

# Buckley v. Valeo at 40

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**B**uckley v. Valeo is a January 30, 1976 Supreme Court case that struck down key pieces of Congress' post-Watergate money in politics reforms, and set the structure of modern campaign finance law.<sup>1</sup> Buckley and the line of cases that followed—including 2010's *Citizens United*<sup>2</sup>—eliminated many of the strongest protections against wealthy individuals and institutions translating economic might into political power, and has helped sustain a vicious cycle of political, economic, and racial inequality that endures today.

## What law did the plaintiffs challenge?

Congress passed the Federal Election Campaign Act (FECA) in 1971, but then strengthened it significantly in the wake of Watergate in 1974.<sup>3</sup> Plaintiffs challenged many of the provisions of these 1974 amendments, along with some of the disclosure requirements enacted in the original law.

## What did this have to do with Watergate?

Watergate is best remembered for the break-in at DNC offices at the now-famous hotel and subsequent cover up; but it was also a campaign finance scandal. Twenty-two individuals and 17 corporations pleaded guilty to charges related to illegal corporate contributions to President Nixon's re-election committee and other campaigns.<sup>4</sup> Outrage over these abuses fueled the 1974 FECA amendments.



*Buckley helped structure a society in which wealthy interests can freely translate economic might directly into political power.”*

### What did the post-Watergate law do?

The law as amended had five basic features: contribution limits, spending limits, public financing, disclosure, and enforcement. FECA limited contributions from individuals to candidates, parties, and political committees—both to each entity and in aggregate; limited the total amount that candidate campaigns could spend on a given election, as well as the amount that outside groups or individuals could spend for or against a given candidate; limited the amount that wealthy candidates could spend on their own campaigns; created a two-tiered system for public funding of presidential elections; required disclosure of all federal contributions and spending above a certain threshold; and created the Federal Election Commission (FEC) to enforce the law.<sup>5</sup>

### How well did the law work?

We don't really know. FECA was challenged the day after the 1974 amendments went into effect, and was never fully in effect for even one complete election cycle.<sup>6</sup>

### Who were the plaintiffs who challenged the law?

James L. Buckley was a judge on the U.S. Court of Appeals for the D.C. Circuit until his retirement in 2000, and is the brother of famous conservative intellectual William F. Buckley, Jr.<sup>7</sup> In 1974, Mr. Buckley was a U.S. Senator from New York who was elected in 1970 as a Conservative Party candidate.<sup>8</sup> Interestingly, Mr. Buckley spent approximately half of what would have been his spending cap under the new FECA amendments, while his (losing) opponent spent more than one and a half times the limit.<sup>9</sup>

Senator Buckley was joined in the suit against FECA by Eugene McCarthy, who challenged Hubert Humphrey for the 1968 Democratic presidential nomination on an anti-war platform, along with his 1976 presidential committee; Stewart Mott, a prominent anti-war donor who contributed more than \$200,000 to McCarthy's 1968 campaign and more than \$350,000 to George McGovern's 1972 campaign (nearly \$2 million in 2015 dollars); the New York Civil Liberties Union; the Republican Party of Mississippi; the Libertarian Party and the Conservative Party of New York; two conservative advocacy organizations; a weekly newspaper called Human Events; and Republican Congressman William Steiger from Wisconsin.<sup>10</sup>

### What were their main arguments?

FECA opponents argued that contribution and spending limits always and necessarily violate First Amendment free speech rights because “[l]imiting the use of money for political purposes amounts to restricting the communication itself” and because the limits allegedly discriminated against challengers in favor of incumbents.<sup>11</sup> Further, plaintiffs argued that “[p]rivate campaign financing does not...foster inequality of political expression” because “[l]arge contributions are made on behalf of the whole spectrum of political persuasion” and that the limits would “make American politics more unresponsive and...inevitably lead to an increase in alienation and apathy.”<sup>12</sup>

Plaintiffs argued that the public financing provisions were unconstitutional because “[t]here is no public interest in relieving candidates of the need to raise money to finance their political activities” and because they discriminate against minor

party candidates who would qualify for less funding.<sup>13</sup> Although they cited disclosure as the best remedy for corruption scandals like Watergate, plaintiffs argued that FECA's disclosure thresholds were unconstitutionally low and the provisions would have a chilling effect on speech in support of minor parties and candidates.<sup>14</sup> Finally, the plaintiffs challenged the structure of the FEC based upon the process for appointing commissioners.<sup>15</sup>

### **Were FECA opponents' factual allegations correct?**

At least three of the plaintiffs' key factual allegations were highly speculative or clearly incorrect. Opponents of strong campaign finance protections have long argued that strict contribution and spending limits amount to "incumbency protection," yet the evidence for this contention is scant. The City of Albuquerque, New Mexico, for example, maintained candidate spending limits for mayoral races for nearly thirty years despite *Buckley*, and the city's mayoral reelection rate during the period was zero percent—not one incumbent was returned to power.<sup>16</sup> Defendants pointed out in their brief that removing all of the contributions above the \$1,000 FECA limit would have left challengers better off relative to incumbents in the 1972 and 1974 elections.<sup>17</sup> Since *Buckley*, incumbents have continued to dominate high-dollar fundraising, and more recent research shows that contribution limits do no harm to challengers.<sup>18</sup>

Next, the idea that reasonable limits on campaign spending would undermine confidence in government seems pretty far-fetched given current public opinion about our big money system of unlimited spending. The general public lacks

confidence in public institutions such as Congress and is angry about the outsized role of wealthy interests in setting the nation's policy agenda.<sup>19</sup>

The notion that big political spending does not skew politics or policy because large donors are spread equally across the political spectrum has been decisively disproven. The wealthy, in fact, have substantially different policy preferences and priorities than do average Americans, especially regarding economic policy and the role of government; and policymakers in the U.S. are sharply more responsive to the wealthy minority than to broader public opinion.<sup>20</sup>

### **Who defended the law?**

The named defendants in the case were the Secretary of the U.S. Senate (Francis Valeo), the Clerk of the U.S. House, the Comptroller General, the Attorney General, and the FEC.<sup>21</sup> Three nonprofits (along with assorted individuals) also intervened to defend the law—the Center for Public Financing of Elections, Common Cause, and the League of Women Voters.<sup>22</sup>

### **What were the main legal arguments before the Court in defense of the law?**

In addition to disputing the plaintiffs' flawed factual allegations, the key big picture points in defense of the law were as follows.

