an amendment that would protect the rights of local, state, and federal governments to institute public funding of campaigns, and permit other regulations of campaign finance (Zhang 2023). Constitutional amendments introduced into Congress must pass with a two-thirds majority in both chambers to move on to the states for their ratification (75 percent of states must approve it for the amendment to be adopted). Although these amendments have not come up for votes, 22 states and 842 localities have expressed their support for such an action as recorded by United for the People, a website maintained by People for the American Way, a progressive 501(c)4 organization (United for the People n.d.).

Legislation has also been introduced by congressional Democrats

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known as the For the People Act and numbered symbolically as H.R. 1 (and its Senate companion bill S. 1). It was introduced in both 2019 and 2021, both times passing the House. H.R. 1 was sent to the Senate for consideration, but Republicans succeeded in using the filibuster to prevent a vote in June 2021 (NBC News 2021). H.R. 1 includes proposals to reform voter registration and voting, redistricting, election security/cybersecurity, and ethics requirements for all three branches of the federal government, and to overhaul a variety of campaign finance practices.

As with previous reform efforts, most of these proposals have been around for many years, some as stand-alone legislation, such as the DISCLOSE (Democracy Is Strengthened by Casting Light On Spending in Elections) Act, which has been introduced continuously since 2010. However, congressional Republicans oppose most if not all these proposals, and Senate Minority Leader Mitch McConnell called H.R. 1 a "federal takeover of our nation's elections" (McConnell 2021). Thus, the window of opportunity for H.R. 1 is not likely to fully open unless Democrats control both chambers of Congress, have a filibuster-proof majority in the Senate (60+ senators), *and* are motivated to focus on campaign finance reform over other pressing national policy issues.

Revisiting the Fundamentals

At the beginning of this book, we said that we were not going to propose any plan of reform of our campaign finance system. Many political scientists, legislators, and journalists have produced a variety of good ideas. But as we have shown, most never reach the adoption stage and those that do have not realized their full promise. We contend that these proposals are not likely to succeed unless they can overcome some of the fundamental features of the American political system that produce the system that we have. We revisit those here.

Fundamental One: Democracies Need Elections

How important is money to the outcome of our elections? Since there seems to be so much campaign finance activity going on, having more money must lead to electoral success. This is the common concern when self-financed candidates run for office. As we noted in chapter 6, however,

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even those who spend huge amounts of their own money, and far more than their opponents, generally do not win (Steen 2006). In 2016, Donald Trump spent significantly less ($333.1 million) than Hillary Clinton ($563.8 million) to win the presidency (OpenSecrets 2017a). Trump's victory raises critical questions about the effectiveness of paid communications outlets as well as the need to have a contributor base of "establishment" interests, since Trump lacked both.

We also showed that despite the idea that democracies need citizens to make choices about how we will be governed, very few congressional elections are competitive. Yet the rhythm of fundraising does not seem to adjust for that, as noncompetitive candidates also engage in campaign fundraising to achieve other goals that do not have much to do with the connection between citizens and their representatives.

When spending escalates, we do hear people complain about the barrage of political ads they experience. Yet there is little evidence that the extreme spending changes the outcome of elections. Joshua Kalla and David Broockman' s synthesis of field experiments finds that, overall, campaign contact matters very little or not at all to the outcome of elections. Party identification and the likelihood of a person voting is what motivates turnout in campaigns. People are not changing their minds, except perhaps in deciding whether casting a vote is worth the effort in a particular election (Kalla and Broockman 2018). Even when we consider that the campaign spending is concentrated in less than 20 percent (maybe even less than 10 percent) of all congressional races in a two-year cycle, the evidence that campaign activity changes people's minds is mixed. If this spending does change voters' choices to support a candidate or to vote at all, only a very small number of people are converted.

So, in our candidate centered system, the end goal for incumbent members is to make their elections as free from competition as possible. Campaign finance is not the only cause of this. But if this feedback loop between citizens and those who represent them is out of whack, how are campaign finance reforms going to make any difference?

Fundamental Two: What Is Corruption (or Its Appearance)?

Starting with *Buckley* in 1976, the Supreme Court has put corruption at the center of its rationale for regulation, but, as we discussed in chapters 2 and 4, their narrow view of what constitutes corruption and recent devel-

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opments in the legal treatment of corruption complicate attempts to curb it. Is it possible that a zeal for eliminating corruption makes every social act a potentially corrupting interaction? That is, might we find corruption everywhere we look? Christopher Robertson et al. (2016, 4) argue that the Supreme Court's current quid pro quo corruption standard is "a peculiar legal concept, to be distinguished from ingratiation, access, or other more capacious notions of corruption," but they ask if this standard may actually make "contemporary practices of everyday politics appear to be quid pro quo corruption." A recent case of non-campaign-finance-related corruption shows how far from this standard we continue to drift.

In 2016, the Supreme Court unanimously overturned the conviction of former Virginia governor Bob McDonnell (R), who received $175,000 in gifts and loans from a businessman. The governor arranged meetings for the donor with state officials, hosted a luncheon at the governor's mansion when the donor was rolling out a new product, and sent emails asking about the possibility of state-funded studies at Virginia public universities of the donor's product's efficacy. No studies of the donor's diet drug were ever conducted (Helderman and Zapotosky 2014).

The lower court convicted McDonnell of public corruption. But the U.S. Supreme Court ruled that these were not official actions that utilize governmental power and therefore not a corrupt quid pro quo exchange. Chief Justice John Roberts wrote the Supreme Court's opinion in *McDonnell v. United States*:

> There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption . . . [with a broader interpretation] officials might wonder whether they could respond to even the most commonplace requests for assistance, and citizens with legitimate concerns might shrink from participating in democratic discourse.[8]

The Supreme Court found that the lower court's interpretation of the term "official acts" was "over inclusive" and in overturning McDonnell's conviction established "a more bounded interpretation of 'official act'."[9] This

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illustrates how difficult it is to know corruption when we see it and to distinguish corruption from the regular activities of holding office much as the Keating Five senators argued they had done (see chapter 2).

Recent cases have gone even farther. In 2017, judges in New York cited the *McDonnell* decision in overturning the corruption convictions of former state Senate majority leader Dean Skelos (R) and former Assembly speaker Sheldon Silver (D) (Kirby 2017). The federal corruption case against U.S. Senator Robert Menendez (D-NJ), which included six counts of bribery, ended in a mistrial with a hung jury in November 2017 (Eliason 2017). Most of the jurors were in favor of acquittal primarily because of the current narrow definition of an official act and the high bar for what counts as corruption. In January 2018, the Department of Justice said it planned to retry Senator Menendez, but just a few days later, the judge in the case dismissed 7 of the 18 charges. The judge wrote that the government's allegations of an exchange of campaign contributions for favors performed were "empty of relevant evidential fact" and "there is no there there" (Corasaniti and Zernike 2018). If this narrower view of what constitutes an official governmental act had been in place in 1989, the Keating Five senators may not have been accused of misconduct at all. However, in 2023, Senator Menendez pleaded not guilty to an indictment for conspiring to act as an unregistered agent for the Egyptian government, and he and his wife are charged with taking bribes from three New Jersey businessmen, which included a Mercedes-Benz convertible, hundreds of thousands of dollars in cash, and gold bars (L. Cohen 2023). As of this writing in 2024, given the justices current narrow view of what an official government act is and what constitutes corruption, it is difficult to say what the Supreme Court might do if presented with these allegations.

Certainly, the ordinary activities of holding office should not be considered corrupt activities. Yet, because the Court has made stopping corruption or the appearance of corruption the only acceptable justification for campaign finance limits, the narrowing of the corruption standard for deciding which campaign finance activities should be regulated and which should instead receive First Amendment protection further complicates attempts to produce reforms. These recent cases demonstrate how hard it is to prove that a government official helped a donor that *they would not have otherwise helped*. Nothing short of a payment-for-service will meet the corruption standard.

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Fundamental Three: Freedom of Speech

When reformers wrote the campaign finance laws passed in the 1970s, they hoped that campaign spending limits would limit corruption and give more citizens a way to be heard by their elected officials. They did not worry that free speech would be impeded by these spending limits. *Buckley* immediately cast a shadow on that interpretation.

As we explained in chapters 2 and 3, the judicial interpretation that money is a way for free speech to be disseminated made spending limits almost impossible to preserve. Certainly, reformers disagreed with this view of spending, but the Court made a distinction between contributions and expenditures that has endured, though even now contribution limits are in danger as antiregulation activists and at least one Supreme Court justice (Clarence Thomas) argue for lifting all limits on campaign contributions. The major shift toward protecting speech rights after BCRA has made room for little else than reduction of campaign finance limits and constraints in the name of protection of free speech rights.

Reformers certainly did not expect that the courts would find that various corporate forms would be granted constitutional protection to spend without limit. Yet this right has been so firmly established that it is hard to see how it can now be reversed. The courts also continue to allow some groups to hide their donors' identities.

In May 2022, with familiar reference to the First Amendment, the Supreme Court ruled along ideological lines in *Federal Election Commission v. Ted Cruz for Senate*. The Court said the BCRA provision that placed a $250,000 limit on postelection fundraising to retire debt on loans candidates made to themselves was unconstitutional. In the majority opinion, Chief Justice John Roberts wrote the limit "burdens core political speech without proper justification," and that "personal loans will sometimes be the only way for an unknown challenger with limited connections to front-load campaign spending."[10] In the dissent, Justice Elena Kagan wrote "the money comes too late to aid in any of his campaign activities. All the money does is enrich the candidate personally at a time when he can return the favor—with a vote, a contract, an appointment. It takes no political genius to see the heightened risk of corruption."[11]

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Fundamental Four: The U.S. Is a Capitalist System

We have highlighted capitalism as a structural component of American democracy and reminded our readers that our economic and political systems favor the interests of those whose businesses employ most Americans. We have quoted the founders' concerns about too much representation of wealthy interests. Yet, in 1925, President Calvin Coolidge famously recognized the pivotal role business interests play in American society:

> After all, the chief business of the American people is business. They are profoundly concerned with producing, buying, selling, investing and prospering in the world. I am strongly of the opinion that the great majority of people will always find these are moving impulses of our life. (Coolidge 1925)

The historical power of firms in American history makes the case. As we discussed in chapter 1, as a republic, and not a pure democracy, our founders understood that constraining interests, especially capital interests, was a major challenge for an open system such as ours. In the 19th century, railroad magnates, mining interests, and manufacturers had great freedom to pollute the air and water, ignore workplace safety, and halt efforts to enact laws to ban child labor, establish a minimum wage, and allow workers to engage in collective bargaining with their employers. When the banking system collapsed in 1929, it exposed not only the failure of the banking and financial systems but also the fact that most Americans had no social safety net. For a brief time, policies from FDR's New Deal to Johnson's Great Society asserted social welfare, not just corporate gain, mattered. B. Dan Wood and Soren Jordan (2017, chap. 3) point to the extreme polarization in the American public from the early national period (1800s) to the New Deal era (1930s), arguing that the collapse of the economy and the Great Depression changed how voters and parties thought about "robber-baron" style wealth and excesses—what was once good was now bad. From the 1930s to the 1970s, moderation, not polarization, ruled. That meant that public policies favoring ordinary citizens became law.

Recall that in the 1960s and 1970s, when campaign finance reforms were adopted, we also passed the Freedom of Information Act (FOIA) of 1967, the Consumer Product Safety Act of 1972, the Budget Accounting Act of 1974, and the Government in the Sunshine Act of 1976. Congress

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enacted these reforms to combat the system's corruption revealed by the Watergate scandal and to constrain the influence of corporate America by shining light on all the ways it had operated in the dark. But Lewis Powell's famous warning to the business establishment and push for more corporate power in the 1970s (see chapter 3) seemed to put the community on notice—and their response has included strategies beyond campaign finance.

We know that "investor" donors want access to elected officials. What do they do with that access? They lobby. Anthony Nownes (2006, 6) defines lobbying as "an effort designed to affect what the government does," as a process, not one singular activity. While we have tracked the campaign giving by business-oriented interests, it turns out that lobbying is the method preferred by many firms to influence policy outcomes. Wendy Hansen and Neil Mitchell examine firms' use of lobbying, PAC contributions, and charitable giving in pursuit of their policy goals. They find more firms lobby than use PAC contributions (but just barely) or charitable giving (by a lot):

> Lobbying conveys most information to policymakers concerning policy preferences, is most instrumental, and is most likely to result in an exclusive benefit, such as regulatory relief or a government contract. . . . The expected benefits of PAC contributions are broader, as the noncontributing corporation cannot be excluded from the benefits of electing a probusiness candidate. (2000, 893)

Many studies have documented that Washington lobbying is dominated by business interests (Baumgartner and Leech 2001; Baumgartner et al. 2009; Drutman 2015). While it is true that business groups spend a great deal of money on elections, for many it is a drop in the bucket compared to their lobbying outlays. Olivier Wouters (2020, 692) tracked the campaign contributions and lobbying expenditures of the pharmaceutical and medical device industries from 1999 to 2018 and found that total outlays on lobbying in this period was more than *fourteen* times what these firms spent on campaigning.

Figures 8.1 and 8.2 give you an idea of the resources powerful interests in Washington, DC devote to lobbying and campaign contributions. Figure 8.1 shows the organizations that spent the most on lobbying in 2020 and those organizations' campaign contributions to federal candidates in 2019–20. Figure 8.2 shows the organizations that spent the most

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on PAC contributions to federal candidates in the 2019–20 elections and those organizations' 2020 reported lobbying expenditures (OpenSecrets, Top PACs n.d., Lobbying n.d.). Both figures show that resource-rich organizations, mostly corporations, spend *far more* on lobbying than on PAC contributions; even most of those that are the top PAC contributors spend more on lobbying (fig. 8.2). Granted, PAC contributions are limited and the money for them must be raised in limited amounts, often from specific groups of people,[12] and there are no restrictions on how much an individual or organization may spend on lobbying.[13] However, lobbying and PAC contributions are both means by which organizations make direct contact with politicians. Notice there are only four organizations on both figures 8.1 and 8.2, all of them corporate or business interests (marked with asterisks): National Association of Realtors, Blue Cross/Blue Shield, Comcast Corp, and Raytheon Technologies. These organizations are maximizing both channels of possible influence—contributions and lobbying. Other organizations, such as the seven labor unions among the biggest PAC givers (fig. 8.2), are not on the top lobbying spenders list (fig. 8.1).[14]

Richter, Samphantharak, and Timmons (2009) critiqued studies looking for PAC contribution linkages to roll-call votes on legislation in their study of lobbying effort by firms and the taxes they pay. They found that firms that increase their lobbying expenditures end up with a lower tax burden the following year. They encourage other scholars to look to actual lobbying efforts, not solely campaign finance expenditures, to explain policy outcomes. Hall and Deardorff's (2006, 80–81) argument that some lobbying is a "legislative subsidy," by assisting members of Congress with data gathering and analysis, suggests that lobbyists might help make better policy outcomes, while acknowledging that significant resource imbalances obviously privilege some lobby concerns over others.

Mahoney and Baumgartner (2015, 203) find that from the interest group's perspective, creating a coalition of lobbying allies (government officials who are advocates of the championed policies) produces policy victories more often than campaign donations alone. Milyo, Primo, and Groseclose (2000, 84–85) found not only did lobbying expenditures dwarf both PAC contributions and soft money spending, but charitable giving was even greater than lobbying expenses, sometimes by a large factor of 10 times or more (see also Halpin and Nownes 2021). The point is that corporations will invest in venues that lead to profitability for their companies. Influencing elections is simply one of many options.

