

DEMOCRACY FOR SALE:  
A CRITICAL EXAMINATION OF THE POLITICAL-MEDIA COMPLEX  
AT WORK IN CAMPAIGN FINANCE AND POLITICAL BROADCASTING REGULATION  
IN U.S. PRESIDENTIAL ELECTIONS FROM 1976 TO 2016

By

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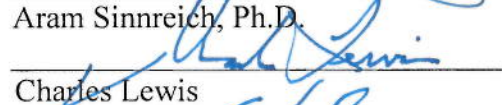
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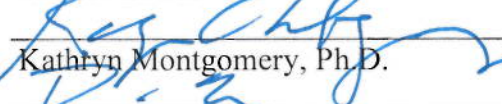
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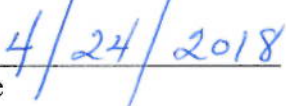
  
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## **Abstract**

This dissertation is a critical examination of the political-media complex (PMC) in the United States, as observed along three currents: philosophical, historical, and political. The development of this symbiotic ecosystem is charted longitudinally, with an emphasis on the forty years of reform, regulation, and deregulation of campaign finance and political broadcasting that followed the Watergate scandal. Attention is focused on this network of media and political actors, and their synergistic architecture of power, as observed through the eleven presidential elections that followed the post-Watergate reform movement, from 1976 to 2016. Situating this problem as a crisis of political communication rather than political science, the conventional voter-centric “rational choice” model is rejected; instead, the perspectives found in critical media studies, political economy of media, and science and technology studies are employed for a more holistic view of the landscape and outlook of this industrial knowledge-power structure. This work culminates with a multifaceted mandate for actionable intervention, and normative recommendations for reform at the regulatory level are put forth.

The contemporary debate about the issue of “money in politics” writ large hinges on whether or not money – specifically, the spending of it for purposes of political persuasion – should be considered speech, and therefore left largely unregulated lest it impinge on First Amendment rights. This debate strikes at the core of a dialectical tension within our democracy: liberty versus equality. Throughout this work, the empirical reality is held in contrast to normative democratic theory.

The ever-increasing costs of federal political campaigns in the U.S. have created a troubling culture of “permanent campaigning” and tipped the balance of power in the White House and in Congress away from elected leaders, and their constituents, toward the wealthy donors – individual, corporations, and special interest groups – who fund their electoral victories. How do we fix this inappropriate and destructive power dynamic? If we take a step back to investigate *why* the cost of political campaigning has skyrocketed over the past forty years, we land at the doorstep of a clear culprit: the astronomical cost of political advertising on broadcast television.

This dissertation seeks to examine how and why the broadcast networks have been allowed to subvert their public interest obligation and profit off of American elections, and what legislative and advocacy attempts have been made to rein in their influence. For this investigation, archival data, secondary sources, running records and recollections are all employed to present as accurate a portrayal as possible of the political-media complex at work in each of the eleven presidential elections since 1976. Particular attention is given to the myriad policy interventions – regulatory, legislative, and judicial – and their often unexpected outcomes.

In conclusion, this study explores the need for a new theoretical paradigm by which to understand the role of broadcast media as a powerful political entity in its own right, and its dominant, nonpareil role in American politics. Finally, normative recommendations will be put forth on what can be done to mitigate the powerful gatekeeping role of the broadcast media within our political system, thereby dramatically reducing the amount of money needed to campaign. By

chipping away at the exorbitant cost of campaigning for the presidency and advocating multiple new channels for transparency, hopefully the power, influence, and leverage of campaign funders can be diminished, returning political power to elected officials and, ultimately restoring the political voice of the American voter. Acknowledging that money will never be completely eradicated from the political process, these recommendations are offered in the spirit of restoring a sense of equilibrium currently lacking in U.S. politics.



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## Chapter 1: Introduction

FADE IN ON:

A TINY BLACK PIECE OF TAPE.

We see it in the center of the large, dimly lit screen. As the tape is pressed around a door--

BEGIN THE BREAK-IN SEQUENCE.<sup>1</sup>

So begins the screenplay for *All the President's Men*, the romanticized cinematic retelling of the role of the media in the Watergate scandal, starring Robert Redford and Dustin Hoffman as the dynamic duo of investigative journalism who would bring down a President. This story gets it wrong in many ways, almost single-handedly crediting Bob Woodward and Carl Bernstein for toppling Nixon's presidency, popularizing the dominant narrative of journalistic persistence (Campbell, 2017) aided by a sexy secret informant, and largely ignoring the role of the federal prosecutors, the FBI, a grand jury, and even the Supreme Court, in uncovering the truth. But the movie gets Watergate right in one crucial way: it was made to be on screen.

The real journalistic success story of Watergate is not about Woodward and Bernstein and *The Washington Post*, or frankly, about investigative journalism at all, but about executives and journalists at the three broadcast networks – ABC, CBS, and NBC – recognizing good television when they saw it, and deciding to cover the Senate Watergate hearings, gavel-to-gavel. It was must-see reality TV

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<sup>1</sup> <http://www.imsdb.com/scripts/All-the-President's-Men.html>

and nearly 85 percent of American households tuned in.<sup>2</sup> On August 20, 1973, *Time* magazine reported,

When the Senate Watergate hearings pre-empted daytime serials last spring, local stations were flooded with protest calls. By last week, when the hearings recessed, viewers were demonstrating a change of heart. In Minneapolis, for example, the switchboard of WCCO-TV blazed indignantly when people tuning in for Watergate found a baseball game instead. Forging ahead of the soaps and game shows, Watergate topped all daytime rivals in the latest Nielsen ratings.<sup>3</sup>

“The Watergate hearings would become the first political corruption scandal televised in real-time complete with protagonists, villains, foils, suspense, and climax. It was outrageous reality TV, but with the future of the country in the balance.”<sup>4</sup> It’s impossible to isolate the independent variable of a captivated national television audience and know how the Senate proceedings would have gone had the entire country not been watching, but the attention and scrutiny from the American people was so intense that Watergate went from being thought of as a “third-rate burglary” non-issue in Nixon’s 1972 landslide reelection to a public *cri de coeur* over corruption that led to his unprecedented resignation.

Today, we find ourselves in a remarkably similar situation, as evidence of Russian interference in the 2016 presidential election inches closer and closer to collusion and a possible cover-up inside Trump Tower, if not the Oval Office itself. Certainly the response from the Trump White House echoes the combative Nixonian playbook with its disparagement and denigration of journalism (fake

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<sup>2</sup> <http://www.museum.tv/eotv/watergate.htm>

<sup>3</sup> <http://content.time.com/time/subscriber/article/0,33009,907706,00.html>

<sup>4</sup> <https://timeline.com/watergate-hearings-television-nixon-fal1b60d53e7a>

news!) and penchant to “admit nothing, deny everything, and launch counterattacks.”<sup>5</sup> Today’s analogous campaign finance scandal once again involves “hush money,” not to so-called “plumbers,” but this time paid to porn star Stormy Daniels by Trump’s longtime lawyer and consigliere, Michael Cohen. What’s different now is our media environment. No longer are all eyes fixed on one of the “Big Three” broadcast networks for the six o’clock news every night. Today’s political events play out in a polarized, fragmented, “hybrid” media system, wherein the flow of information traverses old and new media technologies (Chadwick, 2013), and citizen media diets exist largely inside of partisan silos. And while no President since Richard Nixon would be foolish enough to tape record the goings-on of the Oval Office, it’s worth noting that, thanks to modern technology, we are living in an era of unprecedented third-party surveillance (see Greenwald, 2014; Lessig, 2006; Rosen, 2000; Solove, 2006 and 2008), and a record is made of nearly all electronic communications in this hybrid system.

The importance of the televised Senate Watergate hearings in orienting this particular research endeavor would be hard to overstate. The hearings laid bare for the American people, at home in their living rooms, the kind of special interest corruption Washington was/is built upon. This sociocultural phenomenon gave way to forty years of legislative, judicial, and advocacy efforts aimed at curbing not just the outright quid pro quo bribery seen in Watergate, but the more pervasive systemic influence peddling and “dependence corruption.” (Lessig, 2011) Perhaps most importantly for this study, Watergate illustrated the sui generis role of

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<sup>5</sup> This phrase is frequently credited to Nixon and Trump adviser, Roger Stone; however, its actual origins are unknown.

broadcast television in American politics. Then and still now, despite the complexity of today's hybrid media environment, America's broadcast networks remain the dominant media of our democracy, as this research will demonstrate.

### *On Democracy*

It's worth noting at the start that democracy itself is not a scientific principle or truth, but rather a man-made body of theorems, logics, and strategies for the implementation of self-governance. While this may sound obvious, it's important to understand that none of the various exercises in democracy – historical or contemporary – have been guided by immutable scientific law, but by the constructs of philosophers, in dialogue with and through iteration of one another's ideas. There is no long arm of democracy bending any one way or another. This seemingly cynical vantage point is not meant to discount the imperfect implementation of lofty democratic ideals; rather, this approach may help ground our understanding of why reality never fails to disappoint ideology, and prevent the fetishization of any one manifestation of self-governance over any equally imperfect other. This dissertation will focus on the ways in which our empirical understanding of the relationship between media and democracy meets, or falls short of, the seminal tenets of normative democratic theory. This is undertaken in the hopes of proposing actionable recommendations that will bring what should be closer to what is in American democracy, while pushing ever toward normative democratic ideals.

### **Statement of the Problem**

*“I am of the opinion, on the whole, that the manufacturing aristocracy which is growing up under our eyes is one of the harshest that ever existed in the world; but at the same time, it is one of the most confined and least dangerous. Nevertheless, the friends of democracy should keep their eyes anxiously fixed in this direction; for if ever a permanent inequality of conditions and aristocracy again penetrates into the world, it may be predicted that this is the gate by which they will enter.”*

– Alexis de Tocqueville, *Democracy in America*

(1835)

The American experiment in democracy is in crisis – due to the outsized influence of moneyed interests in the U.S. political system – and so much so that Tocqueville’s dystopian prediction of “a permanent inequality of conditions” appears to be at hand. The United States is one of the richest countries in the world per capita and has the world’s largest economy,<sup>6</sup> and yet income inequality is worse now than it has been in a hundred years, with the top tenth of the top one percent having almost as much wealth as the bottom ninety percent.<sup>7</sup> The last thirty years have seen an enormous transfer of wealth from the middle class and the poor to the wealthiest people in the country.<sup>8</sup> Fifty-eight percent of all new income since the financial crisis of 2008 has gone to the top one percent (Saez, 2015), substantiating the axiom that “the rich get richer and the poor get poorer.” Far gone are the halcyon

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<sup>6</sup>Ranked by World Bank GDP data:

[https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi\\_data\\_value\\_2014+wbapi\\_data\\_value+wbapi\\_data\\_value-last&sort=asc](https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?order=wbapi_data_value_2014+wbapi_data_value+wbapi_data_value-last&sort=asc)

<sup>7</sup> per the Economic Policy Report retrieved on October 20, 2016 from [http://www.epi.org/blog/wages-for-top-earners-soared-in-2014-fly-top-0-1-percent-fly/?utm\\_source=Economic+Policy+Institute&utm\\_campaign=6b344f772a-](http://www.epi.org/blog/wages-for-top-earners-soared-in-2014-fly-top-0-1-percent-fly/?utm_source=Economic+Policy+Institute&utm_campaign=6b344f772a-)

[EPI\\_News\\_11\\_13\\_1511\\_13\\_2015&utm\\_medium=email&utm\\_term=0\\_e7c5826c50-6b344f772a-55867937](http://www.epi.org/blog/wages-for-top-earners-soared-in-2014-fly-top-0-1-percent-fly/?utm_source=Economic+Policy+Institute&utm_campaign=6b344f772a-EPI_News_11_13_1511_13_2015&utm_medium=email&utm_term=0_e7c5826c50-6b344f772a-55867937)

<sup>8</sup> per the World Wealth and Income database, sponsored in part by the European Research Council, retrieved online October 21, 2016 at <http://www.wid.world/#Country:2>

days of an economically and politically powerful middle class in the United States. This stratification of American civil society will continue without significant political intervention. Yet our political process is so dominated by moneyed interests – wealthy individuals, corporations, and so-called “special interests,”<sup>9</sup> the modern-day manifestation of Tocqueville’s *manufacturing aristocracy*, that all hope of democratizing legislation – economic policy designed around the needs of the average American, rather than the wants of the top one percent – is nearly lost.

The hijacking of representative democracy by moneyed interests is hardly a secret, as anti-money rhetoric currently saturates our political public sphere – with the notable exception of coverage by corporate-owned mass media. The 2016 election cycle alone gave rise to a tsunami of activity aimed squarely at curbing money’s influence in the American political system: populist sentiments from presidential candidates on both sides of the political binary; record-breaking grassroots protests and arrests on the National Mall and inside the U.S. Capitol building; the proliferation of extraordinarily well-organized non- and bi-partisan issue advocacy organizations; resolutions from sixteen states in favor of a constitutional amendment to overturn *Citizens United v. FEC*; and a torrent of thought pieces and dire warnings from issue advocates, prominent public intellectuals, and opinion journalists – all in agreement that democracy in the United States is at perilous risk of becoming, or has already become, a plutocracy, ruled not *by* and *for* the people, but exclusively *by* and *for* the moneyed interests.

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<sup>9</sup> Wesleyan Media Project/Center for Responsive Politics Report on Outside Group Activity, 2000 - 2016, retrieved online on October 21, 2016 at <http://mediaproject.wesleyan.edu/releases/disclosure-report/>



Public opinion on the broad issue of money in politics is at a near-consensus level of dissatisfaction with 84% of Americans in agreement that “money has too much influence” in the U.S. political system.<sup>10</sup> 87% of Americans support changes to campaign finance law, such that wealth would not dictate political influence.<sup>11</sup>

Yet curiously, the corporate-owned mass media – particularly broadcast television news programs – gave shockingly little attention to the broad matter of money in politics during the 2016 election cycle, with broadcast television news barely covering the issue *at all*. Illustratively, in April 2016, over 1,240 protesters were arrested during the weeklong “Democracy Spring” demonstration, aimed at getting Congress to pay attention and take action toward getting “big money” out of politics. In what was one of the largest acts of nonviolent civil disobedience in the U.S. since the Vietnam War, everyday citizens and media-savvy celebrities joined forces to carry on the hard-won American tradition of dissenting political speech dating back to that foundational protest, the Boston Tea Party. Activists went so far as to gain access to the Capitol rotunda through an official tour and chain themselves to scaffolding en masse.<sup>12</sup> In terms of what matters to journalists and television news producers in determining “newsworthiness,” this event checked all nine boxes of established criteria: timeliness, proximity, conflict,

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<sup>10</sup> *The New York Times* / CBS News Poll on Money and Politics conducted May 28 -31, 2015, retrieved online October 19, 2016 via *The New York Times* website at <http://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>.

<sup>11</sup>

<http://www.campaignlegalcenter.org/sites/default/files/The%20Money%20in%20Politics%20Disaster%20-%20Trevor%20Potter%20Independent%20Sector%20for%20Distribution.pdf>

<sup>12</sup> per Democracy Spring media release retrieved online October 21, 2016 at [http://www.democracyspring.org/april\\_campaign](http://www.democracyspring.org/april_campaign)

prominence, human interest, consequence, usefulness, novelty, and deviance. (Campbell, 2016)

So how much media coverage did this massive, well-orchestrated, camera-ready protest receive? The three commercial broadcast network evening shows – ABC's *World News Tonight*, *CBS Evening News*, and *NBC Nightly News* – gave a combined total of zero seconds of airtime to the demonstration.<sup>13</sup> Likewise, the three network weekend programs, known simply as the “Sunday shows” by the beltway cognoscenti – ABC's *This Week*, CBS's *Face the Nation*, and NBC's *Meet the Press*, all of which purport to specialize in covering current political and sociopolitical events – likewise omitted coverage of the protests entirely.<sup>14</sup>

This curious omission of coverage begs the question: Was this a purely coincidental omission, or could it be related to the fact that network television remains by far the largest beneficiary of political campaign spending with a staggering \$6.8 billion<sup>15</sup> spent in the 2016 election cycle alone? That is \$158 million more<sup>16</sup> than the previous presidential election cycle, adjusted for inflation. Despite the data-driven advances of modern “technology-intensive” campaigning (Kreiss, 2016), including the precision micro-targeting of campaign messaging to voters, an unprecedented level of measurability, and the proliferation of lower cost

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<sup>13</sup> Only publicly-funded *PBS NewsHour* devoted any airtime to the demonstration, with an underwhelming 29 seconds of coverage, as reported in *Broadcast Networks Ignored Democracy Awakening, Democracy Spring Protests*, Media Matters, published April 20, 2016 on [mediamatters.org](http://mediamatters.org).

<sup>14</sup> Ibid.

<sup>15</sup> up \$86.5 million from 2012 per Center for Responsive Politics Report, <https://www.opensecrets.org/news/2016/10/total-cost-of-2016-election-could-reach-6-6-billion-crp-predicts/>

<sup>16</sup> <https://www.opensecrets.org/overview/cost.php>

digital and social media alternatives, broadcast television still remains king for political advertising, reaching 87% of Americans 18 and older.<sup>17</sup>

### *The Political-Media Complex*

Like the “military-industrial complex” that President Eisenhower forewarned in his farewell address, the political-media complex is the supra-structure of the interconnected and interdependent entities of politics, government, and the commercial news media. It represents a symbiotic ecosystem, wherein mutual cooperation is absolutely necessary for each institution to succeed in according with the demands of its market. In the case of politics, that means success in communicating with voters in the hopes of affecting voter behavior, and in the case of the commercial media, that means feeding the demands of capitalism by turning a profit handsome enough to appease Wall Street. “...Politicians cannot succeed without access to the media, just as reporters cannot succeed without access to political leaders.” (Swanson, 1992) The missing component in the political-media complex is the public interest. Identifying the consequences of this power dynamic at work, Swanson (1992) writes

Constructed news spectacles, sound-bite news, personalized issues, negative campaigning, and other afflictions of contemporary political communication are the products of a self-serving, self-absorbed political-media complex. Like the spectacles staged in republican and imperial Rome, they serve narrow institutional interests by producing public quiescence through distraction. Real problems persist on the sidelines while politics and government are tailored to commercial media values.

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<sup>17</sup> *The Total Audience Report*, Nielsen, published Q1 2016 on Neilson.com.

The rising costs of political campaigns have created a troubling federal culture of “permanent campaigning” and tipped the balance of power in the White House and in Congress away from elected leaders, and their constituents, toward the donors who fund their campaigns. How do we fix this inappropriate and destructive power dynamic? If we take a step back to investigate *why* the cost of political campaigning has skyrocketed over the past forty years, thereby enabling democratic power to be controlled by moneyed interests, we land at the doorstep of the culprit: the ever-increasing cost of advertising on broadcast television. The skyrocketing costs of political campaigns are primarily the consequence of the arms race of broadcast television spending between campaigns.<sup>18</sup>

This dissertation seeks to examine how and why have the broadcast networks been allowed to profit off of American democracy, and what legislative and advocacy attempts have been made to rein in their corporate greed. Finally, this dissertation will put forth normative recommendations on what can be done going forward to mitigate the powerful gatekeeping role of the broadcast media over our political system; thereby dramatically reducing the amount of money needed to campaign; therefore neutralizing the power, influence, and leverage of campaign funders; ultimately returning political power to elected officials and, most importantly, restoring the voice, importance, and political power of the American voter.

## **Rationale**

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<sup>18</sup> <http://www.npr.org/sections/itsallpolitics/2015/08/19/432759311/2016-campaign-tv-ad-spending>

While there are certainly many fascinating media issues to be examined as political communication researchers autopsy the 2016 election – Twitter, “fake news,” the role of partisan cable outlets such as Fox News and MSNBC, conservative talk radio, the smugness of elite liberal media in their coverage of Trump’s candidacy, how hosting a reality TV show became a viable path to 1600 Pennsylvania Avenue, and the list goes on – understanding the sui generis role of broadcast television, and its evolution to sustained political dominance over the past forty years, is of the utmost importance if we hope to uncover the complex power dynamics at work perpetuating the modern political-media complex. Of all forms of modern media, broadcast television is the most demonstrative of the tensions within the system. These tensions in the political-media complex were callously acknowledged by CBS President Les Moonves, reflecting on the influx of political campaign revenue at CBS in February 2016, “It may not be good for America, but it's damn good for CBS.”<sup>19</sup>

#### *Why Broadcast Television Still Matters*

Allow me to state the obvious: Americans *love* television. American adults, on average, watch over five hours of television a day;<sup>20</sup> the bulk of that – four and a half hours – is still live television, despite the trends of time-shifting, cord-cutting, mobile viewing, and the proliferation of streaming services like Netflix, Amazon Prime, and Hulu. That number increases among African-Americans, and jumps to over seven hours a day for those sixty-five and older. The percentage of U.S. homes with televisions receiving a television signal – via broadcast, cable, DBS, Telco, or

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<sup>19</sup> <http://www.politico.com/blogs/on-media/2016/02/les-moonves-trump-cbs-220001>

<sup>20</sup> March 2014 “Cross-Platform Report” released by Nielsen

broadband Internet connection – is 96.5% for 2017, representing total market saturation.<sup>21</sup> Despite the increase in smartphone usage and time-shifted television viewing, the data on live television viewership has remained surprisingly stable over the past several years. The consensus among media critics is that we are currently living in a third “Golden Age” of television.

Furthermore, television is nearly inseparable from American culture, being both an inextricable part of the American cultural experience itself, and the most prolific reflection of that culture. As Neil Postman (1985) observed,

Television is our culture's principal mode of knowing about itself. Therefore – and this is the critical point – how television stages the world becomes the model for how the world is properly to be staged. It is not merely that on the television screen entertainment is the metaphor for all discourse. It is that off the screen the same metaphor prevails.

For the past twenty years, America’s biggest export to the world has not been our agricultural bounty or our factory-manufactured consumer products, but the products of our popular culture, with American television now culturally colonizing every corner of the globe – for better or worse.

Contemporary American television viewership is by no means limited to fans of vapid reality television and zombie apocalypse shows. Pew Research Center’s 2016 Report, *The Modern News Consumer*, demonstrated that American adults – 7 in 10 of whom report following the news on a regular basis – have a clear preference for watching their news rather than reading it. Of those news watchers,

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<sup>21</sup> <http://www.nielsen.com/us/en/insights/news/2017/nielsen-estimates-119-6-million-us-tv-homes-2017-2018-tv-season.html>

80 percent of them prefer consuming news via the television rather than any other digital and social media available.<sup>22</sup>

### *Broadcast versus Cable – What’s the difference, anyway?*

Since 2009, when transmission of over-the-airwaves broadcast television went digital, the functional difference between broadcast and cable has been nearly invisible to the American consumer – until time to pay the hefty cable bill, anyway. The functional difference between broadcast and cable is the distribution mechanism.

With cable, originally known as Community Access Television (CATV), there is a physical coaxial or fiber-optic cable connecting the “head-end” demarcation point to the destination, such as into a customer’s home. Cable emerged in the 1940s as a supplement to over-the-air broadcasting in remote and mountainous areas where the airwaves were difficult to receipt. The physical cables can carry a wide variety of content in either analog or digital format, and are now equipped to offer Internet access and voice over Internet Protocol (VOIP) as well. These services are bundled into packages for the customer and received in the home through a cable box. Cable boxes, necessary before televisions were built to be cable-ready, now serve to convert digital content and to scramble content that has not been paid for.

Broadcast television, on the other hand, is transmitted wirelessly over the air using radio frequencies from one terrestrial or earthbound location (as opposed to satellite) to another. Each frequency carries only one channel (e.g. NBC) and all

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<sup>22</sup> <http://www.journalism.org/2016/07/07/the-modern-news-consumer/>

a consumer needs to receive the signal is an antenna. As opposed to cable, broadcast television is free to the anyone with an antenna, which can be as rudimentary as homespun “rabbit ears” or the \$8.99 RCA model<sup>23</sup> available on Amazon.com.

The differences between broadcast and cable do not end with technology; the regulations that govern them are quite different as well. In fact, the FCC has no regulatory authority over cable companies.

Furthermore, there are some important socioeconomic implications worth noting: broadcast television is available to 96% of American homes.<sup>24</sup> Cable is a luxury, and one that, according to a 2015 report from the Pew Research Center, one in seven U.S. adults<sup>25</sup> who once subscribed are now willing to go without, 75% of those cutting the cord because the monthly cable bills were too expensive. With 9% of Americans saying they’ve never subscribed to cable or satellite television, that means 24% of American households are without any television access other than broadcast.

Broadcast television remains king for political advertising because it still reigns supreme in viewership with the American people. Pulling a combined average of 23.75 million viewers for the evening network news programs, broadcast blows cable’s combined average 4.7 million primetime viewers out of the water every night. Compared with the daily print circulations of the country’s most well-read newspapers, *USA Today* (under 1 million) and *The New York Times* (just over

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[https://www.amazon.com/gp/product/B000HKGK8Y/ref=as\\_li\\_tl?ie=UTF8&camp=1789&creative=390957&creativeASIN=B000HKGK8Y&linkCode=as2&tag=bguidelink-20&linkId=IYIKCNW37QCSRAFO](https://www.amazon.com/gp/product/B000HKGK8Y/ref=as_li_tl?ie=UTF8&camp=1789&creative=390957&creativeASIN=B000HKGK8Y&linkCode=as2&tag=bguidelink-20&linkId=IYIKCNW37QCSRAFO)

<sup>24</sup> <http://www.nielsen.com/us/en/insights/news/2016/nielsen-estimates-118-4-million-tv-homes-in-the-us--for-the-2016-17-season.html>

<sup>25</sup> <http://www.pewinternet.org/2015/12/21/4-one-in-seven-americans-are-television-cord-cutters/>



half a million), it's clear that the network evening news is still appointment viewing for a plurality of the American public.

A recent Pew Research Center poll showed that half of all Americans *trust* the network news, ranking ABC (50%), CBS (46%), and NBC (50%), well above the Public Broadcasting System (38%), *The New York Times* (34%), and National Public Radio (29%) in overall trust. This is particularly meaningful in the context of increasing systemic distrust among Americans in so many once-venerated institutions such as the mass media in general (32%), the federal government (18%)<sup>26</sup>, banks (27%), public schools<sup>27</sup> (30%), and even organized religion (at an all-time low of 41%). With this pervasive cynicism, it's nothing short of miraculous that half of all Americans still actually *trust* America's broadcast networks.

Even with the proliferation of cheap alternatives to cable, including online streaming services and hardware devices, it's hard to beat free over-the-air broadcasting, available with nothing more than an old-fashioned TV antenna. While broadcast viewership and revenues have remained steady, the rising cost of cable subscriptions has given rise to cord-cutting, particularly among Millennial and Generation X viewers. This has some interesting implications for political news coverage and electoral behavior, since Millennials and Gen Xers outvoted Baby Boomers and older generations in 2016, a trend that statistically cannot help but continue and seems likely to further marginalize the importance of cable news coverage. The tension between two countervailing trends, time-shifted viewing and second-screening, could keep live television numbers surprisingly stable for some

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<sup>26</sup> <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/>

<sup>27</sup> <http://news.gallup.com/poll/192581/americans-confidence-institutions-stays-low.aspx>

time to come. While cable is struggling with its viewer demographics and the changing media landscape, in an economy increasingly fixed on eyeballs – what Tim Wu calls the “attention economy” (2017) – broadcast networks show little signs of slipping. With cable cords being cut by a significant portion of the U.S. population, a general distrust of news media sources in general, and the rollout of Next Gen TV in 2018 – promising higher definition picture quality and increased interactivity – could we be looking toward a renaissance of broadcast television for the 2020 election cycle?

The rationale for focusing this research on broadcast television is threefold. First and foremost, the viewership of broadcast television news is unique in both the size and demographic profile of its audience. For purposes of this study, broadcast television will include the “Big Three” broadcast networks: ABC, CBS, and NBC. While some researchers include Fox among the broadcast networks (not to be confused with Fox News, which is cable) because its household reach is on par with the “Big Three,” its programming lineup is distinct from the others in two significant ways: 1) Fox offers only two hours of original programming per night, while the “Big Three” networks all offer three hours, and 2) Fox has no news programming. Therefore, from a pragmatic research standpoint, Fox is not analogous to ABC, CBS, and NBC, and would skew the research findings. ABC is owned by The Walt Disney Company; CBS is owned by the CBS Corporation; and NBC is owned by Comcast. All three of these companies are major media

conglomerates with revenues of \$74.51 billion for Comcast;<sup>28</sup> \$13.88 billion for CBS Corporation;<sup>29</sup> \$52.46 billion for The Walt Disney Corporation.<sup>30</sup>

Regarding viewer demographics, the foretold “graying” of the broadcast television audience has not occurred nearly as quickly as predicted; in fact, the age composition of broadcast viewership has not changed markedly over the past five years. The 18-34 bracket continues to account for about one-quarter of the broadcast television audience, which is almost matched by the 65+ age group alone, however, which itself constitutes one-fifth of the audience.<sup>31</sup> Overall, a strong majority of the broadcast TV audience is at least 45 years old. Coincidentally, this trend line of age demographics for broadcast television runs directly parallel to that of American voter turnout.<sup>32</sup>

Age composition aside, unlike cable, audience demographics of the broadcast networks are largely “undifferentiated,” meaning that the distributions of their audience members according to other demographic characteristics – income, race/ethnicity, gender, geographic area, and political affiliation – are relatively flat across the board. The political importance of being able to address an undifferentiated audience cannot be overstated: the eyes and ears of America’s swing voters are affixed to broadcast television.

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<sup>28</sup> COMCAST CORP 2015 Annual Report Form (10-K), United States Securities and Exchange Commission, filed February 5, 2016, retrieved online on October 21, 2016 at <https://www.sec.gov/Archives/edgar/data/902739/000119312516452423/d49239d10k.htm>

<sup>29</sup> CBS Corporation 2015 Annual Report Form (10-K), United States Securities and Exchange Commission, filed February 27, 2016.

<sup>30</sup> Disney's Fiscal Full Year and Q4 2015 Earnings Results Webcast. The Walt Disney Company. November 5, 2015. Retrieved October 22, 2016 online at <https://thewaltdisneycompany.com/disneys-fiscal-full-year-and-q4-2015-earnings-results-webcast/>

<sup>31</sup> Simmons Research Audience Studies, 2014 - 2016.

<sup>32</sup> <http://www.electproject.org/home/voter-turnout/demographics>

Given what we know about selective media exposure, media fragmentation, the political balkanization of social media, increasing political polarization of the American polity – evidenced socially, culturally, and geographically – and the disappearance of the so-called “third places” for civic interaction, where are the spaces in American life that we still come together and digest the same information? Culturally and politically speaking, broadcast television is Main Street USA. (Yes, even still.)

The second – and perhaps most obvious – reason for studying broadcast television as it relates to U.S. politics is that, as mentioned earlier, broadcast television still remains king for political advertising, reaching 87% of Americans 18 and older.<sup>33</sup> Which explains why campaigns spend far more money to advertise on broadcast television than any other form of media, by several orders of magnitude. In fact, they spend more on broadcast television than they spend on all the other forms of media *combined*.

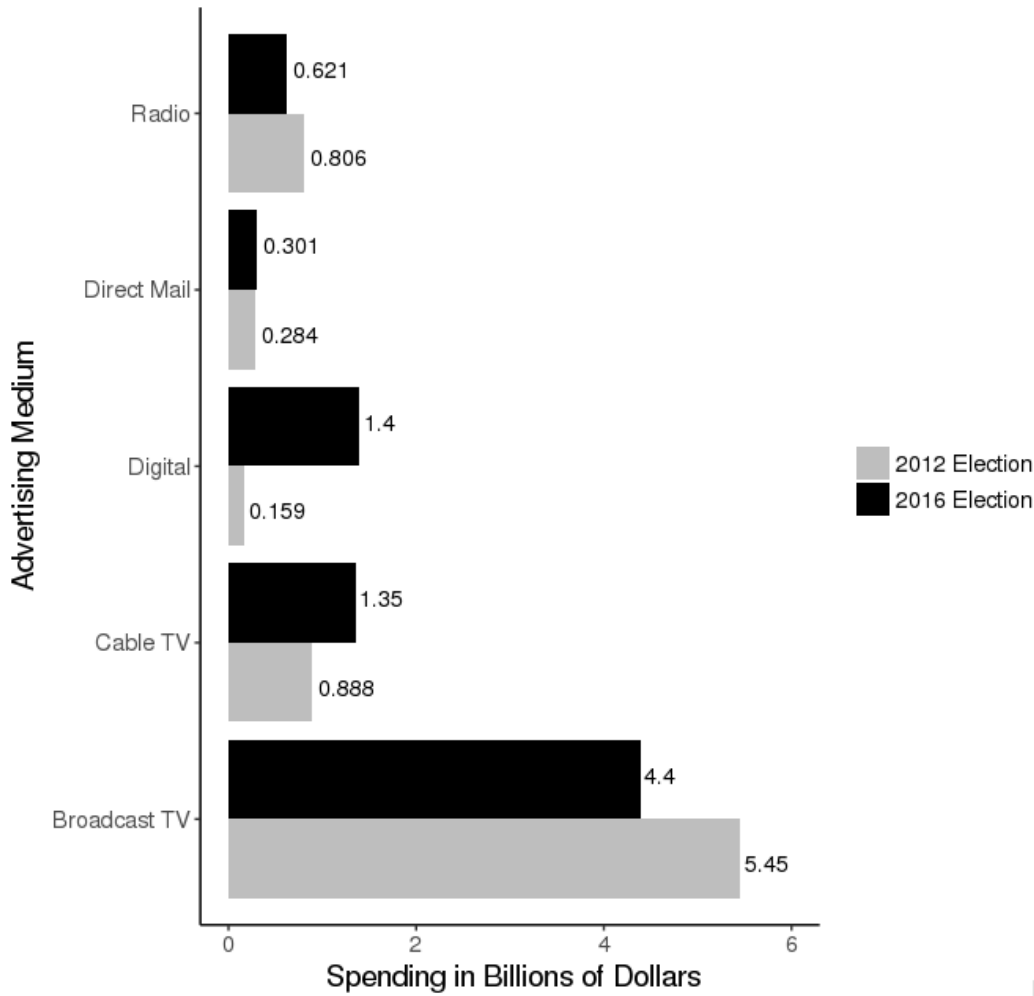
**Figure 1.1: Political ad spending in the 2012 and 2016 elections, by medium**

(in billion U.S. \$)

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<sup>33</sup> *The Total Audience Report*, Neilson, published Q1 2016 on Neilson.com.