#### *Challenge Premature Because Alleged Harms Highly Speculative*

First, the defendants argued that many of the challenges were not yet ready for the Court to review since there had been no opportunity to see how the law would actually operate.<sup>23</sup> Many of the plaintiffs'

central arguments, such as the accusation of pro-incumbency bias, were highly speculative. The Court could have chosen to observe the new law in operation for a few cycles and then decide the various claims with much stronger record evidence. Plus, defendants argued, since Congress is in a better position than the courts to assess the likely effect of the various provisions, the Court should defer to legislative judgment absent strong evidence to the contrary—like it did when reviewing the original Voting Rights Act and the Hatch Act, which prohibits certain political activity by civil servants.<sup>24</sup> Without seeing the amended FECA in full effect for a few cycles, no such strong evidence existed.

#### *Compelling Interests Justify the Law*

The defendants pointed to a number of “[c]ompelling public needs” that justified the various provisions of FECA in the face of a First Amendment challenge.<sup>25</sup>

*Corruption, Distortion, and Public Confidence.* “The primary compelling need,” according to defendants, “is to curb the undue influence of a wealthy few on candidate positions and on government actions and the corrosive effect of both the fact of such influence and its appearance on the public’s confidence in the integrity of its elected government.”<sup>26</sup> This included actual *quid pro quo* corruption, such as the pledge of \$2 million in dairy industry contributions to President Nixon’s campaign in exchange for price supports and the explicit sale of ambassadorships, as well as the broader influence of the wealthy and the public cynicism this can engender.<sup>27</sup>

*Equality.* Defendants also asserted a compelling need to “equalize as far as practicable the relative ability of all voters

to affect electoral choices” and pointed directly to the Court’s apportionment and voting rights cases for support, specifically highlighting the 1972 case that struck high candidate filing fees as creating “disparity in voting power based on wealth.”<sup>28</sup> They pointed out that one-third of President Nixon’s financial support in the 1972 election came from one ten-thousandth of one percent of the population.<sup>29</sup>

*Barriers to Entry.* Defendants asserted a similar but additional interest “to more nearly equalize the opportunity of all interested citizens to become candidates for elected office, and to reduce the barrier that lack of personal wealth or access to the wealth of others now presents.”<sup>30</sup>

#### *Spending & Giving Money is Conduct, Not Speech*

Regarding the relationship between money and speech, defendants argued that giving and spending money are forms of conduct rather than speech; that action, “however intertwined with speech, is not entitled to the full and special protection of speech itself”; and that the impact of limits on freedom of expression is “very indirect”, pointing to the Supreme Court’s decision upholding a law against burning draft cards in *United States v. O’Brien*.<sup>31</sup>

#### *“Dollars and decibels,” Not Content Discrimination*

The defendants also made a crucial distinction between regulations that target the content of speech (always highly suspect) and the limits in FECA, which seek to put reasonable restrictions on volume so that the wealthy cannot drown out the rest of our voices: “We are dealing here...with dollars and decibels. And just as the volume of sound

may be limited by law, so the volume of dollars may be limited, without violating the First Amendment.”<sup>32</sup>

### What did the Court decide, exactly?

The justices<sup>33</sup> upheld disclosure requirements for contributions and spending; public funding for presidential campaigns, including spending limits tied to acceptance of public funds; limits on the amount that an individual may contribute to a particular candidate, party, or political committee (known as “base” limits); and a limit on the total amount that an individual can contribute to all federal candidates, parties, and PACS combined (known as an “aggregate” limit).<sup>34</sup>

The Court struck down mandatory limitations on the total amount that candidates can spend on their campaigns; limits on the total amount that an individual or committee can spend to support or defeat a candidate without cooperating with that candidate’s campaign (known as “independent expenditures”); limits on the amount that a wealthy candidate can spend on her own campaign; and the method Congress chose to appoint members of the FEC, due to separation of powers concerns.<sup>35</sup>

### What was the Court’s logic?

#### *Money is Like Speech*

First, the Court decided that giving and spending money to influence election outcomes is more like speaking than like engaging in conduct that also has a speech-like quality.<sup>36</sup> This was not an obvious conclusion. Spending limits were technically in effect for House and Senate campaigns since 1911, although rarely

enforced.<sup>37</sup> The Federal Corrupt Practices Act (FCPA), which contained the restriction on spending, was upheld by the Supreme Court in 1934 against a challenge that did not include First Amendment claims.<sup>38</sup> A later Supreme Court case which invalidated the FCPA did so on federalism, not First Amendment, grounds,<sup>39</sup> and Congress responded by re-enacting spending limits.<sup>40</sup> And, as noted, the defendants had argued that spending political money is more like burning a draft card than printing a newspaper editorial, a position that the lower court in *Buckley*, Justice Stevens and many scholars have embraced.<sup>41</sup>

#### *Spending Money is Like Direct Speech; Contributing Money is More Like Association*

Next, the Court drew a questionable distinction between spending money directly to advocate for or against a candidate and contributing money to that candidate’s campaign. Spending money, the Court reasoned, is like direct speech because the spender controls the content of the expression.<sup>42</sup> Contributing money is more like attenuated speech because a contribution communicates general support but not the reason behind it; and the candidate may or may not spend the funds in the way the contributor intended.<sup>43</sup> In this way, contributing to a candidate more closely resembles a form of association with that candidate than speech on her behalf. The Court reasoned that, unlike speech, association is binary—a larger contribution does not engender more association.<sup>44</sup>

#### *Corruption the Only Legitimate Concern*

Next, the Court analyzed the various “compelling public needs” (also known as “government interests”) defendants put

forth to defend the law.<sup>45</sup> When a statute is challenged as violating a constitutional right, courts generally balance the importance of the asserted right against the importance of the interest(s) the government has in enacting the statute, and then assesses how precisely the law serves the purported interest(s). As noted above, the government gave a number of reasons for limiting campaign contributions and spending—ranging from fighting corruption of candidates and the political process to preserving the equal value of each citizen’s voice to protecting candidates and officeholders from a fundraising arms race that would distract them from studying the issues or actually governing.

But, the only “government interest” the *Buckley* Court recognized as worthy of consideration was fighting corruption or its appearance.<sup>46</sup> It essentially ignored the asserted interest in lowering the barrier to entry for candidates without access to large contributors or personal wealth.<sup>47</sup> And, critically, the Court flatly rejected an interest in leveling the playing field between wealthy donors and the great mass of ordinary citizens who cannot afford to make large contributions or expenditures. In what may be the single most damaging sentence in the modern canon of constitutional law, the justices wrote that “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...”<sup>48</sup>

This sentence, which Justice Breyer later said “cannot be taken literally,” has effectively guaranteed for 40 years that wealthy individuals and interests can spend whatever it takes to dominate electoral politics.<sup>49</sup> It warped the First Amendment from an

essential guarantee of a vibrant democracy into a tool for the one percent.