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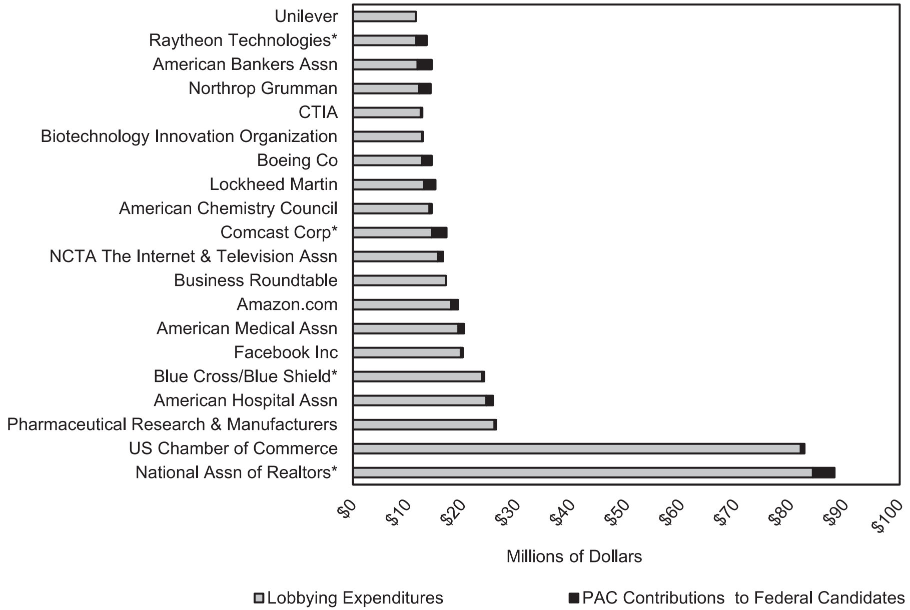

Fig. 8.1. Top Lobbying Spenders: Lobbying Expenditures and PAC Contributions to Federal Candidates, 2020
Source: Compiled by authors with data from OpenSecrets, Lobbying (n.d.); OpenSecrets, Top PACs (n.d.).

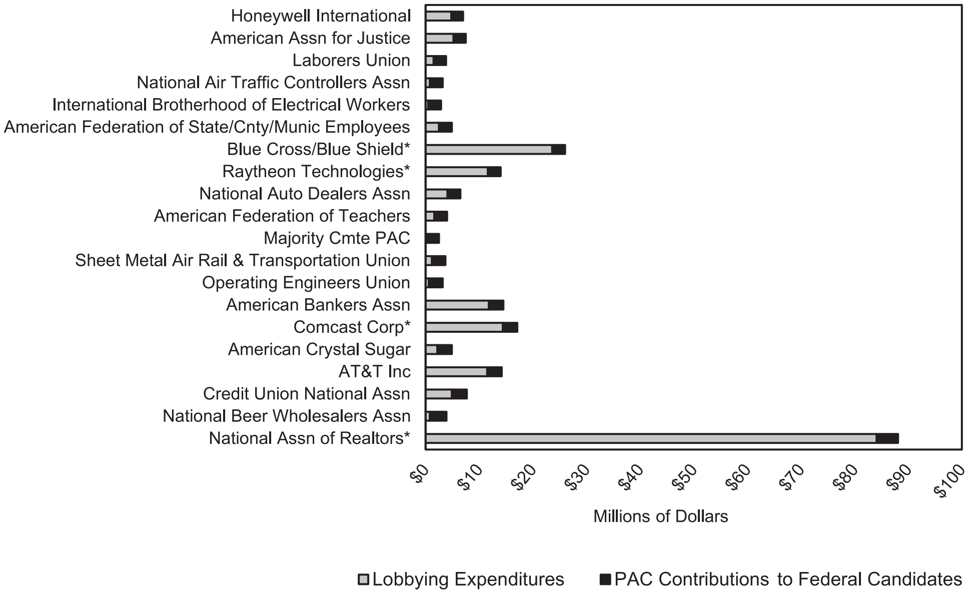

Fig. 8.2. Top PAC Spenders: Lobbying Expenditures and PAC Contributions to Federal Candidates, 2020
Source: Compiled by authors with data from OpenSecrets, Top PACs (n.d.); OpenSecrets, Lobbying (n.d.).

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Fundamental Five: Ambition Must Be Made to Counteract Ambition

We also considered another fundamental the founders predicted that remains strong today: the ambition of Americans. In chapters 2 and 5, we explained how people have a wide variety of motivations to give their money to political campaigns. Some donors are motivated to support causes that will bring benefits to many people (ideological), but others are interested in their material gain (investors), or their social gains (intimates). Limiting contributions was a way to manage some of their ambitions, but with the rise of free speech rights as the value courts care about most, even though *contributions* are limited, donors can literally *spend* all they want and expect to fulfill some of their goals in return. Our contributors we used as exemplars in chapter 5 are just two of many more people willing to spend $30 million or more to promote their political beliefs, economic interests, and social status.

In chapter 6, we showed how incumbent members of Congress with no opposition in their elections continue to raise money for their campaign committees and leadership PACs. They use these funds to redistribute to their colleagues and parties so they can achieve more power in the political process or to consider a bid for another federal office. Senators find that they can raise extra money in their Senate campaign committees in advance of their presidential runs and simply transfer the funds. Yet donors are expressing their connection to these officeholders and are not dissuaded by a lack of competition, for they know their money will be used for purposes other than campaigning. Even states and localities that try to break the officeholders' advantage by using public money cannot get away from the fact that some candidates are just better at politics than others and some people want a career in politics. Hopes that local reforms can lead to more citizen engagement, competitive elections, different candidate recruitment outcomes, and less money in elections still must contend with the macro trends in our nation at large that pull things in the other direction.

How Will Money Matter Going Forward?

Can campaign finance reforms, such as public funding and spending limits, really reduce the influence of powerful special interests if their lobbying efforts are successful and if they can "punish" society for attempts to

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increase corporate taxes, enhance environmental regulations, or increase wages and benefits (Lindblom 1982, 325–26)? Campaign finance cannot be considered in a vacuum if we truly want to understand why we have the system we have.

Our discussion above should make clear there are other avenues for influence in U.S. politics. In closing this book, we would like to turn your attention to several new developments in how politics is conducted in the U.S. that may change the role of campaign money in political battles and may enhance the voices of the masses over those of elites.

The seismic shifts in the nature of communication in recent decades mean that substantial financial resources are not required to reach many people. The internet and social media allow virtually anyone to engage in politics for little or no cost, and some ideas will gain enough traction to influence policy. Of course, these powerful digital tools are available to politically interested people of all stripes. Thus, both Black Lives Matter and QAnon can mobilize many like-minded citizens online. Moreover, some scholars have found that digital politics may inflame polarization even as it mobilizes new participants to enter the political arena (Bail et al. 2018; Haidt 2022; Marks et al. 2019; Settle 2018). Nevertheless, the power of the internet and social media should not be underestimated as political tools. Indeed, recent social movements have been fueled by the internet. The Tea Party movement, Occupy Wall Street, Black Lives Matter, QAnon, and the MeToo movement all gathered steam online, as did many movements abroad, such as the Arab Spring in 2010 and the #BringBackOurGirls campaign that emerged after Boko Haram kidnapped hundreds of Nigerian schoolgirls in 2014.

While grassroots mobilization both on- and offline has become increasingly sophisticated and thus more costly, canvassing door-to-door and cell phone texting campaigns are still people-powered activities based on low-cost assets. Recently, young people have emerged as powerful grassroots voices on issues such as gun control and climate change. We remain optimistic that money is indeed not everything in American politics.

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Appendix

Major Acts, Regulations, Court Decisions, etc. Mentioned in This Book

How to Interpret Government Sources Listed in This Appendix

Supreme Court Cases

When the U.S. Supreme Court decides a case, they first issue a slip opinion, followed by a preliminary print of the *United States Reports*. It takes about three years (for final corrections) until a case is printed in a bound volume, as in this example:

Buckley v. Valeo, 424 U.S. 1 (1976)

The Buckley case is in volume 424 of the *United States Reports*, and the case starts on page 1. It was decided in 1976.

U.S. Courts of Appeals

There are 13 of these courts, which are also called circuit courts. Eleven of them represent a geographical area that is numbered (1st Cir. through 11th Cir.). One court is devoted just to cases in the District of Columbia (called D.C. Court of Appeals) and the last is a Federal Circuit Court of

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Appeals. These courts hear appeals from lower courts. They do not retry the case but review the lower court decision to determine if the law was applied correctly. Decisions made by these courts are published in the *Federal Reporter*, indicated by an F., followed by the number of the series it is in (or if it is in the Federal Supplement). In this example:

Federal Election Commission v. Furgatch, 807 F.2d 857 (9th Cir. 1987)

Furgatch is in volume 807 of the *Federal Reporter*, second series, page 857. The decision was issued by the 9th Circuit Court of Appeals in 1987.

Public Laws—Federal

These are the laws passed by the U.S. Congress and then signed into law by the president. Prior to 1874, laws were published in *Statutes at Large of the United States of America*. These volumes are abbreviated as "Stat." and feature the volume number, Stat., and page number, like this:

5 Stat. 491

After 1874, laws also have a public law number (often abbreviated as P.L.), which gives the number of the *Congress* (not the year of passage) that passed the law and the sequential number indicating when it passed in the sequence of all laws passed in that Congress. These laws are also published in the *United States Statutes at Large*. This is abbreviated as "Stat." with the volume number before and the page number after:

P.L. 96-187, 93 Stat. 1339

This law was the 187th law passed by the 96th Congress. You can also find it in volume 93 of the *United States Statutes at Large*, at page 1339.

United States Code

After a law is published in Stat., it will be included in the *United States Code* when it is next updated (usually every six years with annual updates).

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The content will not differ from that in the United States Statutes at Large. It is simply another way to refer to the same information. The older this law is, the more likely you will find it in U.S.C. The United States Code is organized into 53 subject titles (titles 1 through 54, with title 53 in reserve). These subject titles are different from those used in the Code of Federal Regulations (below). A United States Code citation includes a title number and section number:

26 U.S.C. § 527(e)(2)

Title 26 is the Internal Revenue Code of the United States Code. This indicates section 527 (followed by subsections).

Code of Federal Regulations

The executive departments and agencies of the federal government will issue permanent rules to implement the laws they are mandated to execute. Proposed rules are first published in the *Federal Register*. Once they take effect, they appear in the *Code of Federal Regulations* (CFR).

The CFR is divided into 50 titles that represent broad subject areas. Each title is divided into chapters that usually correspond to the federal agency that issued these regulations. The CFR is updated once a year. Specific regulations are indicated by the number of one of the 50 titles, followed by CFR (Code of Federal Regulations), part number, section number, and paragraph number. In this example:

11 CFR 109.32(a)

The regulation is in Title 11 (Federal Elections), Part 109 (Coordinated and Independent Expenditures), section 32, paragraph a.

FEC Advisory Opinions

If any filer with the FEC has questions about how federal campaign finance law applies to specific questions that may not be clear in the law, they may request guidance from the FEC as an advisory opinion. Advisory opinions

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(AOs) can be found on the FEC website by their number, which is the year in which the AO is issued, followed by its sequential number in that year. When possible, the name of the requestor should be in the citation:

FEC Advisory Opinion 2012-18 (National Right to Life Committee)

This is the 18th AO issued by the FEC in 2012. The entity requesting this AO was the National Right to Life Committee.

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I. Supreme Court Cases

Case	Year	Citation	Provisions
Newberry v. United States	1921	256 U.S. 232 (1921)	Struck down spending limits for primary elections on the basis that primaries existed outside of the Constitution and therefore the federal government held no power of regulation.
United States v. Classic	1941	331 U.S. 299 (1941)	Ruled that only the states, not Congress, could regulate primary elections.
Associated Press v. United States	1945	326 U.S. 1 (1945)	The Court held that the Associated Press had violated the Sherman Act by engaging in restraint of trade with nonmember newspapers, which is not protected by the First Amendment. First Amendment freedom of the press does not permit repression of free expression by private interests.
Roth v. United States	1957	354 U.S. 476 (1957)	The Court ruled that obscenity was not constitutionally protected speech and that the First Amendment does not protect all forms of expression.
NAACP v. Alabama ex rel. Patterson	1958	375 U.S. 449 (1958)	A state cannot compel groups conducting business in their state to turn over information such as the names and addresses of the group's members, because it is a restraint on freedom of association and a violation of the Fourteenth Amendment.
Buckley v. Valeo	1976	424 U.S. 1 (1976)	Found limits on congressional candidates' spending and independent spending unconstitutional as violations of the First Amendment. Upheld limits on contributions, disclosure, and public financing for presidential election contests.
First National Bank of Boston v. Bellotti	1978	435 U.S. 765 (1978)	Established free speech right of corporations to attempt to influence ballot measure elections but left open the question of corporate independent expenditures in candidate elections.
Brown v. Socialist Workers '74 Campaign Committee	1982	459 U.S. 87 (1982)	Ruled that the First Amendment right of association prohibits states from compelling minor political parties to disclose the names of contributors and recipients of disbursements when there is a reasonable probability that those persons will be subject to threats, harassment, or reprisals.

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Federal Election Commission v. Massachusetts Citizens for Life (MCFL)	1986	479 U.S. 238 (1986)	Ruled FECA's ban on corporate spending in federal elections is unconstitutional as applied to independent expenditures made by a narrowly defined type of ideological nonprofit corporation. Allowed independent spending by certain ideological nonprofits in federal elections.
Austin v. Michigan Chamber of Commerce	1990	494 U.S. 652 (1990)	Upheld Michigan law that prohibited independent expenditures by corporations because corporate spending can lead to corruption (i.e., broadened definition of corruption).
Colorado Republican Federal Campaign Committee v. Federal Election Commission (aka Colorado I)	1996	518 U.S. 604 (1996)	Overturned section of the 1971 FECA prohibiting independent expenditures by parties as a violation of the First Amendment.
Nixon v. Shrink Missouri Government PAC	2000	528 U.S. 377 (2000)	Anticorruption rationale for regulating federal campaign finance activities established in the 1976 *Buckley* decision applies at all levels of electoral competition.
Federal Election Commission v. Colorado Republican Federal Campaign Committee (aka Colorado II)	2001	533 U.S. 431 (2001)	Limits on party coordinated expenditures upheld.
McConnell v. Federal Election Commission	2003	540 U.S. 93 (2003)	Upheld most of BCRA, including the party soft money ban and requirement that ads featuring a federal candidate close to an election be paid for with limited and disclosed funds. Invalidated requiring parties to choose between making coordinated or independent expenditures and a prohibition against minors making campaign contributions.
Randall v. Sorrell	2006	548 U.S. 230 (2006)	Struck down two provisions of Vermont's 1997 campaign finance law: (1) invalidated Vermont's expenditure limits as a violation of the *Buckley* ruling that spending is protected First Amendment speech and not a corruption concern; (2) struck down Vermont's low contribution limits ($200–$400 per candidate, the lowest in the nation) as an unconstitutional restriction preventing candidates from campaigning effectively, especially challengers.