## Political Advertising Spending in Presidential Elections



*Data Source: Center for Responsive Politics*

The third reason for focusing this dissertation research on broadcast television is more complicated, technical, historical; however, in my view, this piece is critical to understanding when, where, and how our political discourse – and, therefore, our political system writ large – veered so badly off-course.

Broadcast television derives its name from the broadcast spectrum, the portion of the electromagnetic spectrum optimal for telecommunications transmissions, with frequencies far lower than infrared or visible light. Federal law grants the Federal Communications Commission the authority to determine who

can broadcast on which frequencies between 9 Hz and 400 GHz,<sup>34</sup> so as to prevent interference between stations. The U.S. Code of Federal Regulations defines broadcasting as “transmissions intended for reception by the general public, either direct or relayed.”<sup>35</sup> Broadcast, therefore, is a *public* resource by definition; and the electromagnetic spectrum, which facilitates broadcast’s terrestrial transmission, is *literally* a natural resource (Herter, 1985), over which the FCC has regulatory authority. “The US commercial (broadcasting) system resulted from a carefully crafted cooperation endeavor by national corporations and federal regulators.” (Hilmes, 2004) Indeed, as this study will seek to demonstrate, the broadcast television media are the biggest “special interest” in U.S. politics, the 800-pound gorilla having its way with our political process. “But wait,” you ask, “I thought ABC, CBS, and NBC were competitors?” Enter their trade association/lobbying organization, the National Association of Broadcasters.

### **Figure 1.2: U.S. Spectrum Frequency Allocation**

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<sup>34</sup> [www.FCC.gov](http://www.FCC.gov)

<sup>35</sup> U.S. Code of Federal Regulation, Title 47, Part 97

# UNITED STATES FREQUENCY ALLOCATIONS

## THE RADIO SPECTRUM



Source: U.S. Dept. of Commerce, National Telecom & Information Administration

The Communications Act of 1934, which continues to serve as the charter for broadcast television, put forth the requirement that, in exchange for the use of a public utility, broadcast licensees were to operate in “the public interest, convenience, and necessity.” In the same piece of legislation, Congress imposed a ban on “common carrier” regulation, which prohibited non-licensees from having free speech rights via the broadcast medium. While the government claimed such oversight was necessitated by the finite bandwidth of the electromagnetic spectrum, the battle over “white space” – the unused broadcasting frequencies within the spectrum – rages on still today, revealing the alleged “scarcity of access” to be more a product of government regulation than of physics. The government’s licensing arrangement was justified by requiring that broadcasters act according to the

“public trustee” model, created earlier as a part of the Radio Act of 1912, which described the public trustee role as follows:

[Despite the fact that] the conscience and judgment of a station’s management are necessarily personal... the station itself must be operated as if owned by the public... It is as if people of a community should own a station and turn it over to the best man in sight with this injunction: “Manage this station in our interest.” The standing of every station is determined by that conception.<sup>36</sup>

### *America’s Last Public Square*

When you add together the publicly-owned nature of this natural resource, the government mandate that broadcasters act in accordance with the public interest, and the aforementioned “undifferentiated” (i.e. diversity) of its viewer demographics, broadcast television starts to form the contours of what was once a quintessential place, an immutable principle, and a sacred construct in the American exercise of democracy: the public square. America’s broadcast airwaves are the last remaining and closest thing we have to a public square.

Broadcasters – unlike magazines, newspapers, and cable outlets – have, since their inception, been considered public trustees, who agree to operate in “the public interest, convenience, and necessity,” in exchange for the *exclusive* permission to use (at no charge, ever!) the public’s airwaves. For nearly a century, Congress has ceded what is arguably our most precious natural resource, and has exercised almost no authority in making sure our public interest is being met in accordance with the law. Adding insult to injury, the current market value of the

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<sup>36</sup> Schaffer Radio Company (FRC 1930) (quoted in John W. Willis, The Federal Radio Commission and the Public Service Responsibility of Broadcast Licenses, 11 FED. COM. B.J. 5, 14 (1950)).



analog and digital spectrum, given freely to the broadcasters, is estimated at well over \$200 billion (Nader, 2000).

Since the ancient days of the Athenian *agora* – literally meaning “gathering place” or “assembly” – the idea of a central space for public political discourse has been central to the philosophy and praxis of democracy. In the world’s first democracies, the agora was synonymous with public speech, so much so that it birthed the Greek verb *agoreúō*, meaning “to speak publicly.” Since those days, the public square has provided the foundational architecture – both physically and figuratively – for almost every democracy that followed. It has become the metaphorical representation of the centrality of free speech, deliberation, and debate, both the place where and the process through which the public interest begins to take shape. In many cases, the public square serves as both an economic and a political arena – a place where the needs of both are held in balance. That is not to say that the agoras of modern times have always been utopian; in fact, they have a rather storied history of erupting into protest and even violence – hence the term *agoraphobia*, the fear of being in public spaces.

The downfall of America’s last public square – broadcast television – won’t be one of violence or bloodshed, but rather the privatization of our airwaves, which should be, at least in some part, a forum for free speech. At the very least, this is the place where presidential candidates should be able to go to present their ideas directly to the American people, using a public resource for the public good, without what Edelman (2010 [1988]) described as constructed news spectacles – the hoopla of rallies and the theatrics of prime time debates – or the editorializing

of journalists and pundits. As Chapter Four will outline in detail, the last forty years of deregulation have eroded away the broadcasters' public interest obligation – in public expectation, industry execution, and regulatory enforcement thereof.

### **Research Design**

This study combines longitudinal analyses of presidential campaign fundraising with television advertising spending by presidential campaigns, political parties, and outside groups from 1976 to 2016. This approach seeks to illuminate the complexities and power dynamics at work within the modern political-media complex. Furthermore, this study explores the need for a new theoretical paradigm by which to understand presidential politics vis-a-vis the role of the broadcast media as powerful political players in their own right, and their dominant role in American politics. These themes will be investigated by answering the research questions outlined below.

### **Methodology**

Comparative historical analysis, as used in this investigation, has a long and rich history in the social sciences. The founders of modern social science, including everyone from Adam Smith to Karl Marx, employed comparative historical analysis as their central method of inquiry, continuing the dominant research tradition.

Only by the mid-twentieth century did other approaches to social knowledge partially eclipse comparative historical research, going so far as to threaten its permanent decline. After some period of neglect, however, recent decades have witnessed a dramatic reemergence of the comparative historical tradition. ...This mode of investigation has reasserted itself at the center of today's social sciences. The

revival of comparative historical analysis shows few signs of losing momentum.

(Mahoney and Rueschemeyer, 2012)

As a method of social science inquiry, qualitative comparative historical research seeks to contextualize social, cultural, and political phenomena as they have developed over time. Schutt (2010) breaks this process down into four stages: 1) developing the premise of the investigation, identifying events, concepts, etc. that may explain the phenomena; 2) choosing the cases that will be examined; 3) using “interpretive historical sociology” to examine the similarities and differences; and 4) determining a causal explanation for the observed phenomena. (Skocpol, 1984) Schutt outlines three key concerns of historical comparative research: causal relationships, processes over time, and comparisons. Determining causal relationships requires that the independent and dependent variables have an association, such that the independent variable (the cause) has an effect on the dependent variable, in every case. He goes on to detail the five criteria that must be met to identify a causal relationship: association, time order, nonspuriousness, mechanism, and context. Association is the observed correlation between the independent and dependent variables, wherein the two must vary together. Time order suggests that the cause, or the independent variable, comes before the effect, the dependent variable. Nonspuriousness means that the relationship between the independent and dependent variable must not be due to a third variable. A causal mechanism is the process that creates a connection between the variation in an independent variable and the variation in the dependent variable it is hypothesized to cause. Finally, context is the focus of idiographic causal explanation, wherein a

particular outcome is understood as part of a larger set of interrelated circumstances. This will be the methodology employed to address our research questions:

### **Research Questions**

RQ1: How has the financing of U.S. presidential campaigns evolved from 1976 to 2016?

RQ2: How does that evolution correspond with policy interventions regarding campaign finance regulation?

RQ3: How has the regulation of political broadcasting evolved throughout U.S. history?

RQ4: Are existing theoretical models sufficient to explain the empirical realities of the political media complex as observed in U.S. presidential elections since the post-Watergate reform movement? If not, how should the theoretical models be updated?

RQ5: What normative and regulatory recommendations are there to be made to reduce the amount of money in the U.S. presidential campaign process and increase transparency?

For this investigation, archival data, secondary sources, running records and recollections are all employed to present as accurate a portrayal as possible of the campaign fundraising processes and outcomes in each of the eleven presidential elections since 1976. Particular attention is paid to the policy interventions – regulatory, legislative, and judicial – at which various inflection points become

obvious in the methods and manner of fundraising itself and the outcomes for each presidential candidate in a given election cycle.

### **Purpose of the Study**

The fundamental reasons for this study are twofold. First, it seeks to contribute to the growing body of academic work in the field of political communication, situated at the intersection of communication studies and political science, by using the lens of the issue of money in politics as a vantage point into the complicated interplay between political actors and the mass media, and their various impacts on one another and on public policy, and to put forth new concerns regarding the privatization of governance of our last public square. The interdependencies of the media and political elites, each with their respective cultural and political economies, and the opaque nature of the massive flow of money between them – as well as to and from other moneyed interests – makes the issue of money’s outsized influence in our political system a perfect case study of a “wicked” problem – one made difficult because of incomplete or missing/hidden information, with a moving target of changing regulations – to solve.

To that end, secondly, this study seeks to offer practical advice for the cohort of issue advocates working to curb the influence of money in the American political system today. These public intellectuals, non-profit advocacy professionals, and opinion journalists are tasked with determining the best uses of limited financial resources for maximum gain in terms of impacting media agenda-building, garnering media coverage, framing the issue for public consumption, increasing public awareness, stimulating issue salience, and the list goes on. While

there is general consensus among them as to the importance of media outreach, there is little empirical data on which they can base these critical decisions of resource allocation. Furthermore, there is a lack of clarity as to where exactly digital efforts should fit into the architecture of their advocacy, and while the determination of that is beyond the scope of this particular study, the hope is that the findings herein will further inform the appropriate design of that infrastructure going forward.

To summarize, this dissertation attempts to find a pathway forward by conceptualizing the issue at hand – how to reduce the influence of moneyed interests in U.S. politics – as a crisis of political communication, rather than one of political science; this is a question of the dynamics and parameters of our political public sphere, and the role of the media within it. Given the mediated nature of public political discourse and its primacy in our political system, critical questions must be asked of the media themselves in order to understand the pathways of influence and the mechanisms of disconnection between the U.S. citizenry and its allegedly representative government. The power dynamics and political economies at work therein must be critically examined.

### **Significance of the Study**

This study seeks to contribute several tangible pieces to fill some of the gaps in the body of political communication scholarship: a longitudinal analysis of presidential campaign financing and television advertising spending by presidential campaigns from 1976 to 2016 – illustrating the inflection points and implications of attempted policy interventions – and a set of normative recommendations on

how to reduce the influence of money in our political system by using the public utility of the broadcast airwaves for the public interest.

## Chapter 2: Literature Review & Theoretical Framework

To organize the philosophical underpinnings of this study, four realms of academic theory are called upon: critical and cultural theory; political communication; public sphere theory and related conceptualizations of societal organization; and science and technology studies.

### Critical and Cultural Theory

A study of contemporary media remains a 'meaningless' activity without a historical framework relating the press to the emancipatory struggles of the middle classes and the critical assessment of culture. (Löwenthal, 1949)

Critical theory, in contrast with traditional theory, arose out of the Western Marxist tradition known as the Frankfurt School. Whereas the orientation of traditional theory is explanatory, critical theory seeks emancipation: "to liberate human beings from the circumstances that enslave them." (Horkheimer, 1982) "There are no general criteria for judging the critical theory as a whole... except concern for the abolition of social injustice." (Horkheimer, 1972 [1937]) Critical theory is "always concerned not merely with how things (are) but how they might be and should be," (Broner, 2011)

In *Dialectic of Enlightenment*, Max Horkheimer and T.W. Adorno (2002 [1944]) put forth the idea of the "culture industry," wherein the mass media industrialize the production of culture, rendering the working class of society too concerned with capitalist consumption to constitute an active or engaged citizenry. Reductionist as their theory may be, the sustained power and influence of the



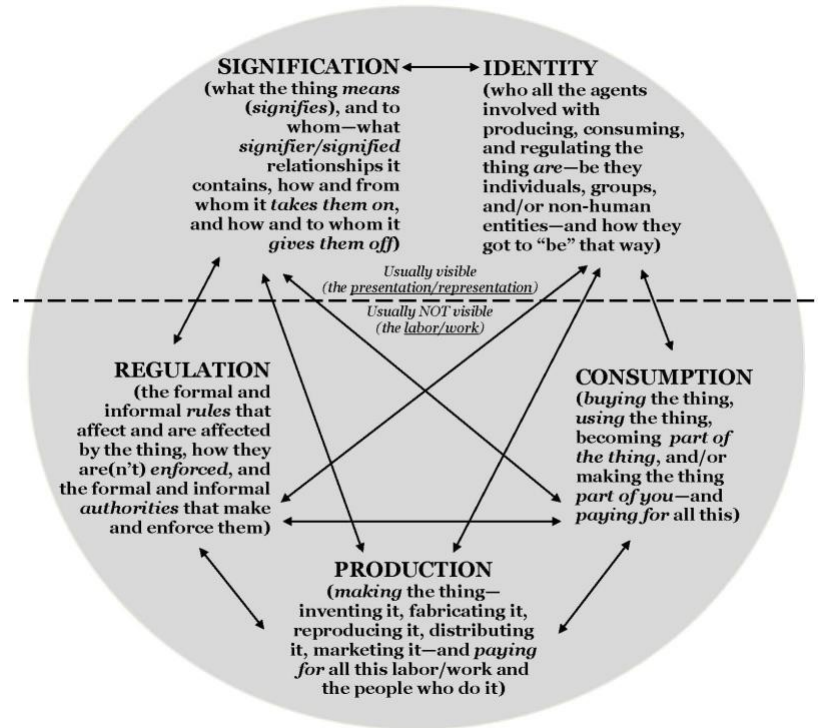
Fordist media systems – both culturally and politically – would be hard to overstate. This points to the subjugation of the individual, the basic unit in a democracy, to the power and dominance of commercial institutions.

Critical alternatives to traditional media sociology take two forms: cultural studies and political economy, (Ampuja, 2004) wherein political economy is defined as “the study of social relations, particularly power relations, that mutually constitute the production, distribution, and consumption of resources.” (Mosco, 2010) The McChesney (2008) model of political economy harkens back to Marx’s concept of fetishization of capitalism, and focuses on the anti-democratic alignment of interests between political and media industries as evidenced by politically-enabled market tendencies such as corporate media concentration.

Cultural studies, on the other hand, emerged in the post-Fordist era and came out of the Birmingham Centre for Contemporary Cultural Studies, under the leadership of Richard Hoggart and Stuart Hall. Cultural studies emphasizes the reciprocal nature of media systems, wherein there is an iterative process of encoding and decoding (Hall, 1973) and a rejection of the false binary between consumption and production. Rooted in this tradition, the Circuit of Culture model (du Gay, 1997) argues for “radical contextualization” wherein production is one of many symbiotic processes, including representation, consumption, regulation, and identity formation. The Circuit of Culture framework (illustrated below) is a particularly useful one for critiquing the political-media complex, as it separates out what is visible: signification and identity, from what is not visible: regulation,

production, and consumption. These unseen elements of the “radical contextualization” model are the focus of this research.

**Figure 2.1: The Circuit of Culture**



### Political Communication

As an adolescent field of interdisciplinary inquiry, political communication takes its epistemological cues from both sides of its academic genealogy: first, from political science, which grounds the field in normative democratic theory, and secondly, from communication studies. As a product of these two branches of the social sciences, political communication focuses – often in the somewhat aspirational manner of *how democracy should be*, rather than *how it actually is* (Habermas, 2006) in today’s “actually existing democracy” (Frazer, 1990) – on “the communicative interaction between the formal actors within the political communication system: political institutions and/or actors; the media; and citizens”

(Dahlgren, 2009). These ideas take for granted the rational voter paradigm: that citizens act in a rational, logical manner when voting, as opposed to acting haphazardly in a way that cannot be explained by social science. Whereas this is the bedrock assumption for political science and political communication scholarship, it is not without rival, including the investment theory of money-driven political systems, discussed below in more detail.

Research in political communication is agitated by the enduring debates between Aristotle and Plato, specifically regarding the optimal role of the individual within a democratic society, and what criteria should be met by the individual in order to participate in self-governance; as well as those of their early twentieth century American intellectual descendants, John Dewey and Walter Lippmann, who debated the social and philosophical role of the media and knowledge in a democracy. The echoes of these great debates still reverberate in our conceptualizations of democracy itself, offering scholars a trilogy of normative democratic models from which to choose: liberal, republican, or deliberative, “which claims an epistemic dimension for the democratic procedures of legitimation” (Habermas, 1994). For scholars of political communication, deciding which of these conceptualizations of democracy to evaluate vis-à-vis communication is of paramount importance. Habermas (1994) cautions that,

Mediated political communication in the public sphere can facilitate deliberative legitimation processes in complex societies only if a self-regulating media system gains independence from its social environments, and if anonymous audiences grant feedback between an informed elite discourse and a responsive civil society.

At present, the majority of political communication studies situate themselves within the normative ideals of deliberative democracy, which

offers as its main empirical point of reference a democratic process, which is supposed to generate legitimacy through a procedure of opinion and will formation that grants (a) publicity and transparency for the deliberative process, (b) inclusion and equal opportunity for participation, and (c) a justified presumption for reasonable outcomes (mainly in view of the impact of arguments on rational changes in preference.) (Habermas, 1994)

Over the last twenty years, there has been a torrent of theorizing on the definition and fundamental requisites of deliberative democracy. Gutman and Thompson (1994) define it as,

a form of government in which free and equal citizens and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching decisions that are binding on all at present but open to challenge in the future.

This places emphasis on a knowledgeable, participatory citizenry engaging in an interactive dialogue with their representatives. Much of the recent political communication scholarship has taken this approach, in no small part because of the oft ballyhooed democratizing potential of the Internet (viewed at first as one behemoth platform with a standard set of affordances) and the potential for interactivity – real deliberation – afforded by the nonhierarchical discourse architectures of social media platforms as transformative firmament for informal political talk and participatory ideals. However, as research has shown, what these platforms really offer is simply an opportunity for “controlled interactivity” (Stromer-Galley, 2012). As Jennifer Stromer-Galley laments, “We could have

finally achieved Barber’s “strong democracy,” but instead the electoral campaigns are giving us little more than opportunities to clap loudly for our favorite candidate.” (2012)

### *Public Opinion and its Role in Democracy*

Much of normative democratic theory, and therefore both political science and political communication, is rooted in the primacy of public opinion. Walter Lippmann’s disparaging portrayal of citizens as “not equipped to deal with so much subtlety, so much variety, so many permutations and combinations” (1965) was – and still is – countered by John Dewey’s more optimistic assertion that “formal training, supported by quantitative assessment, in how to think” (Sproule, 2005) would foster a citizenry worthy of participation, among whom public opinion would provide the “best safeguard to democracy” (Bullert, 1983). Scholars of political science and public opinion “inextricably link public opinion to the functioning of a democratic society” (Moy & Bosch, 2013). Despite the fact that “their ideas fed a view that the weak-minded and dangerously neurotic public could not be trusted to take intelligent political action without formal training, supported by quantitative assessment, in how to think,” according to Sproule’s assessment (Sproule, 2005); their debate was foundational to the field and continues unabated still today.

In 1940, George Gallup’s *The Pulse of Democracy* represented polling as,

a new instrument which may help to bridge the gap between the people and those who are responsible for making decisions in their name. The public opinion polls provide a swift and efficient method by which legislators, educators, experts, and editors, as well as

ordinary citizens throughout the length and breadth of the country, can have a more reliable measure of the pulse of democracy.

Two other theories of political communication of central importance still today, as we navigate the transition into a hybrid media environment (Chadwick, 2013), are the normative ideals of the informed voter and that of political voice. I will examine each of these legacy political theories, and articulate how they have stood the test of time and still provide useful frameworks for today's research.

### *The Informed Voter*

Nearly every democratic theorist views an informed polity as essential to legitimate democratic practice (see Dahl, 2000; Held, 2006; Shapiro, 2003). Voters need to know who or what they are selecting and why. Thomas Jefferson espoused the view that an educated citizenry is a vital requisite for survival as a free people, and that, as such, it is the responsibility of every American to be informed. (Wagoner, 2004) Abraham Lincoln succinctly reiterated this concept when he said, "Let the people know the facts, and the country will be safe." (1865)

### *The Role of Media in a Democracy*

To that end, the *flow* – the basic transmission of facts – and the *quality* of the information are both of paramount importance to our exercise in democracy. Having the state control the flow of information in society is antithetical to freedom, which brings the role of the media in democracy to the foreground for consideration. Wrestling control over the flow of information away from the state was the foundational logic behind the so-called "free press" – an inextricable part of American democracy – whose charge was, from the beginning, twofold: 1) to

inform the polity, so as to facilitate a robust “marketplace of ideas,” and 2) to keep a watchful eye on the government, so that it be held accountable to the citizenry, always. Colonial revolutionary Patrick Henry articulated the latter role writing, “The liberties of people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them.”<sup>37</sup>

And yet, as Hacker & Pierson observe, today we live in a society where “most citizens are too busy with their lives to pay too much attention” (2011), and we have made Jefferson’s normative idea of “informed citizenship” an “overwhelming task” (Schudson, 2011). All the more reason for the modern media to pay close attention to fulfilling both of their roles, as informant and as watchdog, to keep the government accountable to a citizenry too busy to pay only nominal attention.

### *Political Voice*

The idea of political voice comes from the discipline of political science (Hindman, 2009). It has been said that, “meaningful democratic participation requires that the voices of citizens in politics be clear, loud, and equal” (Verba, et al, 1995). In theory, citizens are able to exercise agency in this, as we ostensibly have the freedom to control our own political voice – to amplify it as loudly as we choose, to keep it quiet and hushed among a small group of close friends, or to keep it silent altogether. However – and this is why the theory remains such a useful construct – central to our understanding of democracy is the idea of equality. Not economic equality, but political equality. All votes count the same, and we all have

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<sup>37</sup> Speech On the Expediency of Adopting the Federal Constitution, Delivered in the Convention of Virginia (June 9, 1788)

the same right to have our political voices be heard. There are all sorts of ways in which our implementation of democracy in the U.S. has evolved such that some voices are heard far louder than others, while many are still silenced. At present, money is the loudest megaphone there is.

The idea of political voice is central to the consideration of our mediated political public sphere. When the Supreme Court equates spending money with political speech, as they have since their 1976 decision in *Buckley v. Valeo*,<sup>38</sup> they effectively silence those in poverty. Meanwhile, all we can metaphorically hear anymore is a cacophony of voices – wealthy individuals and corporations – all screaming at the same time.

#### *The Investment Theory of Money-Driven Political Systems*

Scholars of political science have long resisted what seems obvious to most Americans: that the influence of money – be it that of private corporations, groups of like-minded special interests, or wealthy individuals – plays a defining role in both electoral outcomes and public policy decisions. The majority of political science scholarship holds fast to the conventional voter-centric notion of rational choice theory, which posits that individual actors make individual decisions; that these decisions are based on a rational process of deliberation and cost-benefits analysis discernment; and that the aggregate of individual choices comprises our model of social, economic, and voter behavior. One could hazard a guess that this rejection among political scientists has to do with an unwillingness to submit to a rather simplistic reality, particularly for a field that considers itself to be one of

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<sup>38</sup> *Buckley v. Valeo* [1976] USSC 24; 424 U.S. 1; 96 S.Ct. 612; 46 L.Ed.2d 659; Nos. 75-436 and 75-437 (27 February 1976)



complex hard science. And yet, “even in light of skyrocketing campaign costs, the belief that major financial interests determine whom parties nominate and where they stand on issues has been ignored by most political scientists.” (Ferguson, 1995)

Historically-oriented political science theorist Thomas Ferguson introduced a new theoretical framework for understanding the outsized influence of moneyed interests in the U.S. political system in his 1995 manifesto, *The Golden Rule*, which could be summarized as saying “to discover who rules, follow the gold.” Rather than accepting that political parties target voters as their primary audience, the investment approach conceptualizes the two-party system as one in which wealthy individuals are the primary constituencies of political parties, and that their preferences dictate the political and policy priorities and nominating processes of the parties.

This research takes Ferguson’s investment theory as praxis, building on the work of scholars such as Fred Block (2007) and William Domhoff (2014), who argue that investors and business elites set the agendas for both political parties and dominate the public policy-making process, molding both to fit their economic dictates. How else can one explain the bending of public policy over the past forty years to fundamentally reshape the American economy in favor of the economic elite? Jeffrey Winters (2009) takes this so far as to argue that this phenomenon has transformed our democracy into Aristotle’s conception of oligarchy, wherein the wealthy aristocracy – in this case, the top one-tenth of one percent of wealth-holders in the United States – exert political dominance over the rest of society. (Page, et al, 2013) Revisiting the aforementioned idea of political voice, this illustrates the

way in which the wealthy have a political voice that is louder and more likely to be heard than that of other citizens. As Ferguson puts it, we “...habitually confuse the sounds of money talking with the voice of the people.”<sup>39</sup> Meanwhile, official Washington continues to “make the rich richer, and turn its back on the middle class. (Hacker & Pierson, 2010) For as long as democracy has been a construct, its demise has been foretold based on inequality of economic conditions, from Plato to Thomas Paine. “An imbalance between rich and poor is the oldest and most fatal ailment of all republics,” wrote Plutarch.

Ferguson’s investment theory is of particular significance in orienting this research, because it is predicated on the idea that investment is only required because political campaigns are so expensive. Investment theory presents it as a foregone conclusion that, as long as the costs of campaigns continue to escalate, so will the influence of the so-called investors, and the corresponding willingness of office holders and those who would be office holders to cater to the investors’ demands. In the words of the late activist Aaron Swartz,

The key point about the (investment) theory is that issues which no corporations support, even if massively popular among the people,<sup>40</sup> will never be raised in a political campaign. Were a candidate to make the mistake of supporting them, his money supply would quickly dry up, and his campaign would wither. The result? All political policies enacted, from the New Deal to the invasion of Vietnam, are those supported by wealthy corporations, not the people.<sup>41</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Such as campaign finance reform

<sup>41</sup> Citation needed. Text on Aaron’s blog at <http://www.aaronsw.com/weblog/001458>

If that is indeed the only direction our political system is moving in, all the more important, to those of us who are troubled by the inequality, to undercut the cost of campaigning as a vital counterattack against the innumerable inequalities perpetuated by the current system.

### *Cognitive Media Effects*

Much of public opinion research is focused on gaining insight into citizens' political thinking and motivations as they are impacted by messages from the mass media, which leads us directly into the rich body of scholarship on cognitive media effects. Harold Lasswell (1927) laid the foundation for the field of media effects by studying governmental use of propaganda and its impact in fostering public support for World War I. Based on this early scholarly emphasis on propaganda, the prevailing view of the media for much of the early twentieth century was as an all-powerful entity manipulating a passive audience; what we now call the "magic bullet" or the "hypodermic needle" model. This thinking evolved, and the dominant theory since the early sixties has given slightly more agency to individual citizens and attributed more limited effects to the media. In *The Effects of Mass Communication*, Klapper (1960) put forth this new paradigm with his "phenomenistic" approach, which "is in essence a shift away from the tendency to regard mass communication as a necessary and sufficient cause of audience effects, toward a view of the media as influences, working amid other influences, in a total situation." Paul Lazarsfeld and his colleagues at Columbia University's Bureau of Applied Social Research advanced this view of a more active and involved citizenry with the introduction of the two-step flow model of political persuasion (1948), wherein opinion formation is not simply seen as a direct result media influence, but

rather the result of informal political talk with influencers or opinion leaders in their lives. Interestingly, Lazarsfeld's survey respondents, voters in Erie County, Ohio, during the 1940 presidential election, reported more exposure to interpersonal political talk than to political coverage in the media. This crucial point of Lazarsfeld's study begs the question of whether or not the two-step flow theory still has relevance today, when the environment is reversed: the American public is inundated with media coverage of politics, but less likely to engage in interpersonal political discussion with those who do not share their view.<sup>42</sup> The data on this is telling: Evidence suggests that Americans spend a significant amount of time engaged in informal political talk; however, as many as *half* of consistent conservatives (50%) and 35% of consistent liberals say it is important to them to live in a place where most people share their political views – prioritizing political ideology over any other ideological classification.<sup>43</sup> Furthermore, are there any spaces left in American life for exposure to cross-cutting messages, in light of the disappearance of so-called third places of civic participation? (Putnam, 2000) With the increasing polarization of the American public<sup>44</sup> – political, social, cultural, and geographic (Bishop, 2009) – it stands to reason that media coverage of politics might provide one of the few vehicles of exposure to views unlike one's own.

This potential for media influence may be negated, however, under the so-called “limited effects” model (Klapper, 1960), and by the phenomenon of selective exposure, wherein individuals seek to minimize exposure to messages that don't

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<sup>42</sup> Pew Research Center Report on Political Polarization in the American Public, June 12, 2014, <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>

<sup>43</sup> Ibid.

<sup>44</sup> Ibid.

match their own view, in an attempt to reduce cognitive dissonance. We see this writ large today in the context of digital and social media with cyberbalkanization, which Sunstein (2001) has cautioned could be devastating for democracy, allowing individuals to avoid altogether opinions unlike their own. Conflicting evidence exists as to whether or not this trend continues or existed in the first place. A recent study from The Wharton School at the University of Pennsylvania demonstrates that mass customization and algorithmic personalization of the web foster commonality, not fragmentation; when it comes to consumer behavior at least, individuals use filters to expand rather than limit their interests (Hosanagar, et al, 2013).

#### *Agenda Setting Theory*

As Rosenberry & Vicker describe it, “agenda setting is from the sociological perspective, that is, theories that examine the ways in which the media have been shown to be influential on large groups or society in general.” (2009) Agenda-setting is conceptualized on two levels: First level agenda-setting is “focused on the relative salience of issues or objects,” whereas second level agenda-setting “examines the relative salience of attributes of issues or objects” (Weaver, 2007). An empirical examination of “agenda-scrubbing” – that is, the agenda(s) set by media silence – falls outside the scope of this work, but remains on the researcher’s agenda for future academic inquiry. The idea of agenda-scrubbing can be understood best perhaps through the words of composer Claude Debussy, who is said to have quipped, “The music is not in the notes, but in the silence between

the notes.” Similarly, the agenda is set not only by the coverage of an issue in the mass media, but also by the deafening silence of the lack thereof.

Currently, there exists no other definitive explanation or theoretical framework for issue salience in public opinion absent media attention within our understanding of political-effects research, but the researcher’s future work will also focus on the impact of priming – the effect of “changes in the standards that people use to make political evaluations” (Iyengar & Kinder, 1987). The object of examination in this study – money in politics – would seem to disprove the conventional wisdom on priming: the media regularly use success in fundraising (the so-called “money primary”) as a barometer for candidate viability, elevating the importance of quarterly fundraising reports filed with the Federal Election Commission as a criterion from which political evaluations are made. The current theory of priming posits that this would *prime* public opinion to view campaign cash as an evaluative criterion; however, in this case, perhaps it has the opposite effect. It may be that the obscene amounts of money raised and reported on by the media *prime* public opinion to flip against the subject matter altogether, resulting in what could be thought of as second-level priming. If that were true, it would mean that second-level priming could sometimes have a paradoxical effect, with the second level effect being the reverse of the first level – and likely, the intended – effect. Again, media effects testing such as this falls outside this particular study; however, future research will certainly seek to answer these questions, though there is a paucity of longitudinal data on public opinion of money in politics to be overcome.