### *Putting it Together*

Adding these concepts together leads to the Court’s central ruling in *Buckley*: that Congress may limit campaign contributions, but not spending. The logic goes as follows.

Spending is a form of direct speech, deserving the highest level of First Amendment protection. Plus, since the “independent” spender can’t cooperate with candidates or parties, the risk of corruption—the only legitimate government concern—is low because a) there is no opportunity to request a special favor; and b) expenditures made without consultation might be off message and not that useful to the candidate anyway.<sup>50</sup> Strong constitutional right versus weak government interest; the limits on spending are struck down.

Contributions, on the other hand, are a form of indirect speech that implicates associational rights—which are not dependent upon how much is contributed. Sure you have the right to contribute to show your association with a candidate, but it matters less how much. And the candidate, not the contributor, decides what message will ultimately be conveyed.<sup>51</sup> At the same time, the risk of corruption is heightened because there is a direct connection between the contributor and the recipient candidate, a chance to arrange a *quid pro quo*.<sup>52</sup> Weaker constitutional right versus stronger government interest; the limits on contributions are upheld.

This distinction between direct spending and contributions, sometimes called “the *Buckley* divide,” has shaped the basic structure of campaign finance law ever since.

## What Did the Court Get Wrong?

### *The Relationship Between Money and Speech: Creation vs. Amplification*

The Court's analysis of the relationship between money and speech was simplistic and has led to absurd results.

The *Buckley* defendants argued that spending money is conduct with incidental speech elements rather than speech itself. This is the position the lower court took in *Buckley*, and which Justice Stevens has defended in several dissents.<sup>53</sup> This may also be a bit too simple. After all, just about any form of expression requires some money to effectuate. Making a sign requires a marker and paper; attending a rally requires paying for gas or public transit to arrive; posting a blog entry requires a computer, an Internet connection, and electricity.

So, it may indeed be impossible to separate creating speech from spending a small amount of money. We all have a right to express ourselves, and if the government said we could not spend a dime we would not be able to do so. And, it's important for democracy and self-governance that public debate be "uninhibited, robust, and wide-open" in the words of the famous Supreme Court case *New York Times v. Sullivan*.<sup>54</sup>

But, the story does not end there. At some level, spending money no longer *creates* new speech, but rather *amplifies* existing speech. At this point, limitations on spending are not troubling suppression of expression, but rather reasonable rules that balance one person's right to communicate with others' rights to not have unwanted messages thrust upon them, or to have their voices heard in a landscape of limited attention. I may have a right to say what I want to say, but that doesn't necessarily mean I have the right to

blast my speech as loudly as possible so that it drowns out others' voices.

The *Buckley* Court never grappled with this distinction. And, in future cases, the Court has continued to muddle the distinction between content and amplification.<sup>55</sup>

### *The Justices Asked the Wrong Question*

The *Buckley* Court's singular focus on fighting corruption or its appearance misses the forest for the trees. Rules governing the use of money in politics are not just about clean governance, but also address fundamental questions about the degree to which we allow wealthy individuals and interests to translate economic might into political power. To protect core American values such as equal citizenship, democracy must write the rules for capitalism, not the other way around.<sup>56</sup>

In the U.S., explicit bribery is not the donor class' key mechanism for influencing public policy. Rather, those with money shape politics and policy primarily by filtering the pool of candidates for elected office, influencing the views of those who run, and giving their favored candidates the best chance to win—none of which depend upon *quid pro quo* arrangements.<sup>57</sup>

### *The Buckley Court Read Equality Out of the Constitution*

Equal citizenship is a foundation of our democracy. The Reconstruction and Nineteenth amendments made this clear, and the notion of equal opportunity for expression is central to the First Amendment itself.<sup>58</sup> As noted by the *Buckley* defendants, the Court has recognized the centrality of political equality in several voting rights cases related to electoral

district population equality, poll taxes, and candidate filing fees.<sup>59</sup> Yet, with almost no discussion, the *Buckley* Court flatly rejected any application of the principal of equal voice in the money in politics context. This is not only harmful to campaign finance law, but has fostered severe incoherence in the Court’s approach to democracy.<sup>60</sup>

### *The False Distinction Between Contributions and Spending*

The distinction the *Buckley* Court drew between contributions and spending initially sounds plausible—but there are a few big problems. First, the notion that spending takes place without the knowledge or gratitude of the candidates or parties it helps has proven naïve and far-fetched.<sup>61</sup> Candidates who benefit from the “independent” spending of Super PACs run by former staff and dedicated specifically to helping their campaigns know full well who their multi-million dollar supporters are and what they want.

More important, if we break free from the corruption-only box the distinction makes even less sense. Spending, like contributing, is a way to make one’s views known about candidates and influence election outcomes. There’s no good reason why millionaires and billionaires should be able to exert hundreds or thousands of times more influence over elections than ordinary citizens.

### **But isn’t political speech exactly what the First Amendment was intended to protect?**

Absolutely—criticizing government officials and speaking out on candidates’ positions on the most important issues of the day are core First Amendment activities. The Amendment, however, primarily protects content rather than volume. It would never be acceptable for

Congress to pass a law that prevented citizens from criticizing an incumbent president’s foreign policy decisions, while allowing supporters of the president unlimited ability to advertise their support. And, as noted above, it may be problematic for the government to prevent spending the minimal amount it takes to put pen to paper to express a thought. But, this is totally different from a law that makes no content distinctions but places reasonable restrictions on amplifying speech so that those with more money do not get more speech.

The Court has repeatedly conflated content and amplification over the years. For example, Chief Justice Roberts wrote in a 2014 case: “Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”<sup>62</sup> These, of course, are flawed analogies. What “offends” about money in politics is not the content of anyone’s speech, but rather the way a privileged few are able to drown out the rest of us.<sup>63</sup> A closer analogy would be if parade routes went to the highest bidder and the Nazis (or anyone else) booked Main Street every Saturday for a year—the problem is not what the marchers have to say, but that few others are getting the chance to be heard, and the reason is because some can afford to outbid others for scarce attention.

In addition, when it comes to the money in politics, as Justice Breyer has pointed out, there are First Amendment considerations on both sides of the equation.<sup>64</sup> The First Amendment was never intended as a tool for use by wealthy interests to dominate the



political process. Rather its core purpose is to foster the kind of robust discussion that leads to good self-government. This is not always served by a Wild West, might makes right environment.