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Federal Election Commission v. Wisconsin Right to Life (WRTL)	2007	551 U.S. 449 (2007)	Ruled that BCRA restrictions were unconstitutionally applied to what the Court deemed were "issue ads," not true "express advocacy" ads. Invalidated BCRA's 30- and 60-day blackout periods requiring electioneering communications that feature a federal candidate run in those windows before an election be paid for with limited and disclosed hard money.
Davis v. Federal Election Commission	2008	554 U.S. 724 (2008)	Struck down BCRA's Millionaires' provision as a penalty on candidates who exercise their First Amendment free speech rights to spend their own money to run for office.
Citizens United v. Federal Election Commission	2010	558 U.S. 310 (2010)	Overruled *Austin v. Michigan Chamber of Commerce* (1990) and parts of *McConnell v. FEC* (2003) that prohibited political spending by corporations and held that corporations have a First Amendment right to spend unlimited amounts for express advocacy independent expenditures related to candidate elections. Upheld disclosure requirements and ban on direct corporate and union contributions to candidates.
Doe v. Reed	2010	561 U.S. 186 (2010)	Found that public disclosure of declaratory acts (e.g., signing a petition) is consistent with the First Amendment.
American Tradition Partnership v. Bullock	2012	567 U.S. 516 (2012)	Held that *Citizens United* (2010) decision did apply to the state of Montana and the state's ban on independent corporate spending was an unconstitutional restriction on protected free speech.
McCutcheon v. Federal Election Commission	2014	572 U.S. 185 (2014)	Ruled that the two-year aggregate campaign contribution limit for individuals was an unconstitutional violation of free speech. Left contribution limits to candidates, parties, and committees intact.
McDonnell v. United States	2016	579 U.S. 550 (2016)	Overturned the conviction of former Virginia governor Robert McDonnell for corruption, ruling that the meaning of "official act" does not include setting up meetings, calling other officials, or hosting an event, and such activities do not constitute a quid pro quo act of corruption.
Americans for Prosperity v. Bonta	2021	594 U.S. ___ (2021)	Struck down a California law requiring nonprofits to disclose their donors in state tax returns.

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Dobbs v. Jackson Women's Health Organization	2022	597 U.S. ___ (2022)	Landmark decision finding that the Constitution does not confer a right to abortion. Overruled *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), returning to states the power to regulate any aspect of abortion not protected by federal law.
Federal Election Commission v. Ted Cruz for Senate	2022	596 U.S. ___ (2022)	Struck down section 304 of the Bipartisan Campaign Reform Act (2002), which limited to $250,000 the amount of money that candidates could be repaid on personal loans to their campaign (within 20 days of Election Day).

II. U.S. Courts of Appeals Cases

Case	Year	Citation	Provisions
Federal Election Commission v. Furgatch	1987	807 F.2d 857 (9th Cir. 1987)	Confirmed the FEC's claim that Furgatch violated election law for failure to report spending for express advocacy independent expenditures and failure to state the communication was not authorized by a candidate or a candidate's committee. The court ruled that context is relevant to a determination of express advocacy.
Faucher v. Federal Election Commission	1991	928 F.2d 468 (1st Cir. 1991)	Found that FEC regulation at 11 CFR 114.4(b)(5) is not consistent with the Supreme Court's *MCFL* decision. Therefore, corporations can engage in issue advocacy. Only express advocacy by a corporation is forbidden.
VanNatta v. Keisling	1998	151 F.3d 1215 (9th Cir. 1998)	Struck down ban on out of state contributions in Oregon, which was adopted by a ballot initiative.
North Carolina Right to Life v. Leake	2008	525 F.3d 274 (4th Cir. 2008)	Overturned North Carolina's campaign finance laws defining "express advocacy" and "political committee" in ways that were overbroad; struck down North Carolina's law applying contribution limits to independent expenditure committees.
South Carolina Citizens for Life v. Kenneth C. Krawcheck et al.	2010	759 F. Supp. 2d (D.S.C. 2010)	Citing *Leake*, federal court in South Carolina found the state's campaign finance regulations overbroad and inconsistent with plaintiff's rights to expression.

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SpeechNow.org v. Federal Election Commission	2010	599 F.3d 674 (D.D.C. 2010)	Citing the Supreme Court's *Citizens United* decision, the D.C. Circuit Court struck down limits on contributions to independent political groups that spend money to support or oppose federal candidates only; upheld disclosure requirements.
Carey et al. v. Federal Election Commission	2011	791 F. Supp. 2d 121 (D.D.C. 2011)	Allowed traditional PACs to establish a super PAC to raise unlimited amounts and spend unlimited amounts on independent expenditures with the two organizations sharing overhead expenses but not bank accounts. Created the legal framework for hybrid PACs.
Citizens for Responsibility and Ethics in Washington (CREW) v. FEC	2018	316 F. Supp. 3d 394, (D.D.C. 2018)	Federal district court invalidated the FEC's narrow donor disclosure rule for independent expenditure organizations. Required enhanced disclosure of donors who contribute over $200 to 501(c) nonprofits and other entities for express advocacy spending.
Thompson v. Hebdon	2018	909 F.3d 1027 (9th Cir. 2018)	Supreme Court remanded this case to the 9th Circuit in light of *Randall v. Sorrell*. Reversed ban on out of state money above a certain limit and struck down other fundraising limits as being too low and a burden to challengers in Alaska.

III. Public Laws

Laws	Year	Citation	Provisions
Apportionment Act of 1842	1842	5 Stat. 491, 27 Cong., Ch. 47	Required states to designate individual districts for each elected official, an electoral system commonly referred to as single member plurality (SMP), as opposed to at-large districts with many representatives for the U.S. House.
Appropriations Act (Government) of 1877	1876	19 Stat. 143, 44 Cong. Sess. I, Ch. 287	Prohibited government executives from raising campaign money from other employees.
Pendleton Act	1883	22 Stat. 403, Ch. 27	Created the civil service and prohibited raising campaign money from those federal workers.
Tillman Act	1907	P.L. 59–36; 34 Stat. 864	Prohibited national banks and corporations from making contributions to federal campaigns but without meaningful enforcement from a dedicated agency.

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Federal Corrupt Practices Act (Publicity Act)	1910	P.L. 61–274; 36 Stat. 822	Required national political party committees to disclose (after the election) their contributions and expenditures related to campaigns for the U.S. House of Representatives. Amended in 1911 and 1925. Repealed by the Federal Elections Campaign Act of 1971.
1911 Amendments to the Federal Corrupt Practices Act	1911	37 Stat. 25	Added disclosure of Senate campaign spending (now House and Senate) and required reporting before and after both primary and general elections; added the first requirement for spending limits in federal campaigns before and after elections, both primary and general. Disclosure for primary elections struck down by *Newberry v. United States* (1921).
Montana Corrupt Practices Act of 1912/Montana Campaign Expense Limits Initiative, I 304–305	1912	Mont. Code Ann. § 13-35-227	Banned independent corporate political spending in the state. Overturned in *American Tradition Partnership v. Bullock* (2012).
Federal Corrupt Practices Act of 1925	1925	43 Stat. 1070	Replaced the Federal Corrupt Practices Act. Strengthened disclosure rules and increased the spending limits for general elections but with little enforcement for new rules.
Radio Act	1927	P.L. 69–632; 44 Stat. 1162	Replaced Radio Act of 1912, increasing federal regulatory powers over radio communication, with oversight vested in the newly created Federal Radio Commission.
National Industrial Recovery Act	1933	P.L. 73–67; 48 Stat. 195	Permitted collective bargaining, strengthening unions at a time when unions were playing bigger roles in financing campaigns.
Communications Act	1934	P.L. 73–416; 48 Stat. 1064	Replaced Federal Radio Commission with Federal Communications Commission (FCC); transferred regulation of interstate telephone services from the Interstate Commerce Commission to the FCC.
Revenue Act of 1934	1934	P.L. 73–216; 48 Stat. 680	Raised individual income tax rates on higher incomes; prohibited charitable organizations from engaging in lobbying.
National Labor Relations Act (Wagner Act)	1935	P.L. 74–198; 49 Stat. 449	Required employers to bargain in good faith with a union supported by a majority of a company's employees.

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An Act to Prevent Pernicious Political Activities (Hatch Act)	1939	P.L. 76–252; 53 Stat. 1147	Prohibited all federal workers from taking an "active part" in political activities.
Hatch Act 1940 Amendments	1940	P.L. 76–753; 54 Stat. 767	Extended the ban against active political activities to state and local officials whose positions were funded by the federal government. Banned contributions from federal contractors.
War Labor Disputes Act (Smith-Connally Act)	1943	P.L. 78–89; 57 Stat. 163	Banned unions from making campaign contributions, but not from forming a political action committee.
Labor Management Relations Act (Taft-Hartley Act)	1947	P.L. 80–101; 61 Stat. 136	Made Smith-Connally Act labor contribution ban permanent; banned labor unions from using their treasury funds for federal campaign contributions.
Johnson Amendment to the Internal Revenue Code	1954	P.L. 83-591 §501(c)(3)	Bars tax-exempt charities from engaging in political activity
Freedom of Information Act (FOIA)	1967	P.L. 89–487; 80 Stat. 250	Provides that any person has the right to request access to federal agency records or information except if the records are protected from disclosure by any of nine exemptions or by one of three special law enforcement exclusions.
1971 Revenue Act	1971	P.L. 92–178; 85 Stat. 497	Created the first publicly financed campaign system for presidential elections.
Federal Election Campaign Act 1971 (FECA)	1971	P.L. 92–225; 86 Stat. 3	Consolidated existing campaign finance law, strengthened disclosure requirements and contribution and expenditure limits.
Consumer Product Safety Act of 1972	1972	P.L. 92–573; 86 Stat. 1207	Established the Consumer Product Safety Commission to develop safety standards for products that could cause injury or death. Allowed the CPSC to issue recalls for dangerous goods.
Congressional Budget and Impoundment Control Act of 1974	1974	P.L. 93–344; 88 Stat. 297	Established a new congressional budget process and Committees on the Budget in each chamber; established a Congressional Budget Office; established procedure for congressional control over impoundment of funds by the executive branch.

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FECA Amendments of 1974	1974	P.L. 93–443; 88 Stat. 1263	Revised and expanded disclosure requirements and contribution and expenditure limits of FECA (1971); created the FEC; provided for public financing of presidential nominating conventions and primary elections.
Tariff Schedules Amendments	1975	P.L. 93–625; 88 Stat. 2108	Doubled maximum political contribution tax credit and deductions. Later repealed by 1978 Revenue Act.
Massachusetts Gen. Laws: Disclosure and Regulation of Campaign Expenditures and Contributions	1975	Mass. Gen. Laws Ann., ch. 55, § 8	The state of Massachusetts amended their law related to political contributes by corporations to say that corporations could not spend on any measure relating to taxing individuals, which was later struck down by the Supreme Court in *First National Bank of Boston v. Bellotti* (1978).
Government in the Sunshine Act	1976	P.L. 94–409; 90 Stat. 1241	Stipulates that every meeting of a federal agency will be open to the public.
FECA 1976 Amendments	1976	P.L. 94–283; 90 Stat. 475	Congress's response to *Buckley v. Valeo*. Revised means of appointing FEC commissioners so that all six members would be appointed by the president subject to Senate confirmation; specified some contribution limits and required disclosure of independent expenditures; exempted legal and accounting costs incurred by candidates or parties to comply with the law from spending limits; limited losing primary candidates' ability to collect public funding.
Revenue Act of 1978	1978	P.L. 95–600; 92 Stat. 2763	Doubled maximum political contribution tax credit to $50 ($100 for joint returns) but eliminated tax deduction for political contributions.
FECA 1979 Amendments	1979	P.L. 96–187; 93 Stat. 1339	Allowed parties to spend unlimited amounts of hard (federal) money for a range of grass-roots volunteer *party-building* activities, but not for direct support of federal candidates; increased the public funding grants for presidential nominating conventions; simplified reporting and disclosure requirements to reduce paperwork to report campaign finance activity.
Tax Reform Act of 1986	1986	P.L. 99–514; 100 Stat. 2085	Repealed tax credits for political contributions.
Ethics Reform Act	1989	P.L. 101–194; 103 Stat. 1716	Forbade members of Congress from keeping excess campaign funds for personal use upon retirement after 1992.

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Family Medical Leave Act (FMLA)	1993	P.L. 103–3; 107 Stat. 6	Requires covered employers to provide employees with job-protected, unpaid leave for qualified medical and family reasons.
Lobbying Disclosure Act	1995	P.L. 104–65; 109 Stat. 691	Required greater public disclosure of who is lobbying on what issues, on behalf of whom, and for how much.
527 Organization Disclosure Act	2000	P.L. 106–230; 114 Stat. 477	Required organizations to declare 527 committee status to the IRS; requires public disclosure of certain contributions and expenditures; requires political organizations with over $25,000 in gross receipts to file a tax return and to disclose the return; provides for monetary penalties for noncompliance.
527 Amendment on Notification Requirements and Duplicate Reporting	2002	P.L. 107–276; 116 Stat. 1929	Eliminated notification and return requirements for state and local committees. Avoids duplicate reporting.
Bipartisan Campaign Reform Act of 2002 (McCain-Feingold Act)	2002	P.L. 107–155; 116 Stat. 81	Banned party soft money, regulated sham issue ads run close to elections; raised and indexed to inflation the limits on hard money individual contributions to candidates and party committees; included Millionaire's Amendment.
Honest Leadership and Open Government Act (HLOGA)	2007	P.L. 110–81; 121 Stat. 735	Banned gifts, tickets to sporting and other events, trips, and meals valued over a minimal amount to lawmakers and put new restrictions on use of campaign funds for travel on noncommercial aircraft.
Dodd-Frank Wall Street Reform and Consumer Protection Act	2010	P.L. 111–203; 124 Stat. 1376	Imposed restrictions on the banking and finance industries in the wake of the Great Recession of 2008.
Gabriella Miller Kids First Research Act	2014	P.L. 113–94; 128 Stat. 1085	Terminated the Presidential Election Campaign Fund for presidential nominating conventions and reallocated the funds to pediatric cancer research.
Consolidated and Further Continuing Appropriations Act, 2015 (CRomnibus)	2015	P.L. 113–235; 128 Stat. 2772	Increased limits for contributions to national political party committees. Amended FECA 1971 to triple the dollar value limits on contributions to political committees of national political parties; established new special party accounts for legal/recount, conventions, and headquarter expenses.

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Consolidated Appropriations Act of 2016 (SEC Prohibition)	2016	P.L. 114–113; 129 Stat. 3030	Forbids the SEC from finalizing, issuing, or implementing any action to require the disclosure of political contributions or other contributions or dues paid to tax exempt organizations, or trade associations.
National Defense Authorization Act	2020	P.L. 116–92; 133 Stat. 1198	Authorized funding levels and ensured troops have the training, equipment, and resources they need. Includes paid parental leave under Title 5.

IV. United States Code

U.S. Code	Year	Citation	Provisions
Definition of 501(c)4 groups	1913	26 U.S.C. § 501(c)(4)(a)	Describes 501(c)(4) groups as "social welfare organizations" and requires they be "operated exclusively for the promotion of social welfare."
Press Exemption	1971	52 U.S.C. § 30101(9)(B)(i)	Federal campaign finance restrictions do not apply to the costs associated with producing "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication."
Presidential Primary Matching Funds Eligibility	1974	26 U.S.C. § 9033(c)(1)(B)	Terminated payment of Presidential Primary Matching Funds to any individual who received less than 10 percent of votes cast in two consecutive primary elections.
Definition of "exempt function" for 527 organizations	1988	26 U.S.C. § 527(e)(2)	527s that engage in any exempt function that tries to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office must file with the FEC. Nonexempt functions (training, education) are permissible.
Permissible noncampaign use of funds	2002	52 U.S.C. § 30114(a)	Describes permissible uses for campaign committee funds as transfers and other contributions.