A second possible explanation for issue salience in public opinion absent media attention follows Dewey's philosophy of experiential education, wherein "knowledge comes from the impressions made upon us by natural objects" (Dewey, 1916). Which points to an individual's personal experience being physiologically programmed to override the influence of messages received from their media diet when experience and information result in cognitive dissonance. This would be in keeping with McQuail's theory of "negation models" (2005), which suggest that media effects on political thinking, including agenda-setting and priming, depend "heavily on predispositions, schema, and other characteristics of the audience (Scheufele & Tewksbury, 2007), which inevitably color the way an individual processes media messages. By combining the Deweyian experiential education model – for example, firsthand experience of income inequality and observation of the lack of political intervention to abate the problem – with McQuail's negation models, one might arrive at the answer as to why public opinion sees the influence of money in politics as hugely salient despite the lack of coverage of the issue in the media.

The most visible of media effects, at least on this particular issue, is that of framing, on which volumes have been written. Though the epistemological roots of framing are found in cognitive psychology (Bartlett, 1932) and anthropology (Bateson, 1955), the application of framing theory for media studies conceptualizes the media as those who "set the frame in which citizens discuss public events" (Tuchman, 1978) and therefore "narrow the available political alternatives." Gitlin (1980) situates framing in the context of political communication, stating that

frames “organize the world both for journalists who report it and, in some important degree, to those of us who rely on their reports.” Gamson and Modigliani most succinctly define media frame as “a central organizing idea or story line that provides meaning to an unfolding strip of events... The frame suggests what the controversy is about, the essence of the issue” (1987). Taking the idea into a higher level of abstraction, Robert Entman puts forth that,

analysis of frames illuminates the precise way in which influence over a human consciousness is exerted by the transfer (or communication) of information from one location – such as a speech, utterance, news report, or novel – to that consciousness... Framing essentially involves selection and salience. To frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and / or treatment recommendation for the item described. (1993)

### **Public Sphere Theory**

Rather than contradicting one another, Gramsci’s critical theory of civil society; Habermas’s idealized, yet indispensable, conception of the public sphere; and Nancy Fraser’s model of counterpublics each offer an essential contribution to our understanding of societal structure and the power/knowledge dynamic, as Foucault saw it, between the ruling class and the lower class of those over whom they rule.

Gramsci conceptualizes a political society – the bourgeoisie – that rules over a distinct civil society – the proletariat – through cultural hegemony, or cultural imperialism; that is, dominance of the ruling class through the process of the cultural manipulation of society. This can take many forms, but each serves to



justify and reinforce the political, sociocultural, and economic status quo as beneficial for everyone, not exclusively for the ruling class.

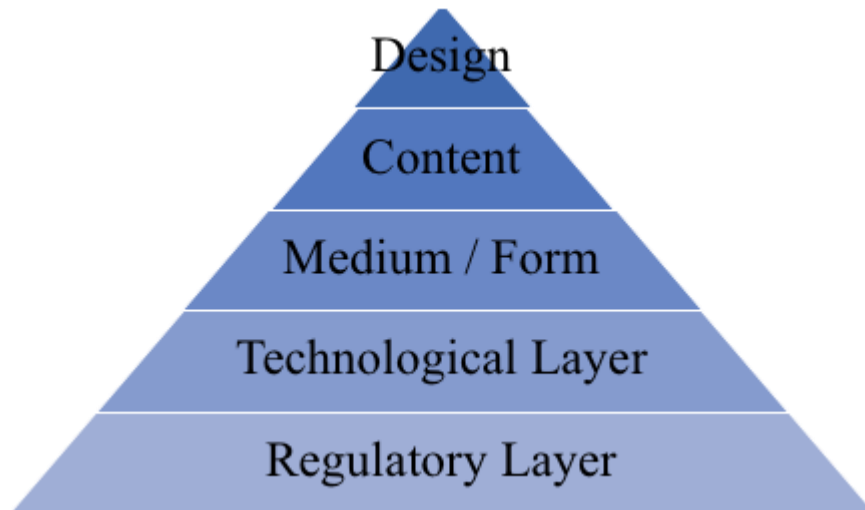
More optimistically, Jürgen Habermas sees the state apparatus as an entity separate from the public arena of civil discourse – the public sphere – an assigned “theatre in modern societies in which political participation is enacted through the medium of talk.” (Fraser, 1990) His public sphere is also separate and distinct from the official market-driven economy; it exists as an area of discursive, as opposed to commercial, relations. It is on this point that the Habermasian model for application in the United States should be critiqued, as there exists no area of public life not influenced by market forces within the context of a capitalist democracy. Perhaps most importantly, Habermas’s theories of communicative rationality and communicative action (1981, 1984, 1987) provide the bedrock upon which the ideal of deliberative democracy – arguably the seminal normative tenet of political communication studies – stands.

### **Science and Technology Studies**

Much like Political Communication, the academic field of Science and Technology Studies (STS) is both relatively adolescent and inherently interdisciplinary. As a field of inquiry, STS rests at the intersection of two converging, and sometimes conflicting, paths of scholarly research. First, STS consists of research “on the nature and practices of science and technology... (wherein) science and technology (are approached) as social institutions possessing distinctive structures, commitments, practices, and discourses that vary across

cultures and change over time.”<sup>45</sup> The second motif of STS research “concerns itself more with the impacts and control of science and technology, with particular focus on the risks that science and technology may pose to peace, security, community, democracy, environmental sustainability, and human values.”<sup>46</sup> Both of these scholarly streams give rise to the concept of Information Architecture, which has a multitude of meanings under the STS umbrella, but is defined here as the structural framework of how information is presented and communicated. This iteration of the layers principle of Internet architecture (Solum, 2003) can be visualized as a layered pyramid:

**Figure 2.2: Information Architecture Pyramid**



This illustration is particularly useful for seeing the points at which there are levers of power and control at work, constricting the flow of information and manipulating the manner in which information is conveyed. Each delineation between layers

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<sup>45</sup> <http://sts.hks.harvard.edu/about/whatissts.html>

<sup>46</sup> Ibid.

represents a “discrete gate,”<sup>47</sup> and therefore a powerful gatekeeping role in action, albeit often invisible to the end user/consumer of information.

Along the philosophical current, conceptualizing Information Architecture in this way may be helpful in analyzing the appropriateness of a given medium for the content it is endeavoring to communicate, otherwise known as “fit.” Media theorist Neil Postman offered the memorably clever example of smoke signals as a medium: fantastically well equipped for Morse code-style emergency communications, but woefully inadequate for anything more lengthy, such as putting forth a philosophical argument. “You cannot use smoke to do philosophy. Its form excludes the content.” (1985) In this manner, we can examine the fit between the technological affordances of a medium and the normative requirements of, in this case of political communications research, deliberative democracy.

The idea of technological affordances refers “to attributes of both the object and the actor... it focuses on the interaction between technologies and the people who will use them.” (Gaver, 1991) Revisiting Habermas’s (1994) aforementioned principles of deliberative democracy: publicity, transparency, inclusion, and equal opportunity for participation, one can begin to form a taxonomy of media according to how ill- or well-suited a given medium might be to these requirements. Scholars have given a great deal of attention to the democratizing potential (or lack thereof) of the Internet and new media, such as the opportunity for interactivity afforded by blogs and social media platforms. (Hindman, 2009; Papacharissi, 2010) However,

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<sup>47</sup> To borrow (and disagree with) Bruce Williams and Michael X. Delli Carpini’s 2000 claim that new media “undermine the idea that are discrete gates through which political information passes: if there are no gates, there can be no gatekeepers.” Even with the most democratic and open source technologies, discrete gates still exist, and gatekeepers still control the flow of information.

as their research has demonstrated, opportunities for genuine deliberation are lacking.

Though it may sound retrograde, it's possible that television remains the dominant medium of our democracy because of its fit with the demands of the deliberative paradigm. Despite its discourse architecture, most of our experience on the Internet tends to be solitary. As Sherry Turkle (2017) puts it, we are "alone together." Television, on the other hand, invites those in a multi-person household or viewing in public places, into a conversation with one another about what they are seeing and hearing on the screen. The medium layer of television itself, because of its technological affordances, provides a good fit with democratic deliberation.

Then what about the content layer? Given the challenges of media fragmentation and political polarization, America's broadcast airwaves may be considered the last remaining and closest thing we have to the notion of a public square. Whereas studies have shown (need citations) that those watching Fox News or MSNBC are unlikely to even agree on a basic set of facts underlying a given political issue, the "Big Three" broadcast networks offer a common denominator of sorts from which to engage in meaningful deliberation. Rather than conceptualizing this in a disparaging manner, this study places high value on this shared commons within our democracy.

The theoretical underpinnings of STS fall into two main camps: technological determinism and social constructionism.

## Chapter 3: Presidential Campaign Financing

### & The Deregulation of Campaign Finance

*“Money, like water, will always find an outlet.”*

– U.S. Supreme Court Justices Stevens and O’Connor, 2004<sup>48</sup>

During his 1972 reelection campaign, President Richard M. Nixon raised more money than his seasoned campaign operatives knew how to spend, including \$20 million (\$100 million in today’s dollars) from secret, undisclosed sources, made possible by taking advantage of a gap in federal disclosure laws from February to April of that year. (Reeves, 2001) The campaign, which raised over \$60 million total, was awash in cash – almost \$2 million of it<sup>49</sup> – donated anonymously in brown paper bags.<sup>50</sup> Nixon campaign operative Mike Duncan, who would later go on to chair the Republican National Committee, said “Frankly, in the 1972 campaign with Nixon, we had more money than we knew what to do with, so we wasted a lot of it!” (Vogel, 2014) The Nixon campaign’s comfortability with large sums of cash would later be evident in the audio recordings of the Nixon White House that became public during the impeachment proceedings. When it was suggested to the President by White House Counsel John W. Dean III that the Watergate burglars were demanding as much as \$1 million in “hush money,” (over

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<sup>48</sup> Writing the opinion of the Court in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2004) available <https://supreme.justia.com/cases/federal/us/540/93/opinion.html>

<sup>49</sup> <https://www.nytimes.com/1973/09/30/archives/5million-given-for-nixon-in-2-days-predating-law-confidence-in.html>

<sup>50</sup> A phenomenon that is still permissible under current campaign finance law, provided it not exceed \$200 from any one individual.

\$5.5 million in today's dollars) Nixon can be heard grumbling, "We could get that... and... get it in cash. I know where it could be gotten."<sup>51</sup>

As foretold in the folkloric advice of Deep Throat to Carl Bernstein to "follow the money" (all the way to the Oval Office), the Watergate hearings revealed that at least \$1.65 million of Nixon's campaign war chest had been raised illegally, according to Article V, Charges 10-25, of the Articles of Impeachment<sup>52</sup> against Richard M. Nixon. Charge 10, *Conspiracy to Defraud the United States*, reads

President Nixon... in concert with and aided and abetted by others, conspired to devise and carry out a plan or scheme to obtain money to spend for and in support of the reelection (campaign), in which they employed various unlawful means, to wit, obtaining campaign contributions from corporations and foreign nationals in violation of sections 610 and 613 of the Criminal Code, and soliciting and/or obtaining campaign contributions from individuals, political committees, corporations, and foreign nationals in exchange for promises of government benefit and/or withholding of governmental sanctions and/or the cessation of governmental law enforcement action; in violation of article 11, section 4 of the Constitution<sup>53</sup> and sections 201, 241, 371, 1503, and 1505 of the Criminal Code.

*(Impeachment Publications, 1974)*

## **The Pre-Watergate Era**

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<sup>51</sup> Audio available via <https://www.nixonlibrary.gov/virtuallibrary/tapeexcerpts/>.

<sup>52</sup> Articles IV and V of the Articles of Impeachment were ultimately not put forth by the House Judiciary Committee, but their findings remain.

<sup>53</sup> "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." (Article II, Section IV, of the United States Constitution)

Corporate donations to political campaigns were outlawed as part of the Tillman Act of 1907, the first real piece of campaign finance legislation in U.S. history, which established criminal penalties for wrongdoing but failed to put into place any disclosure requirements or mechanism(s) of enforcement or oversight, as the FEC would later be charged with handling. In 1910, with the Federal Corrupt Practices Act, commonly referred to as the Publicity Act, Congress established spending limits for political parties and general election campaigns (but not primaries) for the House of Representatives (but not for the U.S. Senate). In 1911, that legislation was amended to include primary election campaigns and U.S. Senate races. However, once again, failure to provide a system of oversight meant that the law was rarely enforced. The 1911 amendments instituted two other important features of campaign finance regulation: the first disclosure requirements for campaigns – to be filed *after* the election had taken place – and spending limits for congressional races, set at \$5,000 for House races and \$10,000 for Senate races. In 1913, the 17th Amendment passed, which called for the direct election of Senators, rather than election by state legislatures, thereby flooding more money into the political system. In 1921, Congress’s jurisdiction over primary elections and party nominating processes was called into question in *Newberry v. U.S.*,<sup>54</sup> and the United States Supreme Court overturned the spending limits. 1922 brought the country’s first real campaign finance scandal with the Teapot Dome bribery incident. As a result of that, in 1925, the Federal Corrupt Practices Act was further amended and strengthened to require quarterly campaign disclosures (still the

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<sup>54</sup> 256 U.S. 232

primary standard enforced by the FEC today) of any contribution in excess of \$100 (now \$200). The spending limit was also raised to \$25,000 for U.S. Senate races. (need citations) In 1943, and over President Franklin D. Roosevelt's veto, the Smith-Connally Act was passed, which allowed the federal government "war powers" to seize and operate industries threatened by or under strikes that would interfere with war production (Sabato and Ernst, 2006) and prohibited labor unions (as was already the case with corporations) from donating directly to federal candidates. (LaRaj, 2008) During the 1930s, labor unions had been making political donations from non-segregated accounts, which meant that people's dues were going to pay for the union's political activities. The Congress of Industrial Organizations (CIO) labor union formed the first political action committee (PAC), modeled as an "open, public operation, soliciting support from non-CIO unionists and from the progressive public," (Zeiger, 1997) which gave them a mechanism with which to circumvent the new laws.

### **Watergate: A Campaign Finance Scandal**

Among the itemized impeachment charges against him, President Nixon and his aides were found to have traded a \$100,000 contribution from the International Telephone & Telegraph (ITT) Corporation to the 1972 Republican National Convention in San Diego for a favorable ruling from the Department of Justice (DOJ) for ITT to acquire Hartford Fire Insurance Company, which DOJ had previously opposed on antitrust grounds. At the time of the Watergate investigation, the House Judiciary Committee did not have the benefit of a recording from the



Oval Office on May 13, 1971, made public by the National Archives some twenty years later, wherein the following exchange can be heard between the President and his Chief of Staff, H.R. Haldeman.

Haldeman: "We saved them. Because they didn't want..."

Nixon: "Now this is very, very hush-hush and it has to be engineered very delicately and it'll take six months to do properly, but..."

Haldeman: "Does ITT have any money?"

Nixon: "Geneen?" (in reference to Harold Geneen, ITT President)

Haldeman: "Geneen, yes."

Nixon: "Oh, God, yes. Does he ever! That's part of this ballgame... but it should be later. It should not be right now." (Lardner, 1997)

It's worth noting, while examining the Nixon White House's practice of dropping federal investigations and antitrust cases in exchange for campaign contributions, that the boundaries between campaigning and governing were hard to find, as evidenced by the fact John Mitchell, the Attorney General of the United States, was in charge of the Committee to Re-elect the President, better known as "CREEP."

Other charges included the exchange of a blatantly illegal \$2 million campaign contribution from the Associated Milk Producers, Inc. (AMPI), a dairy farm conglomerate, for an increase in federal milk subsidies from \$4.66 to \$4.93 per 100 pounds of fluid manufacturing grade milk, "at a cost of \$125 million to the Treasury of the United States and to the profit of the dairy industry of \$500 to \$700 million." (*Impeachment Publications*, 1974) "It was a simple trade," writes Nixon biographer Richard Reeves, "Nixon got \$2 million for charging American

consumers \$100 million.” (2001) Had it not been for the Watergate investigation, AMPI would have gotten away with its corporate contributions, thanks to their clever maneuvering. AMPI split the \$ 2 million into approximately 800 \$2,500 contributions, and made them through a host of ironically named political action committees (PACs) such as the Americans United for Honesty in Government, the Committee for Political Integrity, and Americans United for Sensible Politics, all created for the sole purpose of funneling money to the Nixon campaign.

That disturbing information on blatant quid-pro-quo corruption and those made-for-TV hearings, broadcast in the summer of 1974 with gavel-to-gavel coverage by ABC, CBS, and NBC, in rotation, captured the ire and attention of the American people and put the need for campaign finance reform at the top of the agenda for the 93rd United States Congress. The legislation that would ultimately pass was largely modeled on the original campaign finance reform bill,<sup>55</sup> which passed both chambers of Congress in 1970, only to be vetoed by President Nixon himself. (Dunn, 1972) This legislation had been motivated in part due to self-interest on the part of those in Congress: the costs of campaigning were rapidly increasing and, as a result, Members found themselves spending more and more time soliciting contributions. Between 1952 and 1968, the costs of presidential campaigning doubled from \$140 million to over \$300 million. (Alexander, 1980) Faced with the specter of even more of their time being devoted to fundraising, Congress enacted legislation aimed at curbing the costs of campaigning. (McCarthy, 1972; Alexander, 1972, 1976; Peabody and Berry, 1972; Benson,

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<sup>55</sup> For detailed provisions of the bill, see *Congressional Record* (daily ed.), Nov. 23, 1970, p. S18723-S18724.

1978). Nixon did eventually sign the campaign finance reform bill into law, but moved its effective date from 1972 to 1976. (Sheppard, 2000)

### **Federal Election Campaign Act (FECA 1974)**

In the fall of 1974, with the public fuming over the campaign finance corruption revealed by Watergate, Congress amended the Federal Election Campaign Act (FECA) of 1971<sup>56</sup> in what was the “first major regulation of money in politics in American history.” (Hasen, 2016) FECA 1971 had taken the important step of outlining disclosure requirements, including the reporting of campaign contributions and expenditures by all federal candidates. The 1974 amendments included a limit on individual contributions to federal candidates (originally set at \$1,000 per election per candidate, now \$2,700, as indexed every two years for inflation<sup>57</sup>); a limit on the amount individuals could spend *independently* (not in coordination with the campaign) in support of federal candidates (originally set at \$1,000 per election per candidate, now void); a voluntary public financing system for presidential elections, extending the 1971 provisions to include primary matching funds; and the establishment of the Federal Election Commission (FEC) as the regulatory agency governing campaign financing. This landmark legislation would set the stage for the next forty years of governance and enforcement (and the lack thereof) as well as the landscape for judicial review on the constitutionality of such provisions.

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<sup>56</sup> FECA, Pub.L. 92-225, 86 Stat. 3, enacted February 7, 1972, 52 U.S.C. § 30101 *et seq.*

<sup>57</sup> Per the Federal Election Committee. Updated Contribution Limits for the 2017-2018 campaign cycle available at <https://transition.fec.gov/info/contriblimitschart1718.pdf>

## The Presidential Election Public Funding Program

A cornerstone of the post-Watergate amendments to the Federal Election Campaign Act was Congress's establishment of a public financing system for presidential elections. Such a system was first proposed by President Theodore Roosevelt in his 1907 State of the Union report<sup>58</sup>, wherein he wrote,

There is a very radical measure which would, I believe, work a substantial improvement in our system of conducting a campaign, although I am well aware that it will take some time for people so to familiarize themselves with such a proposal as to be willing to consider its adoption. The need for collecting large campaign funds would vanish if Congress provided an appropriation for the proper and legitimate expenses of each of the great national parties, an appropriation ample enough to meet the necessity for thorough organization and machinery, which requires a large expenditure of money. Then the stipulation should be made that no party receiving campaign funds from the Treasury should accept more than a fixed amount from any individual subscriber or donor; and the necessary publicity for receipts and expenditures could without difficulty be provided.

Roosevelt's words proved prescient on just how long it would take Congress to come around to the idea: it took another sixty-seven years to implement such a system. The first federal funding law was passed in 1966, but the program was suspended the following year. That legislation called for the payouts to be made to the political parties, rather than directly to the campaign committees themselves. It outlined the establishment of a Treasury Department Presidential Fund, and mapped out the system used today, whereby the coffers of that fund are

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<sup>58</sup> Though modern-day State of the Union addresses have taken the form of a presidential speech in a Joint Session of Congress, from its inception by President Thomas Jefferson in 1801 until President Taft's in 1912, the State of the Union was a written report that the President sent to Congress at the beginning of each new Session of Congress.

filled through a voluntary check-off program on individuals' tax returns. That program was suspended before it began. However, in 1971, as a part of the Revenue Act, the system as we know it today was adopted. The major changes from the original version of the system were that payouts from the fund would be given directly to the campaigns themselves, rather than being funneled through the parties, and that spending limits and a ban on private contributions for the general election were imposed on the candidates to whom the funds were given.

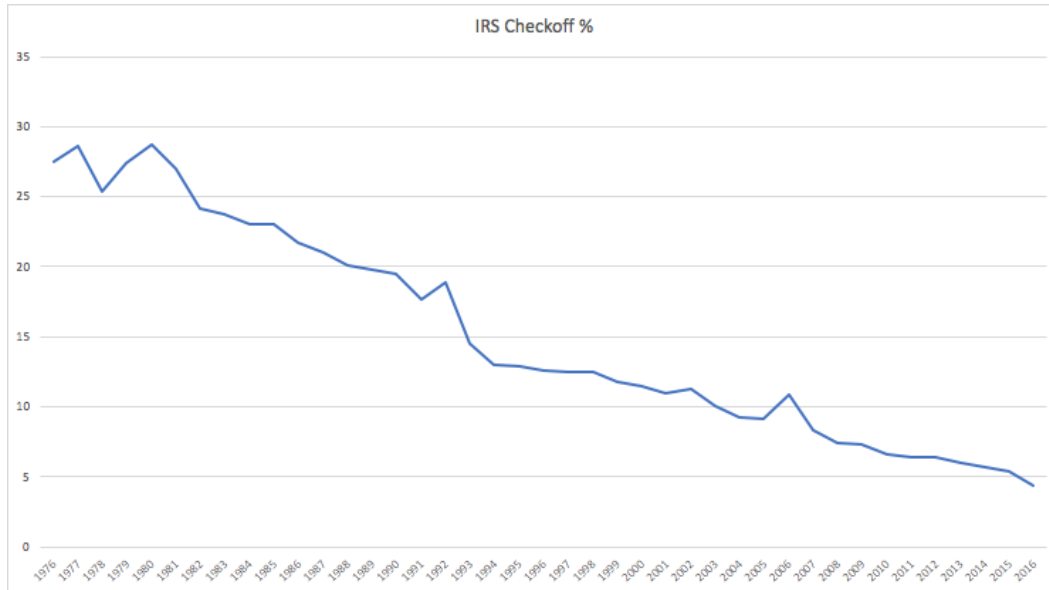
Originally set at \$1, Congress passed legislation in 1994 to increase the amount for the voluntary check-off program to the \$3 we see on our tax returns today. Payouts to presidential campaigns are indexed each campaign cycle (every 2 calendar years) for inflation. However, the \$3 voluntary contribution amount has remained static for the past twenty years, which has led to some cash flow concerns about the Treasury Department's ability to sustain the program long term. Having the revenue side un-indexed while the spending side continues to escalate with inflation is a recipe for a bankrupt program, yet this discrepancy has never been dealt with by Congress, the FEC, the Treasury Department, or the IRS.

**Figure 3.1 U.S. Individual Income Tax Return (Form 1040)**

Form <b>1040</b> Department of the Treasury—Internal Revenue Service (99)		<b>2017</b>		OMB No. 1545-0074	IRS Use Only—Do not write or staple in this space.
For the year Jan. 1–Dec. 31, 2017, or other tax year beginning _____, 2017, ending _____, 20				See separate instructions.	
Your first name and initial _____		Last name _____		Your social security number _____	
If a joint return, spouse's first name and initial _____		Last name _____		Spouse's social security number _____	
Home address (number and street). If you have a P.O. box, see instructions. _____				Apt. no. _____	▲ Make sure the SSN(s) above and on line 6c are correct.
City, town or post office, state, and ZIP code. If you have a foreign address, also complete spaces below (see instructions).					
Foreign country name _____		Foreign province/state/country _____		Foreign postal code _____	
<b>Filing Status</b>		1 <input type="checkbox"/> Single		4 <input type="checkbox"/> Head of household (with qualifying person). (See instructions.)	
Check only one box.		2 <input type="checkbox"/> Married filing jointly (even if only one had income)		If the qualifying person is a child but not your dependent, enter this child's name here. ► _____	
		3 <input type="checkbox"/> Married filing separately. Enter spouse's SSN above and full name here. ► _____		5 <input type="checkbox"/> Qualifying widow(er) (see instructions)	

As shown below in Figure 3.2, public participation in the Internal Revenue Service's voluntary check-off program has been on a steady decline since it was implemented. This may be due in part to a lack of public understanding that the check-off neither increases the amount of taxes owed nor decreases the amount of any refund due. The Treasury Department, the FEC, and the IRS have all thus far declined to undertake any form of public education to boost understanding of and participation in the program.

**Figure 3.2 Taxpayer Participation in Public Financing, 1976-2016**



*Data Source: Federal Election Commission<sup>59</sup>*

The public funding program is administered in three tranches: 1) partial matching funds for the primary election, 2) public grants for the general election, and 3) additional public grants for the parties' nominating conventions. Each of these have different metrics governing them.

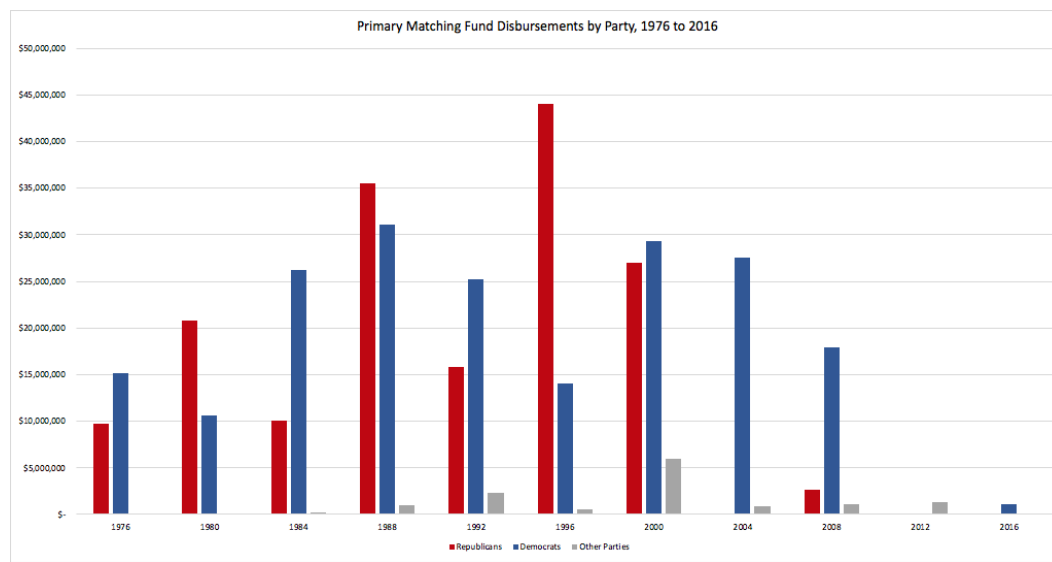
#### *Primary Matching Funds*

Public funding for primary candidates is available in the form of matching funds up to \$250 of an individual's contribution. While individuals can currently give \$2,700 to a candidate in the primary, the federal government will only match the first \$250. In theory, this encourages candidates to gather a broad base of lower dollar support, rather than focus on more high value donors. To qualify to receive the funds, candidates must raise \$5,000 or more in each of at least 20 states, the purpose of which is to show a broad geographical support for the candidate, rather than allowing them to simply rely on donors from their home state. In addition,

<sup>59</sup> Available at [https://transition.fec.gov/press/bkgnd/presidential\\_fund.shtml](https://transition.fec.gov/press/bkgnd/presidential_fund.shtml)

candidates agree to limit primary spending to the national spending limit, which is set at \$10 million, indexed for inflation each campaign cycle; to limit campaign spending in each state to \$200,000, also indexed for inflation, meaning that the funds must be used evenly across the 50 states; and limit their personal spending to \$50,000. The last two requirements have led to candidates turning down primary matching funds in recent years, as shown below in Figure 3.3, either because of vast personal wealth or because the spending limits are too low in the critical early primary states like Iowa, New Hampshire, and Nevada.

**Figure 3.3 Primary Matching Fund Disbursements by Party, 1976 to 2016**



Data Source: Federal Election Commission<sup>60</sup>

### General Election Grants

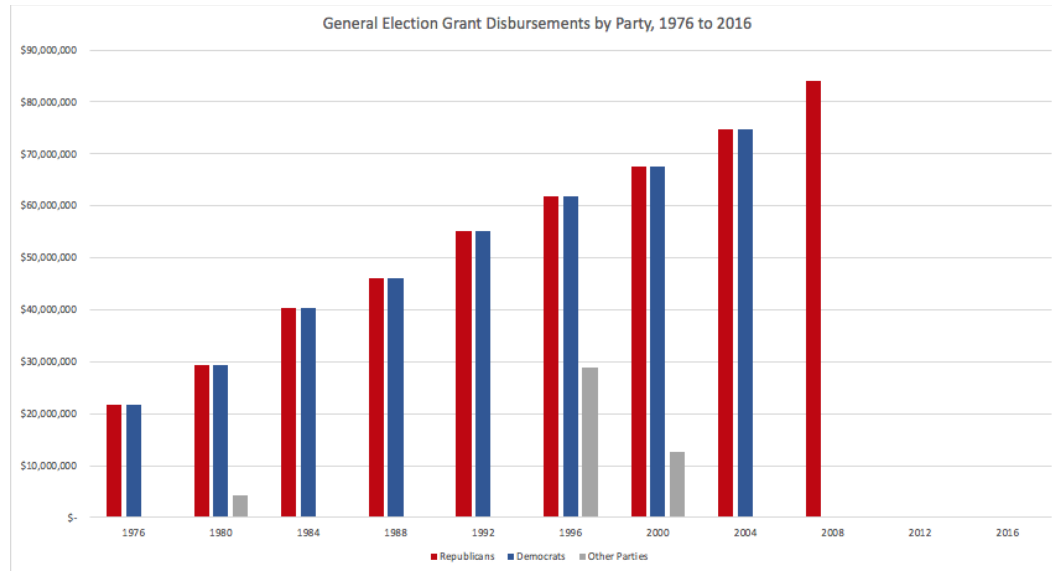
Public funding for the general election has an entirely different structure. Presidential nominees of each major party are eligible to receive a public grant of \$20 million, indexed for inflation. In exchange for that funding, the candidates

<sup>60</sup> [https://www.fec.gov/resources/cms-content/documents/Pres\\_Public\\_Funding.pdf](https://www.fec.gov/resources/cms-content/documents/Pres_Public_Funding.pdf)



agree to limit spending to the amount of the grant, to not accept private contributions (with the exception of a set aside fund for “GELAC” expenses, those used for general election legal and accounting compliance), and to limit their personal spending to \$50,000.

**Figure 3.4 General Election Grant Disbursements by Party, 1976 to 2016**



*Data Source: Federal Election Commission<sup>61</sup>*

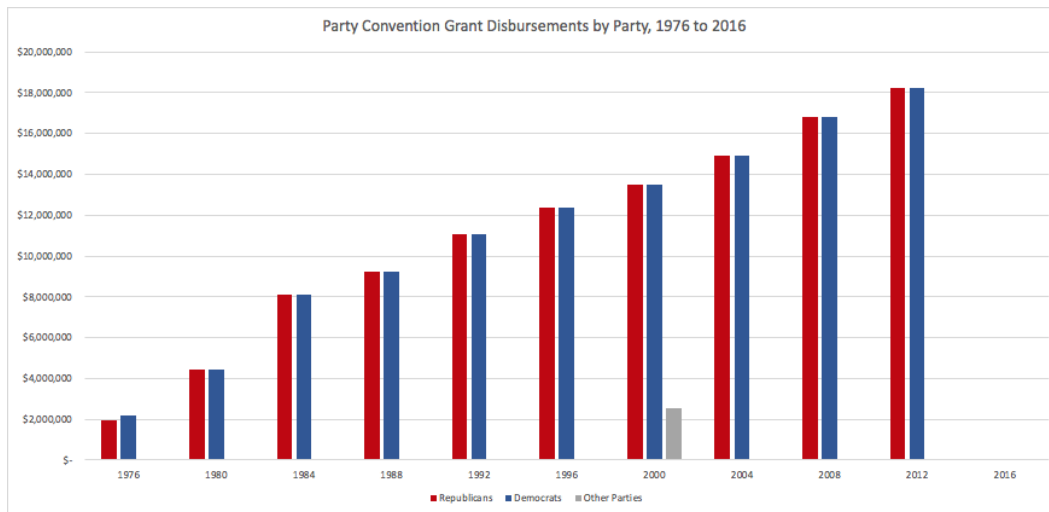
### *Party Convention Grants*

The third and final category of public funding was done away with by President Obama in 2014, but was given to each of the major parties to cover the expenses of their nominating conventions. To be eligible for the public funding, parties must have agreed to cap their spending at the amount of the grant, which was \$4 million, indexed for inflation. Parties generally worked very closely with the convention’s Host Committee, a nonpartisan 501(c)3 established by the city hosting the convention, that can raise unlimited (and undisclosed) corporate funds,

<sup>61</sup> Ibid.

to share expenses. Now that public funds are no longer available for convention expenses, the burden is on the parties and Host Committees; however, no spending limits apply. Third parties are only eligible for public funding for nominating conventions if they received at least five percent of the popular vote in the *previous* presidential election.