The animating idea behind the infamous *Lochner v. New York* case in the early twentieth century was that unrestrained capitalism was somehow natural and pre-political, and that any attempt by the People and their representatives to set the rules of the road interfered with this free utopia.<sup>65</sup> The *Buckley* Court made a remarkably similar mistake—assuming that unrestricted spending by billionaires represents default “freedom of speech” and outlawing any effort to structure a fair debate in which people amplify their voices by joining together with fellow citizens rather than purchasing bigger megaphones.<sup>66</sup>

### **Did the *Buckley* Court get anything right?**

Yes, the majority in *Buckley* did get a few things right. First, it upheld contribution limits, public financing, and disclosure provisions, and signaled important deference to legislators in designing these provisions.<sup>67</sup> Next, the Court recognized that citizens need confidence in our democratic institutions in order for them to function properly, so it allowed laws that fight the appearance of corruption.<sup>68</sup> It also did not define corruption exclusively as *quid pro quo* bribery, so in many cases decided in the first three decades after *Buckley* (including the 2003 case upholding the major provisions of the McCain-Feingold law) the Court could embrace a broad, flexible definition of corruption that allowed legislators to target “the broader threat from politicians too compliant with the wishes of large contributors.”<sup>69</sup> The *Buckley* Court also did not assert that independent expenditures

could never corrupt elected officials, merely that they did not appear to do so at the time.<sup>70</sup> And, although a majority of the justices explicitly rejected the government’s interest in equalizing political voice through restrictions on big money, they did not close the door to other rationales in the future.

Finally, the Court was correct in striking one particular provision of FECA. The \$1,000 limit on “independent expenditures” was too low as applied to political committees. A \$1,000 limit on spending is perfectly fair for any one person, but people should be able to band together to speak louder collectively. Preventing any outside group from so much as buying a newspaper ad that advocates the election or defeat of a candidate would have given candidates and parties an unfair monopoly on campaign messaging and shut down the legitimate voices of advocacy organizations that speak on behalf of thousands or millions of members.

### **How much of that is left in the law today?**

Unfortunately, relatively little. Public financing programs and disclosure rules generally remain on firm legal ground.<sup>71</sup> But the Roberts Court has rolled back much of the remaining positive aspects of *Buckley*. Chief Justice Roberts and his fellow conservatives have reversed *Buckley*’s deferential stance towards Congress regarding contribution limits.<sup>72</sup> They have significantly narrowed the definition of corruption to mean only explicit money-for-votes exchanges (bribery) rather than more systemic forms of undue influence.<sup>73</sup> And, in *Citizens United*, Justice Kennedy announced a blanket rule that independent expenditures cannot corrupt, turning a debatable (and likely incorrect) statement of fact into a principle of law.<sup>74</sup>

Critically, in *Citizens United* and *McCutcheon*, the Court closed the door on other potential government interests supporting campaign limits, stating explicitly that fighting corruption (narrowly defined) is all that's allowed.<sup>75</sup> In a 2008 case Justice Alito wrote for the Court that leveling the playing field between candidates with varied access to financial resources was not only not a *compelling* government interest, but is not even a *legitimate* one.<sup>76</sup> The Chief Justice took this to an absurd conclusion in a 2011 case, citing the fact that advocates had mentioned “leveling the playing field” on its campaign website as affirmative proof of some kind of illicit motivation that should invalidate part of a public financing law.<sup>77</sup>

### What have been the legal consequences of the ruling?

*Buckley's* legal significance can hardly be overstated. The case set out the basic structure of campaign finance law for a generation: contribution limits have been generally ruled acceptable (until two recent Roberts Court cases in 2006 and 2014), but limits on spending have always been considered out of bounds. Beyond that, its core logic—that fighting corruption is the only acceptable reason for limiting campaign money and that spending money without directly cooperating with a candidate does not present corruption risks—set the stage for the Court's recent high-profile campaign finance cases, *Citizens United* and *McCutcheon v. FEC*.<sup>78</sup>

As shown in Figure 1 below, *Buckley* laid the groundwork for decades of flawed campaign finance rulings that have taken many of our strongest protections against big money off the table.

*Buckley* also severely handicapped the movement for money in politics reform

by undermining both its most popular policies and best arguments. Strict limits on contributions and spending are wildly popular with the public and relatively easy to pass by ballot initiative.<sup>79</sup> Public financing programs are gaining impressive momentum, including victories at both the state and local levels in 2015.<sup>80</sup> But, passing them usually requires more resources than limits-based policies.<sup>81</sup>

Yet, *Buckley's* most profound impact may be the way in which it has shaped the entire public conversation around money in politics for 40 years. The basic idea that the size of a person's wallet should not determine the strength of her voice in a democracy makes intuitive sense to most Americans. The notion that we should have strong protections to level the playing field between wealthy donors and the rest of us has similar appeal. But, because of the *Buckley* Court's rejection of the equality interest, reform advocates have shied away from making their strongest case—both in the courtroom and in the public arena.

Rather than talking about deeper values such as equal citizenship or the proper relationship between capitalism and democracy, the entire conversation has been shoehorned into allegations of *quid pro quo* corruption—which are both difficult to prove and often not the main point. Further, all the talk about corruption has only deepened the cynicism of the electorate, making people angry but far from convinced that better laws can cure what is ultimately a deficit of human character. In short, because the *Buckley* Court mis-defined the problem of money in politics as being only about clean governance, we've been having the wrong conversation for four decades.<sup>82</sup>