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V. Code of Federal Regulations

Regulation	Year	Citation	Provisions
Definition of "contribution"	1972	11 CFR 100.52(a) and 100.54	Legal definition of a campaign donation.
FEC REG 1980-8—Independent Expenditure Reporting	1980	11 CFR 109.10(e)(1)(vi)	Regulations issued after the passage of Amendments to FECA 1979. Requires independent expenditure makers to disclose contributors only if they "made a contribution . . . for the purpose of furthering the reported independent expenditure."
FEC REG 1991-04—Allocation of Federal and Non-Federal Expenses	1991	11 CFR 106.5(a)(1), 11 CFR 106.5(b)(2) and 106.6(a)	Revises sections 11 CFR 106.5(a)(1) and 106.6(a) to stipulate allocation rules for how party and other committees must allocate federal/nonfederal (hard/soft) money expenses.
FCC REG 91-403—Lowest Unit Charge	1992	47 CFR §73.1942	The Lowest Unit Rate (LUR) ensures that candidates for public office receive the same discounts for advertising as the station's "best" customer does.
FEC REG 1996-14—Party Coordinated and Independent Expenditures allowed in congressional races	1996	11 CFR 110.7	Section 110.7(b)(4) of the Commission's regulations deleted to follow the Supreme Court's decision in *Colorado I*. Ruling is limited to congressional campaigns. Permits party independent expenditures in congressional campaigns.
FEC REG 1998-04—Party Committee Coordinated Expenditures for presidential candidates	1999	11 CFR 110.7(d)	Creates new section 11 CFR 110.7(d) that addresses party committee coordinated expenditures made before the date the party's candidate receives the presidential nomination.
FEC REG 2002-03—Contribution Limitations and Prohibitions	2003	11 CFR 110.2(e)	Raises the contribution limit for political party committees to donate to Senate candidates from $17,500 per cycle to $35,000 per cycle (adjusted for inflation) as mandated by BCRA.
FEC REG 2002-11—Coordinated and Independent Expenditures	2003	11 CFR 109.32(a) and 109.32–37	Rules to implement coordinated party expenditures to *presidential* candidates to comply with BCRA; details coordinated party limits for presidential candidates. Stipulates only the national committee of a party, or its designated agent, may make coordinated expenditure for presidential candidate.

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FEC REG 2002-21 Definition of Electioneering Communication	2003	11 CFR 100.29 (b)(5), (b)(6), and (b)(7)	Directs filers to the Federal Communications Commission (FCC) website to determine local size of broadcast audience (+/- 50,000); indicates that FCC's determination determines whether a filer is in compliance with BCRA or not.
FEC REG 2004–05 Contributions by Minors Repeal	2005	11 CFR 110.19	Amends FEC regulations to reflect the Supreme Court's *McConnell* decision. Removes regulatory prohibitions on contributions by minors to candidates and political party committees, returning to pre-BCRA rules.
FEC REG 2007–04 Lobbyist Bundling	2009	11 CFR 104.22	Disclosure of bundling by Lobbyists/ Registrants and Lobbyist/ Registrant PACs (2 U.S.C. 434(i)) as required by HLOGA.
FEC REG 2022–22 Internet Communication Disclaimers and Definition of "Public Communication"	2023	11 CFR 100.26, 110.11(c)(5), and 110.11(g)	Updated definition of *general public political advertising* to include internet communications, which are paid for (an ad, not a post). Requires disclaimer statements to be visible without having to visit a new web location and allows fewer exceptions to requirement for internet ad disclaimers.

VI. FEC Advisory Opinions

Advisory Opinion	Year	Citation	Provisions
FEC Advisory Opinion 1978–10 (Republican State Committee of Kansas)	1978	A.O. 1978–10	Allowed state parties to use corporate and union funds to pay for the nonfederal share of a voter drive that included both federal and nonfederal candidates. Opened the door for the use of nonfederal (soft) money in elections featuring federal candidates.
FEC Advisory Opinion 1979–17 (Republican National Committee)	1979	A.O. 1979–17	Allowed national party committees to raise money beyond the FECA contribution limits and from corporations and unions to spend to assist nonfederal candidates, opening the door for national parties to spend nonfederal (soft) money to benefit federal candidates.
FEC Advisory Opinion 1984–15 (RNC)	1984	A.O. 1984–15	Explains when proposed ads would be considered coordinated expenditures or operating expenses. Emphasis on whether specific candidates of either party are identified in the ad.

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FEC Advisory Opinion 1985–14 (DCCC)	1985	A.O. 1985–14	Clarifies that ads must both (1) depict a clearly identified candidate, and (2) convey an electioneering message to be considered a coordinated expenditure.
FEC Advisory Opinion 2010–09 (Club for Growth)	2010	A.O. 2010–09	Confirmed that the *SpeechNow* decision permitted unlimited contributions to independent expenditure-only political committees (super PACs) in federal elections.
FEC Advisory Opinion 2010–11 (Commonsense Ten)	2010	A.O. 2010–11	FEC exceeded the ruling in *SpeechNow.org v. FEC*, stating that *Citizens United* allows independent expenditure-only committees (super PACs) to accept unlimited contributions from political committees, corporations, and unions, not just from individuals.
FEC Advisory Opinion 2011–12 (Majority PAC and House Majority PAC)	2011	A.O. 2011–12	Allows federal officeholders, candidates, and national party officers, to attend, speak at, and be featured guests at fundraisers for super PACs. As long as the federal candidate only requests donations up to the limits, sources, and reporting requirements in FECA, others may solicit unlimited individual, corporate, and labor organization contributions at the same event.
FEC Advisory Opinion 2015–09 (Senate Majority PAC and House Majority PAC)	2015	A.O. 2015–09	Allows for the name or likeness of a federal candidate or officeholder to appear in publicity for nonfederal (soft money) fundraising events that include a solicitation if the candidate or officeholder is referred to as a speaker or honored guest and is not the one asking for contributions.

VII. Constitutional Amendments

Amendment	Year	Citation	Provisions
Seventeenth Amendment	1913	U.S. Constitution, amend. 17	Article I, section 3 of the Constitution was modified by the Seventeenth Amendment to provide for senators to be elected by the people.
Twenty-Second Amendment	1951	U.S. Constitution, amend. 22	No president may be elected more than twice. A person who has finished more than two years of another president's term may be elected once.

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Notes

Chapter 1

1. Ford (1899), 69.

2. See the appendix for a chronological list of all campaign finance laws, regulations, and court decisions referenced in this book.

3. Pennsylvania's voter ID law was struck down in 2014 (Lyman 2014), and the Kansas voter ID law was struck down in 2018 (K. Lee 2018).

4. See chapter 1 in the eighth edition of *Congressional Elections* for a longer discussion of what makes the U.S. a candidate-centered system (Herrnson, Panagopoulos, and Bailey 2019).

5. Various scholars note primary elections filled a role for the party bosses as well, and thus some supported it. Alan Ware (2002) argues that party leaders supported the adoption of the direct primary because it institutionalized practices that had previously been informal. John Reynolds (2006) argues that reformers partly wanted primaries to minimize the influence of the "wrong" element (immigrants) while politicians thought that including a broader base of its supporters in the nomination would discourage voters from "bolting" to another party.

6. Nineteen states and the District of Columbia have rules that allow voters to recall state elected officials and 30 states allow the recall of a local lawmaker before the official's term has ended. The process generally requires gathering many signatures on a recall petition, and, if enough valid signatures are gathered, holding an election to recall and perhaps replace the official. Recalls are difficult to mount and are not common. See National Conference of State Legislatures (2021) for a good overview of the recall process in various U.S. states.

7. If parliamentary majorities are too big and have too many conflicting policy demanders, party leaders have called elections to reduce the size of their majority to achieve a minimum winning coalition, which William Riker argued is the ideal position (Riker 1962).

8. The only exception is Nebraska, which, since 1937, has had a unicameral legislature.

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9. The most notable exceptions are Kentucky, Louisiana, Mississippi, New Jersey, and Virginia, which conduct statewide elections in odd numbered years.

10. For instance, some states have no limits on how much can be given to a state political party by any contributor (e.g., Florida), and some have limits on how much corporations and labor unions may give to a state party but no limits on contributions from other sources (e.g., Wyoming). There's more on this in chapter 8.

11. As of 2023, 13 states offer some form of public financing for campaigns (National Conference of State Legislatures 2023), and from 1976 to 2008, the presidential public funding system was used by all major party presidential candidates (see chapter 6).

12. Here we assume that voters can indeed cast informed votes, while other scholars assert that voters make voting decisions mainly on the basis of partisan and social identity (Achen and Bartels 2016).

13. Collective action refers to the ability of individuals working in a group to achieve a desired action (such as clean air or water) more effectively than each individual working toward this goal on their own. Plus, everyone in the group benefits equally (as in wages negotiated by a union), so working together makes sense.

14. Witko et al. (2021, 38) explain the forms of kinetic power: "Money can certainly have direct effects in politics, but money can also be used to activate other forms of kinetic power—mobilizing voter turnout, lobbying, protest, information generation and dissemination, public relations, organizational efforts, and so on."

15. P.L. 111–203; 124 Stat. 1376.

16. Appropriations Act (Government) of 1877, 19 Stat. 143; 44th Congress, Sess. I, Ch 287.

17. Ch. 27, 22 Stat. 403.

18. For a good explanation of some positive impacts of New York's party machine, Tammany Hall, in assisting, protecting, and giving political voice to the masses of marginalized immigrants in the mid-1800s to the early 1900s and in laying the groundwork for later social reforms, see Golway (2014).

19. P.L. 59–36; 34 Stat. 864.

20. Also known as the Publicity Act, P.L. 61–274; 36 Stat. 822.

21. Known as the 1911 Amendments to the Publicity Act, 37 Stat. 25.

22. The Supreme Court struck down the spending limits for primary elections in *Newberry v. United States*, 256 U.S. 232 (1921), and in *United States v. Classic*, 331 U.S. 299 (1941), the Court ruled that only the states, not Congress, could regulate primary elections.

23. 43 Stat. 1070.

24. Note, however, there continued to be regular disclosure of presidential campaign finance activity, allowing us to understand the broad contours of federal campaign finance in the early to mid-20th century. See Mutch (2014).

25. P.L. 73–67; 48 Stat. 195.

26. P.L. 74–198; 49 Stat. 449.

27. The official title of the Hatch Act is An Act to Prevent Pernicious Political Activities, P.L. 76–252; 53 Stat. 1147.

28. P.L. 76–753; 54 Stat. 767.

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29. Also known as the Labor Management Relations Act, P.L. 80–101; 61 Stat. 136.

30. Section 527 and other numbered groups are named for the section of the tax code that regulates their activities.

31. P.L. 107–155; 116 Stat. 81.

32. *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 674 (D.D.C. 2010).

33. The "magic words" standard comes from a footnote in the 1976 *Buckley v. Valeo* decision that aimed to identify words/phrases that would clearly be considered words of express advocacy.

Chapter 2

1. This agency, funded by U.S. taxpayers, was created in 1961 to carry out a variety of international assistance programs. Its Mission Statement reads in part: "On behalf of the American people, we promote and demonstrate democratic values abroad, and advance a free, peaceful, and prosperous world. In support of America's foreign policy, the U.S. Agency for International Development leads the U.S. Government's international development and disaster assistance through partnerships and investments that save lives, reduce poverty, strengthen democratic governance, and help people emerge from humanitarian crises and progress beyond assistance." U.S. Agency for International Development (2022).

2. These activities were largely eliminated with the 1995 Lobbying Disclosure Act (P.L. 104-65) and the "gift ban" in the 2007 Honest Leadership and Open Government Act (P.L. 110–81), which banned gifts, tickets to sporting and other events, trips, and meals valued over a minimal amount to lawmakers.

3. The 1989 Ethics Reform Act (P.L. 101-194; 103 Stat. 1716) requires that all federal candidates disclose their personal finances, restricts outside employment (such as pay for speeches), prohibits House members and officers from receiving honoraria (but they may direct that an honorarium, up to $2,000, be paid to a charitable organization, and senators were exempted), and imposed postemployment restrictions on former House and Senate members and their staffs for a year after leaving office, prohibiting them from seeking any official action from any current member or staff of the House or Senate, among other things.

4. 11 CFR 100.52(a) and 100.54.

5. One of the most comprehensive and user-friendly sites for finding contribution and other campaign finance data is OpenSecrets.org.

6. The FEC issued a rule in 2005 (FEC REG 2004–05 Contributions by Minors Repeal at 11 CFR 110.19), stemming from the *McConnell v. FEC* (540 U.S. 93) decision in 2003, explaining that minors may contribute to federal campaigns, so anyone of any age may contribute.

7. Significant recent scholarship suggests that the role of parties in nominations has been more substantial in the U.S. than a "candidate-centered" model supposes. See, for example, Masket (2009), Hassell (2017), and Bawn et al. (2012).

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8. P.L. 92-225; 86 Stat. 3.
9. P.L. 92-178; 85 Stat. 497.
10. P.L. 93-443; 88 Stat. 1263.
11. P.L. 89-487; 80 Stat. 250.
12. P.L. 92-573; 86 Stat. 1207.
13. P.L. 93-344; 88 Stat. 297.
14. P.L. 94-409; 90 Stat. 1241.
15. FECA 1971 required that personal contributions from candidates and their families be limited to a combined total of $50,000 for presidential and vice-presidential candidates, $35,000 for Senate candidates, and $25,000 for House candidates.
16. We call these separate segregated fund PACs that are established based on the rules set out in the 1971 FECA *traditional PACs*, which differ from super PACs and other campaign finance groups, which we discuss in detail in later chapters.
17. Recall from chapter 1 that the first PAC was the Congress of Industrial Organization Political Action Committee (CIO-PAC), which formed with voluntary donations from union members in 1943.
18. To receive public funding, presidential candidates had to limit their overall spending to "$0.15 multiplied by the voting-age population of the United States and, for major party candidates (. . . those whose party received more than 25 percent of the popular vote in the previous presidential election), that they not accept contributions beyond the public subsidy. . . . Minor party candidates (. . . those whose party received between 5 and 25 percent of the popular vote in the previous presidential election) were eligible for a fraction of the major party grant. . . . Candidates of new parties or of minor parties who reached the eligibility threshold in the current election were entitled to postelection subsidies based on their share of the vote compared with the average vote for the major party candidates" (Corrado 1997a, 50–51).
19. The 1971 Revenue Act included a tax credit (for half of the contribution up to $12.50) or tax deduction (for the full contribution up to $50) to encourage citizens to make small contributions to candidates, party committees, and some PACs at any level of government. The tax credit was doubled in 1975 (1975 Tariff Schedules Amendments, P.L. 93-625; 88 Stat. 2108) and again in 1978 (1978 Revenue Act), but it was completely repealed as part of the 1986 Tax Reform Act (P.L. 99-514; 100 Stat. 2085). For more explanation, see Anthony Corrado (1997a).
20. The 1974 FECA Amendments stipulated that Senate candidate spending in primary elections was limited to $100,000 or $0.08 times the voting-age population (VAP) of the state, and a maximum of $150,000 or $0.12 times the VAP for the general election, whichever is greater. House candidates in states with more than one district could spend up to $70,000 per election, with the primary and general election considered separate elections, and those in states with only one representative could spend the same as their state's Senate candidates. Presidential candidates were limited to $10 million for primary elections and $20 million for the general election. Limits on all candidate expenditures, except for those made by presidential candidates who accept public funding, were repealed in *Buckley v. Valeo* in 1976.
21. Party committee spending on behalf of candidates, called coordinated expenditures, was limited to $10,000 for House general election candidates and $20,000 or $0.02 times the VAP (voting age population) for a Senate candidate, whichever was

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greater. Parties were limited to spending $0.02 times the VAP for their presidential nominee. These limits are adjusted for inflation.

22. The convention public funding was repealed in 2014 (see chapter 5).

23. *Buckley v. Valeo*, 424 U.S. 1 (1976).

24. While in the Senate, Buckley aligned himself with the Republican Party.

25. After Buckley and his colleagues lost at the District of Columbia Circuit Court, they appealed the decision to the U.S. Supreme Court, which issued its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976).