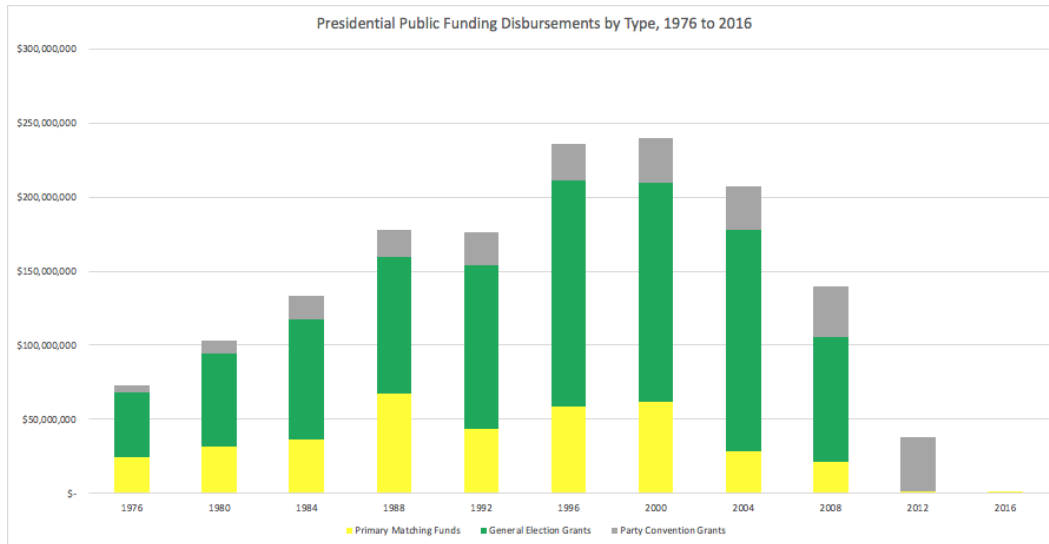
**Figure 3.5 Party Convention Grant Disbursements by Party, 1976 to 2016**



*Data Source: Federal Election Commission<sup>62</sup>*

**Figure 3.6 Presidential Public Funding Disbursements by Type, 1976 to 2016**

<sup>62</sup> Ibid.



Data Source: Federal Election Commission<sup>63</sup>

## The Federal Election Commission

The FEC, which opened its doors in 1975, was established “to protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws.”<sup>64</sup> This activity falls into three main categories: public disclosure of funds raised and spent to influence federal elections, restrictions on contributions and expenditures made to influence federal elections, and the now waning public financing of presidential campaigns.

Independent regulatory agencies like the FEC, such as the Federal Communications Commission (FCC), the Environmental Protection Agency (EPA), and the Securities and Exchange Commission (SEC), supplant legislative oversight in many policy areas and, once established, are left to formulate and

<sup>63</sup> Ibid.

<sup>64</sup> <https://www.fec.gov/about/mission-and-history/>

implement policy on their own, largely free from legislative oversight. (Mounk, 2018)

It has been widely speculated that the FEC was designed (by the same Congress it would need to govern) in such a way as to inhibit action. “From the start, the FEC has been criticized as being a ‘captive province’ of the Congress,” commented a former commissioner in a 1979 interview. (Muller, 1979) Originally designed as an 8-member body with six commissioners and two non-voting *ex officio* members (the Clerk of the House and the Secretary of the Senate), the original plans called for two commissioners appointed by the President, two by the President pro tempore of the Senate, and two by the Speaker of the House. However, two federal court rulings changed that original structure. *Buckley v. Valeo* (1976) “invalidated the original appointments method, holding that congressional appointments violated the Constitution’s Appointments Clause.” (Garrett, 2018) Then in 1993, the U.S. Court of Appeals for the District of Columbia held in *FEC v. NRA Political Victory Fund* that “the presence of the two congressional *ex officio* members violated the constitutional separation of powers.”<sup>65</sup>

Today, the commission is made up of six commissioners, with the stipulation that no more than three come from any one party. Frequently, this results in a 3:3 party line split among commissioners, and yet it takes a minimum of four votes to pursue an investigation or trigger an enforcement action. There is no mechanism in place for breaking a tie, so the FEC frequently remains

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<sup>65</sup> Ibid.

gridlocked, prompting *The Huffington Post* to dub it “the government’s most dysfunctional and acrimonious body.”<sup>66</sup>

Other similar federal agencies like the SEC and FCC have five commissioners, and far less historic gridlock. Former Commission Lee Goodman defends that the agency is acting as it was designed to, commenting, “Congress set this place up to gridlock. This agency is functioning as Congress intended.” During the 2016 presidential primary election, *The New York Times* reported that “some commissioners are barely on speaking terms, cross-aisle negotiations are infrequent, and with no consensus on which rules to enforce, the caseload against violators has plummeted.” (Lichtblau, 2015) Former head of FEC enforcement Kenneth Gross told *The Wall Street Journal*, “After 40 years of watching the six-member FEC, I have learned one thing: don't ever join a group with an even number of votes, not even a condo association or book club.”<sup>67</sup>

Former Commissioner and past Chairman of the FEC, Ann Ravel, who resigned her seat in frustration in March 2017, has been a vocal critic of the “dysfunction and deadlock”<sup>68</sup> that has come to characterize the FEC in recent years. In a searing op-ed in *The Times* just before her early departure from the FEC, Commission Ravel bemoaned that, “what we are left with is an agency mandated to ensure transparency and disclosure that is actually working to keep the public in the dark.” (2017)

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<sup>66</sup> [https://www.huffingtonpost.com/2015/06/18/federal-election-commission\\_n\\_7615084.html](https://www.huffingtonpost.com/2015/06/18/federal-election-commission_n_7615084.html)

<sup>67</sup> <https://www.wsj.com/articles/party-politics-fec-at-loggerheads-on-how-to-celebrate-anniversary-1429228827>

<sup>68</sup> <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html>

Partisan disagreements among FEC Commissioners over the past decade have ranged from the ideologically profound to the laughably mundane – with recent press reports focusing more on the latter, including a public spat on planning the agency’s 40th anniversary in 2015: “whether to rent a theater, whether to publish a report, whether to serve bagels or doughnuts, and whether, in fact, the agency even had an anniversary worth noting.” (Ballhaus, 2015) If all of this sounds like petty partisan bickering, that’s because it is, and it gets worse.

With the resignation of Commissioner Ravel in 2017 and the recent resignation of Commissioner Lee Goodman, the FEC stands at only 4 commissioners, the bare minimum required for a quorum, with each of the 4 remaining commissioners continuing to serve in a “holdover status,” meaning their six-year terms have already expired. Furthermore, according to a December 2017 report by the Center for Public Integrity, Commissioner Steven T. Walther, an independent who frequently votes with the Democrats, is considering stepping down.<sup>69</sup> With 4 votes required to move forward on any matter before the Commission, the current situation demands a rare unanimous vote. Given that most, if not all, current FEC regulations (and perhaps more accurately, the overwhelming lack thereof) benefit the incumbent candidates, the Trump Administration has little to no incentive to appoint replacements for the two vacancies, leaving campaign finance governance as good as paralyzed heading into the 2018 midterms and the ramp-up to the 2020 presidential race. A shut down of the agency is not without

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<sup>69</sup> <https://www.publicintegrity.org/2017/12/20/21410/new-hope-new-problem-will-federal-election-commission-shut-down>

precedence; the FEC lost quorum in 2007 and was effectively closed for business for six months.<sup>70</sup>

Additionally, the FEC has been without an Inspector General for over a year now. The Office of the Inspector General (OIG) serves to “detect and prevent fraud, waste, and abuse, and violations of law and to promote economy, efficiency and effectiveness in the operations of the FEC.”<sup>71</sup> The year-long OIG vacancy, which does not require such time-consuming processes as a presidential appointment or congressional confirmation, may indicate the agency’s own skittishness about being held accountable.

Drama and gridlock notwithstanding, the FEC is still charged with oversight of all federal elections, including presidential campaigns. While the Treasury Department administers the payouts, the FEC, assuming it stays open, administers the Presidential Election Campaign Fund, and makes the determination on which candidates qualify to receive the funds. In 1976, the newly minted FEC presided over its first presidential election, which is where our examination of the evolution of U.S. presidential campaign financing properly begins.

## **Methodology**

Comparative historical analysis, as used in this investigation, has a long and rich history in the social sciences. The founders of modern social science, including everyone from Adam Smith to Karl Marx, employed comparative historical analysis as their central method of inquiry, continuing the dominant research tradition.

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<sup>70</sup> <https://www.cbsnews.com/news/senate-confirms-new-fec-commissioners-ending-long-partisan-standoff/>

<sup>71</sup> <https://transition.fec.gov/fecig/fecig.shtml>

Only by the mid-twentieth century did other approaches to social knowledge partially eclipse comparative historical research, going so far as to threaten its permanent decline. After some period of neglect, however, recent decades have witnessed a dramatic reemergence of the comparative historical tradition. ...This mode of investigation has reasserted itself at the center of today's social sciences. The revival of comparative historical analysis shows few signs of losing momentum.

(Mahoney and Rueschemeyer, 2012)

As a method of social science inquiry, qualitative comparative historical research seeks to contextualize social, cultural, and political phenomena as they have developed over time. Schutt (2010) breaks this process down into four stages: 1) developing the premise of the investigation, identifying events, concepts, etc. that may explain the phenomena; 2) choosing the cases that will be examined; 3) using “interpretive historical sociology” to examine the similarities and differences; and 4) determining a causal explanation for the observed phenomena. (Skocpol, 1984) Schutt outlines three key concerns of historical comparative research: causal relationships, processes over time, and comparisons. Determining causal relationships requires that the independent and dependent variables have an association, such that the independent variable has an effect on the dependent variable, in every case. He goes on to detail the five criteria that must be met to identify a causal relationship: association, time order, nonspuriousness, mechanism, and context. Association is the observed correlation between the independent and dependent variables, wherein the two must vary together. Time order suggests that the cause, or the independent variable, comes before the effect, the dependent variable. Nonspuriousness means that the relationship between the



independent and dependent variable must not be due to a third variable. A causal mechanism is the process that creates a connection between the variation in an independent variable and the variation in the dependent variable it is hypothesized to cause. Finally, context is the focus of idiographic causal explanation, wherein a particular outcome is understood as part of a larger set of interrelated circumstances. This will be the methodology employed to address our first two research questions:

**RQ1: How has presidential campaign financing evolved from 1976 to 2016?**

**RQ2: How does that evolution correspond with policy interventions regarding campaign finance regulation?**

For this investigation, archival data, secondary sources, running records and recollections are all employed to present as accurate a portrayal as possible of the campaign financing processes and outcomes in each of the eleven presidential elections since 1976. Particular attention is paid to the policy interventions – regulatory, legislative, and judicial – at which various inflection points become obvious in the methods and manner of fundraising itself and the outcomes for each presidential candidate in a given election cycle.

### **Terminology**

Let us first clarify by specifically defining some of the important terms in this section of the research. In addition to the previously discussed public funding, this work examines the entities involved in the modern presidential campaign

financing ecosystem in three categories: campaign committees, political parties, and outside groups. This research tracks the relative importance and dominance of these three groups ebb and flow throughout the following comparative historical analysis, frequently in direct response to policy interventions, or the various loopholes they have created over the years.

### *Campaign Committees*

The terms “campaign” and “campaign committee” are used interchangeably to refer to the official presidential campaign itself, which campaign finance law refers to as a presidential campaign committee – a distinction which will become even more confusing when we define political parties. The campaign committees are given specific legal names, filed with the FEC at the time of announcement of candidacy, such as “Hillary for America” and “Donald J. Trump for President” in the 2016 election. These campaign monikers are often a sign of the political communication priorities of the time, resulting in names like “RickPerry.org, Inc.” in 2012, which assured the candidate’s website was listed every time the campaign committee’s name appeared in writing (and had the effect of confusing donors), and “Jeb 2016, Inc.,” which – along with the infamous “Jeb!” logo – attempted to cast former Florida Governor Jeb Bush as relatable to voters, as on a first-name basis.

### *Political Parties*

To those outside the Beltway, it may seem obvious that, in our current two-party system, there would be two major political parties. However, there are in fact six major political parties, three belonging to Democrats and three belonging to

Republicans. Each side of the aisle has a national party committee: the Democratic National Committee (DNC) and the Republican National Committee (RNC); a senatorial committee: the Democratic Senatorial Campaign Committee (DSCC) and the National Republican Senatorial Committee (NRSC); and a congressional committee: the Democratic Congressional Campaign Committee (DCCC, known as the “D-trip”) and the National Republican Congressional Committee (NRCC). These three entities, along with the state-level parties, comprise what are colloquially referred to as “the Democratic Party” and “the Republican Party,” but it’s worth keeping in mind that none of the above bear the name “party,” not even the Grand Old Party (GOP).

#### *Outside*

#### *Groups*

As if all of that alphabet soup isn’t confusing enough, outside groups are where it gets really tricky, particularly because they fall into two categories. First, there are the traditional Political Action Committees (PACs), which fall under the umbrella of “hard money,” alongside candidate committees and political parties. Regulated by the FEC, traditional PACs must disclose their donors and adhere to contribution limits. Traditional PACs are permitted to spend money in coordination with campaign committees and political parties and contribute directly to them within restricted limits.

In the second (and more problematic for research) category of outside groups, are the myriad “soft money” organizations, many of which are not required to disclose the source(s) of their financing, and therefore constitute what has come to be known as “dark money” spending in elections. These groups are prohibited

from coordinating their spending with campaign committees and political parties, but are allowed to make unlimited “independent expenditures” on behalf of candidates and/or issues. These groups can take the form of 501(c)3, 501(c)4 (so called “social welfare” organizations), and 501(c)6 groups, which are tax-exempt and governed by the Internal Revenue Service (IRS); Super PACs – “independent expenditure-only committees” as defined by the FEC – and Hybrid PACs, or “Carey Committees;” and Limited Liability Corporations, which frequently serve as shell organizations for purposes of obfuscating political spending post the Supreme Court’s ruling in *Citizens United v. FEC*. Super PACs and Hybrid PACs fall under the umbrella of outside groups due to their independent expenditure restrictions; however, despite the fact that they can accept and spend unlimited sums, they are required to disclose their receipts and disbursements to the FEC, thus falling outside of the “dark money” motif. Super PACs can, however, accept unlimited sums from “dark money” organizations, making a shell game out of political spending, creating a substantial knowledge gap in who is communicating within our political public sphere, and frustrating investigative journalists, reform advocates, and academic researchers.

### ***Buckley v. Valeo (1976)***

Following the 1974 amendments to the Federal Election Campaign Act, Senator James L. Buckley filed a lawsuit against the Secretary of the Senate, Francis R. Valeo, challenging portions of the 1974 amendments on constitutional grounds. The Court reached two different conclusions regarding constraints on contributions and expenditures. First, the Court upheld Congress’s restrictions on

individual contributions to political campaigns and candidates, arguing that such contributions did not violate the First Amendment since the limitations enhance the “integrity of our system of representative democracy” by guarding against “corruption or the appearance of corruption.” (need citation) Second, the Court overturned expenditure limits – including independent expenditures, expenditures by candidates from their own personal resources, and the limitation on total campaign expenditures – stating that governmental restriction of such expenditures would limit political communication and campaign speech, which would violate First Amendment rights.

The *Buckley* decision introduced the judicial framing of money as political speech, which continues to be the dominant discourse informing campaign finance law today, most notably with the recent extensions of that calculus in *Citizens United v. FEC* and *McCutcheon v. FEC*. “Almost all questions of the constitutional validity of campaign finance rules trace back to the fountainhead of *Buckley v. Valeo*.” (Gora, 2011) In the forty years of jurisprudence that followed the *Buckley* decision, not once, in any of the Justices’ majority or dissenting opinions that have followed, has the central claim – that money (specifically, the spending of it in a political context) equates with First Amendment protected speech – been called into question.

A footnote in the *Buckley* decision sought to clarify what speech should be considered “expressly advocating” for or against a candidate, as part of their judgement was that campaign finance laws only apply to ads that were engaging in such express advocacy. This led to “eight magic words” (and phrases) which

continue to dictate categorization and treatment around campaign ads today. They are: “vote for,” “elect,” “support,” “cast your ballot for,” “So-and-so for President,” “vote against,” “defeat,” “reject,” or any other such variations thereof.

## **1976 Presidential Election**

As the first presidential election following the post-Watergate “scandal reform” amendments to the Federal Election Campaign Act, the 1976 race saw both Ford and Carter benefit from the newly implemented public presidential financing system. (Mutch, 2014) Former President Jimmy Carter articulated just how much presidential fundraising has changed since his first presidential campaign against President Gerald Ford in 1976, the first for the nation’s public financing system, saying the process has “changed dramatically. As a matter of fact, when I ran against incumbent President Gerald Ford, you know how much money we raised? None!”<sup>72</sup> What comes across as folksy hyperbole was, in fact, true thanks to the nascent public financing system. Public funds provided 35% of all campaign receipts in the 1976 presidential primaries, and 95% in the general election.<sup>73</sup>

Under the new regulations overseen by the infant FEC, the candidates were eligible for up to \$5 million in partial matching funds during the primary and another \$20 million of federal funds for the general, provided they elected to eschew private fundraising altogether. That pledge, however, did not bar the presidential candidates from raising money for the party (which could, in turn, spend up to \$3 million in support of their nominee); filling their own campaign

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<sup>72</sup> <http://www.politifact.com/truth-o-meter/statements/2013/feb/26/jimmy-carter/jimmy-carter-says-when-he-ran-against-gerald-ford/>

<sup>73</sup> [https://transition.fec.gov/press/archive/1977/19770605\\_Index-76Presidential.pdf](https://transition.fec.gov/press/archive/1977/19770605_Index-76Presidential.pdf)

compliance funds (which set aside funding to comply with the new FEC regulations); or raising funds for down-ballot candidates running for the House and Senate. Future First Lady Rosalynn Carter was a popular surrogate fixture on the fundraising circuit, headlining a fundraiser at Constitution Hall with American composer/conductor Leonard Bernstein, and dining with donors at the stylish Tavern on the Green restaurant in New York City to benefit the New York State Democratic Party.

Conventional wisdom would suggest that the financing advantage belonged to incumbent President Gerald Ford; however, given the Watergate scandal, the 1976 election turned into a race more about the candidates' character than their credentials or golden rolodexes, with Jimmy Carter effectively presenting himself as a trustworthy "outsider" (a peanut farmer, no less!) to the American people. Ford's pardoning of Nixon for any wrongdoing, contrary to his stated goal of healing the nation, furthered distrust in government, reinforced the sense that the President was above the law, and mired Ford too steeply in the corruption associated with the previous administration.<sup>74</sup> Until Carter's upset of Ford, no sitting president running for reelection had been defeated in forty-four years, making him the exception that proves the rule on the power of incumbency.

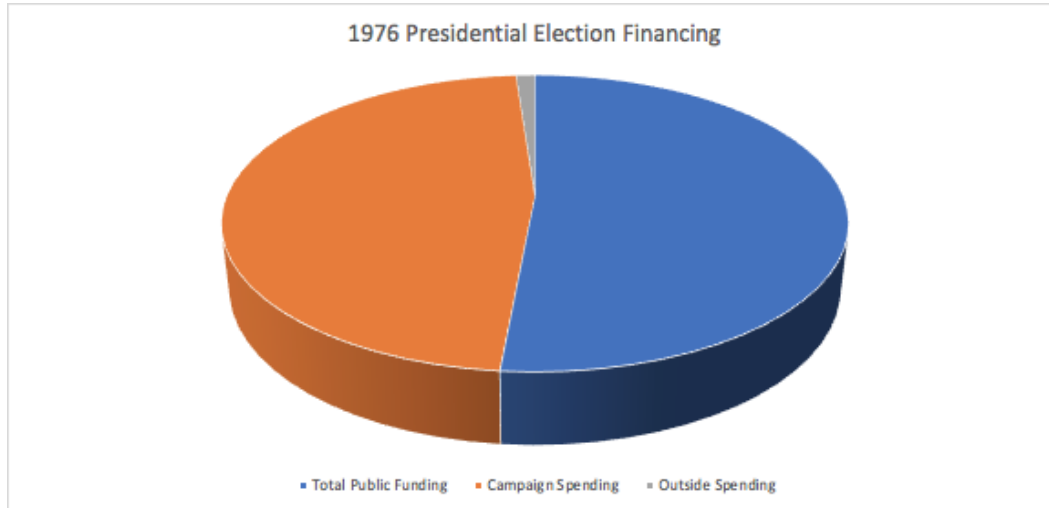
The breakdown of spending in the 1976 presidential election was an almost even split between public financing (totaling \$72.7 million between primary matching funds and general election grants) and private fundraising (\$66.9 million

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<sup>74</sup> [https://www.washingtonpost.com/news/act-four/wp/2017/05/25/trump-in-2017-or-nixon-in-1974-from-shady-charities-to-self-sabotage-who-can-tell/?utm\\_term=.8415ef1b90f7](https://www.washingtonpost.com/news/act-four/wp/2017/05/25/trump-in-2017-or-nixon-in-1974-from-shady-charities-to-self-sabotage-who-can-tell/?utm_term=.8415ef1b90f7)

in total). Outside spending (totaling just \$1.6 million) accounted for a mere one percent of the \$141.2 million spent in total.

### **Figure 3.7 Presidential Election Financing, 1976**



*Data Source: Federal Election Commission*

### **Foreign Corrupt Practices Act (FCPA 1977)**

In addition to the FECA amendments of 1974, the Watergate scandal eventually led to the Foreign Corrupt Practices Act as well “to restore public confidence in the integrity of the (American capitalist) marketplace”<sup>75</sup> in 1977. While investigating possible illegal campaign contributions post-Watergate, the Securities and Exchange Commission (SEC) found more than 400 American corporations had made monetary bribes to foreign government officials “as a substitute for healthy competition for foreign business,”<sup>76</sup> which was legal at the time. FCPA was written to “require companies subject to the jurisdiction of the

<sup>75</sup> Fraud Section, Criminal Division, U.S. Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. Found at <https://www.justice.gov/iso/opa/resources/29520121114101438198031.pdf>

<sup>76</sup> Report of the The Committee on Banking, Housing and Urban Affairs, U.S. Senate, March 28, 1977. <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/senaterpt-95-114.pdf>



Securities and Exchange Commission to maintain accurate records, to prohibit certain bribes, to expand and improve disclosure of ownership of the securities of U.S. companies.”<sup>77</sup> FCPA is enforced jointly by the SEC, which oversees the corporate accounting and recordkeeping provisions, and the U.S. Department of Justice (DOJ), which investigates and prosecutes criminal incidents of bribery of foreign officials.

Whereas FECA was almost immediately curtailed by the *Buckley v. Valeo* decision and never fully implemented as designed (Gora, 2001), FCPA, relatively dormant for its first two decades of existence, became highly utilized in curbing corruption in the years following the tragedies of September 11, 2001, and the Enron and WorldCom accounting scandals (in 2001 and 2002, respectively), the latter of which led to the passage of the Public Company Accounting Reform and Investor Protection Act, better known as the Sarbanes-Oxley Act, in 2002.<sup>78</sup> (Ashcroft and Ratcliffe, 2012; Ryznar & Korkor, 2010) The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2012 furthered this anti-corruption legislation by allowing for rewards (of up to 30% of FCPA judgments in excess of \$1 million) to corporate whistleblowers.<sup>79</sup>

How does this relate to campaign finance? With the post *Citizens United v. FEC* rise in corporate-sponsored independent expenditures, we find ourselves asking what Stanley Sporkin, then Director of SEC Enforcement asked: “How does

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<sup>77</sup> Ibid.

<sup>78</sup> <https://www.gpo.gov/fdsys/pkg/PLAW-107publ204/pdf/PLAW-107publ204.pdf>

<sup>79</sup> On March 15, 2018, the U.S. Senate passed the Economic Growth, Regulatory Relief and Consumer Protection Act (S. 2155), sponsored by Senate Banking Committee Chairman Mike Crapo (R-ID), which would repeal major provisions of Dodd-Frank, if signed into law.

Gulf Oil record a transaction of a \$50,000 cash payment? What account did they charge? Do they have an account called ‘Bribery’?” (Torres-Spelliscy, 2012) He assigned a team of investigators to find out, and what they found were activities that “involved matters of possible significance to public investors, the non-disclosure of which might entail violations of the federal securities law.” Such is the case for the millions of dollars being poured into electioneering communications by corporations today. Shareholders have a right to know – and possibly have some say in – a corporation’s political activities, which will take the enforcement of the SEC. Likewise, the public has a right to know what corporations are putting into the political public sphere. It warrants further examination as to whether or not these corporations, through their unconstrained political spending, have in some way usurped the role traditionally played by political parties and the media in political agenda-setting.

### **1980 Presidential Election**

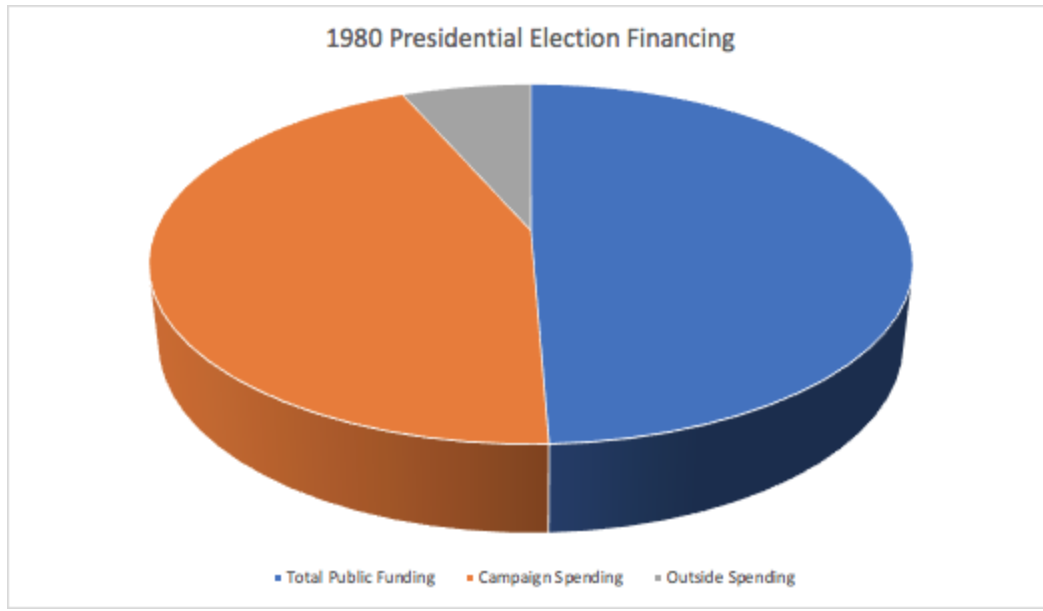
While President Carter enjoyed the benefits of incumbency, holding just four reelection fundraisers, eventual Republican nominee Ronald Reagan struggled through a bruising primary. In the summer of 1979, Reagan’s campaign was broke, thanks to weak fundraising and aggressive spending, and they faced the dispiriting choice of shutting down the campaign or accepting federal matching funds and the strict spending limits that came with them. At the end of the second quarter of 1979, Reagan’s primary fundraising – seen, then and now, as a bellwether for electoral viability – trailed behind that of several of his Republican rivals: Illinois Congressman Phillip M. Crane, former Texas Governor John Connally, and former

Director of the CIA, George H.W. Bush. While his campaign was fourth in fundraising, it was first in spending, having already spent \$1.3 million of the \$1.4 million raised. By September, the Reagan campaign was half a million dollars in debt. In January, the Reagan campaign made the difficult decision to accept federal matching funds (which ran counter to their ideology on entitlement spending) and by March, they had secured a commanding lead in the GOP primary.

The general election was a three-way race between Carter, Reagan and Republican-turned-Independent John Anderson. While Carter and Reagan both accepted public financing, receiving \$29.4 million each, Anderson raised \$18.5 million from private donations. Naturally, this put Anderson at a serious spending disadvantage, with Carter and Reagan both outspending him nearly 2:1. Despite Anderson siphoning off disaffected moderate Republicans, Reagan won the election in a landslide, winning 448 votes in the Electoral College compared to just 49 for Carter.

\_\_\_\_\_By 1980, public financing surpassed private funding and supplied 49 percent of the total financing of the presidential election, with private money accounting for 44 percent. Outside spending increased to six percent of the overall financing, as shown below. While that pales in comparison to outside spending today, it was a significant increase from the one percent it occupied in 1976.

### **Figure 3.8 Presidential Election Financing, 1980**



*Data Source: Federal Election Commission*

### **1984 Presidential Election**

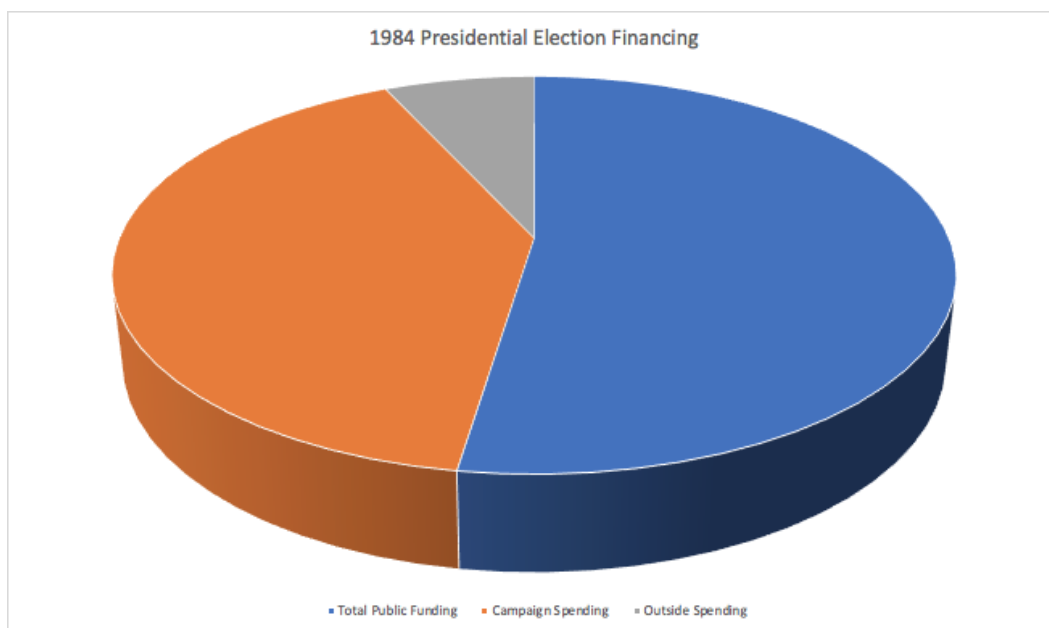
President Ronald Reagan did not have to hold a single fundraising event for his 1984 reelection campaign. He hit the primary spending limit of \$20.2 million, despite being uncontested for the Republican nomination. Former Vice President Walter Mondale, then the titular leader of the Democratic Party, was the frontrunner for the Democratic nomination from the beginning, besting a crowded field including the telegenic Senator Gary Hart of Colorado and Rev. Jesse Jackson of Illinois, Senator John Glenn of Ohio, and Senator George McGovern of South Dakota.

Reagan and Mondale both received \$40.4 million in federal funds to finance their general election campaigns, with their respective parties being able to spend up to \$6.9 million on their candidate's behalf. On Election Day, President Ronald Reagan carried 49 of the 50 states, with Mondale only winning in the District of Columbia, a guarantee for any Democrat, and his home state of Minnesota.

Reagan's 525 (out of the 538 possible) Electoral College votes remains the highest number ever received by any presidential candidate.

Total financing of the presidential election in 1984 held relatively to the same makeup as the 1980 election: public funding accounted for 52.4%, private funding for 40.7%, and outside spending remained the same at 6.9% of the total financing.