**Figure 1. Supreme Court Shreds Protections Against Big Money Politics**

Year	Protection Struck Down	Case	Impact	Example
1976	Limits on how much personal or family wealth a candidate can spend on her own campaign	<i>Buckley v. Valeo</i>	Millionaires and billionaires can attempt to buy elected office with unlimited personal or family wealth	Michael Bloomberg spends more than \$250 million to become and stay mayor of New York City. <sup>1</sup>
1976	Limits on total spending by candidate campaigns	<i>Buckley v. Valeo</i>	High cost of campaigns raises significant barrier to entry for non-wealthy candidates; officeholders forced to spend up to half of their time raising money in a nonstop arms race	Candidates spend a combined \$49 million in one 2014 Kentucky U.S. Senate race. <sup>2</sup>
1976	Limits on the amount an individual or political committee can spend to influence an election without cooperating with a candidate ("independent expenditures")	<i>Buckley v. Valeo</i>	Billionaires permitted unlimited election spending; sets the stage for the rise of "outside spending" groups, which took off after <i>Citizens United</i> in 2010	Anthem, Inc. insurance company gives nearly \$13 million to defeat a 2014 pro-consumer health care initiative in CA. <sup>3</sup>
1979	Ban on spending by corporations on ballot initiatives	<i>First National Bank of Boston v. Bellotti</i>	For profit and nonprofit corporations can spend treasury funds to support or oppose ballot initiatives	More than 75% of the \$266 million given by the top 50 donors to 2014 ballot measure groups comes from corporations or business trade groups, which had a 96% win record. <sup>4</sup>
1981	Limits on contributions to ballot initiative campaigns	<i>Citizens Against Rent Control v. Berkeley</i>	Wealthy individuals and institutions can spend unlimited sums to influence what measures make it onto state and local ballots and ultimately pass or fail	Anthem, Inc. insurance company gives nearly \$13 million to defeat a 2014 pro-consumer health care initiative in CA. <sup>5</sup>
2006	Strict limits on contributions to candidates, set at levels that average Americans can afford to give—such as \$200 to state representative candidates	<i>Randall v. Sorrell</i>	Congress, states, and cities can set relatively high contribution limits to prevent candidates from being bought off, but not low contribution limits that level the playing field between wealthy donors and ordinary citizens	2012 U.S. Senate candidates get 64% of the funds they raise from individuals in contributions of at least \$1,000 – from 0.04% of the population. <sup>6</sup>
2010	Ban on direct spending by corporations to influence candidate elections	<i>Citizens United v. FEC</i>	For-profit corporations and unions can spend unlimited treasury funds to support or oppose candidates, overturning nearly a century of law; secret money explodes into U.S. politics since many nonprofit corporations are not required to disclose their donors	The Koch Brothers' network of political organizations pledges to spend \$889 million in the 2016 election cycle, mostly through nonprofits that are not required to disclose their donors. <sup>7</sup>
2010	Limits on contributions to groups that spend money to influence elections but do not contribute to candidates	<i>Citizens United v. FEC and Speech Now v. FEC (DC Circuit)</i>	Super PACs are born; permitted to collect unlimited contributions from virtually any source and spend unlimited sums, as long as they don't contribute to or cooperate with candidates or parties	Super PACs raise \$696 million in the 2014 election cycle – more than either major party that cycle. <sup>8</sup>
2011	Additional public financing for candidates to match big spending by opponents or outside groups	<i>Arizona Free Enterprise Club v. Bennett</i>	Public funding programs cannot match high-dollar spending by non-participating candidates or outside groups, making systems harder to sustain	Arizona "Clean Elections" candidate Janie Hydrick lost to her privately-financed opponent by less than 5,000 votes while being outspent more than 3.5 to 1. <sup>9</sup>
2014	Limits on the total amount one wealthy donor can contribute to all candidates, parties, and political committees combined	<i>McCutcheon v. FEC</i>	A single individual can now contribute millions of dollars to a single party's candidates and committees plus millions more to PACS, versus a prior total federal cap of \$123,200	Paul Singer made over \$569,000 in 2014 cycle contributions to federal candidate and party committees – more than 4 times the limit before McCutcheon. <sup>10</sup>

Sources

1. Michael Barbaro & David W. Chen, "Bloomberg Sets Record for His Own Spending on Elections," New York Times, October 23, 2009.
2. Adam Lioz & Karen Shanton, *The Money Chase*, Demos & U.S. PIRG Education Fund (2015).
3. 2012 Top Donors to Outside Spending Groups, Center for Responsive Politics
4. Liz Essley White, "Big business crushed ballot measures in 2014," The Center for Public Integrity, February 5, 2015.
5. Demos analysis of National Institute on Money in State Politics data available at [www.followthemoney.org](http://www.followthemoney.org); Greg Topp, "Florida voters reject medical marijuana measure," USA Today, November 5, 2014.
6. Demos analysis of National Institute on Money in State Politics data available at [www.followthemoney.org](http://www.followthemoney.org)
7. Nicholas Confessore, "Koch Brothers' Budget of \$889 Million for 2016 Is on Par with Both Parties' Spending," New York Times, January 26, 2015.
8. Outside Spending & Political Parties, Center for Responsive Politics
9. Demos analysis of data from Arizona Secretary of State
10. 2014 Overview, Top Individual Contributors: Hard Money, by Individual, Center for Responsive Politics

## What have been the practical consequences of the ruling?

By eliminating spending limits, *Buckley* perpetuated an arms race that has consistently driven up the cost of campaigns faster than inflation.<sup>83</sup> This serves as a critical barrier to entry for non-wealthy citizens hoping to serve in elected office, leading to a Congress where the majority of members are millionaires and less than 2 percent have had a working class background over the past century.<sup>84</sup> This arms race—and the notion that we cannot pass limits to promote equal political voice—has empowered a “gatekeeper class” of \$1,000+ donors who largely determine which candidates survive the wealth primary before facing voters at the polls.<sup>85</sup> With a narrow donor class filtering the candidate pool and setting the agendas in Washington and state capitals across the country, it’s no surprise that elected officials are both much wealthier and whiter than the country writ large, and sharply more responsive to the wealthy than to the rest of us.<sup>86</sup>

The *Buckley* plaintiffs cited concerns that spending limits would protect incumbents; yet without such limits incumbency rates remain sky-high.<sup>87</sup> Ironically, the plaintiffs also claimed that spending limits would both decrease responsiveness and undermine public confidence in government;<sup>88</sup> but without such limits responsiveness has tilted towards the wealthy and trust in government has only continued to decline.<sup>89</sup>

## Forty years later, what is *Buckley*’s legacy?

Since the 1970s, the top one percent has monopolized the vast majority of the nation’s economic growth, while inter-

generational mobility has stalled.<sup>90</sup> More than perhaps any other single case or law, *Buckley* helped structure a society in which wealthy interests can freely translate economic might directly into political power, and write rules that keep themselves rich while the majority of Americans struggle to get ahead, or even stay afloat. *Buckley*’s legacy is a vicious cycle of political and economic inequality, and a big money political system that holds back our struggle for economic justice and racial equity.<sup>91</sup>

## What about *Citizens United*—isn’t that the real problem?

The Court’s 2010 *Citizens United* decision has become shorthand for the damage the Court has done to our democracy through its campaign finance rulings. This makes sense, since the ruling was in many ways an (il)logical extension of *Buckley* and other cases. And, *Citizens United* did help revive the notion that corporations have constitutional rights, setting the stage for troubling cases outside the campaign finance arena.<sup>92</sup>

Yet it is important to recognize that much of the damage to our democracy precedes *Citizens United*, and can be traced back to *Buckley* itself. A significant majority of the money fueling the Super PACs that have leapt to prominence since *Citizens United* comes from wealthy individuals, not corporations.<sup>93</sup> These individuals have been permitted to spend unlimited sums on “independent expenditures” since *Buckley*. It’s true that Super PACs provide a more convenient vehicle for this spending, but overturning *Citizens United* doesn’t necessarily solve the problem. Billionaires who are now accustomed to being active political players could simply hire their

own consultants to spend their political money, without making a contribution to a separate entity.

Next, *Buckley*—not *Citizens United*—ensured that wealthy candidates can attempt to buy elected office by spending unlimited personal or family funds.