26. *Buckley v. Valeo*, 424 U.S. 1 (1976) at 27 (Brief of the Appellants). There was some discussion of freedom of speech around the issue of campaign finance in court cases in the wake of the 1947 Taft-Hartley Act (i.e., the Labor Management Relations Act), but these arguments to end Taft-Hartley's ban on union political activity did not prevail (see Mutch [2014], 109–14, for a thorough discussion of these cases).

27. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 14, 19.

28. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 24.

29. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 3.

30. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 14.

31. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 21.

32. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 19.

33. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

34. *Buckley v. Valeo,* 421 U.S. 1 (1976) at 154 (Brief of the Appellees).

35. *Colorado Republican Federal Campaign Committee v. FEC*, 518 US 604 (1996) (aka *Colorado I*).

36. The Supreme Court extended First Amendment free speech rights to corporations in *Citizens United v. FEC*, 558 U.S. 310 (2010), which allowed corporations to make unlimited independent expenditures. We discuss this case and the various consequences of the Court's decision in chapters 3 and 4.

37. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 30 (Brief of the Appellants).

38. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 60.

39. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 48–49; the Court quoted *Associated Press v. United States*, 326 U.S. 1 (1945) at 20 and *Roth v. United States*, 354 U.S. 476 (1957) at 484.

40. See, for example, Justice Thomas's dissent in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000).

41. *Buckley v. Valeo*, 421 U.S. 1 (1976) at 91.

42. Family Medical Leave Act P.L. 103-3; 107 Stat. 6.

43. P.L. 116-92; 133 Stat. 1198.

Chapter 3

1. H. Alexander (1979), 21. The legislation calculated expenditure ceilings based on each state's population.

2. As the vice president in August 1974, Ford became president when Richard Nixon resigned.

3. For an analysis of the Democratic nomination in 1976, see Julian Zelizer's

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article, “17 Democrats Ran for President in 1976: Can Today’s GOP Learn Anything from What Happened?” (2015).

4. State lawmakers amended section 8 of the Massachusetts Gen. Laws Ann., ch. 55, § 8 in 1975.

5. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

6. Note that Powell did not share his probusiness memo with the Senate during his confirmation process in 1971, and the contents of his memo were not publicly known until it was leaked to a journalist a year later. See Nichols and McChesney (2013), 81.

7. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at 777.

8. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) at 824.

9. A recent example illustrates this distinction. In December 2022, the Trump Organization, but not Donald Trump personally, was convicted on 17 counts of tax evasion and misrepresentation. The corporation, but not Donald Trump personally, must curb its practices and pay fines and back taxes. To get these convictions, one employee of the Trump Organization pleaded guilty to reduced charges in exchange for his testimony against the organization (Protess et al. 2022). On March 30, 2023 a grand jury indicted Trump personally on similar charges to the ones levied against his company (Protess et al. 2023).

10. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

11. *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) at 257–58.

12. We discuss the activities of politically active 501(c) nonprofit corporations at length in the next two chapters. Here we focus on the role that nonprofit corporations played in the evolution of corporate participation in federal campaign finance.

13. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

14. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) at 660.

15. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) at 660.

16. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) at 680.

17. *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), aka *Colorado I*.

18. *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001), aka *Colorado II*.

19. *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) at 452.

20. The 1979 Amendments are P.L. 96-187; 93 Stat. 1339.

21. Note that party committees may transfer unlimited amounts of money to one another at all levels—federal, state, and local.

22. FEC Advisory Opinion 1978–10 (Republican State Committee of Kansas).

23. FEC Advisory Opinion 1979–17 (Republican National Committee).

24. Note that, since the 2004 election cycle, parties, candidates, and groups easily raise much more in limited hard money donations due to effective online small donation fundraising.

25. Good government groups are generally nonpartisan, nonprofit groups that advo-

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cate for various reforms to improve the responsiveness and accountability of government. These groups first emerged in the U.S. during the Progressive Movement in the late 19th century and advocated for reforms such as the civil service to replace patronage jobs. Today, many good government groups advocate for campaign finance reform.

26. In chapter 6, we discuss how the separation of powers in government shapes the political party and campaign finance systems outside of government.

27. Under 11 CFR 106.5(b)(2), party committees that make disbursements in connection with both federal and nonfederal elections and want to use both federal and nonfederal funds to pay for them must allocate those expenses according to a specific formula: "60% to the federal account and 40% to the non-federal account in non-presidential election years, and 65% to the federal account and 35% to the non-federal account in presidential election years."

28. *Buckley v. Valeo*, 424 U.S. 1 (1976) at footnote 52.

29. *Federal Election Commission v. Furgatch*, 807 F.2d 857 (9th Cir. 1987).

30. *Faucher v. FEC*, 928 F.2d 468 (1st Cir. 1991).

31. 26 U.S. Code § 527(e)(2) defines exempt function.

32. See Dwyre and Farrar-Myers, *Legislative Labyrinth: Congress and Campaign Finance Reform* (2000) for a thorough analysis of the (ultimately unsuccessful) efforts to pass comprehensive campaign finance reform in the late 1990s.

33. Established in 1979, C-SPAN (Cable-Satellite Public Affairs Network) broadcasts gavel-to-gavel unedited and unfiltered coverage of the U.S. Congress, as a public serve paid for by cable and satellite providers. The C-SPAN cameras are fixed on the speaker's podium and lawmakers are keenly aware that all their comments made on the floor of the House or Senate are recorded and broadcast to their voters back home and to the world.

34. P.L. 106–230; 114 Stat. 477.

35. There were several fraud and insider trading convictions of top Enron executives, who all made millions of dollars from the company, while most employees were denied the ability to sell their company stocks, and many lost their life savings. The scandal revealed the SEC's failure to exercise appropriate regulatory oversight and the complicity of the credit rating agencies and investment banks, which gave the company high ratings.

36. In the aftermath of the Enron scandal, journalists discovered that the company's executives made generous contributions to President George W. Bush and the RNC, although the administration did not intervene to save the company or its employees from federal prosecution.

37. The new law had not yet applied to anyone, and the Supreme Court agreed to hear the challenge to BCRA before its term started to provide guidance in time for the 2004 election.

38. *McConnell v. FEC*, 540 U.S. 93 (2003).

39. *McConnell v. FEC*, 540 U.S. 93 (2003) at 86–87.

40. See FEC REG 2004–05 Contributions by Minors Repeal (McConnell) 11 CFR 110.19.

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Chapter 4

1. *Citizens United v. FEC*, 558 U.S. 310 (2010).

2. FECA did not include inflation adjustments for contribution limits.

3. See Jeffrey Birnbaum (2000), 90–91, for a discussion of the formal and informal ways donors wish to spend time with lawmakers.

4. Political committees that receive itemized contributions of $200 or more must report the contribution to the FEC along with the donor's name, address, occupation, and employer, as well as the date and amount of the contribution and an aggregate of all contributions from the donor during the election cycle to date. We discuss this further in chapter 5.

5. P. L. 106-230; 114 Stat. 477.

6. We document and discuss the growth of 527 and other outside group spending in chapter 5.

7. The groups fined were the Swift Boat Veterans and POWs for Truth, the League of Conservation Voters, and MoveOn.org.

8. See, for example, *Citizens for Responsibility and Ethics in Washington (CREW) v. FEC*, 316 F. Supp. 3d 394, D.D.C. (2018), and also Galston (2021).

9. See, for example, the website of OpenSecrets (a group that advocates for campaign finance and other reforms), which has an entire section devoted to "Dark Money": https://www.opensecrets.org/dark-money/

10. *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

11. *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007) at 470.

12. The FEC had brought the original action against WRTL as a violation of BCRA's electioneering communications provision. Yet, once the Supreme Court invalidated the BCRA blackout period, the FEC implemented the ruling by giving the widest latitude to those running the ads, making it easy to avoid disclosure. The FEC's lax disclosure was consistent with a 1980 FEC rule implementing the 1979 FECA Amendments. The FEC rule stated that only those contributors who gave "for the purpose of furthering the *reported* independent expenditure" must be disclosed (emphasis added, see 11 CFR 109.10(e)(1)(vi)). This precedent went unnoticed until the 2007 *WRTL* case because very few groups or individuals were making independent expenditures in the 1980s.

13. Note that the enhanced disclosure requirements required by *CREW v. FEC* (2018—see note 8 above) applied only to express advocacy independent expenditures, not to the electioneering communications that were the subject of the 2007 *Wisconsin Right to Life* case.

14. We document and discuss the growth of 501(c) and other outside group spending in chapter 5.

15. *Davis v. FEC*, 554 U.S. 724 (2008).

16. *Davis v. FEC*, 554 U.S. 724 (2008) at 9.

17. *Citizens United v. FEC*, 558 U.S. 310 (2010).

18. Recall that *FEC v. Massachusetts Citizens for Life* (1986) permitted certain ideological nonprofit corporations that do not accept for-profit corporate or labor union contributions to engage in express advocacy spending in federal elections (see chapter 3).

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19. Recall that express advocacy communications call for the election or defeat of a clearly identified candidate by using words such as “vote for” or “oppose,” and the Court has generally required that an ad contain such obvious advocacy to justify regulation.

20. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) at 660.

21. Recall, however, the floodgates had already been cracked open three years earlier with the *WRTL* case, which allowed corporations and unions to run electioneering communications close to Election Day.

22. *Citizens United v. FEC*, 558 U.S. 310 (2010) at 909 and 913.

23. *Citizens United v. FEC*, 558 U.S. 310 (2010) at 876 and 910.

24. *Citizens United v. FEC*, 558 U.S. 310 (2010) at 448.

25. *SpeechNow.org v. FEC*, 599 F.3d 674 (D.D.C 2010).

26. *SpeechNow.org v. FEC*, 599 F.3d 674 (D.D.C. 2010), 694–96.

27. Advisory Opinions (AOs) are issued by the FEC at the request of a “filer” that wishes to engage in activity that is either not mentioned in current law or for which there are unclear guidelines. The organization is asking if a proposed activity will result in a violation of the law. AOs are discussed in chapter 7.

28. FEC Advisory Opinion 2010-09 (Club for Growth).

29. FEC Advisory Opinion 2010-11 (Commonsense Ten).

30. Note, however, that many super PACs spend money on campaign activities other than independent expenditure advertisements, such as opposition research and fundraising expenses. See Diana Dwyre and Evelyn Braz (2015).

31. *McCutcheon v. FEC*, 572 U.S. 185 (2014).

32. BCRA also set a sublimit of $57,500 per election cycle in aggregate contributions to parties and PACs (with no more than $37,500 of it going to organizations other than national party committees) and $37,500 to all candidates (Federal Election Commission, Contribution Limits n.d., 2003–4 limits).

33. This aggregate limit included $46,200 combined to all federal candidates and $70,800 to all parties and PACs (Federal Election Commission, Contribution Limits n.d. [2011–12 limits]).

34. *McCutcheon v. FEC*, 572 U.S. 185 (2014) at 15.

35. *McCutcheon v. FEC*, 572 U.S. 185 (2014) at 2.

36. Justice Breyer also warned that lifting the aggregate contribution limits would encourage more use of joint fundraising committees (committees of parties, candidates, and sometimes PACs that raise money together) to raise and direct money to candidates and parties from the same donors. See our fuller discussion of JFCs in chapter 5.

37. Contributor data calculated by authors from FEC data.

38. The 2014 Gabriella Miller Kids First Research Act, P.L. 113-94; 128 Stat. 1085.

39. P.L. 113-235; 128 Stat. 2772.

40. Congress has missed the October 1 deadline to enact all 12 appropriations bills since 1997 and now relies on continuing resolutions (CRs) to continue government funding at current levels and extend spending authority to federal agencies, often enacting many CRs in a single year. Using CRs allows lawmakers to avoid the tough decisions needed to allocate funding for the entire year, making it difficult for federal

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agencies to plan. Yet CRs are often used to avoid a government shutdown, which would be a worse outcome.

Chapter 5

1. Michael Alvarez et al. refer to these donors as being "eventually visible" while those giving their first donation in an amount of $200 or more are "immediately visible." Those who never meet the $200 threshold are "hidden." When analyzed this way, we learn that "eventually visible" donors contribute earlier in the campaign cycle than the other types and account for a plurality (46.2 percent) of the Bernie Sanders' 2016 receipts from individuals (Alvarez, Katz, and Kim 2020, 10).

2. In chapter 8, we explain that some states tried to ban out-of-state donations, but those laws were struck down by federal courts as violations of freedom of association rights.

3. In certain districts where one political party dominates, the primary election is in effect the main election, because the voters choose between candidates from that dominant party in the primary and the winner is all but certain to win the general election against the weaker party's candidate. Many races in the city of Philadelphia are like this.

4. *McCutcheon v. FEC*, 572 U.S. 185 (2014).

5. We used the OpenSecrets list of the biggest donors in the 2020 cycle. These $30-plus million contributors were by no means the biggest spenders in 2020. The top contributors gave a lot more: Sheldon and Miriam Adelson contributed over $218 million, and Michael Bloomberg gave more than $152 million (OpenSecrets, Biggest Donors n.d.).

6. That means $10,000 per year for a state's federal committees. A donor may give to a county federal committee, the state's committee, and so forth as long as the total for the federal activity does not exceed this limit.

7. That means for the headquarters accounts for the DNC, DSCC, and DCCC (3), the recount/legal accounts for the DNC, DNCC, and DCCC (3), and the convention account for the DNC (1).

8. Note that both parties' 2020 national conventions were scaled-back events due to the Covid-19 pandemic.

9. Each state party may establish a committee to raise and spend hard money *only* on federal races. These committees help the political parties transfer funds.

10. Note that non-multicandidate PACs (ones that have not been registered at least six months, have fewer than 50 contributors, and have not contributed to five or more candidates) may donate more to national party committees than multicandidate PACs, and their contribution limit is indexed to inflation. The non-multicandidate PAC contribution limit to a party committee was $35,000 per year for the 2019–20 election cycle (higher than the multicandidate PAC limit of $15,000 per party committee).

11. Leadership PACs are traditional multicandidate PACs established by incumbent members of Congress to contribute to other congressional candidates, to party

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committees, and to pay for other expenses they cannot pay for with their campaign committee or their congressional budget. We discuss leadership PACs further in chapter 6.

12. This means that a national party committee and its senatorial campaign committee shared this limit. So, the DNC and the DSCC together could donate $17,500 pre-BCRA. Post BCRA, the RNC and NRSC could donate $35,000 (adjusted for inflation) in total.

13. 11 CFR 110.2(e).

14. 11 CFR 109.32–37.

15. The 1974 FECA Amendments did not allow the parties to make coordinated expenditures with their *presidential* candidates; however, in 1999 the FEC created new section 11 CFR 110.7(d) that allowed this before the date the party's candidate receives the presidential nomination.

16. P.L. 78–89; 57 Stat. 163.

17. Leadership PACs are also considered nonconnected PACs.

18. P.L. 110–81; 121 Stat. 735.

19. 11 CFR 104.22.

20. Any time through the 20th day before an election, committees must report independent expenditures with an aggregate value of $10,000 or more for the election within 48 hours of each independent expenditure, and within 24 hours after the 20th day before an election. See https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/reporting-independent-expenditures-form-5/

21. FEC Advisory Opinion 2011–12 (Majority PAC and House Majority PAC) and FEC Advisory Opinion 2015–09 (Senate Majority PAC and House Majority PAC).

22. Remember that a super PAC must operate independently of all candidates and parties. Presidential single-candidate super PACs are not controlled or run by the candidates, their campaigns, or parties. Thus, a super PAC is established to *help* a candidate, but the candidate might not agree with the super PAC's strategy, tone, activities, and so forth, and the candidate may not communicate directly with the super PAC. Box 5.1 explains why candidates could be pleased with what a super PAC does.