**Figure 3.9 Presidential Election Financing, 1984**



*Data Source: Federal Election Commission*

### **1988 Presidential Election**

With the endorsement of President Ronald Reagan, Vice President George H.W. Bush emerged as the early frontrunner for the Republican nomination, vanquishing his opponents, including Senator Bob Dole, conservative televangelist Pat Robertson, Congressman Jack Kemp, former Secretary of State Alexander Haig, and former Secretary of Defense Donald Rumsfeld. George H.W. Bush was a formidable fundraiser as the sitting Vice President. In a humorous bit of

foreshadowing, future President Donald J. Trump hosted a well-attended New York City fundraiser for him at The Plaza Hotel, which Trump owned at the time, that featured boxing promoter Don King as a celebrity guest. (Barrouquere, 2016)



*Photo: © Getty Images*

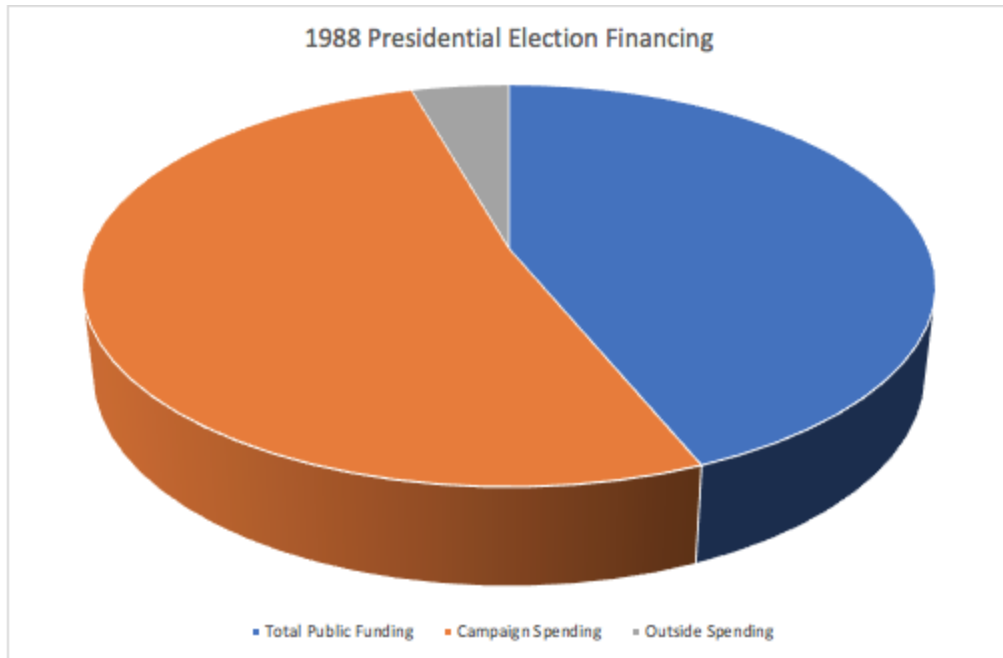
Massachusetts Gov. Michael S. Dukakis took an early fundraising lead over his rivals for the Democratic nomination, reporting a fundraising haul of \$4.2 million in the two months between announcing his candidacy on April 30, 1987 (significantly later than many of his rivals) and his second quarter FEC filing on June 30. Impressive as that was, Vice President Bush reported raising \$9 million in the same quarter. Meanwhile, Democratic candidate former Arizona Gov. Bruce Babbitt, who had raised \$1.1 million but spent \$818,544 on early television advertising for the Iowa caucuses, was taking out bank loans to keep his campaign afloat.

On Election Day, the people spoke, and Vice President George H.W. Bush would be the forty-first President of the United States. However, voters in key

battleground states voted with split tickets, with roughly a quarter of Bush supporters backing Democratic House and Senate candidates. Since Democrats regained control of both chambers of Congress, President George H.W. Bush began his Presidency with both a recipe for gridlock and a loss of faith from within his own party. Senate Minority Leader Bob Dole criticized Bush for not having made enough appearances on behalf of down-ballot Republican candidates. “There's not a man in America, in either party, who has been to more fundraising events, more speaking events and participated in more Congressional, Senate, gubernatorial contests than George Bush while he was Vice President,” Lee Atwater, Bush’s campaign manager, said in defense of his boss. “The fact of the matter is that the Vice President was in a tough race for President.” (Dionne, 1988)

1988 marked a notable shift in the aggregate financing of the presidential election, with private funding outpacing public funding for the first time since the program was enacted in 1976. In a reversal of the makeup of the 1984 election financing, private funding now accounted for 51.7% while public funding came in at 43.8%. Outside spending diminished slightly to just 4.4% of the total presidential election financing.

**Figure 3.10 Presidential Election Financing, 1988**



*Data Sources: FEC and the Center for Responsive Politics*

### ***Austin v. Michigan Chamber of Commerce (1990)***

\_\_\_\_\_ While a landmark case for campaign finance in general, *Austin v. Michigan Chamber of Commerce*<sup>80</sup> did not have a direct impact on presidential fundraising per se. It did, however, demonstrate the view of the Court at that time on corporate spending in elections. During this case, the Court upheld the provision of the Michigan Campaign Finance Act that prohibited corporations from making independent expenditures in elections, ruling that the restriction did not violate the First Amendment. The Court defended the prohibition on corporate political speech, admitting that “corporate wealth can unfairly influence elections.” Justice Marshall, writing for the majority, outlined their decision by stating,

Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the

<sup>80</sup> 494 U.S. 652 (1990)



political process, and it has implemented a narrowly tailored solution to that problem. By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections.<sup>81</sup>

This ruling – and the logic behind it, of restricting political speech to facilitate equality of political voice among the populous – would be overturned exactly two decades later with the Supreme Court’s *Citizens United* decision.

### **1992 Presidential Election**

The 1992 race for the White House began in a place called Hope, but Arkansas Governor Bill Clinton would need a lot more than hope to unseat an incumbent President. He would need a powerful fundraising apparatus. The Democrats lacked a big-name candidate to take on President George H.W. Bush, who enjoyed sky-high approval ratings – as high as 89 percent – in the glow of American victory in the Gulf War.<sup>82</sup> He looked all but unbeatable. Clinton, who dubbed himself “the comeback kid,” made quick work of becoming the frontrunner for the Democratic nomination by Super Tuesday, thanks in part to an extended interview on CBS’s *60 Minutes*, on which the telegenic candidate appeared with his wife, Hillary Rodham, at his side, and connected with the viewers at home. Despite having gone into debt to keep his campaign afloat through the early primaries, by the time of the Democratic National Convention, Governor Clinton

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<sup>81</sup> 494 U.S. 652 (1990)

<sup>82</sup> <http://www.nytimes.com/1991/05/22/us/history-suggests-bush-s-popularity-will-ebb.html>

was well positioned. He had a broad base of support, as evidenced by having received an astounding \$7.2 million in contributions under \$200 in the third quarter alone, compared with a paltry \$208,000 from small contributors to President Bush in the same timeframe. Clinton was even keeping pace with larger donors, bringing in \$3.4 million from larger contributors, outraising Bush's \$3.3 million from the same.<sup>83</sup>

Bush, who incidentally vetoed a bill in 1992 that would have provided partial public financing for congressional candidates, logged nineteen official fundraising events. His campaign came under fire when *The Washington Post* revealed that several companies, which were prohibited from making donations of any kind to federal campaigns, were listed as sponsors of a fundraising event in Michigan. As *The Times* later reported, "The mistake occurred because the sponsors of the dinner inadvertently acknowledged the obvious: that the bundling of supposedly individual donations from corporate executives had the same effect as a donation from the corporation."<sup>84</sup>

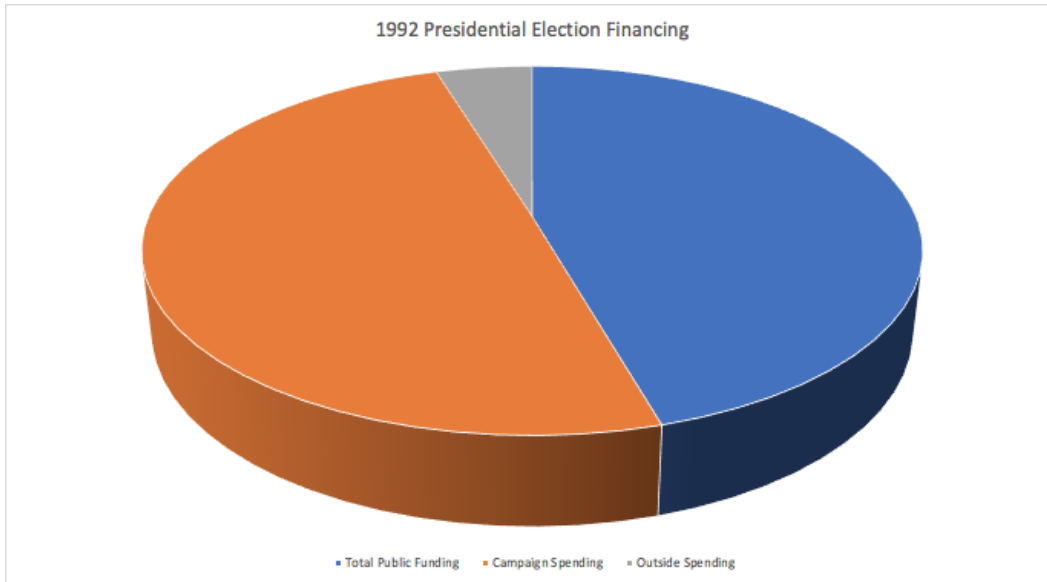
Despite a decreased in the actual dollars (from \$210.7 million in 1988 down to \$192.2 million in 1992), the overall makeup of presidential election financing remained very similar to 1988: private funding accounted for the majority of spending at 50%, public funding came in at 45% and outside spending remained flat at 4.7%.

### **Figure 3.11 Presidential Election Financing, 1992**

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<sup>83</sup> <http://www.nytimes.com/1992/04/27/us/1992-campaign-campaign-finances-being-governor-helps-clinton-raise-money-home.html>

<sup>84</sup> Ibid.



*Data Sources: FEC and the Center for Responsive Politics*

### **1996 Presidential Election**

President Clinton’s 1996 reelection campaign, like much of his second term in office, was plagued with controversy. One particular finance scandal, dubbed “Chinagate,” offers a pertinent cautionary tale for our time vis-a-vis foreign interests in American presidential politics – and demonstrates how quickly we as a country forget our own recent history. A handful of Chinese businesspersons living in the U.S. donated to and/or bundled money for the Clinton campaign and the Democratic National Committee, much of which was later returned when it was found out to have come from China’s military intelligence operation. They were also found to have contributed large sums to President Bill Clinton’s \$4.5 million legal defense fund, needed because of the Whitewater investigation, the accusations of sexual misconduct, and the impeachment inquiry. The FEC eventually levied a record-setting fine of \$719,000 against the DNC for accepting contributions from

foreign nationals. Thanks to successful fundraising in the form of “soft money,” the DNC was well financed for the reelect.

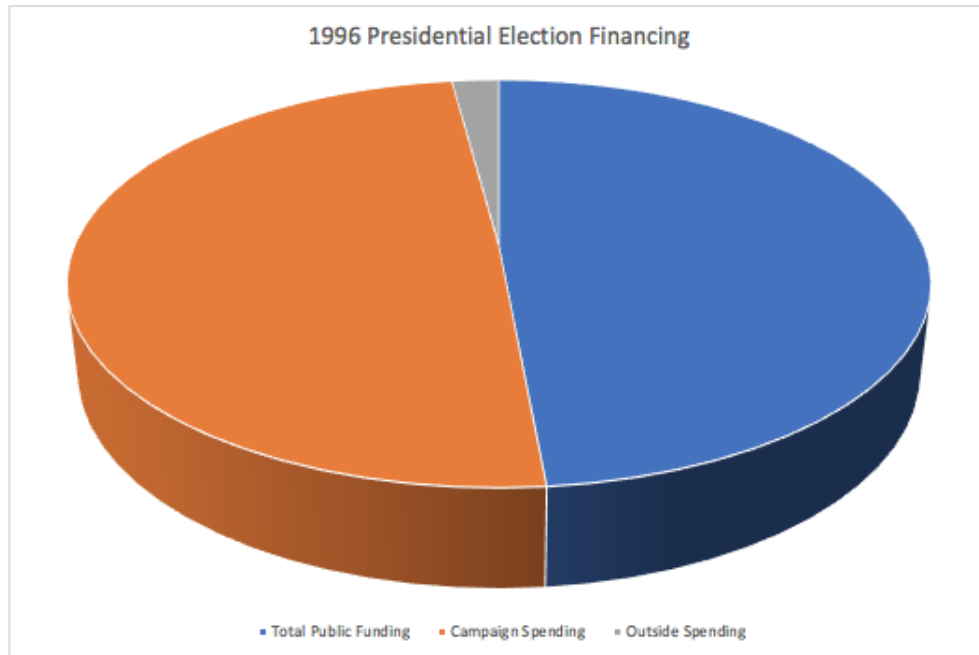
In August 1996, the Center for Public Integrity published an extensive report called “Fat Cat Hotel,”<sup>85</sup> which examined the profound linkages between those who had donated large sums of money to the Clinton-Gore campaign or the DNC, and those who had been invited to spend the night at the White House, most infamously in the Lincoln Bedroom. The Department of Justice mounted an extensive investigation into both of these matters, but Attorney General Janet Reno found no evidence of wrongdoing that would warrant further scrutiny.

As for the Dole-Kemp campaign, they were holding their own and staying out of trouble. While they had a campaign website, which is miraculously still online at [www.DoleKemp96.org](http://www.DoleKemp96.org), you could not use it to make a donation. (You could, however, calculate your tax cut!) At the time, campaign finance regulations were not favorable to donating via credit card, whereas today campaigns have digital operations that are largely geared toward low-dollar fundraising. (Stromer-Galley, 2012)

\_\_\_\_\_ Total financing of the 1996 presidential election held to similar patterns as in recent presidential election years. Private funds made up 49%, public funding accounted for 48% of total spending, and outside spending decreased almost back to 1976 levels at a mere two percent of total spending.

### **Figure 3.12 Presidential Election Financing, 1996**

<sup>85</sup> [https://iw-files.s3.amazonaws.com/documents/pdfs/fat\\_cat\\_hotel\\_1996\\_08.pdf](https://iw-files.s3.amazonaws.com/documents/pdfs/fat_cat_hotel_1996_08.pdf)



*Data Sources: FEC and the Center for Responsive Politics*

## **2000 Presidential Election**

Governor George W. Bush made history in 2000 as the first primary candidate to reject the primary matching public funds system since its founding in 1974. His campaign also innovated the latest work-around of the FEC regulations by professionalizing the practice of bundling contributions. While they were not the first campaign to attempt such a strategy, they were the first to market it unabashedly, calling those who raised \$100,000 or more for the campaign “Pioneers.” The list of 241 Pioneers from the 2000 campaign include such names as Jack Abramoff, Ted Cruz, Betsy DeVos, and Kenneth Lay, CEO of Enron.

Republican primary challenger Senator John McCain (R-AZ) made waves by championing campaign finance reform as a cornerstone of his platform, touting

his ability to work across the aisle as he had been doing with Senator Russ Feingold (D-WI) in drafting a meaningful campaign reform package.

The Internet was experiencing widespread adoption in the U.S., yet presidential campaigns had not yet caught on to the power of the World Wide Web as a tool for organizing or fundraising. *The Times* called Al Gore's fundraising apparatus a "a dizzyingly effective machine," yet he continued to be plagued with the remnants of the 1996 fundraising scandals.

The 2000 election may have been the high water mark of power wielded by the national political parties over their presidential nominees/campaigns, due to their effectiveness in raising and spending unregulated "soft money." While individuals and PACs had limits imposed on the amounts they could give directly to campaigns (\$1,000 at the time), there was no limit on the amount of money they could contribute to political parties, as long as the funds were used for "party-building activities," an ambiguous designation that made the restriction fairly easy for party operatives to circumvent. Furthermore, corporations and labor unions were allowed to contribute to the parties as well.

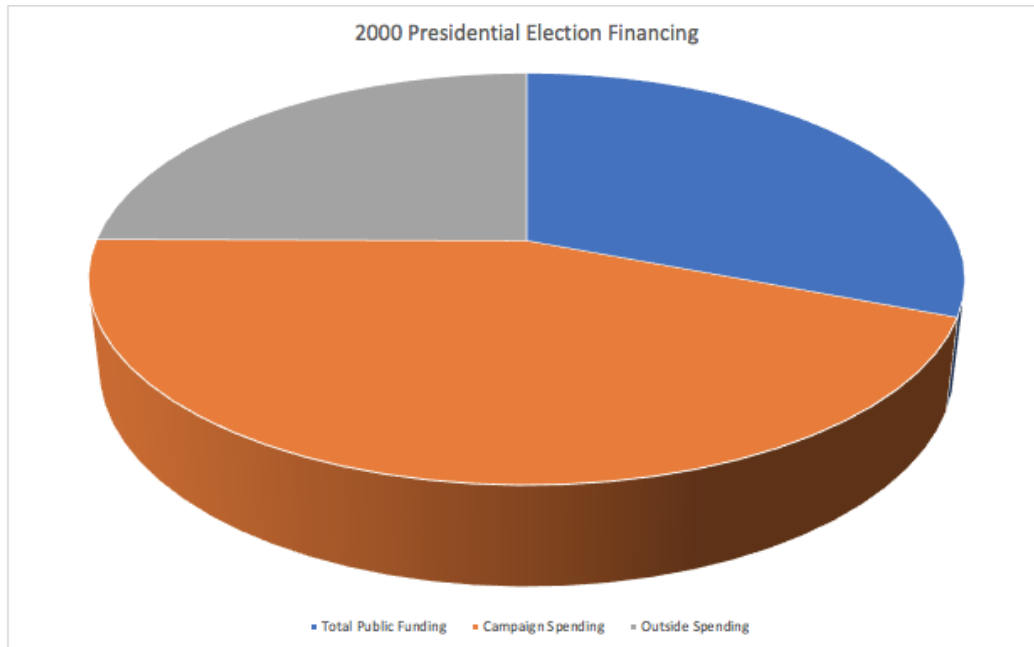
Political parties sponsor their own nominating conventions each presidential election cycle, using a combination of soft money, public funding, and Host Committee fundraising. Each of the major parties received \$13,512 million in public funding grants for their 2000 nominating conventions, and the Reform Party received \$2,522,690. (Third parties are only eligible for public funding for nominating conventions if they received at least five percent of the popular vote in the previous presidential election; the Reform Party was eligible for funding in

2000 because of the relative success of Ross Perot achieving viability as a third party candidate. This points to one of the many high barriers of entry for any third party presidential candidate: it's nearly impossible to be succeed without a significant party-building effort paving the way years in advance, vast personal wealth, or donors willing to shell out millions on independent expenditures.) Political parties agree to spending limits and disclosure protocols in exchange for the public convention funding, which is designated for the direct operation of the convention event itself.

In 2000, both major party candidates received \$67.56 million in public funds and were each held to a spending limit of \$67.56 million, not including the \$50,000 of personal funds they were allowed to put in, and excluding any so-called "GELAC" funds, those used for general election legal and accounting compliance.

\_\_\_\_\_2000 marked a significant shift in the overall financing of the presidential election with outside spending increasing dramatically to 25% of total spending. At this time, outside spending was essentially synonymous with spending by political action committees. Campaign spending remained steady at 44% and public funding decreased to an all-time (at that time) low of 30.8% of total presidential election financing.

**Figure 3.13 Presidential Election Financing, 2000**



*Data Sources: FEC and the Center for Responsive Politics*

### **The Bipartisan Campaign Reform Act (2002)**

Better known as “McCain-Feingold” for its bipartisan sponsors in the Senate, Senator John McCain (R-AZ) and Senator Russ Feingold (D-WI), the Bipartisan Campaign Reform Act was the first major campaign finance reform package since the 1974 FECA amendments. Despite McCain and Feingold generally getting the credit for passing bipartisan campaign reform, it was the House version of the bill, H.R. 2356, introduced by Rep. Chris Shays (R-CT) and Rep. Marty Meehan (D-MA) – which was largely modeled after the version of McCain-Feingold that passed the Senate the previous year – that ultimately became law. BCRA was largely due to concern about the massive influx of “soft money” into the political parties, and partially (and partisan-ally) in response to the Clinton fundraising controversies.



BCRA's most notable provision banned all "soft money" from being given to national political parties, as it had long been for candidates for federal office.<sup>86</sup> This meant that all of the funds coming into the national political scene would be in the form of "hard money," and therefore subject to the regulation and oversight of the FEC. The provisions of BCRA that apply to federal races are outlined below.

#### *Hard Money Contribution Limits*

BCRA increased the limit for individual contributions from \$1,000 per election to \$2,000 per election, to be indexed for inflation with each campaign cycle. The limit for individual contributions to national political parties increased from \$20,000 to \$25,000 per year, to be indexed for inflation with each campaign cycle. The limit for individual contributions to state-level political parties increased from \$5,000 to \$10,000 per year, to be indexed for inflation with each campaign cycle.

Aggregate limits for individuals, which were previously set at \$25,000 per year, increased to: an overall aggregate contribution limit of \$95,000 per election cycle, \$37,500 of which could go to candidates and \$57,500 could go to all other political committees, \$37,500 of which could go to PACs, state party committees and other non-national party committees. All of the limits for individuals would be indexed for inflation. (PAC contribution limits would remain static.) Contributions by minors (under 18 years old) were prohibited. No change to the amount individuals may contribute to a PAC or that a PAC may donate to a candidate.

#### *Soft Money Ban*

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<sup>86</sup> State-level party committees can, and do, still take corporate donations, in accordance with state laws.

A national committee of a political party could no longer accept corporate or labor union contributions, or any contributions from individual donors, that were in excess of the “hard money” contribution limits. Federal candidates, officeholders, their agents, and entities controlled, established, or financed by them may not raise, solicit, or spend soft money. They may, however, attend, speak, or be the featured guest at events sponsored by state, district, or local committees of a political party.

### *Non-profit Organizations*

All party committees, their agents, and their officers were banned from contributing to or soliciting contributions for IRS § 527 political organizations and nonprofit groups that make contributions or expenditures in connection with “federal election activity” or participate in “federal election activity,” which would include: voter registration activity within 120 days of an election; voter identification, get-out-the-vote activity, and generic campaign activity; and advertisements that refer to a clearly identified candidate for federal office and “promote, support, attack, or oppose” a candidate for that office.

Federal candidates and officeholders could solicit \$20,000 per calendar year per individual for a 501(c)3 organization, provided the funds were used for specific activities, including voter registration drives, voter identification, and get-out-the-vote activities. Candidates could raise unlimited funds for 501(c) non-profit organizations that do not engage in political activity and for the non-political activity of other non-profit organizations.

### *Advertising & Coordination*

Corporations and labor unions, as well as organizations that receive funds from corporations and labor unions, were prohibited from running “electioneering communications,” which are certain issue advertisements. A corporation's or union's PAC could only run such ads with hard money. A 501(c)(4) organization could, under certain conditions, make an “electioneering communication.” “Electioneering communications” were defined as “broadcast, cable, or satellite ads that refer to clearly identified candidates within 60 days of a general, special, or runoff election or within 30 days of a primary election or convention and are received by 50,000 or more persons in the congressional district or state where the election is being held.” (need citation) Interestingly, this definition excluded other forms of advertising such as newspaper ads, billboards, direct mail, or other types of communications. The ban applied to “targeted” ads by 501(c)(4), so-called “social welfare” organizations and to 527 political organizations, even if those ads are paid for with contributions from individuals. Any non-corporate or non-union person or group of persons who paid for “electioneering communications” must file with the FEC within 24 hours of disbursing more than \$10,000 on such an ad; identify the person making or controlling the disbursements and the custodian of the records; identify those who contributed \$1,000 or more; and identify those to whom disbursements of more than \$200 were made.

The definition of coordination was expanded to include coordination with political parties and party committees, in addition to candidates. The legislation repealed existing FEC regulations on coordination and mandated that the FEC issue new regulations to address: the republication of campaign materials; the use of

common vendors; communications directed or made by those who previously served as an employee of that candidate or political party; and communications made by a person “after substantial discussion about the communication with a candidate or a political party.” Any “electioneering communications” coordinated with a political party, candidate, or officer or agent of either would be considered as a contribution and, therefore, subject to contribution limits and prohibitions.

#### *The Millionaires’ Amendment & Other Provisions*

Provisions of BCRA, together known as the “Millionaires’ Amendment” allowed candidates running against self-funding opponents to “be eligible to receive contributions from individuals at increased limits and to have increased coordinated party expenditures made on their behalf.” (52 US Code §30116)

Several general civil penalties, criminal fines, and prison terms were increased. The penalty for violations of the conduit contribution ban was increased to “no less than 300% of the amount involved and no more than \$50,000 or 1000% of the amount involved.” The criminal penalties were increased to fines of the same amount and/or a prison term of not more than 2 years. The United States Sentencing Commission was ordered to create sentencing guidelines for criminal violations, and the statute of limitations for such violations was extended from three to five years.

#### **Table 3.1 BCRA changes to FECA provisions**

Donating Entity	To a Candidate		To a National Party Committee		To Any State, Local, or Party Committee		To Any Other Political Committee		Total Per Year		
	FECA	BCRA	FECA	BCRA	FECA	BCRA	FECA	BCRA	FECA	BCRA	
An Individual	\$ 1,000	\$ 2,000	\$ 20,000	\$ 25,000	N/A	\$ 10,000	\$ 5,000	\$ 5,000	\$ 25,000	\$462,000	
National Party Committee	\$ 5,000	\$ 5,000	Unlimited	Unlimited	N/A	Unlimited	\$ 5,000	\$ 5,000	Unlimited	\$431,000	
Political Action Committee (Multicandidate PAC)	\$ 5,000	\$ 5,000	\$ 15,000	\$ 15,000	N/A	\$ 5,000	\$ 5,000	\$ 5,000	Unlimited	Unlimited	
Political Action Committee (Non-Multicandidate PAC)	Unlimited	\$ 2,000	Unlimited	\$ 25,000	Unlimited	\$ 1,000	Unlimited	\$ 5,000	Unlimited	Unlimited	
State, District, and Local Party Committee	N/A	\$ 5,000	N/A	Unlimited	N/A	Unlimited	N/A	\$ 5,000	N/A	Unlimited	
Authorized Campaign Committee	N/A	\$ 2,000	N/A	Unlimited	N/A	Unlimited	N/A	\$ 5,000	N/A	Unlimited	
Candidate	Depends on Office		Unlimited	\$ 20,000	\$ 25,000	N/A	\$ 10,000	\$ 5,000	\$ 5,000	Depends on Office	Unlimited

*Data Source: Federal Election Commission*

President George W. Bush signed BCRA into law on March 27, 2002, with the law set to go into effect on November 6 – the day after election day – and with the new contribution limits set to take effect on January 1, 2003 for the 2003-2004 campaign cycle. BCRA’s imprint can still be seen on every presidential campaign ad today. When you hear a candidate say, “I’m John Doe, and I approve this message,” that’s because of the so-called “Stand By Your Ad” provision of McCain-Feingold. One of the unforeseen consequences of BCRA was that it resulted in the proliferation of “independent” PACs that could accept up to \$5,000 from an individual or a national party committee per calendar year. See below the growth in PACs registered with the FEC pre and post-BCRA.

In addition to registered PACs, another side effect of BCRA was that it led to the explosion in tax-exempt “Section 527” political organizations. So called “527s” – so named because they are organized in accordance with Section 527 of

the IRS tax code<sup>87</sup> – are able to pay for voter mobilization, issue advocacy, and other political activities, provided they do not engage in “express advocacy” for or against a candidate for federal office. Most importantly, 527s are not limited to how much they can raise or spend in either hard or soft dollars; however, they must report their contributions and expenditures to the IRS. (need citation)

### ***McConnell v. FEC (2003)***

No sooner was the ink dry on the Bipartisan Campaign Reform Act than it was being challenged on First Amendment grounds, with then-Senate Majority Whip, Senator Mitch McConnell (R-KY), as its most vociferous critic. In December 2003, the Supreme Court upheld the majority of the provisions outlined in McCain-Feingold, finding that that the restrictions on free speech in BCRA were justified by the government's interest in preventing “both the actual corruption threatened by large financial contributions and... the appearance of corruption” that could result from such contributions. Justices O'Connor and Stevens presciently wrote that “money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day.”<sup>88</sup> The Court did, however, strike down BCRA’s prohibition on contributions from minors.

### **2004 Presidential Election**

Arguably, the biggest fundraising story of the 2004 election was the online juggernaut of Senator Howard Dean’s (D-VT) primary campaign, in which 40% of the \$50 million raised was brought in via the campaign’s website. (Medvic, 2011)

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<sup>87</sup> U.S. Internal Revenue Code (26 U.S.C. § 527)

<sup>88</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

Thanks to BCRA raising the individual limit from \$1,000 per person per election to \$2,000 per person per election, Bush's Pioneers could now ask all of the people in their "roll-up," those whose contributions they received credit for, for double the amount of money. Capitalizing on this, Bush-Cheney '04 added two new levels of bundlers to their fundraising pyramid: Rangers, who raised \$200,000 or more, and Super Rangers, who raised \$300,000 or more.

During the general election, Senator John Kerry (D-MA) and President George W. Bush raised a combined \$880.5 million in what was the most expensive election to date. Feeling burned by the overly restrictive spending limits, Senator John Kerry discouraged his party's next nominee from accepting the public funds, saying it was insufficient to "adequately fund the campaigns."<sup>89</sup>

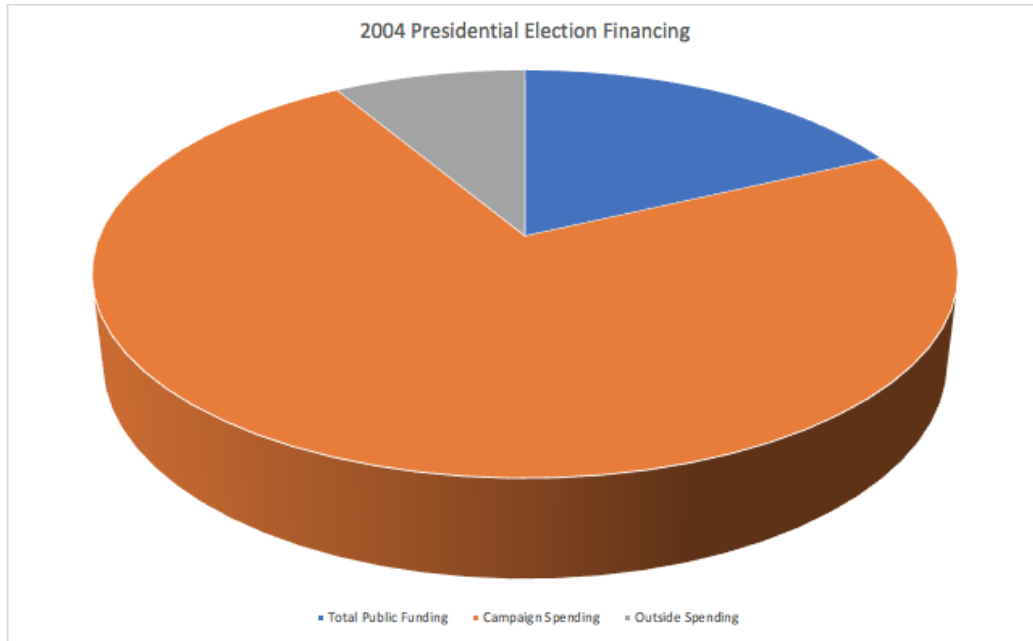
According to the Center for Public Integrity, fifty-three 527 organizations focused "largely or exclusively on the presidential election" raised over \$246 million, and spent over a half-billion dollars total during the 2004 cycle.

Despite the noble intentions of BCRA, total spending on the presidential election jumped 49% percent, exceeding a billion dollars for the first time in U.S. history. The total price tag of the 2004 presidential election was \$1.154 billion, up from the 2000 total expenditure of \$775.6 million. Outside spending diminished back to 8.6% and public funding hit an unprecedented low at just 18% of total spending.

### **Figure 3.14 Presidential Election Financing, 2004**

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<sup>89</sup> <https://thinkprogress.org/why-ronald-reagan-didnt-have-to-hold-a-single-reelection-fundraiser-9450d43b8dcc/>



*Data Sources: FEC and the Center for Responsive Politics*

***Randall v. Sorrell (2006)***

In *Randall v. Sorrell*, the Court struck down Vermont’s campaign spending limits and individual contributions limits, ruling them in violation of the First Amendment.

***Federal Election Commission v. Wisconsin Right to Life (2007)***

In 2007, the Supreme Court heard *Federal Election Commission v. Wisconsin Right to Life, Inc.*<sup>90</sup> and overturned BCRA’s “blackout period” for issue ads in the 30 days before the primary and 60 days before the general election in a 5-4 decision. Now largely superseded by the Court’s *Citizens United* decision, *FEC v. Wisconsin Right to Life* was a bellwether of the jurisprudence to come from the Roberts Court. Of particular alarm to campaign finance reform advocates was the

<sup>90</sup> *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)



rhetoric used in the majority opinion of *FEC v. Wisconsin Right to Life*, authored by the Chief Justice, John Roberts. In a dramatic departure from the language and judicial reasoning employed in *McConnell v. FEC*, the Court chastised the FEC, stating “enough is enough” when it came to regulating campaign finance and warning that the Court would “give the benefit of the doubt to speech, not censorship.”