Finally, and most important, in restricting the People’s power to only fighting corruption or its appearance, the *Buckley* Court prevented us from adequately addressing the wealth primary phenomenon in which large donors act as gatekeepers and aspiring officeholders without personal wealth or a network of rich friends and associates are locked out of the process. Long before *Citizens United*, candidates for Congress raised the majority of their funds in \$1,000+ contributions from far less than one percent of the population.<sup>94</sup>

### **What should we do about *Buckley* now?**

We need to overturn *Buckley*, and there are two basic ways to do this. First, we can push the Supreme Court to overturn the case. Just as the Court has reversed course on New Deal economics, racial justice, LGBT rights and more, new democracy-friendly justices can transform the Court’s whole approach to money in politics. Next, we can amend the Constitution to clarify that We the People have the power to limit big money.

### **Are these solutions realistic?**

As noted, the Supreme Court has shifted dramatically on key issues in the past. The drive to overturn the “separate but equal” doctrine and win 1954’s *Brown v. Board of Education* decision kicked off in 1931, and looked extremely bleak.<sup>95</sup> But years of sustained strategic effort produced a

wholesale transformation. There will be substantial turnover on the Court in the next four to eight years, and presidential candidates have already talked about appointing justices who will change course.<sup>96</sup>

Amending the Constitution is difficult, but nearly every generation has done so.<sup>97</sup> Since 2010 16 states, hundreds of municipalities, and a majority of the U.S. Senate have called for an amendment.<sup>98</sup> And even short of actual passage, the grassroots energy behind the drive can help shift the Court.

### **What can a citizen who is not a lawyer or judge do?**

Americans concerned about the disastrous impact of *Buckley* on our democracy can press the presidential candidates to commit to appointing justices who will revisit *Buckley*, not just *Citizens United*; tell their U.S. senators to ask any prospective justice about *Buckley*; make sure their U.S. senators and representatives are co-sponsors of the Democracy for All Amendment; push their state legislators or city councilors to pass a resolution calling for an amendment; and join the advocacy organizations who have come together around [a comprehensive agenda to fight big money](#).

### **What can we do in the meantime, while *Buckley* is still the law of the land?**

In the meantime, we can move forward with programs that use limited public funds to amplify the voices of ordinary citizens in the process. In 2015 voters approved ballot measures that provide Seattle voters with four \$25 vouchers to contribute to local candidates and strengthened Maine’s grant-based public funding system.<sup>99</sup> Other cities like New York match small contributions six-to-one.<sup>100</sup>

## Where can I learn more?

Here are some resources for those who would like to dig deeper into the case, consequences, and possible solutions:

- [Fighting Big Money, Empowering People](#)
- [Breaking the Vicious Cycle, Demos](#)
- [Why Citizens United Just Scratches the Surface, The American Prospect](#)
- [More Than Corruption Threatens the Integrity of Our Democracy, The American Prospect](#)
- [Rethinking Campaign Finance, The Brennan Center for Justice](#)
- [United4thePeople.org](#)
- [Government By the People Act, Demos](#)

## Endnotes

1. 424 U.S. 1 (1976).
2. *Citizens United v. Fed. Election Com'n*, 588 U.S. 310 (2010).
3. The Federal Election Campaign Act of 1971 ("FECA"), Pub. L. 92-225, 86 Stat. 3 (1972); The Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 (1975).
4. Brief for Appellees at 60, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 171457, at 98.
5. See *Buckley*, 424 U.S. at 7.
6. Brief for Appellants at 6, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 253.
7. *Experts Hon. James L. Buckley*, THE FEDERALIST SOCIETY, <http://www.fed-soc.org/experts/detail/james-l-buckley> (last visited Nov. 25, 2015); THE HISTORICAL SOC'Y OF THE D.C. CIRCUIT, ORAL HISTORY PROJECT, HONORABLE JAMES L. BUCKLEY 2 (1995), available at [http://dcchs.org/jamesLBuckley/jamesbuckley\\_complete.pdf](http://dcchs.org/jamesLBuckley/jamesbuckley_complete.pdf).
8. Brief for Appellants at 14, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 256.
9. Brief for Appellees at 28-29, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 171457, at 87.
10. Brief for Appellants at 14-25, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 256-61. Because the case was at the Supreme Court on appeal, the parties listed are technically "appellants" rather than "plaintiffs;" but we use here the term with which more readers are likely to be familiar.
11. Brief for Appellants at 27-29, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 262-63.
12. Brief for Appellants at 28, 30, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 263.
13. *Id.* at 32.
14. *Id.* at 34.
15. *Id.* at 35.
16. Richard Briffault, *The Return of Spending Limits: Campaign Finance after Landell v. Sorrell*, 32 FORDHAM URBAN LAW JOURNAL 101, 107-11 (2004).
17. Brief for Appellants at 28, 30, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 13.
18. ADAM LIOZ & BRENDA WRIGHT, CAMPAIGN CONTRIBUTION LIMITS: NO HARM TO CHALLENGERS (The State PIRGs' Democracy Program & the National Voting Rights Institute, 2006), available at [http://www.uspirg.org/sites/pirg/files/reports/Campaign\\_Contribution\\_Limits\\_USPIRG.pdf](http://www.uspirg.org/sites/pirg/files/reports/Campaign_Contribution_Limits_USPIRG.pdf).
19. See, e.g., *Congress, Confidence in Institutions*, GALLOP (June 2-7, 2015), <http://www.gallup.com/poll/1597/confidence-institutions.aspx>; *Americans' Views on Money in Politics*, NEW YORK TIMES AND CBS NEWS POLL (June 2, 2015), <http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html>.
20. See generally MARTIN GILENS, AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA (2012); Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 AM. POL. SCI. ASS'N PERSP. ON POL. no. 1, 2014 at 564.
21. *Buckley*, 424 U.S. at 8.
22. See *id.* at 7, 9.
23. Brief for Appellees at 6, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 171457, at 79.
24. *Id.* at 37-40.
25. Brief for Appellees at 9, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 171457, at 81.
26. *Id.*
27. *Id.* at 47-51; 63-65.
28. *Id.* at 10-11 (internal citations omitted), 81-86.
29. *Id.* at 66.
30. *Id.* at 11; 86-88.
31. *Id.* at 12.
32. *Id.* at 12 (internal citations omitted).
33. The opinion of the Court was "per curium" meaning "by the Court" with no author listed. This designation was traditionally reserved for unanimous, non-controversial decisions. See generally, Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curium Opinions*, 86 TUL. L. REV. 1197 (2012). *Buckley*, however, was far from unanimous; there were in fact five dissents on an eight-justice Court. Justice Burger would have struck down essentially all of the amended FECA. *Buckley*, 424 U.S. at 235-57. Justice White would have upheld FECA's spending limits. *Buckley*, 424 U.S. at 257-86. Justice Marshall would have upheld FECA's limits on candidates' use of personal funds. *Buckley*, 424 U.S. at 286-290. Justice Blackmun would have struck FECA's contribution limits. *Buckley*, 424 U.S. at 290. Justice Rehnquist would have struck FECA's presidential public financing program as discriminatory against minor parties. *Buckley*, 424 U.S. at 290-294. Justice Stevens took no part in the decision, although later