23. *Carey et al. v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011).

24. The 527 Organization Disclosure Act of 2000 (P.L. 106–230; 114 Stat. 477) and the 527 Amendment on Notification Requirements and Duplicate Reporting of 2002 (P.L. 107–276; 116 Stat. 1929).

25. 501(c)(3) organizations are traditional charities, which are prohibited from participating in any campaign activity.

26. The primary or "major purpose" of an organization is difficult to determine, and vague laws and regulations as well as lax IRS enforcement make it easy for 501(c) groups engaged in political activities to avoid designation as a political committee, which would trigger strict contribution limits and disclosure requirements regulated by the FEC (Galston 2021, 272–79).

27. 26 U.S. Code § 501(c)(4)(a).

28. The big jump in 501(c)(4) spending in 2012 was due primarily to big spending by two conservative groups—$71 million by Crossroads Grassroots Policy Strategies

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and $37 million by Americans for Prosperity, which together constituted 42 percent of all 501(c)(4) spending in 2011–12 (OpenSecrets, Political Nonprofits n.d.).

Chapter 6

1. Note, however, that the bicameral structure of the U.S. Congress is primarily the result of the Great Compromise (or Connecticut Compromise) at the Constitutional Convention that was designed to give the small states (sparsely populated with whites) what they wanted, equal representation for each state in the Senate (two senators per state regardless of population), and the large states what they wanted, representation based on population in the House.

2. In every U.S. state, voters may easily "split" their tickets by voting for an individual candidate for each office. Thus, while many voters do vote for candidates from the same party, not all do, and the ballot configuration allows them to split their tickets.

3. This ability to donate to several candidates and entities was illustrated by our discussion of the two wealthy individual donors in chapter 5.

4. See, for example, Grant and Rudolph (2004, 78), and Primo and Milyo (2020, 159–60).

5. The FEC has different rules for minor and new party candidates: "A minor party candidate is the nominee of a party whose candidate received between five and 25 percent of the total popular vote in the preceding presidential election. The amount of public funding to which a minor party candidate is entitled is based on the ratio of the party's popular vote in the preceding presidential election to the average popular vote of the two major party candidates in that election. A new party candidate receives partial public funding after the election if he or she receives five percent or more of the vote. The entitlement is based on the ratio of the new party candidate's popular vote in the current election to the average popular vote of the two major party candidates in the election" (Federal Election Commission, Public Funding n.d.).

6. See 26 U.S.C. § 9033 (c) (1) (B). The DNC used a similar formula of measuring donor support and poll numbers to determine who participated in the 2019 Democratic presidential nomination candidate debates.

7. As an unconventional candidate with no preexisting base of contributors, Trump partially self-financed his 2016 campaign with over $66 million in loans and contributions (OpenSecrets 2017a).

8. Recall from chapter 5 that a joint fundraising committee (JFC or victory committee) allows one or more candidates, party committees, and sometimes PACs to raise money together and split the proceeds according to a predetermined allocation formula.

9. This is the limit for the 2022 election cycle. In 2002, BCRA raised the base limit to $2,000 and provided for a cost-of-living correction every two years rounded to the nearest hundred dollars. PAC contributions are not indexed to inflation.

10. Both chambers of Congress have very clear guidelines on the use of official staff and property for campaign purposes. See the House Ethics Committee: https://ethics

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.house.gov/general-prohibition-against-using-official-resources-campaign-or-political-purposes#campaign_fnote3, and the Senate Ethics Committee: https://www.ethics.senate.gov/public/index.cfm/campaign-activity

11. For example, state and local party committees may only give congressional candidates small contributions (cash or in-kind) of $5,000 per election. Parties can spend more on coordinated expenditures, but in House races that amounted to only $55,000 for 2022 (Federal Election Commission, Contribution Limits n.d.: 2021–22 limits). This means that a congressional candidate cannot establish office space in the district subsidized by any party organization unless the candidate produces the funds to pay for the use of the space.

12. Sometimes candidates run staff expenses through state and local parties to make items such as health insurance and accounting services more affordable, but if the employee spends 25 percent of their time on federal races, the congressional or presidential candidate must compensate the state/local party organizations for this service.

13. Note that incumbent federal candidates may *not* use the franking privilege they enjoy as elected officials to send mail at no cost to their constituents for campaign purposes. It is illegal to pay to produce or mail/transmit overtly campaign or election related material using taxpayer dollars. Nevertheless, much of what congressional staff does to provide assistance to constituents, such as help with navigating the complex federal bureaucracy, pays electoral dividends that are difficult to quantify. See Cain, Ferejohn, and Fiorina (1984).

14. The leading reasons are for retirement or to run for another office—such as president.

15. Recall from chapters 4 and 5 that a hybrid PAC is a single organization that has both a traditional PAC and a super PAC.

16. This excludes the vote totals of minor party or independent candidates who usually attract a small percentage of votes.

17. See permissible noncampaign use of funds, 52 U.S.C. 30114(a).

Chapter 7

1. *Doe v. Reed*, 561 U.S. 186 (2010) at 228.

2. The reason for all the donor information is to ensure that no person violates the contribution limits. Otherwise, there is no way to distinguish "John L. Smith" from St. Louis, Missouri and "John L. Smith" from Ferguson, Missouri.

3. *NAACP v. Alabama ex rel. Patterson*, 375 U.S. 449 (1958) at 460–63; *Buckley v. Valeo*, 424 U.S. 1 (1976) at 64–66; *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87 (1982) at 102.

4. Some well-known journalists who have covered campaign finance most accurately are Eliza Newlin Carney of *National Journal*, Jackie Koszczuk of *Congressional Quarterly*, Derek Willis of ProPublica, Michelle Ye Hee Lee of the *Washington Post*, Peter Overby of National Public Radio, and Nicholas Confessore of the *New York Times*.

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5. Federal campaign finance laws require all federal candidates, political parties, PACs, super PACs, hybrid PACs, as well as any 501(c) and 527 nonprofits, corporations, unions, host and convention committees, inaugural committees, and some individuals who spend in federal elections to disclose their federal campaign finance activity to the FEC, the IRS, or other agency.

6. What if a donor uses a middle initial for one donation and does not for a later one? What if a woman uses her married name to make one donation and her maiden name for a later one? Or, what if the campaign volunteer inputting data misspells a donor's name one time and not the other? These are all typical issues for campaign filers.

7. FEC commissioner Ellen Weintraub agreed that ignorance of the rules is by far the central reason errors are reported by candidates and committees. Personal interview with FEC commissioner (and chair) Ellen Weintraub, to Robin Kolodny, Philadelphia (Temple University), October 3, 2019.

8. In-kind contributions are goods or services offered for free or at a reduced charge, and the value of an in-kind contribution counts against the total contribution limit a person or entity may give.

9. 11 CFR 100.52(a).

10. The FEC website directs people to the Office of Government Ethics if they wish to see the personal financial statements of presidential candidates. As this is not campaign finance reporting, we do not include it in our discussion. See the FEC website section on "External Data Sources," https://www.fec.gov/data/browse-data/?tab=external

11. It is in the Consolidated Appropriations Act of 2016, P.L. 114–113; 129 Stat. 3030 states: "None of the funds made available by any division of this Act shall be used by the Securities and Exchange Commission to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions, contributions to tax exempt organizations, or dues paid to trade associations."

12. 597 U.S. ___ (2022).

13. P.L. 69-632; 44 Stat. 1162.

14. P.L. 73-416; 48 Stat. 1064.

15. The Lowest Unit Rate (LUR) ensures that candidates for public office receive the same discounts for advertising as the station's "best" customer does. Federal Communications Act of 1934, 47 CFR §73.1942.

16. 11 CFR 100.29 (b)(5); 11 CFR 100.29 (b)(6); 11 CFR 100.29 (b)(7).

17. Revenue Act of 1934. P.L. 73-216; 48 Stat. 630.

18. See, for example, the "Dark Money" page on the OpenSecrets' website, https://www.opensecrets.org/dark-money/

19. P.L. 106–230; 114 Stat. 477.

20. Now known as the Government Accountability Office.

21. Personal interview with FEC commissioner (and chair) Ellen Weintraub, by Robin Kolodny, Philadelphia (Temple University), October 3, 2019.

22. See FEC regulations, https://www.fec.gov/legal-resources/regulations/explanations-and-justifications/citation-index-part-110/

23. The media or press exemption was added to the law with the 1974 FECA Amendments. It stipulates that federal campaign finance restrictions do not apply to

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the costs associated with producing "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication" (52 U.S.C. § 30101(9)(B)(i)). However, what entities are included in this exemption "is not defined by statute or regulation, and this federal agency [the FEC] is also stuck with the task of determining when those entities are going about their business 'legitimately'" (Bauer 2016).

24. Data compiled by authors from the FEC website listing all AOs issued by the agency.

25. Revision to 11 CFR 100.26, "Public communication," https://www.ecfr.gov/current/title-11/chapter-I/subchapter-A/part-100#p-100.26(Public%20communication), New Disclaimer Requirement for Internet Public Communications, 11 CFR 110.11(c)(5), https://www.ecfr.gov/current/title-11/chapter-I/subchapter-A/part-110/section-110.11#p-110.11(c)(5); New Adapted Disclaimers, 11 CFR 110.11(g), https://www.ecfr.gov/current/title-11/chapter-I/subchapter-A/part-110/section-110.11#p-110.11(g)

26. See Federal Election Commission (2006), "Internet Communications—Final Rules and Transmittal to Congress." Federal Register 71, no. 70, 18589.

Chapter 8

1. *New State Ice Co., v. Liebmann*, 285 U.S. 262 (1932).

2. Montana Corrupt Practices Act of 1912/Montana Campaign Expense Limits Initiative, I 304–305, found at Mont. Code Ann. § 13-35-227.

3. *American Tradition Partnership v. Bullock*, 567 U.S. 516 (2012).

4. *Randall v. Sorrell*, 548 U.S. 230 (2006).

5. See *North Carolina Right to Live v. Leake*, 525 F.3d 274 (4th Cir. 2008), and *South Carolina Citizens for Life v. Kenneth C. Krawcheck et al.*, 759 F. Supp. 2d (D.S.C. 2010).

6. *VanNatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), struck down Oregon's ban on nonresident contributions; *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) stopped Alaska's ban.

7. It has never been the case that checking this box increases a citizen's tax bill in any way. It is simply an opportunity to send $3 (today) to support presidential elections rather than send that amount to the Treasury for use on any approved government expenditure.

8. *McDonnell v. United States*, 579 U.S. 550 (2016) at 28.

9. *McDonnell v. United States*, 579 U.S. 550 (2016) at 28.

10. *Federal Election Commission v. Ted Cruz for Senate*, 596 U.S. ___ (2022) at 3, 12.

11. *Federal Election Commission v. Ted Cruz for Senate*, 596 U.S. ___ (2022) at 14.

12. A corporation's connected PAC may solicit donations only from the corporation's executives and administrators, its shareholders, and the families of both groups, and a labor union's connected PAC may solicit donations only from its union members, its executives and administrators, and the families of both.

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13. Unlimited spending on lobbying is, like campaign spending, linked to the First Amendment, which includes the assertion that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for redress of grievances," that is, lobbying.

14. The six unions that spent more on campaign contributions than on lobbying in 2020 were the Operating Engineers, Sheet Metal Air Rail & Transportation, American Federation of Teachers, International Brotherhood of Electrical Workers, National Air Traffic Controllers, and Laborers Union.

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Index

501(c) 4/5/6: after BCRA, 118, 124, 156, 261; and *Citizens United*, 113–14; connections with parties and groups, 156, 172–75. 283; defined, 26–27, 242–43; disclosure by, 108, 135, 229, 326n5; IRS oversight, 108, 207, 237–38, 242–44, 323n26; spending by, 108–9, 111, 118–19, 144, 170, 172–75, 177, 205–6, 211–12; unlimited contributions to, 108–9, 134–35, 144, 193; and *WRTL*, 109–11

527 groups: after BCRA, 117, 124, 156, 172; connections with parties and groups, 167, 176–77; defined, 26–27, 86–87, 242; disclosure by, 91, 108, 135; IRS oversight, 87, 107, 144, 238, 243; spending by, 107–8, 117, 177, 205, 212–13; unlimited contributions to, 87, 109, 117, 134, 144, 193

Act Blue, 106, 128–29, 131, 134, 171–72

advisory opinions (AO). *See* AO

AFL-CIO, 88, 160. *See also* labor unions

aggregate contribution limit for individuals: in BCRA, 94, 321nn32–33. See also *McCutcheon*

Alexander, Herbert, 65

Alito, Samuel, 112–13

Alvarez, Michael, 131, 322n1

AO (advisory opinions), 27, 78–79, 245, 259–60, 297–98, 321n27

Austin v. Michigan Chamber of Commerce, 73–74, 114

Bachrach, Peter, 58

Backer, Dan, 171

Baker, Anne, 160

ballot measures in states: corporate spending, 68–69, 71, 74; in states, 270–71, 274. See also *First National Bank of Boston v. Bellotti*

Bankman-Fried, Samuel, 239

Baratz, Morton, 58

Baumgartner, Frank, 291

BCRA 2002 (Bipartisan Campaign Reform Act): 501(c)(4) activity after, 172; 527 activity after, 26, 107–8, 172; adaptation to, 105–6; and *Citizens United*, 113; coordinated expenditures, 155; and FCC, 240; hard money contribution limits under, 136–37, 142–43, 146, 152, 195, 268, 321n32, 323n12, 324n9; Levin Funds, 272; as McCain-Feingold bill, 90–92, 189; and *McConnell*, 125–26, 319n37; and *McCutcheon*, 95–98, 119–20; Millionaires' Amendment in, 93–94, 102–3, 111–12; passage of, 42–43, 65, 89–94, 189; penalties increased in, 257; as Shays-Meehan bill, 90–92; social media omitted in, 263; soft money banned, 85, 139, 163, 193, 216; special party

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
Downloaded on behalf of 3.135.194.251