### ***Davis v. Federal Election Commission (2008)***

In 2008, deregulation continued with *Davis v. FEC*<sup>91</sup> as the Court struck down the so-called “Millionaire’s Amendment” provision of BCRA, which allowed for candidates to exceed the federal limits on fundraising if they were running against a candidate who was self-funding to the tune of \$350,000 or more. Jack Davis, a multi-millionaire and two-time candidate for Congress, challenged Section 319 of BCRA, arguing that it “burdened (his) speech and deter(ed) self-financing candidates from running for Congress by conferring benefits on their opponents.”<sup>92</sup> Whereas Congress put the law into place in order to level the playing field for those running against candidates with greater financial means, the Supreme Court held that there was an “asymmetrical burden on speech because the Millionaire’s Amendment caused candidates in the same election to be bound by two different sets of rules, and that there was no compelling state interest, as the relaxed limits on spending would not prevent corruption, or the appearance of corruption.”<sup>93</sup> This

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<sup>91</sup> *Davis v. Federal Election Commission*, 554 U.S. 724 (2008)

<sup>92</sup> <https://www.brennancenter.org/legal-work/davis-v-federal-election-commission>

<sup>93</sup> *Ibid.*

narrow definition of corruption as only pertaining to obtuse *quid pro quo* corruption helped paved the way not only for an influx of self-funding candidates into the political sphere, but also for the *Citizens United* decision, which “held that it is not corruption for someone to spend money in pursuit of ‘ingratiation and access.’”<sup>94</sup>

## 2008 Presidential Election

2008 continued the perennial post-Watergate presidential campaigning financing headline: the race was the most expensive in American history to date. However, by 2008, the public financing system – used by Presidents Carter, Reagan, George H.W. Bush, Clinton, and George W. Bush – was inadequate funding to meet the demands of a modern presidential campaign.<sup>95</sup> The primary candidates raised over \$1.2 billion, almost double what primary candidates raised in 2004 and four times as much as they raised in 2000.<sup>96</sup> This was partly due to the uncanny popularity of Senator Barack Obama (D-IL), which helped him raise \$400 million during the primary, an unprecedented sum. (Corrado, 2011) Due to their success in fundraising, the Obama campaign rejected the Treasury’s public financing in both the primary and the general election, the first campaign to do so since the inception of the program in 1974. That shrewd decision paved the way for Senator Obama to raise an eye-popping \$745 million in total on his way to the White House, more than the combined total, including public and private funds, raised by incumbent President George W. Bush and his Democratic rival, Senator

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<sup>94</sup> [https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/20/defining-corruption-is-inherently-political-why-do-we-think-the-supreme-court-will-solve-it/?utm\\_term=.eb56c78c3aae](https://www.washingtonpost.com/news/monkey-cage/wp/2016/07/20/defining-corruption-is-inherently-political-why-do-we-think-the-supreme-court-will-solve-it/?utm_term=.eb56c78c3aae)

<sup>95</sup> [https://transition.fec.gov/pages/brochures/pubfund\\_limits\\_2012.shtml](https://transition.fec.gov/pages/brochures/pubfund_limits_2012.shtml)

<sup>96</sup> Per FEC data, the 2004 primary total was \$678 million and 2000 primary total was \$329 million.

John Kerry (D-MA), in the 2004 election.<sup>97</sup> Both major parties received \$16.82 million in public financing for their nominating conventions, based on the 1974 figure of \$4 million, adjusted for inflation.

Senator John McCain (R-AZ), however, stuck with the public funding system, and received \$84 million. Having spent \$37 million of that by September, he had only \$47 million left to spend for the remainder of the campaign, leaving him strapped for cash in the weeks before Election Day, when spending matters the most. Senator McCain, after having lost his presidential bid after accepting the public Treasury funds and their associated spending limits, told conservative paper *The Washington Times* that “no Republican in his or her right mind is going to agree to public financing. I mean, that’s dead. That is over.” (Dinan, 2009)<sup>98</sup>

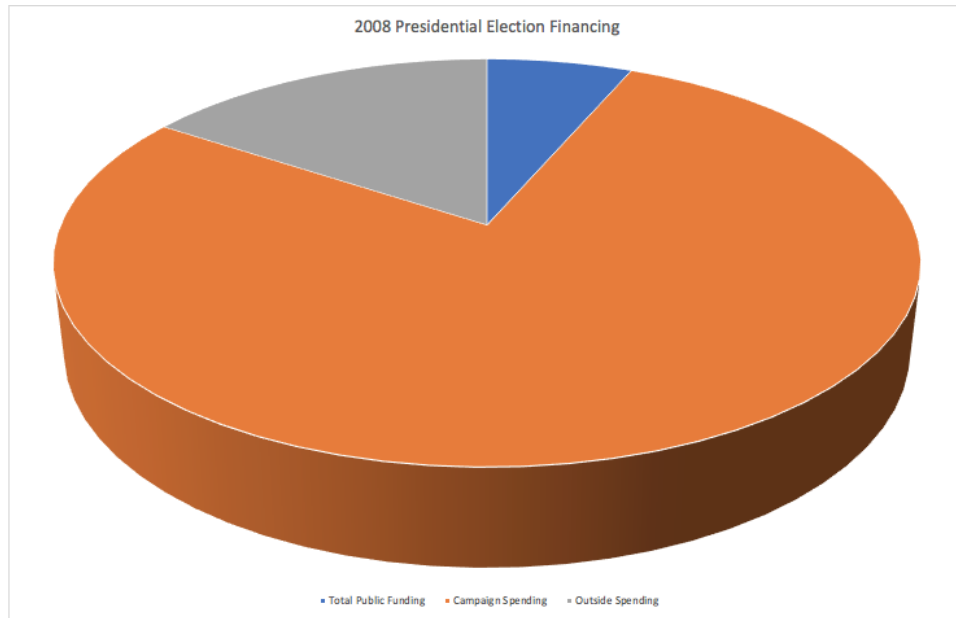
The total amount of money it took to finance the 2008 presidential election was nearly double that of 2004, up to now over \$2.15 billion, in contrast to \$1.15 billion just four years earlier. Due to Obama’s rejection of public financing, this marked a dramatic downgrade in the role of public funds, which came in at just 6.4% of total financing. The breakdown between campaign funds and outside spending was relatively stable, accounting for 77.78% and 15.74%, respectively. However, that belies the exponential increase in real dollars: campaign spending nearly doubled to over \$1.67 billion, up from \$847 million in the 2004 cycle.

### **Figure 3.15 Presidential Election Financing, 2008**

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<sup>97</sup> Per FEC data, President Bush raised \$356.4 million (including \$74.6 million in public funding) in 2004, while Senator Kerry raised \$318.1 million (including the same \$74.6 million in public funding).

<sup>98</sup> <https://www.washingtontimes.com/news/2009/mar/29/public-financing-dead-mccain-says/>



*Data Sources: FEC and the Center for Responsive Politics*

### ***Citizens United v. The Federal Election Commission (2010)***

Whereas corporate contributions to political campaigns were made illegal as part of the Tillman Act of 1907, the conservative nonprofit Citizens United took a case to the Supreme Court one hundred and three years later that would render that longstanding policy meaningless. Citizens United produced a film criticizing Hillary Clinton and sought to air it, and advertise for it, during the 2008 Democratic primary. This would qualify as an “electioneering communication,” defined as “any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office and is made within 30 days of a primary or 60 days of a general election.”<sup>99</sup> They were barred from doing so in accordance with the 1947 Taft-Hartley Act, which prohibited corporations and labor unions from paying for

<sup>99</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

independent electioneering communications expenditures. However, the right-leaning Roberts Court found this to be unconstitutional on First Amendment grounds.

In a 5:4 decision, the Roberts Court ruled it unconstitutional to prohibit corporations from making independent political expenditures, based on the premise that the potential for corruption from such independent spending was minimal. Writing for the majority, Justice Kennedy stated such a prohibition on spending would, “have a chilling effect extending well beyond the government’s interest in preventing quid-pro-quo corruption... the anti-corruption interest is not sufficient to displace the speech here in question.” He went on to write that their ruling would “not cause the electorate to lose faith in this democracy;” however, public opinion polling since then suggests differently: 85% of the American public agrees that changes must be made to the campaign finance system.<sup>100</sup>

#### *On Disclosure*

A common misconception, due to the rise of so-called “dark money” in elections following the *Citizens United* decision, is that the Supreme Court condoned a system without disclosure. Rather, the Supreme Court “expressly rejected the contention that election-law disclosure requirements are limited to express advocacy or its functional equivalent.” Writing for the majority, Justice Anthony Kennedy outlined the way in which the Supreme Court envisioned this new electoral territory being regulated. “With the advance of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the

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<sup>100</sup> New York Times/CBS News poll, June 2011, available online at <https://www.nytimes.com/interactive/2015/06/01/us/politics/document-poll-may-28-31.html>

information needed to hold corporations and elected officials accountable,” he wrote. But this logic defied reality: even United States Senate campaigns were not then (and still are not today) filing their campaign finance disclosure reports electronically. In reality, this ruling meant almost complete deregulation of independent expenditures, opening the floodgates for for-profit and nonprofit corporations, as well as labor unions, to pour unprecedented sums into electoral politics. The most problematic of the outcomes has been that, in the case of nonprofit corporations, disclosure of the donors funding these activities is not required, hence the long shadow cast over American politics known as “dark money.”

### ***SpeechNOW.org v. FEC***

The effect of *Citizens United* was amplified when the D.C. Circuit Court, citing the *Citizens United* ruling, held that BCRA’s limits on contributions to PACs making only independent expenditures were unconstitutional. And thus, Super PACs came to dominate the political landscape as powerful entities that could accept unlimited sums from individuals, corporation, unions, and other groups without limitation.

### ***Super PACs***

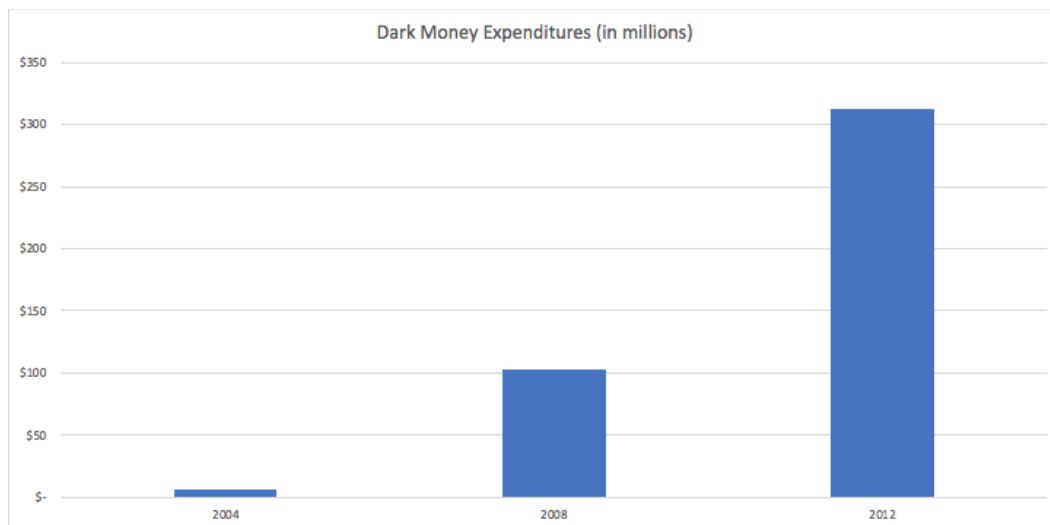
Super PACs do have to report their fundraising and spending to the FEC, but they have the choice of disclosing the sources of their funding semiannually or quarterly in non-election years, and quarterly or monthly in an election year, which systematizes a lag in transparency.

## 2012 Presidential Election

According to FEC estimates, Mitt Romney and Barack Obama spent over \$7 billion in the 2012 presidential campaign, and that number is most likely an undercount.<sup>101</sup> For the first time since its enactment in 1972, the sitting President refused public financing, opting to raise private funds instead. This is not without irony, since President Obama had been a vocal critic of campaign finance and was thought to be an advocate for reforms, but he cited a “broken system” for his decision.

As the first presidential election following *Citizens United v. FEC* deregulation, 2012 was dubbed the “Dark Money Election,” due to the exponential growth in independent spending by opaque outside groups. Spending by outside groups skyrocketed in 2012, from \$534.2 million in 2010 to \$1,035.6 million in 2012.<sup>102</sup>

**Figure 3.16 Dark Money Spending in Federal Elections, 2004 to 2012**



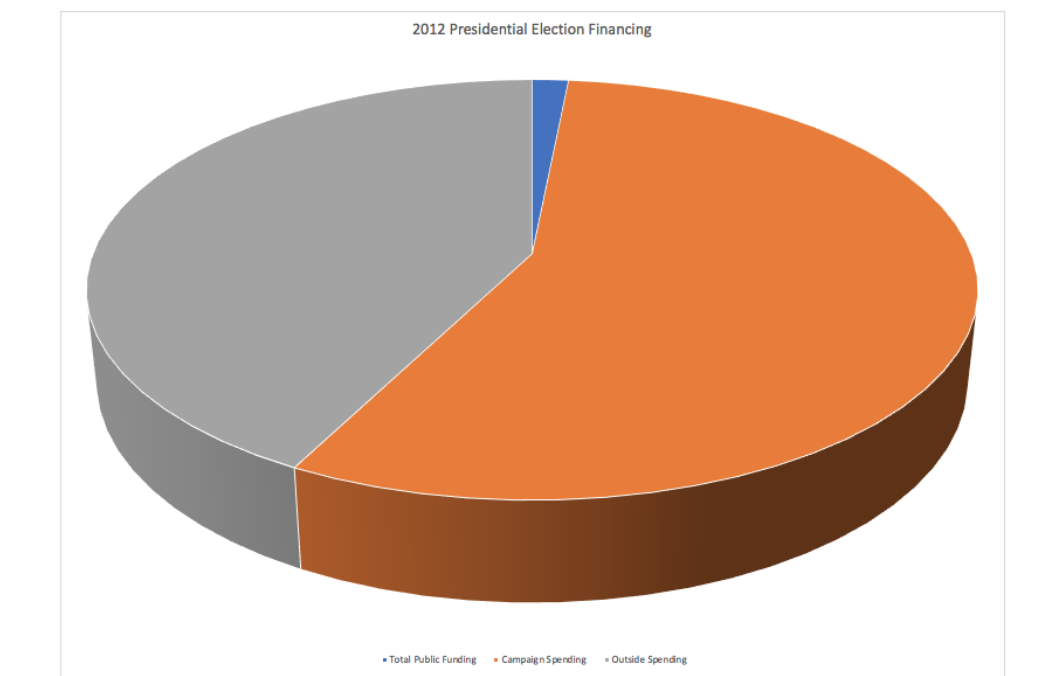
<sup>101</sup> <https://www.nytimes.com/elections/2012/campaign-finance.html>

<sup>102</sup> Center for Responsive Politics

Data Source: Center for Responsive Politics<sup>103</sup>

The 2012 election also marked the first time since 1976 that both general election nominees opted out of the public financing program for both the primary and general elections. Primary matching fund payouts in connection with the 2012 presidential election totaled nearly \$1.4 million, the lowest amount since 1976, all of which went to third party candidates. Public funding for nominating conventions was still in effect and both parties took advantage of the funding to the tune of \$18.25 million each.<sup>104</sup>

**Figure 3.17 Presidential Election Financing, 2012**



Data Sources: FEC and the Center for Responsive Politics

President Obama would go on to sign legislation in 2014, the Gabriella

<sup>103</sup> <https://www.opensecrets.org/outsidespending/disclosure.php?range=tot>

<sup>104</sup> [https://classic.fec.gov/press/bkgnd/pres\\_cf/Pres\\_Public\\_Funding.pdf](https://classic.fec.gov/press/bkgnd/pres_cf/Pres_Public_Funding.pdf)



Miller Kids First Research Act, which banned public funding of conventions and redirected the money to fund the National Institute of Health's research into childhood diseases. This bill was signed in the Oval Office the day after the Supreme Court announced its latest deregulation of campaign finance in *McCutcheon v. FEC*, discussed below, prompting criticism<sup>105</sup> of Obama's decision to back a bill that would have the effect of increasing the amount of private money needed to fund nominating conventions, thereby raising the potential for those wealthy donors and special interest groups to have undue influence on the candidates once elected.

#### ***McCutcheon v. FEC (2014)***

Alabama businessman and proficient Republican donor Sean McCutcheon partnered with the Republican National Committee in 2014 to contest the BCRA-imposed limit on individual aggregate political spending, indexed for inflation at that time to \$123,200 per person per election cycle, alleging that any limitations on spending were in violation of his First Amendment rights. In a 5:4 decision, the Supreme Court struck down the aggregate spending limits. The Court maintained the BCRA limits on individual donations to campaigns, but ruled it a violation of free speech for the number of candidates to be limited. Common Cause, one of the leading campaign finance reform advocacy organizations, illustrates the problem inherent in this decision,

With the overall contribution limits eliminated, an individual donor who elects to give the maximum to every presidential, House and Senate candidate and

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<sup>105</sup> <https://www.theguardian.com/world/2014/apr/04/obama-act-public-funding-signs-aw>

party committee could spend up to \$3.6 million per election cycle. And all of that money could be solicited by a single candidate, who would have a powerful incentive to follow the donor's wishes on legislation and other matters.<sup>106</sup>

“We have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others,” wrote Chief Justice John Roberts for the majority. What he calls “relative influence” one might just as well call “equality.” The Roberts Court has made it clear that it gives far more judicial deference to liberty than adherence to equality.

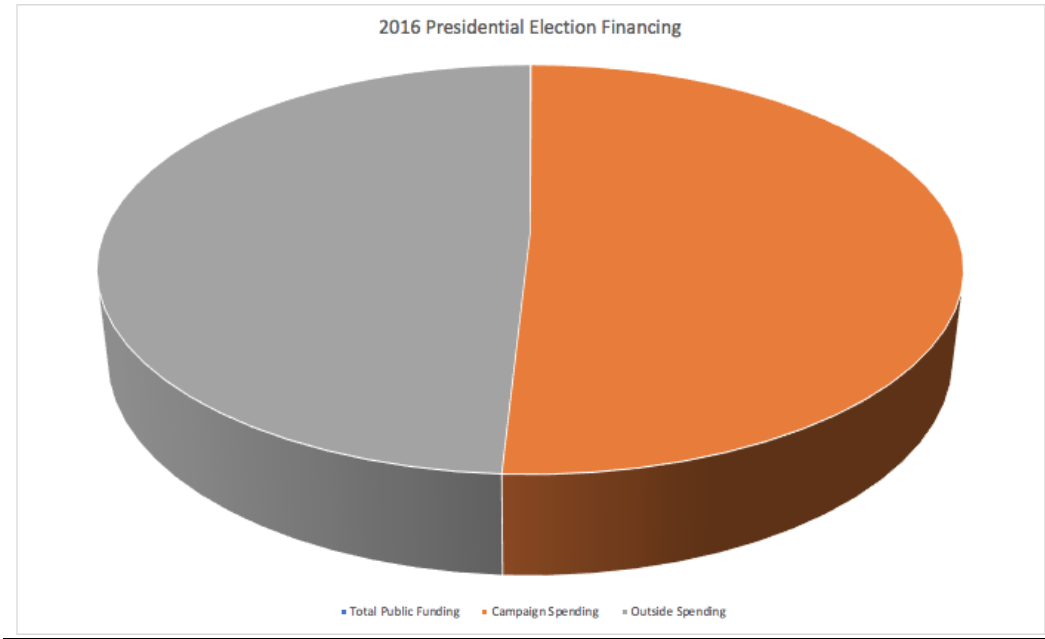
### **2016 Presidential Election**

2016 marked the death of public financing of presidential campaigns, accounting for such a small amount (.04%) of total funding that its blue sliver is no longer visible on the pie chart breakdown below. Furthering the post-*Citizens United* trend of increased outside spending, its now reached parity with campaign spending. Outside groups spent 49.13% of the \$2.85 billion total cost of the 2016 presidential election, and campaigns spent 50.83%.

### **Figure 3.18 Presidential Election Financing, 2016**

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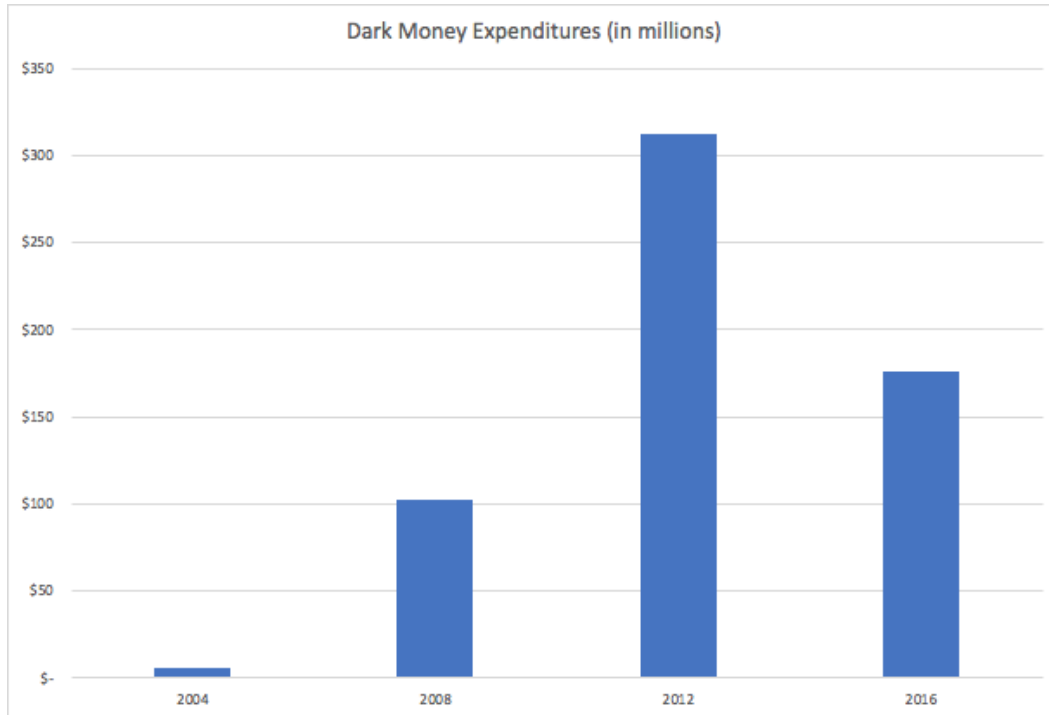
<sup>106</sup> <http://www.commoncause.org/issues/money-in-politics/fighting-big-money/mccutcheon/>



*Data Sources: FEC and the Center for Responsive Politics*

While outside spending rose to 49% of the total amount spent in the 2016 presidential election, the portion of those funds considered to be “dark money” actually decreased from 2012 levels.

**Figure 3.19 Dark Money Spending in Federal Elections, 2004 to 2016**

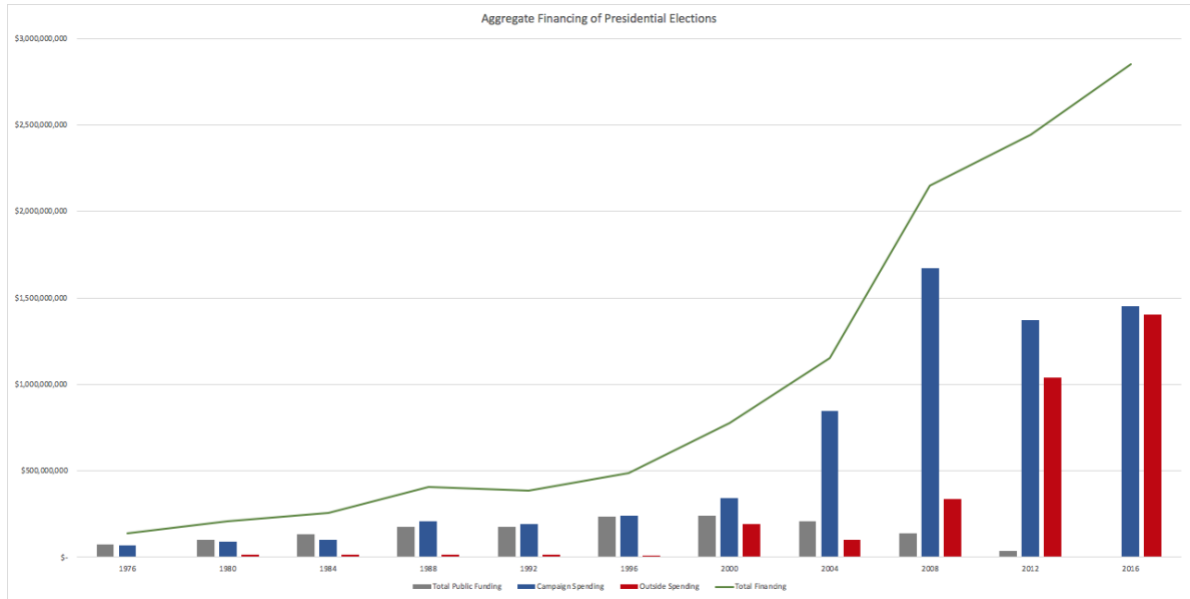


Data Source: Center for Responsive Politics<sup>107</sup>

The forty-year trendline of the total cost of presidential elections in the United States illustrates an exponential growth with an increase of over 2,000% in spending from 1976 to 2016.

**Figure 3.20 Aggregate Financing of Presidential Elections, 1976 to 2016**

<sup>107</sup> <https://www.opensecrets.org/outsidespending/disclosure.php?range=tot>



Data Sources: FEC and the Center for Responsive Politics

## Pending Legislation

Presently, in the 115th Congress, there exists a plethora of draft legislation – joint resolutions, House and Senate resolutions, and bills – that touch on various parts of campaign finance. Their political viability is doubtful, particularly for such drastic reforms as the Joint Resolution<sup>108</sup> proposing a constitutional amendment relating to the authority of Congress and the States to regulate contributions and expenditures in political campaigns and to enact public financing systems for such campaigns, which seek to render the Supreme Court’s *Citizens United* decision void.

Campaign finance reform activist Lawrence Lessig has publicly endorsed the Government by the People Act,<sup>109</sup> sponsored by Congressman John Sarbanes

<sup>108</sup> <https://www.govtrack.us/congress/bills/115/hjres113/text>

<sup>109</sup> <https://www.govtrack.us/congress/bills/115/hr20/text>

(D-MD), which would give every citizen a \$25 voucher (in the form of a tax credit) for campaign contributions and provide matching funds for candidates.

The DISCLOSE Act,<sup>110</sup> which fell just one vote short of passing in the Senate when Democrats held the majority, would amend the Federal Election Campaign Act of 1971 to provide for additional disclosure requirements for corporations, labor organizations, Super PACs and other entities. In the midst of accusations of Russian interference in the 2016 election, this legislation has been updated to crack down on political spending by domestic corporations with significant foreign investment and on shell companies, which may be used to launder illegal foreign money into U.S. elections. According to sponsor Senator Sheldon Whitehouse (D-RI) the bill would also “require organizations spending money in elections – including super PACS and tax-exempt 501(c)(4) groups – to promptly disclose donors who have given \$10,000 or more during an election cycle” and “includes robust transfer provisions to prevent political operatives from using complex webs of entities to game the system and hide donor identities.”<sup>111</sup>

The Fair Elections Now Act,<sup>112</sup> sponsored by Senator Dick Durbin (D-IL) would reform the financing of Senate elections; the Empower Act<sup>113</sup> would amend the Internal Revenue Code of 1986 to reform the system of public financing for presidential elections; and the We the People Democracy Reform Act of 2017<sup>114</sup>

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<sup>110</sup> <https://www.govtrack.us/congress/bills/115/s1585/text>

<sup>111</sup> <https://www.whitehouse.senate.gov/imo/media/doc/DISCLOSE%202017%20One%20Pager.pdf>

<sup>112</sup> <https://www.govtrack.us/congress/bills/115/s1640/text>

<sup>113</sup> <https://www.govtrack.us/congress/bills/115/s1929/text>

<sup>114</sup> <https://www.govtrack.us/congress/bills/115/s1880/text>

would increase transparency and oversight of elections and reform public financing for presidential and congressional elections.

### **Pending Legal Challenges**

Further challenges to campaign finance laws are currently pending in the courts. In June 2018, the Supreme Court will announce its verdict in *Janus v. American Federation of State, County, and Municipal Employees* (AFSCME), wherein the constitutionality of compulsory “agency fees” to labor unions, by those who are not union members but are forced to pay into them as a part of the collective bargaining agreement, is being called into question on First Amendment grounds of compelled speech. While those funds cannot go to funding political activity, Janus and his attorneys will argue that collective bargaining (in the case of public unions, frequently against state governments) is inherently a form political speech. There is little to no question as to how the right-leaning Court will rule in this case, since they ruled 4:4 on the same matter following Justice Antonin Scalia’s death in 2016. With conservative Justice Neil Gorsuch now installed on the bench, the Court is almost certain to vote down party lines in favor of Janus. And though this will not have a direct impact on presidential politics, it will most certainly diminish the political power of labor unions in general, which could have a detrimental effect on overall fundraising for the Democratic party.

### **Implications for the 2020 Presidential Election**

With the public financing system still in place, President Trump will be

eligible to receive tens of millions of tax dollars – whether or not he has a single primary challenger. If the Republican National Committee is successful in clearing the field of potential rivals early in the process, Trump could follow President Reagan’s lead of spending the entirety of the primary entitlement on boosting his own popularity, significantly strengthening his positioning for the 2020 general election. Furthermore, this puts all of the privately raised money – an effort already substantially underway by the 2020 Trump campaign, which unprecedentedly filed its paperwork with the FEC on Inauguration Day (and has already received a letter from the FEC itemizing 46 pages of contributions it suspects were illegal, excessive, or otherwise impermissible<sup>115</sup>) – away for the general election, which means the incumbent president will have a formidable war chest built up over his four years in office. Not to mention the heft of the many pro-Trump Super PACs, which have four years to organize, strategize, and fundraise, and the myriad right-leaning Super PACs, which may or may not have any impetus to play heavily in the 2018 midterms given reasonably safe majorities in both houses of Congress.

**Table 3.2: Contribution Limits for 2017-2018 Federal Elections**

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<sup>115</sup> <http://docquery.fec.gov/pdf/595/201803080300000595/201803080300000595.pdf>



CONTRIBUTION LIMITS FOR 2017-2018 FEDERAL ELECTIONS					
DONORS	RECIPIENTS				
	Candidate Committee	PAC <sup>1</sup> (SSF and Nonconnected)	State/District/Local Party Committee	National Party Committee	Additional National Party Committee Accounts <sup>2</sup>
Individual	\$2,700* per election	\$5,000 per year	\$10,000 per year (combined)	\$33,900* per year	\$101,700* per account, per year
Candidate Committee	\$2,000 per election	\$5,000 per year	Unlimited Transfers	Unlimited Transfers	
PAC-Multicandidate	\$5,000 per election	\$5,000 per year	\$5,000 per year (combined)	\$15,000 per year	\$45,000 per account, per year
PAC-Nonmulticandidate	\$2,700* per election	\$5,000 per year	\$10,000 per year (combined)	\$33,900* per year	\$101,700* per account, per year
State/District/Local Party Committee	\$5,000 per election (combined)	\$5,000 per year (combined)	Unlimited Transfers		
National Party Committee	\$5,000 per election <sup>3</sup>	\$5,000 per year			

Source: Federal Election Commission

In conclusion, whereas the 1974 FECA amendments sought to regulate campaign finance in five ways: through 1) contribution limits, 2) expenditure limits, 3) public funding, 4) donor disclosure, and 5) federal agency oversight, the modern regulatory environment of political spending, as illustrated in the matrix below, is more opaque than transparent. This leaves a tremendous knowledge gap for the American people on who is communicating what within our political public sphere, and the appropriate role, *if any*, of non-citizens in our electoral decision-making process.

**Table 3.3 Current Regulatory Matrix**

	Coordinated Spending			Independent/Outside Spending		
	Campaigns	Parties	PACs	SuperPACs	501(c)4	LLCs
Contribution Limits	yes	yes	yes			
Expenditure Limits						
Public Funding	yes					
Donor Disclosure	yes	yes	yes	yes		
Oversight	yes	yes	yes	yes		

*Data Source: FEC and the Center for Responsive Politics*

## Chapter 4: Political TV Broadcasting

### & The Deregulation of the Telecommunications Industry

When television was first introduced to the American public, it was at the 1939 World's Fair in New York City, and the very first image ever broadcast was that of President Franklin D. Roosevelt, dedicating the Fair. So it's fair to say that television has always been a political – and politicized – medium, and one that has become inextricably linked to both the office of the presidency and the art of campaigning for it. For all of the advances of modern technology over the past forty years – the proliferation of mobile devices, the Internet, streaming services, social media, etc. – broadcast television remains the preeminent form of communication between presidential candidates and voters, and the dominant medium of our democracy. Therefore, attention must be paid to the ways in which that primary mode of communication has been regulated, and deregulated, over time, as well as how it has been used by candidates to communicate with voters.

For purposes of this research, “political broadcasting” refers to candidate speech over the broadcast airwaves, which means we are not focused on the broadcast coverage *about* the candidates, only that *of* the candidates themselves, in various forms. That can take two primary modalities: mediated speech (e.g. an interview with a journalist) or unmediated speech (e.g. a paid advertisement). This differentiation is not to suggest that unmediated speech via broadcast networks does not also have its mediators and gatekeepers; it certainly does. And it's always worth keeping at the fore the fact that the “Big Three” broadcast networks, for whatever else they may also be and whatever other roles they may play in the American



perceived weaknesses of their opponent, and the state and mindset of the country in general. As such, this research looks at the highlights of what was being conveying via paid advertisements for the presidential campaigns from 1976 to 2016.