- indicated he would have upheld FECA's spending limits. *See e.g.* *Randall v. Sorrell*, 548 U.S. 230, 274-75 (2006) (Stevens J., dissenting).
34. *Buckley*, 424 U.S. at 59-84, 85-109, 23-37, 38.
  35. *Id.* at 54-58, 39-51, 51-54, 109-143. Congress passed further amendments to FECA in 1976 which repealed expenditure limits and changed the appointment process for the FEC. FECA, Pub. L. 92-225, 86 Stat. 3 (1972), as amended by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976).
  36. *Buckley*, 424 U.S. at 16 (“...this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.”).
  37. *Buckley v. Valeo*, 519 F.2d 821, 859 (D. C. Cir. 1975).
  38. *Id.*
  39. *Newberry v. United States*, 256 U.S. 232, 258 (1921).
  40. Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T REV. 1, 20 (2008).
  41. *Buckley v. Valeo*, 519 F.2d 821, 840-41 (D.C. Cir. 1975); *see also, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 274-75 (2006) (Stevens J., dissenting) (“[O]ur earlier jurisprudence provided solid support for treating these [expenditure] limits as permissible regulations of conduct rather than speech”); *see e.g.* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L. J. 1001 (1976).
  42. *Buckley*, 424 U.S. at 19.
  43. *Id.* at 21.
  44. *Id.* at 21-22.
  45. *Id.* at 25-26.
  46. *Id.* at 26-28.
  47. Without addressing this interest at all, the Court merely asserted that “the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending...” *Buckley*, 424 U.S. at 57.
  48. *Id.* at 48-49.
  49. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer J., concurring).
  50. *Buckley*, 424 U.S. at 46-47 (“...the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions... Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”).
  51. *Id.* at 21 (“The quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing.”)
  52. *Id.* at 26-27 (“To the extent that large contributions are given to secure a political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined... Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”).
  53. *Buckley v. Valeo*, 519 F.2d 821, 840-41 (D.C. Cir. 1975); *see also, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 274-75 (2006) (Stevens J., dissenting) (“[O]ur earlier jurisprudence provided solid support for treating these [expenditure] limits as permissible regulations of conduct rather than speech”).
  54. *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *see also* Kenneth Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975) (internal citation omitted) (“The principle of equality, when understood to mean equal liberty, is not just a peripheral support for the freedom of expression, but rather part of the ‘central meaning of the First Amendment’”).
  55. *See, e.g.*, *McCutcheon v. Fed. Election Com'n*, 134 S. Ct. 1434 (2014).
  56. ADAM LIOZ, *BREAKING THE VICIOUS CYCLE: RESCUING OUR DEMOCRACY AND OUR ECONOMY BY TRANSFORMING THE SUPREME COURT'S FLAWED APPROACH TO MONEY IN POLITICS* (Dēmos, 2015), (Hereinafter “*BREAKING THE VICIOUS CYCLE*”).
  57. *BREAKING THE VICIOUS CYCLE*.
  58. *See* Adam Lioz, *Breaking the Vicious Cycle: How the Supreme Court Helped Create the Inequality Era and Why a New Jurisprudence Must Lead Us Out*, 43 SETON HALL L. REV. 1227, 1256-58 (2013).
  59. *See id.* at 1256-57.
  60. *BREAKING THE VICIOUS CYCLE*.
  61. *See, e.g.*, Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478 (2015).
  62. *McCutcheon*, 134 S. Ct. at 1441.
  63. Some have attempted to reframe reform arguments about the wealthy having different views than the general public as a kind of content discrimination, as if those seeking limits on big money were trying to silence the wealthy because of their views. This argument is flawed. The wealthy having a louder voice than the rest of us is inherently unfair regardless of their views. The fact that the wealthy tend to have different views means that their (inherently anti-democratic) disproportionate power skews policy outcomes in meaningful ways. This is a consequence of a flawed system, and a reason for people to care beyond pure democratic principle.
  64. *McCutcheon*, 134 S. Ct. at 1467 (Breyer J., dissenting) (“Accordingly, the First Amendment advances not only the individual's right to engage in political speech, but also the public's interest in preserving a democratic order in which collective speech matters.”)
  65. *Lochner v. New York*, 198 U.S. 45 (1905); *see also, e.g.*, Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1397 (1994).
  66. *See* Sunstein, *supra* note 65 at 1398-99.
  67. *See e.g.* *Buckley*, 424 U.S. at 30 (“As the Court of Appeals observed, if it is satisfied that some limit on contributions is necessary, a court has not scalpel to probe, whether, say, a \$2,000 ceiling might not serve as well as \$1,000.” (internal citations omitted)).
  68. *Id.* at 27.
  69. *Nixon*, 528 U.S. at 389; *McConnell v. Fed. Election Com'n*, 540 U.S. 93, 143-44 (2003).
  70. *Buckley*, 424 U.S. at 46.
  71. *Contra Davis v. Fed. Election Com'n*, 554 U.S. 724 (2008), *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 (2011); *see also, e.g.*, Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1449-1459 (2014) (discussing the Supreme Court's treatment of campaign finance disclosure provisions).
  72. *See* *McCutcheon*, 134 S. Ct. 1434.
  73. *See id.* at 1441; *see also* *Citizens United*, 558 U.S. at 360.
  74. *See* *Citizens United*, 558 U.S. at 360.
  75. *See id.* at 359-360; *McCutcheon*, 134 S. Ct. at 1441.
  76. *Davis v. Fed. Election Com'n*, 554 U.S. 724, 741 (2008).
  77. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2825-26 (2011).
  78. Interestingly, the Court does not seem to follow this logic consistently when it comes to elected judges. In two decisions many commentators have found surprising, the Roberts Court has ruled that a judge who benefited from substantial independent expenditures on his behalf must recuse himself to satisfy the requirements of due process, and that states may ban judges from directly soliciting campaign contributions. *See* *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009), *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656 (2015).
  79. *See, e.g.*, *Beyond Distrust: How Americans View Their Government: Perceptions of Elected Officials and the Role of Money in Politics*, Pew Research Center (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/> (“77% of Americans say there should be limits on the amount of money individuals and organizations can spend on political campaigns and issues”); 2012 *Ballot Issues*, Mont. Sec. of State, <http://sos.mt.gov/Elections/2012/BallotIssues/> (last visited Nov. 25, 2015) (Describing I-166 and noting the measure was approved by voters in 2012); *Ballot History*, Colo. State Leg. Council, <http://www.leg.state.co.us/lcs/ballothistory.nsf/835d2ada8de735e787256ffe0074333d/f190f4d9ea07485b87256ffd006a49c8?OpenDocument> (last visited Nov. 25, 2015) (Describing Initiative 27 and noting the measure was approved by voters in 2002).
  80. *See* Adam Smith, *Maine, Seattle Voters Pass Money-In-Politics Reforms to Empower Everyday People*, EVERY VOICE (Nov. 4, 2015), <http://everyvoice.org/press-release/maine-seattle-voters-pass-money-politics-reforms-empower-everyday-peopl>.
  81. The most popular aspects of many public funding programs are the spending limits that candidates must adhere to in exchange for access to public funds—the very policy the Court has taken off the table if mandatory.
  82. *BREAKING THE VICIOUS CYCLE*.
  83. *See, e.g.*, *The Cost of Winning an Election, 1986-2014* (in nominal and 2014 dollars), THE CAMPAIGN FINANCE INSTITUTE, [http://www.cfinst.org/pdf/vital/VitalStats\\_t1.pdf](http://www.cfinst.org/pdf/vital/VitalStats_t1.pdf) (last visited Nov. 25, 2015).
  84. *See, e.g.*, Chris Usher, *Majority In Congress are Millionaires*, NPR (Jan. 13, 2014), <http://www.npr.org/sections/itsallpolitics/2014/01/10/261398205/majority-in-congress-are-millionaires>; NICHOLAS CARNES, *WHITE-COLLAR GOVERNMENT: THE HIDDEN ROLE OF CLASS IN ECONOMIC POLICY MAKING* 4-5 (2013).
  85. *See generally* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. (1994); BLAIR BOWIE & ADAM LIOZ, *BILLION DOLLAR DEMOCRACY: THE UNPRECEDENTED ROLE OF MONEY IN THE 2011 ELECTIONS* (Dēmos & U.S. PIRG, 2013), available at <http://www.demos.org/sites/default/files/publications/billion.pdf>; *see also* ADAM LIOZ & KAREN SHANTON, *THE MONEY CHASE: MOVING FROM BIG MONEY DOMINANCE IN THE 2014 MIDTERMS TO A SMALL DONOR*