BCRA 2002 (Bipartisan Campaign Reform Act) (*continued*) accounts, 121–22; and *SpeechNow.org*, 117–18; weakening of, 98–103; and *WRTL*, 109–11, 320n12
Bellotti, Francis, 68. See also *First National Bank of Boston v. Bellotti*
Biden, Joe, 190, 204, 207, 247
Bipartisan Campaign Reform Act (BCRA). *See* BCRA
Birnbaum, Jeffrey, 245, 247, 320n3
Bloomberg, Michael, 192, 322n5
Bonica, Adam, 129, 254
Bouton, Laurent, 129–31
Brandeis, Louis, 270
Brennan, William, 55
Breyer, Stephen, 120, 321n36
Briffault, Richard, 133
Broockman, David, 224, 285
Brown, Adam, 39, 57
Buckley, James, 49–50, 52
Buckley v. Valeo (*Buckley*): in *Austin*, 74; candidate self-spending, 111, 191; in *Colorado I*, 76–78; consequences of, 64–68; 71; constitutional arguments in, 38, 48–56; 62–63; corruption, 285, 288; disclosure, 227; distinction between contributions and expenditures, 115; FEC composition, 245–46; independent expenditures allowed, 144, 162–63; magic words, 83–85, 95–96; 315n33; state cases applied to, 273–74
bundling: by interest groups, 160–62, 261
Burger, Warren, 55
Bush, George H.W., 55, 113, 193
Bush, George W., 91–93, 110, 112, 188, 192, 319n36

campaign costs, 19, 39, 183, 215, 243; Commission on Campaign Costs, 41; communications, 49, 175, 203–4; fundraising, 105–6, 146, 223; mailings, 106, 152, 203, 218, 325n13; nominating conventions, 121–22; overhead expenses, 26–27, 79, 81–82, 122, 142, 159, 171, 189, 202–3, 213, 217–18, 325n12; research expenses, 152, 172, 203
Campaign Legal Center (CLC). *See* CLC
Canes-Wrone, Brandice, 133
capitalism or capitalist system, 1–2, 12–16, 23, 69–70, 180, 270, 289
Carey committees. *See* hybrid PACs
Carnes, Nicholas, 182
Carter, Jimmy, 66
challenger candidates, 11–12, 24; competitive disadvantage, 52–53, 200, 204, 226, 274–79; in House races, 210–14; in Senate races, 207–10
Chamber of Commerce, 27, 69–70, 158, 172
Chaturvedi, Neilan, 212
CIO (Congress of Industrial Organizations), 22, 158, 316n17
Citizens United v. FEC, 1, 27, 98–100, 110, 113–18, 143, 164, 168–71, 207, 237, 244, 265, 273–74, 283; AO to implement, 117–18; *Hillary: The Movie*, 113; non-profit corporation, 113–14; proposed constitutional amendment to address, 283
CLC (Campaign Legal Center), 170–71, 281
Clinton, Bill, 81–84, 89, 91, 192
Clinton, Hillary, 113, 170, 190, 285
Coelho, Tony, 80–81
Cohen, Marty, 177
Colbert, Stephen, 169–70, 260
Colbert Report. *See* Colbert, Stephen
Colorado I. See *Colorado Republican Federal Campaign Committee v. FEC*
Colorado II. See *FEC v. Colorado Republican Federal Campaign Committee*
Colorado Republican Federal Campaign Committee v. FEC (*Colorado I*), 76–78, 163, 274
Common Cause, 43, 51, 66, 81
Congress of Industrial Organizations (CIO). *See* CIO
Contributions: by minors, 315n6; past tax credits for, 316n19. *See also* aggregate contribution limit; corruption; foreign

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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nationals; hard money; in-kind contribution; individual donors; interest groups; political parties; soft money
Conventions. *See* party nominating conventions
coordinated expenditures, 25, 48; in BCRA, 96, 103, 152–55, 163; in *Colorado I*, 75–78; for House races, 156, 200–201, 325n11; for presidential races, 154, 189, 323n15; for Senate races, 156, 196; state and federal parties, 268–69
coordination, 27, 38, 50–52; 71, 74, 107, 118, 152, 162, 167–70, 262; in *Austin*, 74; in *Bellotti*, 68–71; in *Citizens United*, 113–17, 273; corporate personhood, 69–70, 112, 116, 241; corporate spending in elections banned, 20–22, 26, 39–40, 43–45, 96; and corruption, 51, 71–74, 117; by for-profit corporations, 71, 73–74, 113–15; issue advocacy and, 82–83; in *MCFL*, 73; by nonprofit corporations, 71, 73–74, 76, 108–15, 156, 172; reporting of, 234, 238; in state elections, 273; in Watergate, 44, 244; in *WRTL*, 110. *See also* Powell, Lewis, memo written by; soft money; SSF; Tillman Act 1907
Corrado, Anthony, 80, 316n19
corruption, 23–24, 29–31, 281, 285–88; access strategy and, 224; in *Colorado I*, 76; in contributions not expenditures, 34–35, 61–63, 64, 145; disclosure to prevent, 228, 230; and free speech concerns, 268–69; individual and institutional types of, 59–61; issue advocacy and, 83, 93, 95–96; outside spending free of, 162, 165, 172, 177; pinpointing, 56–63; quid pro quo corruption, 31–33, 38, 40, 51, 56, 59–62, 66–68, 71, 73, 116–17, 120, 225, 275, 286; as rationale for limits in *Buckley*, 48–53; self-financed candidates, 111–12; weak penalties for, 257
Cranston, Alan, 61
Davis v. FEC, 111–12. *See also* Millionaires' provision
Davis, Jack. *See* Millionaires' provision
DCCC (Democratic Congressional Campaign Committee), 75; contribution limits, 142; contributions from, 200; hard and soft money, 81; independent expenditures, 78, 164; JFC (victory) committees, 149–50; special accounts, 322n7; transfers from candidates to, 151
Deardorff, Alan, 60, 224
Democratic Congressional Campaign Committee (DCCC). *See* DCCC
Democratic National Committee (DNC). *See* DNC
Democratic Senatorial Campaign Committee (DSCC). *See* DSCC
Department of Justice (DOJ). *See* DOJ
disclaimer on ads (stand by your ad), 93, 239–41, 257, 263–65
DISCLOSE (Democracy Is Strengthened by Casting Light on Spending in Elections) Act, 284
disclosure, 20–21, 24–26, 42–45, 48–49, 52, 61–62, 74, 142, 225–26, 258; data quality of, 229–32, 248–49; disclaimer and, 236; donors' disclosure options, 101, 111, 128, 132, 135, 226–27; to FCC, 237–38, 240; to FEC, 241, 250, 252, 259, 263–66; via the internet, 93, 228, 237, 262–63; to IRS, 144, 240, 323n26; issue ads and 527s, 90–91, 108, 171; JFCs, 149; of lobbyist bundling, 160, 314n24; and privacy, 43, 226–27; to SEC, 321n11; of soft money, 81; in states, 271–72; transparency and, 230, 253
DNC (Democratic National Committee): contributions to, 106, 142, 150, 323n12; contributions from, 323n12; coordinated expenditures, 156; fundraising by, 134; illegal foreign contributions, 81; independent expenditures, 78; and issue ads, 83–84; special accounts, 122–24, 142–43, 322n7; and Watergate, 43, 75

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
Downloaded on behalf of 3.135.194.251

Doherty, Brendan, 185, 192–93
DOJ (Department of Justice), 235, 239, 244–45, 257–58, 261–62, 287
Dole, Bob, 83–84, 88–89
Donations. *See* contributions
Downs, Anthony, 16, 81
DSCC (Democratic Senatorial Campaign Committee), 75; candidate contributions to, 151; contribution limits, 142; contributions from, 200, 323n12; special accounts, 322n7
Dulio, David, 107
Dwyre, Diana, 43, 319n32

electioneering communications: in BCRA, 93–94, 240; and *Citizens United*, 113–16; and express advocacy, 27, 85; and issue ad ban, 102; in McCain-Feingold bill, 90; in *McConnell*, 95–96; political parties and *WRTL*, 107–11, 259, 320n12, 320n13, 321n21; and super PACs, 208–9, 211
EMILY's List, 130, 161
Enforcement: agencies responsible for, 235; DOJ and, 245, 257–58; and FCC, 239–40; under FCPA, 20–21; FEC and, 25, 27–28, 48, 168–71, 175, 228–32, 244–47, 248, 251, 253–56, 266–67; FEC - Alternative Dispute Resolution (ADR), 254–56; FEC-Administrative Fines (AF), 255; FEC - Matter Under Review (MUR), 28, 254; FEC - Reports Analysis Division (RAD), 255; GAO, 257; impediments to, 261–62; and IRS, 241–44, 323n26; in McCain-Feingold bill, 90; in states, 273
Enron scandal, 92, 98, 319n35, 319n36
express advocacy: 26–27; in AOs, 261; by hybrid PACs, 172; issue advocacy comparison, 82–85; permitted use, 108, 110, 114, 318n13, 318nn18–19; in *SpeechNow.org*, 117, 315n33; by super PACs, 164. *See also* issue advocacy; magic words

Facebook. *See* social media communications
Farrar-Myers, Victoria, 43, 319n32
FCC (Federal Communications Commission), 69, 235, 239–41
FEC (Federal Election Commission): 1976 amendments and, 246; AOs issued, 27–28, 259–61; BCRA increases powers of, 94–95; *Buckley* requires new composition, 65–66; campaign-related expenses and, 183; and *Citizens United*, 113–14; civil enforcement, 254–56; and *Colorado I*, 76–79; creation of, 48, 244–46; data provision by, 231, 251–53; foreign donations sanctioned by, 265–66; gridlock at, 254, 262; hybrid PACs, 171; issue advocacy permitted by, 85–87; party coordinated expenditures with presidential candidates, 323n15; press exemption determination, 326n23; quorum issues, 246–47; regulations issued, 258–59; revolving door of commissioners, 247–50; social media unregulated by, 263–65; soft money use allowed, 79–80; super PACs allowed, 117–19; and *WRTL*, 109–11, 320n12
FEC v. Colorado Republican Federal Campaign Committee (*Colorado II*), 78
FEC v. Massachusetts Citizens for Life (*MCFL*). See *MCFL*
FEC v. Wisconsin Right to Life (*WRTL*). See *WRTL*
FECA 1971 (Federal Election Campaign Act of 1971), 42–48; and *Buckley*, 53–54; corporate election spending banned, 71–73, 96; DOJ criminal investigation power, 257–58; foreign contributions banned, 265; hard money limits in, 67, 82, 119, 137, 150, 155, 195, 317n2; individual aggregate contribution limits, 119; and JFCs, 147–48; PACs allowed, 66, 71, 158
FECA 1974 (Federal Election Campaign Act Amendments of 1974), 42–48, 79; and *Buckley*, 49–54, 64, 83, 191; coordinated expenditures, 75–78, 155, 323n15; creation of FEC, 65, 237, 245; hard money limits in, 136, 139–42,

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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146; national party convention funding, 121; reporting data to FEC, 128, 171, 248; presidential public financing, 185–87; press exemption in, 326n23; spending limits in, 316n20
FECA 1976 (Federal Election Campaign Act Amendments of 1976): reconstitutes FEC, 246
FECA 1979 (Federal Election Campaign Act Amendments of 1979): allows soft money, 79–80, 96, 320n12
Federal Communications Commission (FCC). *See* FCC
Federal Corrupt Practices Act (aka Publicity Act) of 1910: 20, 42, 229; amendments of (1911), 20, 42, 198; comprehensive act of 1925, 21, 41–43
Federal Election Campaign Act of 1971 (FECA). *See* FECA 1971
Federal Election Campaign Act Amendments of 1974 (FECA). *See* FECA 1974
Federal Election Campaign Act Amendments of 1976 (FECA). *See* FECA 1976
Federal Election Campaign Act Amendments of 1979 (FECA). *See* FECA 1979
Federal Election Commission (FEC). *See* FEC
federal system. *See* federalism
federalism, 2, 7, 9–10, 80, 270–73
feedback loop, 3–4, 8, 11, 56, 185–86, 201–2, 226–27, 244–45, 267–69, 285
Feingold, Russ, 90, 110
Ferguson, Thomas, 16–17, 59
First Amendment, 24; and *Austin*, 74; and *Bellotti*, 68–71; in *Buckley*, 48–56, 62–64; candidate self-spending, 191; and *Citizens United*, 113–15; and Colbert Report, 168–71; and *Colorado I*, 76–78; court's primary protection of, 110–13, 124–25, 267–69, 273–74, 288; donor disclosure, 229–30, 293; and equal access, 13–14; and independent expenditures, 144, 162–63; issue advocacy, 82, 85, 87, 95–96; and *McCutcheon*, 119–20; and *MCFL*, 72; and *SpeechNow.org*, 117–18
First National Bank of Boston v. Bellotti, 51, 69–71, 74
Ford, Gerald, 49, 65–66, 317n2
foreign nationals: banned from contributing to elections, 13, 27, 39–40, 53, 79, 81, 116, 118, 133, 262, 265–66, 274
Fowler, Erica, 263
For the People Act (H.R. 1), 284
Francia, Peter, 32, 277, 280
Franz, Michael, 261, 263
freedom of speech/freedom of expression. *See* First Amendment

Galston, Miriam, 87
GAO (General Accounting Office/Government Accountability Office): General Accounting Office, 243; Government Accountability Office, 257
Garrett, Sam, 169, 260, 263
General Accounting Office (GAO). *See* GAO
Gerber, Alan, 203
get-out-the-vote (GOTV). *See* GOTV
Gingrich, Newt, 88, 90
Glavin, Brendan, 280
Goodliffe, Jay, 33
GOTV (get-out-the-vote): 76, 80, 175, 272; and super PACs, 172; voter mobilization, 22, 81, 294
Government Accountability Office (GAO). *See* GAO
Grant, Tobin, 13
Green, Donald, 203
Grimmer, Justin, 225
Grumbach, Jacob, 129–31

Hall, Richard, 60, 224, 291
Hansen, Wendy, 290
hard money, 26–27; to candidates, 136, 145; and *Citizens United*, 113, 168–69; disclosure of, 135; to interest groups, 143–44, 158–62, 176, 215; interest groups and issue ads, 86, 92-96; and JFCs, 146–50; limits on, 165, 189, 318n24; and *McCutcheon*, 119–22, 134, 137; parties and issue ads, 79–84; to

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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hard money (*continued*)
parties, 139–42, 146, 150, 156, 163–64, 190; post-BCRA, 103, 105–7, 142; special party accounts, 122; and *WRTL*, 109–10
Hatch Act of 1939 and 1940 amendments, 22
Heberlig, Eric, 182, 216–17
Heerwig, Jennifer, 130–31, 251
Herrnson, Paul, 202, 204, 277, 280
Hertel-Fernandez, Alexander, 175
House campaign finance system, 197–201, 210–13
H.R. 1. *See* For the People Act
Humphrey, Hubert, 43
Hunter, Caroline, 246
hybrid PACs, 27, 143–44, 156, 162, 171–72, 176–77, 206, 207, 212; as Carey committees, 171; James Carey, 171

IE (independent expenditures): by 501(c) groups, 108; in *Austin*, 73, 86; corporate contributions for, 110; corruption concerns, 38, 50–51, 62, 74; defined, 25; disclosure of, 229, 320n12, 320n13, 323n20; by groups, 38, 67, 73–74, 115, 117, 168; by hybrid PACs, 171–72, 204; by individuals, 38–39, 135, 144; in McCain-Feingold, 90; by political parties, 25, 38, 52, 76, 156, 162–64, 177, 206; in states, 273–74; by super PACs, 27, 114–15, 117–18, 164, 167, 171–72, 207–9, 211;by traditional PACs, 67, 163, 177
IEOC (Independent Expenditure Only Committee). *See* super PAC
in-kind contribution, 35, 168–71, 234, 260, 263, 326n8
incumbent candidates, 24, 66, 132, 213–15; donor preference for, 31–32, 40, 62–63; in the House, 210–13; incumbency advantage, 11–12, 52–53, 133, 200–202, 204–5, 269, 282–83, 293; out of district donors and, 133; PAC preference for, 66, 176, 226–27; in the Senate, 207–9; spending for leadership advancement, 214–15; transfers for majority control, 213–14; uncontested incumbents, 221–23. *See also* leadership PACs
independent expenditures (IE). *See* IE
individual donors: federal candidates as donors, 150, 190, 196–97, 200–201, 215; to interest groups, 160–62; large donors, 10–11, 25, 105–6, 127–31, 134, 137–39, 268–69; limits on donors, 103, 119–20; motivation and types, 31–39, 56–57, 126–33, 142–45, 293; to political parties, 78, 122, 145–50; principal-agent theory, 35–38; privacy rights of, 43, 229–30; small donors, 25, 106–7, 134–37, 182, 190, 195, 199–200, 281–83; and *WRTL*, 116. *See also* 501(c)s; 527s; corruption; foreign nationals; *McCutcheon*; super PACs
interest groups: adapting to BCRA, 105–9, 124–25; access strategy of 32–33, 57, 60–66, 106, 116, 176, 218, 223–26, 253, 269, 290; as agents for individual contributors 35–38; and corruption, 31, 64; and disclosure, 235, 240, 261; donations as indicators of policy interests, 37; endorsements by, 56, 61, 158–59, 174; and issue ads, 86–87; and principal-agent theory, 143–45; rationale for, 17, 26, 60, 177; ways to raise and spend, 157–60
Internal Revenue Service (IRS). *See* IRS
Internet Research Agency (IRA). *See* IRA
IRA (Internet Research Agency), 40, 266
IRS (Internal Revenue Service): as campaign finance enforcement agency, 241–44, 262, 323n26; defining electoral activities, 87, 108, 239; organizations reporting to, 107–8, 235–38, 326n5; public information obtained from, 144, 207; soft money spending reported to, 26; tax exempt status for groups, 86–87; tax form checkoff, 186
issue advertising/issue ads: BCRA to end, 94–95, 103, 105, 109, 145, 163; compared to express advocacy, 82–91; party