At the low control end of the spectrum are what is known as “earned media,” events (e.g. campaign rallies) that generate press, at a lower cost to the campaign than paid media. Debates, I would argue, offer a decent chance to get one’s message out; however, the barriers to even getting on a presidential debate stage are enormously high. Press conferences, or “press availability” (“press avail” for short) as it’s called in political circles, where there is generally a statement given by the candidate and a few questions taken from the media, offer a similarly quasi-controlled opportunity to get one’s message out.

We will get to the 2016 election toward the end of this chapter, but there is little doubt that the low control side of the spectrum is where Donald Trump was able to gain a huge media advantage over Secretary Hillary Clinton, though it’s hard to separate out the fact that Trump entered the race as a reality TV star (from NBC, a broadcast network, no less!), and the fact that Secretary Clinton and her campaign were well-known for wanting tight control of her message. In terms of this spectrum of mediation and control, these two candidates provided a remarkably stark contrast.

This brings us to our analysis of research question 3:

**RQ3: How has the regulation of political broadcasting evolved throughout U.S. history?**

## The Radio Act of 1912

The first U.S. regulation of radio telegraphy – which laid the groundwork for regulation of all broadcasting that followed – came with the Wireless Ship Act of 1910, which mandated that any ship of a certain size leaving a U.S. port be equipped with both an apparatus for radio communication and someone capable of operating it. Congress was hesitant to take further action, and the Department of Justice had yet to apply anti-trust law to telecommunications, as it had with commodities like petroleum. The American Telephone and Telegraph Company (AT&T) was regulated as a so-called “natural monopoly,” and the Associated Press and Western Union monopolies went largely without investigation. The 1910 legislation did not assign radio frequency allocation or require licensing, an idea that was unpopular with amateur radio operators at the time, nor did not mandate around-the-clock monitoring.

However, the sinking of the *R.M.S. Titanic* on April 24, 1912 would change all of that. At this point it's the stuff of legends: a wireless radio operator on a nearby ship, the *Californian*, only about 20 miles away from the *Titanic*, tried to warn the British passenger ship that they were surrounded by dangerous icebergs.<sup>116</sup> As dramatized in James Cameron's movie *Titanic*, the wireless operator aboard *Titanic* was too busy sending and receiving passengers' personal messages, stock prices, and the day's news headlines to receive the warning message, because the radio technology aboard the *Titanic* did not allow for multiple frequencies.

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<sup>116</sup> “Titanic verdict is negligence,” *The New York Times*, May 29, 1912, p. 1.

In the wake of the *Titanic* disaster, Congress passed the Radio Act of 1912, and the government began to license private operators to use the spectrum. The 1912 act also called for the setting of radio frequencies, for an international distress signal (SOS), and for criminal penalties against interference with emergency communications.<sup>117</sup> So it was that the U.S. government went from being the predominant user of the electromagnetic spectrum, and began to license private operators. (Packard, 2013) That legislation failed, however, to provide structure on the use of the frequencies, which meant that operators were soon broadcasting on top of one another, to chaotic effect.

### **The Radio Act of 1927**

#### *Public Interest Obligation*

With the Radio Act of 1927, Congress established the Federal Radio Commission (FRC), which would allocate specific frequencies in exchange for the operators' agreement to operate in the "public interest, convenience, and necessity."<sup>118</sup> There was considerable floor debate in both the House and the Senate preceding passage of the Radio Act. Representative Luther Johnson (D-TX) saw the potential for radio broadcasters to exert extreme influence in the political process, arguing,

American thought and American politics will be largely at the mercy of those who operate these stations, for publicity is the most powerful weapon that can be wielded in a republic. And when such a weapon is placed in the hands of one person, or a single selfish group is permitted to either tacitly or otherwise acquire ownership or dominate these broadcasting stations throughout the country, then

<sup>117</sup> <http://legisworks.org/sal/37/stats/STATUTE-37-Pg302b.pdf>

<sup>118</sup> <http://www.americanradiohistory.com/Archive-FCC/Federal%20Radio%20Act%201927.pdf>

woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.

(as quoted in Johnson, 2008)

### *Equal Time Rule*

Taking this contention into serious consideration, Congress passed the Radio Act of 1927 and included in it Section 18, which stipulated,

If any licensee shall permit any person who is a legally qualified candidate for public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.<sup>119</sup>

This language would go on to form the basis of the Equal Time Rule as we know it today.

The Act did not authorize the FRC to regulate advertising, political or otherwise, but it did forbid programming that used “obscene, indecent, and profane language.” A separate federal agency, the Interstate Commerce Commission, at the time had jurisdiction over telephone and telegraph carriers.

### **The Communications Act of 1934**

The two existing regulatory bodies, the Interstate Commerce Commission and the Federal Radio Commission were merged with the Communications Act of

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<sup>119</sup> Ibid.



1934, which superseded the Radio Act. The combined entity, the Federal Communications Commission, would – and still does – have regulatory responsibility for all communications technologies.

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority theretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.<sup>120</sup>

### *Common Carrier*

Title II of the Communications Act authorized the FCC to develop rules for the regulation of “common carriers.” Unlike private or contract carriers, telecommunications companies that act as public utilities agree to provide their services to the public without discrimination for “public convenience and necessity,” in exchange for their licenses. To be licensed as a common carrier, they must demonstrate to the FCC that they are “fit, willing, and able” to provide the services for which they have been granted authority. As will be discussed later in this chapter, common carriers are a contentious political issue these days,

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<sup>120</sup> 47 U.S. Code § 151 found via <https://www.law.cornell.edu/uscode/text/47/151>

specifically regarding whether or not internet service providers should be classified as such.

### *Section 315*

With the passage of the Communications Act of 1934, the equal opportunity provision of the Radio Act became Section 315 of the new statute. Section 315 (a) mandated that broadcast licensees afford equal access to qualified opposing candidates who request it, and (b) compelled broadcasters to offer candidates favorable advertising rates.

### **1959 Amendments to Section 315**

President Trump may not know it, but if there is one person he should thank for the type and volume of media coverage he received during the 2016 election season, it is a forgotten Chicago politician by the name of Lar “America First” Daly. Daly ran for several offices, including twice for President of the United States, and frequently did so dressed as Uncle Sam. Despite never being elected to anything, he left his mark on American politics by invoking Section 315 of the Communications Act to demand that he be given equal time on Chicago television broadcasts to match their coverage of his opponent, incumbent Mayor Richard Daley. The FCC ruled in favor of Lar “America First” Daly, infuriating the Chicago television stations. In response, Congress created four exemptions to the equal time rule: coverage of a candidate during regularly scheduled newscasts, news interview shows, documentaries, or “on-the-spot” news events would not trigger the equal time provision. The FCC has had some creative interpretation of

these exemptions over the years, including designating presidential debates as “on-the-spot” news events, which gives the broadcaster the freedom to pick and choose which candidates go on the debate stage. This calls journalistic credibility into question, when the lines are blurred, and the media corporations are an inextricable part of the “events” they cover.

### ***Red Lion Broadcasting v. FCC (1969)***

In 1969, Red Lion Broadcasting Corporation took issue with the FCC’s rulemaking on the Fairness Doctrine, particularly with the equal time and response to personal attack rules, arguing that the policies impinged on their editorial judgment and First Amendment rights. The Court upheld the FCC rules, citing “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences.” Part of the Court’s decision was based on spectrum scarcity. Writing for the Court, Justice White explains their decision to uphold the doctrine as,

Even where there are gaps in spectrum utilization, the fact remains that existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities for further uses. Long experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible. These advantages are the fruit of a preferred position conferred by the Government. Some present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government's effort to assure that a broadcaster's programming ranges widely enough to serve the public interest. In view of the scarcity of broadcast

frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views, we hold the regulations and ruling at issue here are both authorized by statute and constitutional.<sup>121</sup>

### **The Federal Election Campaign Act (1971)**

The legislation that would ultimately pass was largely modeled on the 1970 campaign finance reform bill,<sup>122</sup> which passed both chambers of Congress, only to be vetoed by none other than President Richard Nixon. (Dunn, 1972) In hindsight, that veto may have been well-founded. The proposed legislation, which Nixon described as having a “good aim, gone amiss,” would have, if signed into law, negated Section 315 of the Communications Act<sup>123</sup> for presidential and vice presidential candidates (but not those running for Congress).

### **1971 Amendments to Section 315**

Section 315 was further amended in 1971 to (a) require broadcast stations to make a reasonable amount of time available for federal candidates and (b) to offer candidates the same rate as the “most favored advertiser,” meaning any discounts given to commercial advertisers, due to volume of their buy, etc. would also need to be extended to federal candidates. Both of these provisions remain in effect today, though they radically differ in practice and in theory. For example,

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<sup>121</sup> Red Lion Broadcasting Co., Inc. v. FCC, 395 U.S. 367 (1969)

<sup>122</sup> For detailed provisions of the bill, see *Congressional Record* (daily ed.), Nov. 23, 1970, p. S18723-S18724.

<sup>123</sup> <https://www.law.cornell.edu/uscode/text/47/315>

today's presidential campaigns rarely take advantage of Section 315(b) because those advertising time slots can easily be bumped; therefore, campaigns typically pay top dollar to secure time slots that cannot be manipulated, guaranteeing them the audience and reach they demand. (West, 2018)

### **FCC Regulations on Political TV Broadcasting**

In addition to its regulation and treatment of the equal time rule, the FCC has put in place several other regulations that govern political broadcasting on television, including the following:

#### *Reasonable Access*

FCC regulations provide that “legally qualified” candidates for federal office are entitled to “reasonable access” to commercial broadcast stations for the broadcasting of campaign advertising. This means that broadcasters are obligated to make time available for federal candidates. Requests for time must come directly from the candidate or their campaign committee. However, outside groups and issue advertisers do not have reasonable access rights.

#### *Lowest Unit Charge*

Presidential candidates are entitled to the “lowest unit charge” (LUC) during the 45 days before a primary election and the 60 days preceding a general or run-off election.<sup>124</sup> The LUC is the lowest advertising rate “of the station for the same class and amount of time for the same period.” In the words of the National Association of Broadcasters, this “provides a candidate the benefit of all discounts

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<sup>124</sup> 47 CFR 73.1942

offered to a commercial advertiser for the same class and amount of time, without regard to the frequency of the candidate's advertising.”

This provision has become the source of much consternation on the part of campaigns in recent years, because of the manner in which broadcasters are able to oblige this requirement, or cleverly avoid doing so. Broadcasters have discretion in the type of ads for which LUC applies, have the right to preempt LUC ads, and have the ability to increase rates as demand for airtime increases. All of this means that campaigns that choose to pay the LUC rate roll the dice on having their ad bumped to a less desirable timeslot, and one less apt to fit their target audience. Therefore, some campaigns, most notably the Romney campaign in 2012, pay full price in order to ensure their ads are aired when and to whom they intend. In 2012, this strategy had dramatic impact on the Romney campaign's budget. In some markets, Romney was spending approximately four times what Obama was spending, for the same airtime.<sup>125</sup>

### *Sponsorship Identification*

Stations are required by the FCC to ensure that ads disclose the identity of the persons or group(s) paying for the ad. In the case of ads run by campaign committees themselves, the “Stand by your Ad” provision of BCRA dictates that the candidate must verbally approve the message. However, in many other cases, where the ad is paid for by a PAC or an LLC, the ambiguity of the names of sponsoring organizations leaves ample room for manipulation (e.g. “the Swift Boat Veterans for Truth” in the 2004 campaign). There are no rules mandating that the

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<sup>125</sup> <http://dailycaller.com/2012/11/19/in-some-cases-romney-paid-four-times-as-much-for-tv-ads-as-obama/>

naming of said groups reveal anything who or what is actually behind them, so the tactic becomes about making corporate expenditures appear to be grassroots-driven.

### *No Censorship*

Herein lies one of the most fundamental, yet problematic, attempts to regulate political speech in the United States. The FCC restricts stations from in any way censoring or altering the content of political ads, even if statements in the ad would be considered libelous or objectively untrue in any other context. While this seems prudent from a free speech perspective, it runs counter to the societal expectations for truth in advertising established by the Federal Trade Commission's very different handling of commercial advertisements, which are subject to a higher standard of scrutiny for truthfulness. Stations are permitted to utilize neutral disclaimers (i.e. "the following message is a paid political advertisement, the truthfulness of which is not verified"); however, given that this time would cut into their advertising window, and therefore adversely affect profitability, this rarely happens.

### *Political Files & Record Keeping*

Stations are required by the FCC to keep a file of all political advertising available for public inspection. For decades, this information was kept locally by each station in paper form, to be made available upon request. However, it is now required to be made available digitally via <https://publicfiles.fcc.gov>. While this seems like a significant improvement toward transparency, the reality of the execution is that stations can - and routinely do - avoid sharing the most pertinent

information with the public by writing “see attached” for scheduling information. The attachments are then not made public.

### **The Pre-Watergate Era**

When Dwight D. Eisenhower was running for the presidency, his campaign took advantage of the burgeoning medium of television to portray the candidate as a straight shooter. In one day of filming, the campaign produced forty 20-second television spots.<sup>126</sup> Fast forward to John F. Kennedy’s run for the White House, in which his campaign produced over 200 ads<sup>127</sup> featuring their telegenic candidate.

Television, as a medium, was disrupting the old shoe leather ways of American politics. No longer was campaigning for president about whistle-stops, shaking hands, and kissing babies, but about reaching the broadest audience possible via television.

By 1968, journalist Joe McGinnis was embedded on the Nixon campaign collecting stories for his bestseller, *The Selling of a President*, which both cemented the importance of television to presidential candidates and “first introduced many readers to the stage-managed world of political theater.” (Fehrman, 2011)

### **The Post-Watergate Era**

By 1976, the long national nightmare of Watergate may have been over, but it cast a long, dark shadow over that year’s presidential election. In what has now

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<sup>126</sup> <https://www.thebalance.com/a-brief-history-of-political-advertising-in-the-usa-38925>

<sup>127</sup> Ibid.



become a recurring theme in presidential politics, 1976 pitted Gerald Ford's experience versus Jimmy Carter's status as an outsider.

The presidential election of 1980 brought with it "the greatest television candidate in history" (citation) in Governor Ronald Reagan. A former movie star, Reagan's natural instinct to play to the television cameras was rewarded. That year, Carter and Reagan each spent about \$15 million on television ads, with third party candidate Anderson spending just under \$2 million.

In 1981, broadcasters did away with their voluntary code of conduct, which had, through self-regulation, established programming and advertising standards. Also in 1981, the FCC established a "postcard renewal process," eschewing a more formal review of whether or not broadcasters were meeting their public interest obligation.

In 1984, the FCC eliminated the "ascertainment requirements," wherein broadcasters were required to poll the community to determine its needs, address those needs through programming, and defend those choices as a part of their license renewal process. President Ronald Reagan was re-elected in a landslide in 1984, thanks to a strong economy. He became the second presidential candidate in history to carry 49 of 50 states.

In 1987, the FCC abolished the Fairness Doctrine, which required broadcasters to provide reasonable opportunities for contrasting viewpoints, under the logic that "economic competition (would) provide a better means of attaining the original goals of the doctrine than the regulation." (Entman, 1989) Fortunately,

the FCC kept in place the Equal Time and Reasonable Access Rules. This move would set the stage for the rise of conservative talk radio shows, no longer bound by the Fairness Doctrine to offer balanced coverage of the issues.

The 1988 presidential election marked a turning point toward negative advertising, which McChesney and Nichols (2013) have dubbed to now be the “lingua franca” of American politics. This turn pivoted on an attack ad against Democratic challenger Michael Dukakis sponsored by the pro-Bush National Security PAC. The ad<sup>128</sup> accused Dukakis of being soft on crime because he allowed convicted criminals to have weekend passes during his tenure as Governor of Massachusetts. One of these criminals, Willie Horton, committed robbery, assault, and rape during one of his weekend furloughs, and the ad succeeded in making crime a central weakness for the Dukakis campaign. In what would become a significant footnote in the annals of American campaign finance history, the brains behind the Willie Horton ad, Floyd Brown, who was at the time the political director for independent campaign committee Americans for Bush, leveraged his notoriety from the success of the Willie Horton ad into the founding of a new political organization by the name of Citizens United.<sup>129</sup>

### **The 1992 Cable Act**

Despite the crux of this legislation being focused on cable providers, it’s one of the best examples of the lobbying power of the National Association of

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<sup>128</sup> Viewable online at <https://www.youtube.com/watch?v=Io9KMSSEZ0Y>

<sup>129</sup> <https://www.newyorker.com/magazine/2012/05/21/money-unlimited>

Broadcasters, who were successful in lobbying for their member broadcasters to charge cable providers fees for the retransmission of content.

### **The 1992 Presidential Election**

In 1992, Governor Bill Clinton, President George Bush, and third-party candidate Ross Perot, in conjunction with the national political parties, spent over \$120 million dollars on television advertising. Ross Perot ran twenty-nine separate ad spots, the largest number of the election. (West, 2018)

### **Telecommunications Act of 1996**

The preamble to the 1996 Telecommunications Act reads,

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new communications technologies.

While this legislation was the first major overhaul of telecommunications law in over sixty years, it did shockingly little to impact the existing regulations in radio and television broadcasting. The Act's reform measures were "so favorable to industry incumbents that... they could well have been written by the National Association of Broadcasters." (Hazlett, 1997) For its critics, at issue was the fact that it allowed further consolidation in radio and television broadcasting markets, and that it failed to take broadcast spectrum allocation under review.

Repeal of the Fairness Doctrine, but the Right to Respond stayed in place (until 2000?) for political campaigns and related attacks. Provided a prescribed right to respond to attacks in broadcast programming.

### **The Gore Commission (1998)**

In the summer of 1997, President Bill Clinton asked Vice President Al Gore to convene an Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (PIAC), now better known as the Gore Commission. The purpose of the task force was to “reexamine the long-standing social compact between broadcasters and the American people,”<sup>130</sup> as the industry was beginning its conversion to digital.

The Gore Commission’s report, released in December of 1998 – between the Iraq disarmament crisis and the Monica Lewinsky-scandal impeachment proceedings – was panned by the *Los Angeles Times* as a “national scandal.”<sup>131</sup> The report and its “colorless set of recommendations” (Larson, 1999)<sup>132</sup> were so benign that the disappointment stemming from them, by some of PIAC’s own members, generated more interest than the report itself. Much of the criticism focused on the Commission’s “failure to address the spiraling of political campaign costs by requiring broadcasters to provide free airtime to political candidates.”<sup>133</sup>

People for Better TV, a national coalition of some prominence at the time that included the American Academy of Pediatrics, the Civil Rights Forum on Communications Policy, the Communications Workers of America, the Consumer

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<sup>130</sup> Full text of the report available <http://govinfo.library.unt.edu/piac/piacreport.pdf>

<sup>131</sup> <http://articles.latimes.com/1998/dec/07/local/me-51464>

<sup>132</sup> <http://independent-magazine.org/1999/04/gore-commission-report/>

<sup>133</sup> Ibid.

Federation of America, the NAACP, the National Council of Churches, and the National Organization of Women, not only criticized the Commission for failing to meet its stated mission and failing to engage interested parties such as themselves in a public debate over the matter, but when one step further and called out the broadcast television media for their hypocrisy in not covering the issue, writing

Television stations, perhaps fearing regulation, kept the issue off the local and national news. The discussion about how TV stations will (or will not) serve their community is taking place in the same backroom, deal-making, back-slapping environment that always preoccupies official Washington. The spectrum giveaway and the secrecy surrounding this important debate are travesties of American democracy.

*(as quoted in Nader, 2000)*

### **Bipartisan Campaign Reform Act (2002)**

McCain-Feingold (2002) sought to compel broadcasters to give free airtime to presidential candidates, a provision that was stricken quickly between the first and second drafts of the bill.

In 2003, the FCC eliminated a wide range of media concentration protections, allowing media conglomerates to control television stations that serve the same market.

In 2012, the FCC took steps toward improving transparency of the advertising process by establishing a system requiring broadcasters in the top fifty markets to post their political advertising information online.

### **The 2016 Presidential Election**

Finally, 2016 would be the exception that proves the rule: the best funded candidate did not win. While Hillary Clinton won the popular vote, Donald Trump carried the Electoral College. What explains the upset? Given the razor thin margins, there is likely no one magic bullet. In a race that close, everything matters to some extent, and isolating the independent variable – fake news on Facebook, Russian interference, the influence of Twitter, the Comey letter, bad polling data, etc. – is impossible. Given that, we are all given our own Rorschach test to identify what we believe mattered.

However, data from the Wesleyan Media Project shows that (1) Clinton's unexpected losses occurred in states in which she did not air ads until the last week of the election, and (2) Clinton's advertisements were largely devoid of policy, in a way not observed in the previous four presidential elections. (Fowler, Ridout, Franz, 2017) While her campaign outspent Trump's, there is some evidence here to suggest that, had the money been allocated differently, she might have carried the Electoral College.

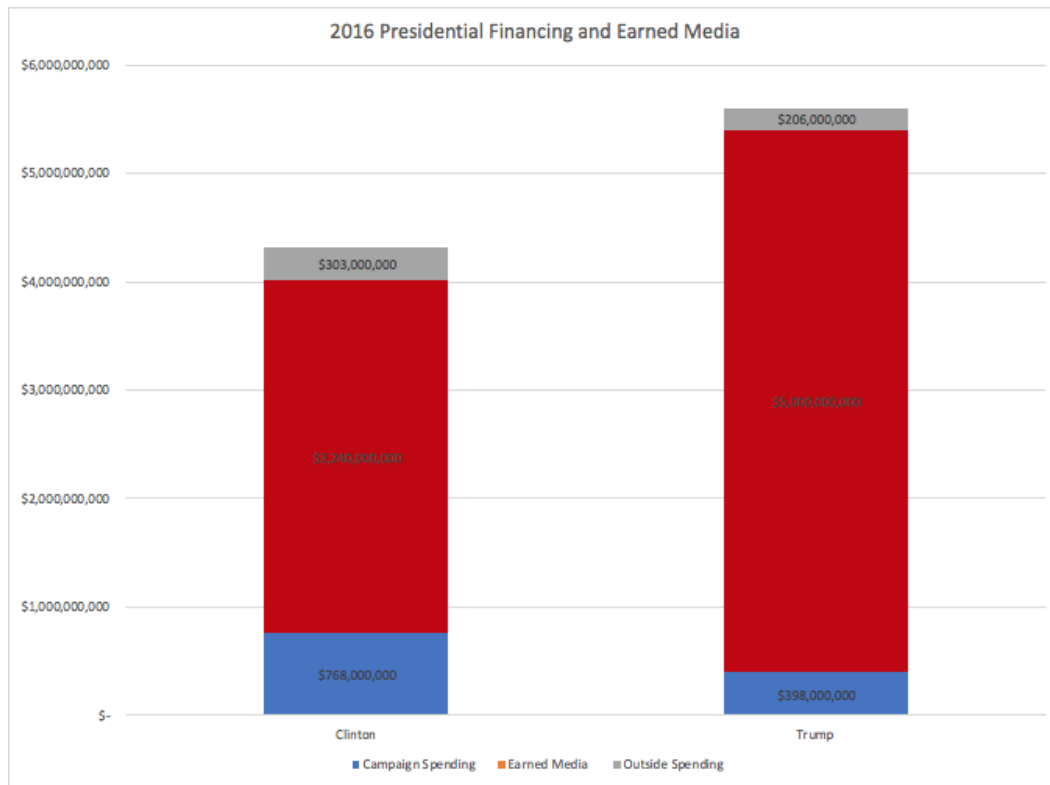
A total of \$2.83 billion was spent on televised political advertising in the 2016 cycle, with over 1 million ads airing for the presidential race alone, at an estimated cost of \$845 million. The biggest advertiser of the 2016 election was the Clinton campaign, which aired over 400,000 ads on broadcast television at an estimated cost of \$258 million. And here is where this election cycle breaks the mold: the second biggest advertiser was not her opponent in the general election, but her opponent in the Democratic primary. Bernie Sanders's campaign – which, obviously, only went through the primary – aired more ads than the Trump

campaign in the primary and general combined.

Outside groups were an important player, funding 28 percent of all federal ads. This figure is consistent with the spending of outside groups in the two previous presidential cycles since *Citizens United*.

The biggest story of the 2016 presidential campaign, however, was the estimated \$5 billion in free or “earned” media that Trump received, compared with only \$3.24 billion for Clinton. When you combined campaign spending, spending by outside groups either for a certain candidate or against their opponent, and the amount of earned media given to the candidate, you see a clear winner in who dominated the airwaves: Donald J. Trump.

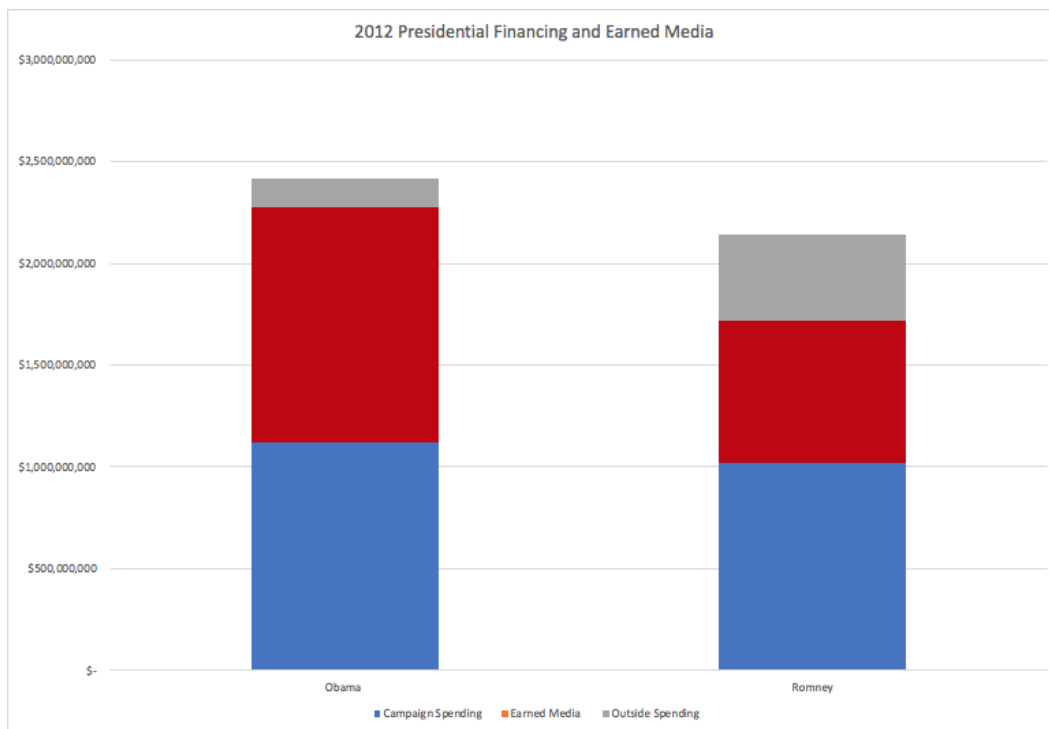
**Figure 4.2 Presidential Financing and Earned Media, 2016**



Data Sources: FEC, Center for Responsive Politics, and MediaQuant<sup>134</sup>

In contrast, the earned media for each presidential candidate in 2012 paled in comparison to what happened in 2016. However, in the aggregate, campaign spending plus outside spending plus earned media did predict the winner of the election.

**Figure 4.2 Presidential Financing and Earned Media, 2012**



Could predicting the winner based on earned media coverage be even more straightforward than that? According to data from the Tyndall Report, which monitors the weekday nightly newscasts of the three American broadcast television networks, two trends are shown since the beginning of their data set in 1988: 1) when the presidency is an open seat election, whoever gets more minutes of

<sup>134</sup> <https://www.mediaquant.net/2016/11/a-media-post-mortem-on-the-2016-presidential-election/>



coverage on the three nightly broadcast news shows, wins the election; and 2) when there is an incumbent in the White House, those three shows will devote more minutes of airtime to the challenger.

**Table 4.1 Broadcast News Coverage of Presidential Candidates, 1996-2016**

	<u>Open Seat</u>		<u>Incumbent Seat</u>	
	<u>Winner</u>	<u>Loser</u>	<u>Incumbent</u>	<u>Challenger</u>
<u>2016</u>	<u>1144</u>	<u>506</u>		
<u>2012</u>			<u>157</u>	<u>479</u>
<u>2008</u>	<u>745</u>	<u>531</u>		
<u>2004</u>			<u>352</u>	<u>445</u>
<u>2000</u>	<u>339</u>	<u>297</u>		
<u>1996</u>			<u>174</u>	<u>337</u>

Data Source: Tyndall Report<sup>135</sup>

### **The National Association of Broadcasters**

The National Association of Broadcasters (NAB) is a trade organization that represents for-profit radio and television broadcasters. According to their website,

<sup>135</sup> <http://tyndallreport.com/yearinreview2016/>

NAB is the chief advocate of broadcasters in our nation's capital, ensuring policymakers are informed on the issues that impact the broadcasting industry. Broadcasters recognize the importance of educating Congress, the Federal Communications Commission (FCC) and the administration on how legislation and regulations affect their business, and more importantly, the listening and viewing public.<sup>136</sup>

They are also one of the largest political contributors in Washington, and according to the Center for Responsive Politics, they spend an average of \$16 million on lobbying every year, putting them in the top ten spenders on lobbying the U.S. federal government. “Broadcasters are the most powerful lobby I have encountered in Washington,” said Senator John McCain (R-AZ). (Snider, 2005)

### **Pending Issues**

#### *NextGen TV<sup>137</sup>*

In 2017, the FCC greenlighted the Next Generation “Next Gen” TV standard, also known as “Advanced Television Systems Committee (ATSC) 3.0,” which will allow broadcasters to transmit higher quality content over the air to televisions and mobile devices, using an Internet Protocol (IP) signal. This advancement in technology will enable advertisers to customize the audience, delivering one ad to one household and a different one to the next, as we have all come to expect with online advertising. This has the potential for an enormous impact on political advertising. Positively, more efficient ad buying could reduce campaign spending. On the other hand, this kind of mass customization will likely

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<sup>136</sup> <https://www.nab.org/about/default.asp>

<sup>137</sup> *Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 16-142, FCC 17-158 (Nov. 20, 2017) (Order & FNPRM).

serve to further polarize the electorate.

### *Net Neutrality*

Net Neutrality is the principle that all traffic on the Internet should be treated the same by Internet Service Providers (ISPs), in keeping with the ethos of democracy and equal access – a “free and open Internet” – that has imbued the Internet since its inception. Under the net neutrality principle, ISPs would be unable to block, “throttle” (i.e. slow down), or charge money for websites and other online content. During the Obama Administration, the FCC classified broadband internet service providers as common carriers, which gave them jurisdiction to enforce net neutrality. However, in December 2017, the FCC voted 3:2 to repeal net neutrality. The U.S Senate has a limited opportunity to stop them; however, Internet Service Providers are substantial campaign donors. The recipient of the most campaign funds from ISPs is none other than Senator John McCain, the most vocal opponent to Net Neutrality, who has taken \$2,554,784 from the telecom industry since he took office.<sup>138</sup> As a point of reference, that is over \$1 million more than the next highest recipient.

AT&T has already given content companies the opportunity to “sponsor” their content, meaning that content would not count against users’ data caps. This is what is known as a “paid fast lane” of the Internet. In a February 2018 text message to their customers, AT&T promoted two of their new sponsors. “Now your plans include sponsored data. This means, for example, that customers who have DirecTV or U-verse TV can now stream movies and shows... without it counting

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<sup>138</sup> <https://www.theverge.com/2017/12/11/16746230/net-neutrality-fcc-isp-congress-campaign-contribution>

against their data plan.”<sup>139</sup> That sounds nice, until you realize that it’s government-endorsed information discrimination.

At the recent Conservative Political Action Conference (CPAC), the National Rifle Association (NRA), one of the biggest and most notorious spenders in politics, presented FCC Chairman Ajit Pai with a rifle<sup>140</sup> and the “Charlton Heston Courage Under Fire Award” for his leadership in repealing net neutrality. What does the NRA have at stake in this telecom regulation fight? This decision will allow them to pay Internet Service Providers like AT&T, Comcast, Verizon, and others to block and “throttle” websites and advertisements advocating for gun control. They will be able to pay enough so that only their pro-gun message reaches the American people. The gun control advocacy community cannot currently compete with the NRA’s fundraising power or their political spending, and now it will have to compete, financially, to ensure basic access to their information online. The repeal of net neutrality has given the NRA a whole new level of firepower.