- DEMOCRACY 4-8 (Demos & U.S. PIRG, 2015), available at [http://www.demos.org/sites/default/files/publications/TheMoneyChase-Report\\_0.pdf](http://www.demos.org/sites/default/files/publications/TheMoneyChase-Report_0.pdf).
86. See generally ADAM LIOZ, STACKED DECK: HOW THE RACIAL BIAS IN OUR BIG MONEY POLITICAL SYSTEM UNDEMURINES OUR DEMOCRACY AND OUR ECONOMY (Demos, 2014)
  87. Brief for Appellants at 29-30, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Nos. 75-436, 75-437), 1975 WL 173792, at 263; *Reelection Rates Over the Years*, CENTER FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/bigpicture/relect.php> (last visited Nov. 25, 2015).
  88. *Buckley*, 424 U.S. at 30.
  89. See *Confidence in Institutions*, GALLOP (Jun. 2-7, 2015), <http://www.gallup.com/poll/1597/confidence-institutions.aspx>.
  90. JACOB S. HACKER AND PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010); Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez, and Nicholas Turner, *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104(5) AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 141 (2014).
  91. See generally DAVID CALLAHAN & J. MIJIN CHA, STACKED DECK: HOW THE DOMINANCE OF POLITICS BY THE AFFLUENT & BUSINESS UNDERMINES ECONOMIC MOBILITY IN AMERICA (Demos, 2013), Lioz, *supra* note 86.
  92. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).
  93. The Center for Responsive Politics reports that in the 2014 Cycle, individual contributions made up \$369,848,623 of the \$ \$606,728,104 in total contributions to Super PACs. See *2014 Super PACs: How Many Donors Give?* CENTER FOR RESPONSIVE POLITICS, [https://www.opensecrets.org/outsidespending/donor\\_stats.php?cycle=2014&type=I](https://www.opensecrets.org/outsidespending/donor_stats.php?cycle=2014&type=I) (last visited Nov. 25, 2015).
  94. See, e.g., ADAM LIOZ, THE WEALTH PRIMARY: THE ROLE OF BIG MONEY IN THE 2002 CONGRESSIONAL PRIMARIES (U.S. PIRG Education Fund, 2002), available at [http://www.uspirg.org/sites/pirg/files/reports/The\\_Wealth\\_Primary\\_2002\\_USPIRG.pdf](http://www.uspirg.org/sites/pirg/files/reports/The_Wealth_Primary_2002_USPIRG.pdf).
  95. Richard Kluger, *Simple Justice* (Vintage Books: 1975) at 132-37 (describing the Margold Report of 1931 that laid out a path to reversing *Plessy v. Ferguson*).
  96. See, e.g., Matea Gold & Anne Gearan, *Hillary Clinton's litmus test for Supreme Court nominees: a pledge to overturn Citizens United*, THE WASHINGTON POST (May 14, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/05/14/hillary-clintons-litmus-test-for-supreme-court-nominees-a-pledge-to-overturn-citizens-united/>; Eliza Collins, *Sanders takes dead aim on Citizens United ruling*, POLITICO (May 10, 2015), <http://www.politico.com/story/2015/05/bernie-sanders-takes-dead-aim-on-citizens-united-ruling-117792#ixzz3p3laVq3E>.
  97. See generally Bruce Ackerman, *A Generation of Betrayal?* 65 Fordham L. Rev. 1519 (1997); Matthew Segal, *Nearly Every Generation Has Amended the Constitution to Help Expand Democracy. Now It's Our Turn.*, Huffington Post (Sept. 16, 2014), [http://www.huffingtonpost.com/matthew-segal/nearly-every-generation-h\\_b\\_5828490.html](http://www.huffingtonpost.com/matthew-segal/nearly-every-generation-h_b_5828490.html).
  98. S. J. Res. 19, 113<sup>th</sup> Cong. (2014) (Yea-Nay Vote. 54 – 42); see also *Constitutional Amendments*, United For The People, <http://united4thepeople.org/amendments/> (last visited Nov. 18, 2015).
  99. Smith, *supra* note 80.
  100. See generally *Matching Funds Program*, NEW YORK CITY CAMPAIGN FINANCE BOARD, <http://www.nycfb.info/program> (last visited Nov. 25, 2015).





Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy.

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