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
Downloaded on behalf of 3.135.194.251

soft money, 79, 98, 192; and *WRTL*, 109–10
issue advocacy: in BCRA, 93–97, 163, 258; compared to express advocacy, 82–91, 261; defined, 26–27. *See* also express advocacy; magic words

Jefferson, Thomas, 1
Jefferson, William, 59–60
JFC (Joint Fundraising Committee), 15, 121, 146–50, 160, 184, 193–94, 223, 226, 273, 321n36, 324n8
Johnson, Dennis, 203
Johnson, Lyndon, 242, 289
Joint Fundraising Committee (JFC). *See* JFC
Josefiak, Thomas, 248

Kagan, Elena, 112, 288
Kalla, Joshua, 224, 285
Katz, Jonathan, 131, 322n1
Keating Five scandal, 60–61, 287; Charles Keating, 60–61
Keena, Alex, 33
Kennedy, Anthony, 113, 116
Kennedy, John: Commission on Campaign Costs, 41
King, Marvin, 132
Kingdon, John, 42
Klobuchar, Amy, 257
Knight-Finley, Misty, 33
Kramer, Ken, 77
Kraus, Jeffrey, 280
Kuhner, Timothy, 16, 54

La Raja, Raymond, 41, 48, 124, 230, 278
labor unions: and *Citizens United*, 115–18; and corrupt acts, 230; defined, 26–27; disclosure by, 259; donations from, 218–20; fundraising and, 110, 158–59, 325n12; and issue ads, 86–88; and Levin funds, 272; and *MCFL*, 73, 318n18; modes of influence, 156, 160, 175–77, 211, 243, 291; rise of, 21–22; state regulations and, 275, 314n10
Larson, Bruce, 182, 216–17
leadership PAC: donations from 190, 196, 201; donors to 138–39, 221; in JFCs 146, 149–50; report bundled contributions, 161; spending by and motives for, 215–16, 217, 223, 293, 322n11
Levin Funds, 93, 272–73
Limbocker, Scott, 251
Lindblom, Charles, 15–16, 57–58, 62, 224
loans to candidate campaigns, 66, 190–92, 201, 288
Lochner, Todd, 255
lobbying: as First Amendment right, 328nn13–14; in policymaking, 16–18, 62, 290–92, 314n14; regulations on, 242. *See also* lobbyists
lobbyists: access strategy, 66–67, 70; disclosure of contributions from, 160–61; informational role of, 60, 291. *See also* lobbying

Madison, James, 14–15, 180
magic words test, 27, 83–88, 90, 93, 95–96, 110, 114, 117, 315n33. See also *Buckley v. Valeo*
Magleby, David, 33
Malbin, Michael, 280–81
Mann, Thomas, 214
Marshall, Thurgood, 55, 74
Masket, Seth, 107
Mason, Dave, 171
Massachusetts Citizens for Life (MCFL). See *MCFL*
matter under review (MUR). *See* MUR
Mayer, Kenneth, 278–79
Mazo, Eugene, 132
McCain, John, 90–92, 189, 276
McCain-Feingold bill. *See* BCRA
McCarthy, Kevin, 149, 201, 218
McChesney, Robert, 10, 112, 318n6
McConnell, Mitch, 95, 284
McConnell v. United States, 95, 102–3
McCutcheon, Shaun. See *McCutcheon v. FEC*
McCutcheon v. FEC, 119–22, 124, 134, 137–38, 143, 146, 193; Shaun McCutcheon, 119

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
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McDonnell, Bob. See *McDonnell v. United States*
McDonnell v. United States, 286–87
MCFL (*FEC v. Massachusetts Citizens for Life*): court case 72–74, 114; nonprofit organization, 73
McKay, Amy, 225
McMahon, Linda, 197
Meehan, Martin, 90, 92
Menendez, Robert (Bob), 287
Milkis, Sidney, 45
Miller, Kenneth, 133
Miller, Michael, 229
Millionaires' provision: in BCRA, 93, 111; *Davis v. FEC*, 111–12
Milyo, Jeffrey, 291
Moran, Rachel, 239–41
MUR (Matter Under Review), 28, 254–55
Murphy, Christopher, 197
Mutch, Robert, 19, 314n24

National Association of Realtors, 37, 175, 218, 291
National Republican Congressional Committee (NRCC). *See* NRCC
National Republican Senatorial Committee (NRSC). *See* NRSC
National Rifle Association (NRA). *See* NRA
Nichols, John, 10, 112, 318n6
Nixon, Richard, 41, 43–44, 46, 55, 69, 75, 244, 317n2
Noble, Larry, 252
Noonen, Thomas, 279
Nownes, Anthony, 290
NRA (National Rifle Association), 26–27, 95, 160, 221
NRCC (National Republican Congressional Committee), 75; contributions and limits to, 134, 142; contributions from candidates to, 151; contributions to candidates from, 200; hard and soft money, 82; independent expenditures by, 164; in JFC/victory committees, 149–50
NRSC (National Republican Senatorial Committee), 75; contributions from candidates, 151; contribution limits to, 142; contributions to candidates from, 200, 323n12

Obama, Barack, 112, 116, 121, 132, 189, 244
Ocasio-Cortez, Alexandria, 218
O'Connor, Sandra Day, 112
Olsen, Joseph, 33
Olson, Mancur, 17
open seat candidates, 24, 76–78, 204–5, 207–13, 218, 220
OpenSecrets, 144, 201, 231–32, 252, 320n9; origins as Center for Responsive Politics, 252
outside spending, 145, 162, 165, 171–74, 205–13
Overacker, Louise, 22
overall contribution limit. *See* aggregate contribution limit
Overton, Spencer, 127

PAC (political action committee), 22, 26, 45–46, 66–68, 70, 86, 156, 176–77, 193–95, 324n9; connected PAC, 158–59, 327n12; donations made to candidates and committees, 122, 149–50, 160–62, 190, 200–201, 215, 218, 220–21, 225–26, 322n10; donors to, 72, 135, 143–44, 158–59; earmarks via, 160–62; and the legislative process, 225, 290–91; limits on donations to, 116, 119; non-connected PACs, 26, 149, 158, 161, 215, 221. *See also* bundling; independent expenditure/IEs; leadership PAC; SSF
Panagopoulos, Costas, 202
party nominating conventions: end of public funding, 121; host committees for, 121–22, 326n5; public funding of, 42, 46–48, 121–22, 124, 185–87, 277, 322n8. *See also* special party accounts
pay-to-play laws, 40, 238
Pelosi, Nancy, 149–50, 201, 218
Pendleton Act, 19, 22, 145
Perot, Ross, 192

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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Persily, Nate, 114
Pierson, Paul, 44
policy entrepreneurs, 41–42, 90, 283
policy window of opportunity, 41–43, 45–46, 90, 283–84
political parties: as agents for individual contributors, 35–37; as corrupt conduits, 78, 103, 152, 162; donations to candidates, 145, 152, 190, 195–96, 200; federalism and, 9–10; links with 527s, 108–9; no coordination with candidates for IEs, 38; nominations, 6–7, 315n7; and other party committees, 184, 187, 226; party-building activities, 80–82, 93, 269–70; party coordinated campaigns, 271–73; permanent campaign and, 8; principal-agent theory, 139; public funding in states, 277, 314n10; regulation of in FECA 1974, 46–48, 75–78; soft money use, 98, 192; special party accounts, 139; voter mobilization by, 19. *See also* coordinated expenditures; hard money; independent expenditures; soft money
Potter, Trevor, 118, 168–71
Powell, Lewis, 55, 69–70, 113, 116, 290; memo written by, 69, 318n6
Presidential campaign finance system, 184–93, 203–7
primary elections: candidate-centered politics, 272, 322n3; in *Colorado I*, 76–77; contribution and spending limits, 136, 138, 152, 160, 195, 314n22; disclosure, 20, 42; electioneering communications blackout dates, 93; end party control of nominations, 6–7, 37, 145, 313n5; and federalism, 9, 270, 314n22; included in FECA, 46; presidential public funding, 42, 48, 66, 185, 187–89, 191–92, 276; primary voters, 57, 129–30; self-funded candidates, 197, 201; super PACs, 206
Primo, David, 291
Progressive Movement, 7, 20–21, 145, 318n25
public funding, 10–11, 12–16, 46–48, 56, 185, 192–93, 226, 269, 316n18; matching funds–presidential primary, 66, 185–88, 192, 226, 276–77; presidential general elections, 188–89, 203; in states and localities, 18, 128, 270–71, 275–83. *See also* party nominating conventions; voucher program
Publicity Act. *See* Federal Corrupt Practices Act

quid pro quo corruption. *See* corruption

Ravel, Ann, 256–57
Reagan, Ronald, 55, 66, 113
Realtors. *See* National Association of Realtors
Rehnquist, William, 55, 70, 112
representation: and corruption 60–61, 282, 289; delegate and trustee, 180–81; descriptive, 33, 180–83; geographic, 132, 324n1
Republican National Committee (RNC). *See* RNC
Revenue Act: of 1934, 242; of 1971, 42, 45–46, 121, 185
Ridout, Travis, 263
RNC (Republican National Committee): contributions to, 106, 150, 319n36; coordinated expenditures, 156; independent expenditures, 78; and issue ads, 83–84; in JFCs/victory committees, 193; limits on contributions to, 75, 142, 323n12; in *McCutcheon*, 119; special party accounts, 122–24
Roberts, John, 112–13, 120, 286, 288
Rocca, Michael, 225
Roosevelt, Franklin, 17, 22
Roosevelt, Theodore, 17, 20, 193
Rudolph, Thomas, 13

Sahn, Alexander, 131
Sanders, Bernie, 107, 131–32, 217, 322n1
Scalia, Antonin, 55, 74, 113, 230
Scalise, Steve, 218
scandals as catalysts for reform, 41–48. *See also* Enron scandal; Keating Five scandal; Watergate scandal

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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Scarrow, Susan, 18
Schattschneider, E. E., 17
Schiff, Adam, 283
Schmidt, Patrick, 234
second face of power, 58–59, 62, 224
Securities and Exchange Commission (SEC). *See* SEC
SEC (Securities and Exchange Commission), 235–39, 326n11
self-financed candidate, 39, 53, 103, 111–12, 191–92, 197, 201, 280, 284–85, 316n15, 324n7
Senate campaign finance system, 195–97, 207–10
separate segregated funds (SSF). *See* SSF
Shapiro, Ilya, 168–70
Shaw, Katherine, 251
Shays, Chris, 90–92
Shays-Meehan bill. *See* BCRA
Shen, Jenny, 254
single member plurality (SMP). *See* SMP
Skinner, Richard, 107
Smith, Adam, 171–72
Smith, Bradley, 55, 275
SMP (single member plurality), 6, 181, 197
social media communications, 10; campaign appeals using, 106, 203, 294; disclaimer issues, 263; Facebook, 10, 40, 263, 266; regulation of, 262–65; Russian ads 2016, 40, 266; Twitter, 10, 40, 266
soft money, 26–27; to 501(c)s and 527s, 144, 172, 175, 272–73; and BCRA, 102–3, 105–9; building fund expenses, 79, 81; corrupting effects of, 89–98; and issue ads, 79–87; semi-soft money, 124
Sorauf, Frank, 44
Sorensen, Ashley, 182
Sotomayor, Sonia, 112
special party accounts: party convention accounts, party headquarters building accounts, party recount/legal accounts, 122, 124, 142, 146, 149
SpeechNow.org v. FEC: court case, 27, 117–18, 143, 164; non-profit organization, 117
SSF (separate segregated funds), 22, 26, 45–46, 68, 116, 158
Stand by Your Ad provision. *See* disclaimer on ads
Steen, Jennifer, 39
Stevens, John Paul, 55, 112, 116
Stewart, Jon, 169–70
Stewart, Potter, 49
Steyer, Tom, 192
Sullivan, Dan, 168
super PACs: Colbert AO, 260; contributions from 501c(4)s, 27, 118–19, 144, 172–75; contributions from 527s, 144, 172–75; contributions from individuals, 144–45; coordination with, 167–68, 262, 323n22; creation of, 26–27, 118–19, 164, 273; disclosure to FEC, 134–35, 326n5; federal candidates as donors to, 215, 223; and hybrid PACs, 171–72; ideological/issue-oriented AOs, 168–71; interest group use of, 156–59; leadership PAC contributions to, 201; outside spending by, 105, 177–79, 321n30; partisan, 165–68, 177; prohibited behavior, 161–62; single candidate, 164–65, 176, 206–7; spending in 2020 House races, 211–12; spending in 2020 presidential race, 205–7; spending in 2020 Senate races, 209; unlimited donations to, 134, 143–44, 172–75
Swers, Michelle, 182

Taft-Hartley Act 1947, 22, 43, 79, 114, 317n26
television ads/TV ads, 82, 87, 93–94, 113, 168–70, 203, 240–41, 260, 263–64
Thomas, Bill, 243
Thomas, Clarence, 55, 113, 288
Thompson, Dennis, 59–61
Thomsen, Danielle, 182
Tillman Act 1907, 20–22, 60, 68, 79, 114
Tokaji, Daniel, 256
Trainor III, James E. "Trey," 246
transfers between federal committees: candidate to other candidate, 215, 217,

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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226; candidate to other federal committee, 217, 223, 293; candidate to party, 150–51; party to party, 79, 120, 145, 193, 217, 272, 322n9
Trump, Donald, 18, 39, 129, 190–93, 204, 207, 246, 258, 266, 285, 318n9, 324n7
Twitter. *See* social media communications

Udall, Morris, 66

victory committee. *See* JFC
voucher program, 129, 277, 281–82; Seattle voucher program, 277–79, 282
voter mobilization. *See* get-out-the-vote
voting age population, 156, 187, 196

Walther, Steven T., 253
Warren, Elizabeth, 144, 165, 217
Watergate scandal, 43–44, 46, 48, 75, 244, 290
Wayman, Frank, 224
Weintraub, Ellen, 250
Whitaker, Paige, 239
White, Byron, 55
Willis, Derek, 202
WinRed, 106, 128, 134, 172
Winkler, Adam, 114
Winter, Ralph, 54
Wirth, Tim, 76–77
Wisconsin Right to Life (WRTL). See *WRTL*
Witko, Christopher, 17, 314n14
Wood, Abby, 135
Wood, B. Dan, 289
Wood, John, 278–79
Wouters, Olivier, 290
WRTL (*FEC v. Wisconsin Right to Life*): court case, 108–16, 124, 175, 259, 320n12, 320n13, 318n21; nonprofit corporation, 109–11

You, Hye Young, 251

Zelizer, Julian, 42, 44
Zhu, Ling, 181

Dwyre, Diana, and Robin Kolodny. *The Fundamentals of Campaign Finance In the U.S.: Why We Have the System We Have.*
E-book, Ann Arbor, MI: University of Michigan Press, 2024, https://doi.org/10.3998/mpub.9813302.
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