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<sup>139</sup> <http://bgr.com/2018/02/23/att-net-neutrality-wireless-plans-ugh/>

<sup>140</sup> Which he later turned down on advice of FCC lawyers re: government ethics gift rules

## Chapter 5: Discussion & Recommendations

Arguably, the *raison d'être* of democracy is equality. And yet, the laws and regulations governing campaign finance and political broadcasting in the United States have, over the past forty years and eleven presidential elections, tipped the scales such that only the wealthiest and most powerful of voices can be heard. This is nothing short of an issue of fundamental civil rights: We should all have an equal voice in the political public sphere, just as we have an equal vote at the polls. To cede our democracy to rule by wealthy corporations and individuals is to say goodbye to it, and to subsume our basic human rights and dignities to the demands of a greedy plutocracy. These concerns bring us to our final research questions:

**RQ4: Are existing theoretical models sufficient to explain the empirical realities of the political media complex as observed in U.S. presidential elections since the post-Watergate reform movement? If not, how should the theoretical models be updated?**

**RQ5: What normative and regulatory recommendations are there to be made to reduce the amount of money in the U.S. presidential campaign process and increase transparency?**

### Updating Theory

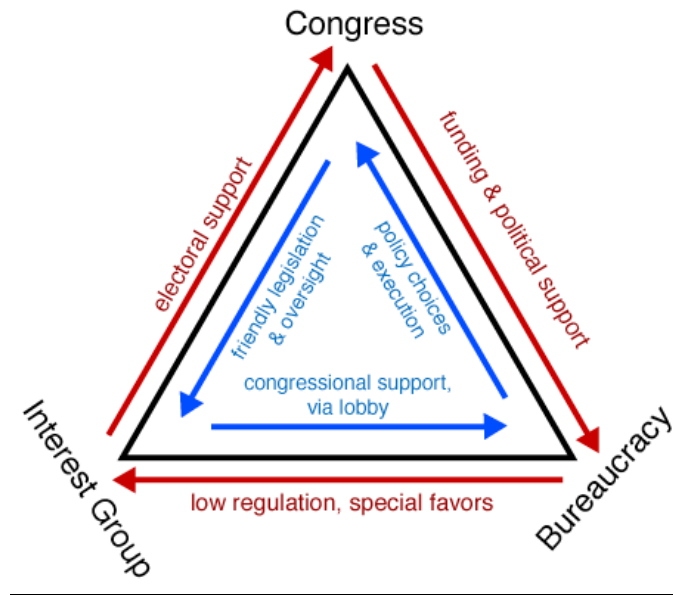
As detailed in chapter two, many theoretical models and schools of thought came together to form the philosophical scaffolding that undergirds this study. However, as previously concluded, while many get close to presenting a theoretical explanation of what is observable here, none do so completely. Ferguson's (1995)

Investment Theory of Money-Driven Political Systems and the Political Economy of what McChesney and Nichols (2013) call the Money and Media Election Complex get closest to reality. What is offered here is a synthesis of these frameworks, presented by modernizing a now outdated political science model.

### *The Iron Triangle*

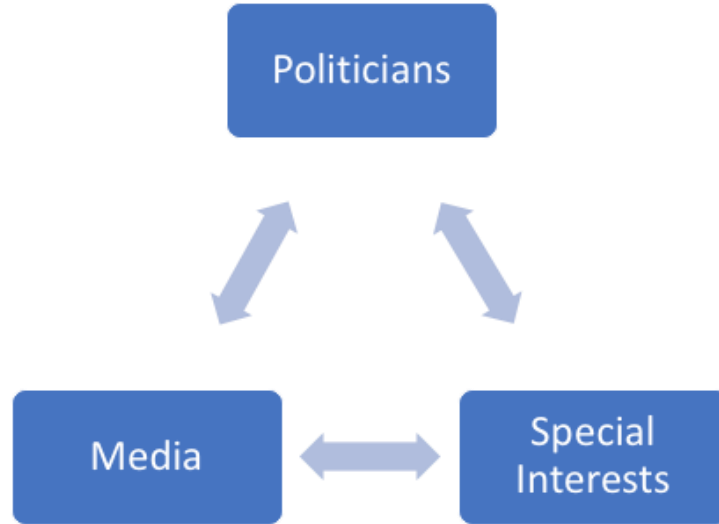
Open any AP Government textbook and you will read about something called the “iron triangle,” a theoretical modeling of influence-peddling between three different entities: Congress, Bureaucracies, and Interest Groups. The defense industry is frequently used as illustrative of the model, wherein industry corporations (e.g. Boeing, Lockheed-Martin, etc.) reach an alignment of interests with the regulatory agencies (i.e. the Department of Defense, the Department of Homeland Security, etc.) and the congressional committees charging with overseeing them (i.e. the U.S. Senate Committees on Armed Services and Appropriations). A central assumption of this theory is that the bureaucracy itself has its own agenda, which is highly questionable. Whereas Congress has the perennial agenda of re-election and industry has the clear agenda of profitability, it is unclear that bureaucracies themselves have agendas aside from perpetuating the job security of the individuals that comprise them.

### **Figure 5.1 The Old Iron Triangle**



Taking into account the questionable assumptions in the model above and our need for an explanatory theoretical model for U.S. politics as it functions (or fails to) today, a new Iron Triangle is envisioned. What is observable through this research and other previously cited scholarship on the subject is the formation of a process architecture wherein politicians (elected officials or those seeking to become them), the special interests that finance their elections (be they individual, corporate, or an assemblage of either), and the corporate-owned television media form a triadic suprastructure wherein each seeks to further its own agenda by and through investing in the agenda of the other two entities. These three powerful entities come together to form their own marketplace, which then has its own market logics. This is a pervasive phenomenon in the modern manifestation of American politics.

**Figure 5.2 The New Iron Triangle**



The New Iron Triangle conceptualizes the Political-Media Complex not as infrastructure as in the previous model, but as process architecture, wherein each part of the trinity has a very clear agenda driven by money. The process in the process architecture is envisioned as an update to Ferguson’s investment theory, meaning each entity above makes an investment in the other two in order to further its own agenda. Whereas political parties were central to Ferguson’s conceptualization, the new iron triangle reflects their diminished role as an intermediary in the exchange of money. In a post-*Citizens United* political system, all that is truly required to fund a presidential candidate, at least through the early primary states, is one wealthy backer (i.e. what Foster Friess was to Rick Santorum or Sheldon Adelson’s PAC was to Newt Gingrich). These special interests, here in the form of wealthy individual benefactors, invest in the candidates who they know will, in turn, invest in them and their agenda, be that in the form of favorable legislation, in maintaining the status quo, or in advancing a political agenda such as, in the case of Adelson, support for Israel.



## Normative Recommendations for Better Regulation

As stated from the outset, the goal of this dissertation is to offer actionable recommendations that would bring our implementation of politics and media into closer alignment with the normative democratic ideals that birthed them. More aspirational than operationalizable, the currently trending scholarly prescriptives and activist proposals take two primary forms: either 1) a constitutional amendment that would overturn *Citizens United*, or 2) a doubling down on the public campaign financing model. Neither of these are supported by the political realities discussed in this research. The Supreme Court is only getting more conservative and, even if the Court were to reach partisan equilibrium in the near future, the unraveling of the Court's precedent would require years. Secondly, public support for the public campaign finance model is at an all-time low, and unlikely to reverse without an investment in public education, which neither Treasury nor the FEC seem inclined to fund. If political communications scholarship is to be relevant, and be seen as such politically, its recommendations must be both normative and practical, if not altogether realistic in a given political regime such as the Trump Administration. This is why the recommendations presented here are regulatory in nature. These nonpartisan correctives could be implemented at any time and mandated in a variety of ways: by executive order, through legislation, or by agency-level rulemaking; no Supreme Court ruling or Constitutional amendment required.

### *A Czar is Born*

At present, the United States has thirty-some-odd executive branch officials that could reasonably be considered "czars," though the U.S. government has never

had an official position with “czar” in the job title. While the word “czar” itself sounds antithetical to democracy, it’s commonly used media shorthand for someone charged with oversight in a specific issue area. The best known among these czars are likely the Drug Czar (the Director of the Office of National Drug Control Policy), the AIDS Czar (the Director of the Office of National AIDS Policy), and the Intelligence Czar (the Director of National Intelligence). But we also have, and have had as history demanded, an abundance of niche czars, including a Bird Flu Czar (the Advisor to the President for Public Health Emergency Preparedness), a Mine Safety Czar (the Assistant Secretary of Labor for Mine Safety and Health), and back in the FDR Administration, a Rubber Czar (appointed by the Chairman of the War Production Board).

It stands to reason that, with the universally acknowledged myriad problems in our electoral system(s), the United States could benefit from having an Elections Czar. This research alone has identified regulatory issues at the FEC, the SEC, the IRS, and the FCC – many of which would require the kind of inter-agency cooperation for which czars are uniquely well-suited to facilitate. With all of these issues, not to mention the incredibly serious election issues that fall outside the scope of this particular research, such as gerrymandering and voter suppression, the case could be made for a trans-agency federal Department of Elections or something to that effect that would combine the FEC and the Election Assistance Commission. However, that seems unnecessarily costly and bureaucratic when an Elections Czar might just as adeptly address these cross-institutional issues. Creating and appointing (or better yet, nominating for Senate confirmation) an

executive branch Elections Czar would likely engender political goodwill – and good press – for any President proposing it.

### *Reducing Foreign Spending in U.S. Elections*

Another important task that could be taken on by an Elections Czar is that of restoring both the integrity of and public confidence in our political process by identifying and preventing foreign interference in our elections. As more information is revealed about Russian interference in the 2016 election, it looks increasingly like the U.S. intelligence community – the Department of Homeland Security, the FBI, and the CIA – has an interest in more closely monitoring our elections, and in fixing the system in such a way as to make it less penetrable and vulnerable to manipulation from the outside. Former Homeland Security Czar, Homeland Security Secretary Jeh Johnson, noted that, “...we should carefully consider whether our election system, our election process, is critical infrastructure like the financial sector, like the power grid.”<sup>141</sup>

All signs indicate that there were multiple points of entry for Russia into the 2016 election: manipulation on social media, hacking the DNC’s e-mail server, etc. It stands to reason that, given the opacity of dark money flowing into nonprofits and mysterious single-purpose LLCs, Russia may have funded a great many independent expenditures under the cover of powerful dark money groups that would gladly take their money, such as the NRA. Yes, this is technically illegal. Federal law<sup>142</sup> prohibits foreign governments, foreign-based companies, and people

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<sup>141</sup> <https://www.infowars.com/homeland-elections-czar-picks-sides-trump-policies-un-american-irresponsible/>

<sup>142</sup> 11 C.F.R. § 110.20

who are not U.S. citizens or permanent residents from contributing or spending money in connection with any federal, state, or local election, but, as it currently stands, this is functionally more loophole than law. The IRS, SEC, and FEC have been so grossly negligent in enacting disclosure regulation and enforcement, one could make the case that they've actually invited this type of foreign interference by leaving the door wide open.

### *Gridlocked and Loaded*

It is worth noting that the NRA spent \$54 million in the 2016 election – *more than double* what it spent in the 2012 election – \$31 million of which was in support of Trump. From where did all of that additional funding come? Our campaign finance laws are such that we may never truly know unless Special Counsel Robert Mueller issues a subpoena for the NRA's donation records, but the FEC has taken the remarkable step of opening a "preliminary investigation" into the matter. While the NRA likes to claim its strictly a grassroots organization rather than a lobbying machine for the commercial interests of gun manufacturers, only half of their money comes from membership dues.<sup>143</sup> According to the NRA's own website, they "must continuously raise the funds needed to sustain the NRA's legislative and political activities."<sup>144</sup> The FEC's decision to open the door on an investigation comes as a result of agitation on the part of Senator Ron Wyden (D-OR) and a complaint<sup>145</sup> filed by Brad Woodhouse, Treasurer of the American Democracy Legal Fund.

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<sup>143</sup> <http://www.amarkfoundation.org/nra-who-funds-the-nra-11-13-15.pdf>

<sup>144</sup> <https://www.vox.com/the-big-idea/2018/2/27/17051560/money-nra-guns-contributions-donations-parkland>

<sup>145</sup> <http://americandemocracy.org/wp-content/uploads/2018/01/2018.1.22-FEC-ADLF-NRA-Complaint.pdf>

At the risk of hitting awkwardly close to home, I would suggest to Special Counsel Mueller that, in reviewing the NRA's donation records for sources of foreign money laundering, he first look for a South Dakota-based company called Bridges LLC. Founded by conservative operative Paul Erickson in February 2016 (when he paid an additional \$50 to expedite the paperwork<sup>146</sup> faster than the typical 4-6 weeks) the stated purpose of the company was to help his friend Maria Butina with tuition for her graduate studies. Putting aside that as a bizarre rationale for establishing an LLC, since college tuition can be paid in any number of ways through a variety of vehicles, it's further complicated by the fact that Maria Butina is a Russian political operative who founded her own gun rights organization and served from January 2015 to May 2017 as a Special Assistant to the deputy governor of the central bank of Russia and NRA life member, Alexander Torshin.<sup>147</sup> Ms. Butina enrolled in graduate school in August 2016, calling into question the need for expediting in February anything to do with tuition that would not come due until August 1st. It might also be worth exploring whether or not Bridges LLC did, in fact, pay any part of Ms. Butina's tuition at the University where she was (and ostensibly continues to be) enrolled: American University in Washington, DC.

The point here is not to pick on Ms. Butina or the NRA, but to demonstrate the potential for foreign collusion with domestic dark money organizations. FEC Commissioner Ellen Weintraub has been sounding the alarm bells about the threat of foreign meddling and the FEC's lack of oversight for several years, penning

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<sup>146</sup> <https://twitter.com/ScottMStedman/status/965702895126462464>

<sup>147</sup> <https://www.thedailybeast.com/the-kremlin-and-gop-have-a-new-friendand-boy-does-she-love-guns>

multiple op-eds and even hosting a public forum on the issue in the middle of the 2016 election.<sup>148</sup> “It defies logic to allow groups of foreigners, or foreigners in combination with American citizens, to fund political spending through corporations,” wrote the Commissioner.<sup>149</sup>

In an increasingly global economy, and with not just foreign nationals but foreign *governments* investing in U.S. corporations – such as the kingdom of Saudi Arabia’s recent \$3.5 Billion investment in Uber<sup>150</sup>, a company that has become a major political player in recent years,<sup>151</sup> which bought them a seat on the company’s board of directors – distinguishing between what is domestic and what is foreign political speech is becoming ever more difficult. American corporations with global reach and foreign investments are only multiplying, so the lack of disclosure regulations about their political spending is likely to become more, not less, of an issue in coming election cycles. Perhaps the implementation of a voluntary firewall system to protect against foreign interference would be a good start for corporate America. Certainly, the onus should be on the corporations themselves to maintain the trust of the concerned American consumer/voter. This will require market pressure, which will depend on public awareness and education on the issue. This means, however, that it will be largely dependent on America’s broadcasters to raise the issue. And given that many of them have foreign investors – and that the FCC just recently approved the first 100% foreign ownership of a group of

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<sup>148</sup> <https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/forum-corporate-political-spending-and-foreign-influence/>

<sup>149</sup> <https://sunlightfoundation.com/2016/04/15/election-agency-mulls-options-to-curb-foreign-political-money-punts-till-summer/>

<sup>150</sup> <https://www.nytimes.com/2016/06/02/technology/uber-investment-saudi-arabia.html>

<sup>151</sup> <http://www.jwj.org/how-much-will-uber-spend-to-get-its-way>

broadcast stations<sup>152</sup> – they will likely need to be compelled by public interest and outrage to give critical coverage to this issue.

Furthermore, it's worthy of attention that the FCC's recent decision to extend broadcast ownership rights to a 100% foreign owned media corporation overturns statutory restrictions on foreign influence that have been in place to protect the sovereignty of the American political public sphere since World War I. In other areas of U.S. law, ownership has been equated with control, as should be the case here. "Federal securities law considers the purchase of a 5% share of a corporation to be significant and worthy of disclosure." (Weintraub, 2017)<sup>153</sup> Wireless communications law, as established by Section 310<sup>154</sup> of the Communications Act of 1934, prohibits any foreign government or its representative, or any alien or any representative of an alien, or any foreign organized corporation from holding an FCC license. If you're a foreigner or a foreign corporation, much less a foreign government, you may not apply to the FCC to hold a radio license. Secondly, foreign individuals, foreign governments, and foreign organized corporations are prohibited from owning or voting more than 20% of the equity or voting interests in an FCC licensee. However, in recent years, the FCC has determined that it has discretion to elect not to enforce that limit when it believes that the public interest warrants doing so. For example, when Rupert Murdoch and Australian-owned News Corporation's ownership of FOX News was challenged in 1995, the FCC deemed it in the national public interest to have a

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<sup>152</sup> <https://www.broadcastlawblog.com/2017/02/articles/fcc-approves-for-the-first-time-100-foreign-ownership-of-us-broadcast-stations/>

<sup>153</sup> [https://www.fec.gov/resources/cms-content/documents/DPCC-19-July-2017\\_Final.pdf](https://www.fec.gov/resources/cms-content/documents/DPCC-19-July-2017_Final.pdf)

<sup>154</sup> <https://www.law.cornell.edu/uscode/text/47/310>

fourth broadcast network, and elected not to enforce their own rules about equity and voting interest.<sup>155</sup>

### *The Federal Election Commission*

The 40-year old Federal Election Commission is woefully inadequate for the transparency and disclosure demands of modern democracy, yet costs taxpayers over \$60 million per year. The FEC requires fundamental reforms in order to perform its most basic function and, almost as importantly, to restore the confidence of the American people in our election systems.

As discussed in Chapter 3, the FEC is, by its 3:3 design, a recipe for stagnation and inaction. This could be solved relatively painlessly by Executive Order appointing, as previously discussed, an Elections Czar, and making that person the head of agency. A 7-member body would disrupt the gridlock by institutional design. Furthermore, this strategy would tilt the power toward the Executive Branch and away from the Legislative Branch, which has a vested self-interest in agency inaction.

The agency itself could, through rulemaking, change its policy to require only three votes (instead of the present four) to move forward on investigations and enforcement actions. Surely this self-regulation would help the FEC better inoculate itself against criticism. While on the subject of rulemaking, the FEC could also change its policy process to one of adjudication by commissioners rather than

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<sup>155</sup> [http://articles.latimes.com/1995-05-05/business/fi-62827\\_1\\_broadcast-ownership-rule](http://articles.latimes.com/1995-05-05/business/fi-62827_1_broadcast-ownership-rule)



through the existing arduous process<sup>156</sup> of public comment.<sup>157</sup> Take, for example, the FEC's most recent Advance Notice of Proposed Rulemaking<sup>158</sup> on internet communication disclaimers and the definition of "public communication," which would regulate the disclaimers needed on online political ads. Rather than the agency being able to take swift action in order to prevent the kind of online fraud seen in the 2016 election cycle from happening again in the upcoming 2018 midterms, the FEC has to put this notice up and await formal public commenting. That process is scheduled for June 2018, meaning it has no chance of correcting the issue (or even providing for better oversight of it) for the 2018 election cycle. Whereas other agencies may have the luxury of time to go through a formal public commenting process, it seems like an unnecessarily bureaucratic step for an agency tasked with staying current every election cycle. This particular issue becomes almost laughable when you consider that their first attempt<sup>159</sup> to regulate online political ads began in 2011, over 3 election cycles ago, and that their inability to move forward on such rulemaking has prompted Congress to take action with the Honest Ads Act, currently at the center of debates around Facebook and the data privacy breach involving Cambridge Analytica.

In addition to stepping up the requirements for online ads, the FEC must get serious about disclosure in the digital age. The public has a right to know, in real time, who is funding whom. There is absolutely nothing preventing the FEC from

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<sup>156</sup> [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf)

<sup>157</sup> <http://sers.fec.gov/forces/addcomments.htm?pid=74739>

<sup>158</sup> <http://sers.fec.gov/fosers/showpdf.htm?docid=373521>

<sup>159</sup> <https://www.fec.gov/updates/advance-notice-of-proposed-rulemaking-for-internet-communication-disclaimers/>

mandating that campaigns disclose online every check they receive, right as it is deposited in the bank. The lag time allowed by quarterly and monthly filings opens up the opportunity for campaigns to take monies from unscrupulous sources, unbeknownst to the American people until well after Election Day.

In the 2012 election cycle, the IT infrastructure at the FEC was so inadequate that the system crashed in response to the overwhelming number of small dollar donors to the Obama campaign after its first quarterly filing.<sup>160</sup> Making matters worse, there are no universal standards for the formatting of public data on campaign finance filings, which makes the watchdog roles of journalists, advocacy organization, and academic researcher/reformers more complicated and time consuming. The technological advances of big data, which have disrupted so many other fields of research, cannot be leveraged when that data is kept in a multitude of different formats, including PDF documents.

### *Transparency versus Privacy*

Disclosure of political affiliation is mandated for federal campaign contributions as regulated by the FEC, in order to limit the kind of secrecy that purportedly allows for corruption. This paper sets that particular debate aside for future consideration. For now, it is enough to be cognizant of the inherent “streetlight effect”<sup>161</sup> created by having an independent regulatory agency charged with monitoring only the small spectrum of political contributions for which

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<sup>160</sup> <http://thehill.com/opinion/finance/379574-the-political-economy-has-a-stock-market-we-should-keep-an-eye-on>

<sup>161</sup> The streetlight effect is a type of observation bias theorized by David H. Freedman, wherein researchers tend to look for answers where the looking is good, rather than where the answers are likely to be hiding. Freedman, David H. December 10, 2010. “Why Scientific Studies Are So Often Wrong: The Streetlight Effect,” *Discover*.

disclosure is currently mandated: those donations of \$200 or more (to the federal limit of \$2,700 per person, per election) made by individuals to federal campaigns. If, as Justice Louis D. Brandeis famously suggested, “sunlight is said to be the best of disinfectants,”<sup>162</sup> the current campaign finance lightscape is more streetlight than sunlight, leaving the billions of dollars of contributions made by corporations, foreign governments, Super PACs, and special interests groups in the dark, and offering only the smallest illusion of transparency.

On January 21, 2016, co-incidentally the sixth anniversary of the Supreme Court’s *Citizens United v. FEC* decision, a three-judge panel of the D.C. Circuit Court of Appeals unanimously rejected a challenge, brought by U.S. Representative Chris Van Hollen (D-Maryland), to a hugely controversial – and, not surprisingly, politicized – FEC disclosure rule. The rule in question allows various types of organizations to run television, cable, and radio advertisements attacking or praising federal candidates without disclosing the identities of those who donated the funds behind the ads. In the opinion,<sup>163</sup> Circuit Judge Janice Rogers Brown outlines the inherent conflict around campaign finance disclosure, writing:

The arc of campaign finance law has been ambivalent, bending toward speech and disclosure. Indeed, what has made this area of election law so challenging is that these two values exist in unmistakable tension. Disclosure chills speech. Speech without disclosure risks corruption. And the Supreme Court’s track record of expanding who may speak while simultaneously blessing robust disclosure rules has set these two values on an ineluctable collision course.<sup>164</sup>

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<sup>162</sup> Brandeis, Louis. December 20, 1913. “What Publicity Can Do,” *Harper’s Weekly*.

<sup>163</sup> The opinion was joined by Judges David Sentelle and Raymond Randolph.

<sup>164</sup> *Van Hollen v. FEC*, D.C. Cir. No. 15-5016 (Jan. 21, 2016)

Balancing these tensions in the American political system, and offering normative recommendations for their resolution, will be the focus of future research. For now, the focus remains on a more basic right to political privacy, which is that of political affiliation itself rather than contributions.

The second form of mandatory disclosure sanctioned by the Supreme Court is that of state regulations requiring registration of one's political party affiliation. On the surface this is a voluntary disclosure of political party affiliation; however, in order to vote in primaries that are "closed," – as is the case in fifteen states<sup>165</sup> and the District of Columbia – voters must be prior registered members of the political party holding the primary.<sup>166</sup> As a matter of state law, this information then becomes a part of the public record, which means that it becomes discoverable online by anyone with Internet access and a few key data points like name, date of birth, and zip code. (Bowman, 2012) The practice of closed primaries has the additional side effect of excluding independent voters from weighing in during primary elections.

It used to be that an American citizen could walk into a voting booth, cast his or her secret ballot, and be reasonably confident no consequences would be suffered as a result of expressing his or her political voice. The notable exception to this expectation was during the so-called "Red Scare," Senator Joseph McCarthy's anti-Communist crusade in the 1950s. While McCarthy's witch-hunt

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<sup>165</sup> The fifteen states with closed primaries are Connecticut, Delaware, Florida, Kentucky, Maine, Nebraska, Nevada, New Jersey, New Mexico, New York, Oklahoma, Ohio, Oregon, and Pennsylvania.

<sup>166</sup> State laws differ in regard to how far in advance of a primary a voter is allowed to change his or her party registration.

relied largely on speculation of affiliation or sympathy with the Communist Party, in the digital age, one's political affiliation is increasingly impossible to mask, partly because of the regulatory calls for more and more detailed levels of disclosure and partly due to the data-driven nature of modern politics. As Hunter (2002) and Kreiss (2010) have argued, political privacy and freedom of association are uniquely at risk with the advent of online campaigning and data-driven political practices.

With a few clicks of a mouse and some easily obtainable data points, such as date of birth and zip code, anyone with Internet access can ascertain your political party affiliation, get your home address, and have a map to your house – all in less than about five minutes. These are data points to which any employer, prospective employer, or school admissions officer would have easy access. In an era of escalating political intolerance, with routine violence at presidential campaign rallies, could discrimination based on political affiliation be far behind?

In the digital era, any illusion of anonymity is quickly eroding. Not only are we living in an era of ubiquitous government and third-party intermediary surveillance, but the same Supreme Court that has upheld our fundamental rights to political free speech, freedom of expression, freedom of association, and even our right to anonymity in speech has sanctioned disclosure rules that have a chilling effect on these integral tenants of self-government. (BeVier, 1978)

The sheer accessibility of information in the digital age exponentially increases the potential for “economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility” – the concerns

Justice Harlan outlined over half a century ago in *NAACP v. Alabama*. Illustratively, supporters of California’s Proposition 8 ballot initiative, which sought to ban same-sex marriage in the state, faced relentless harassment after a federal court declined to bar the disclosure of their identities in 2009. The well-funded opponents of the same-sex ban marriage created a website that used the Prop 8 donor list and created an interactive “hate map” to their homes. What followed illustrated precisely the kind of intimidation tactics and “manifestations of public hostility” the Supreme Court articulated in *NAACP v. Alabama*, with some Prop 8 supporters being fired from their jobs for their affiliation, and several of their businesses being boycotted.

#### *The Securities and Exchange Commission*

Any citizen w/ a 401k invested in stocks or mutual funds has a stake in how corporations spend their money for political purposes. The draft Shareholder Protection Act<sup>167</sup> would amend the Securities Exchange Act of 1934 to require shareholder authorization before a public company could make certain political expenditures. Short of passage of this bill, the SEC could take a much-needed step toward transparency by rulemaking to require publicly traded companies to disclose both direct and indirect political spending.<sup>168</sup>

Furthermore, publicly traded broadcasting companies could be compelled, either by legislation to amend the Securities and Exchange Act or by SEC rulemaking, to list the fair market value of the government subsidy they receive in

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<sup>167</sup> Full text of the bill available online at <https://www.congress.gov/bill/113th-congress/senate-bill/824?q=%7B%22search%22%3A%5B%22shareholder+protection+act%22%5D%7D>

<sup>168</sup> <https://www.sec.gov/comments/4-637/4-637.shtml>

the form of free spectrum. Such a disclosure requirement, while not an undue burden on the corporations themselves, would serve the public interest by allowing for transparency and public discernment about the value of such corporate welfare subsidies.

#### *The Federal Trade Commission*

The Federal Trade Commission has what could be the smallest possible role in improving regulation, but perhaps the most visible to the American public. Just as it does with commercial advertisers, the FTC could enforce truthfulness in political advertising. Granted, this is a slippery slope on free speech grounds; however, particularly given the trends around native advertising (e.g. advertising on podcasts produced to sound like native content) even a simple disclaimer (e.g. “The following claims are unproven by the Federal Trade Commission”) could be helpful in making a clear distinction from what is content, what is substantiated commercial advertising, and what is political propaganda.

#### *The Internal Revenue Service*

The IRS has an unquestionably crucial role to play in making the post-*Citizens United* financing of political campaigns palatable to the American public. First, the IRS could put resources toward public education about the public funding program for presidential campaigns via the \$3 checkoff on individual tax returns. Anecdotally, this program is misunderstood even by those who are well versed in presidential politics. Checking the box neither increases the amount of any tax liability owed to the government, nor decreases the amount of one’s return; it simply allocates \$3 to a Treasury Department fund. Given the low rate of

participation, it seems at least worth the effort of trying a public education campaign before abandoning the program altogether. If the public funding program is to be restored, the \$3 checkoff amount likely also needs to be indexed for inflation every two years, as the spending side of the equation is.

More importantly, the IRS could audit the many 501(c) organizations that engage in political advocacy, ensuring that they are not merely pretending to meet the requirements of 51% of their funds going toward non-political activities. A higher level of nonpartisan scrutiny applied to these rapidly proliferating organizations could help restore public confidence.

#### *The Federal Communications Commission*

Through legislation, Executive Order, or FCC rulemaking, action must be taken to define and clarify the broadcasters' public interest standard once and for all, and to articulate clearly what that means in terms of their obligation within the public sphere. Allowing the public interest standard to remain ambiguous, amorphous, and open to misinterpretation hurts the American public and hurts the FCC's own ability to regulate the broadcasters. The National Association of Broadcasters is quick to cite their public interest obligation when it's politically expeditious to do so, giving them a powerful – and powerfully vague – bargaining chip.

The FCC has been working for years towards comprehensive political file disclosure for public inspection of public files, which are available online at <https://publicfiles.fcc.gov/>. These records need to go from publicly available PDF documents (rife with missing and incomplete information) toward a standard of



useable structured data on ad-buy information. The vast majority of the political files viewed for this research project offered no information whatsoever on the specific time being requested. Campaigns fill out the required form and write in “see schedule;” however, the FCC does not currently make those attachments publically available online.

### **The Revolution will be Televised**

There is plenty of reason to push back against the fatalistic technological determinism of Gil Scott-Heron (1970) and Neil Postman (1985) on television and its inherently negative impact on public discourse. Sure, the corporate-owned mass media have generally deteriorated the substance of political debate over the last forty years, but that doesn’t mean it’s a foregone course that cannot be course corrected.

#### *Sunlight in the Courtroom*

There is some irony to the fact that Justice Brandeis noted that “sunlight is the best disinfectant,” yet the Supreme Court continues to be shrouded in secrecy. Whereas Congress plays out on live television every day, the Supreme Court continues to be, in the words of Fix the Court Executive Director Gabe Roth, “our nation’s most powerful, least accountable institution.”<sup>169</sup> Over the years, a handful of bills have been introduced that would permit or require cameras in the High Court. Former Pennsylvania Senator Arlen Specter (R/D-PA), Chairman of the

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<sup>169</sup> <http://www.msnbc.com/msnbc/why-doesnt-the-supreme-court-have-cameras>

Senate Judiciary Committee and a longtime advocate of cameras in the courtroom, introduced several of these bills, arguing in 2007 that,

the Supreme Court makes pronouncements on constitutional and federal law that have direct impacts on the rights of Americans. Those rights would be substantially enhanced by televising the oral arguments of the Court so that the public could see and hear the arguments presented.<sup>170</sup>

A 2010 poll showed that 60% of Americans thought that televised Supreme Court hearings would be good for democracy, and yet the Supreme Court has repeatedly denied congressional requests to give C-SPAN access to its proceedings, most notably during *Bush v. Gore* in 2000. A *Times* editorial from 2010 entitled “Your Reality TV” harshly criticized the Court for generally veering away from transparency rather than toward it, stating,

Rather than opening up, the court has shown signs of turning further inward. After President Obama, in his State of the Union address, criticized the court’s recent ruling on corporate campaign spending, Chief Justice John Roberts questioned whether the justices should continue to attend the event.<sup>171</sup>

A poll conducted recently by Fairleigh Dickinson University<sup>172</sup> showed that 45% of respondents thought TV would be good “because the judges would consider public opinion more” when making decisions. Others expressed concern that justices would consider public opinion *too much* when making decisions. However, given that Supreme Court seats are lifetime appointments, that concern lacks

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<sup>170</sup> <https://fas.org/sgp/congress/2007/s344.html>

<sup>171</sup> <http://www.nytimes.com/2010/03/14/opinion/14sun2.html>

<sup>172</sup> <http://publicmind.fdu.edu/courtvtv/>

obvious merit when weighed against the open government considerations of the proposed legislation.

Furthermore, television could be an important safeguard against corruption in the High Court. Members of the Supreme Court are remarkably unconstrained by the kinds of disclosure guidelines as congress and other federal and judicial officials. The 1978 Ethics in Government Act, yet another post-Watergate reform to stem corruption in Washington, mandates that federal judges, including those on the bench of the Supreme Court, file a disclosure to report certain gifts of “transportation, lodging, food, or entertainment” over a certain amount. However, this type of cursory disclosure, absent public attention or media scrutiny, does little to curb the potential influence of these benefactors on the Court. Case in point: when Justice Antonin Scalia died in 2016, he was visiting Cibolo Creek Ranch, free of charge, as a guest of John B. Poindexter. Interestingly enough, one of Poindexter’s companies was the defendant in a case that made it all the way to the Supreme Court in 2015, when the Court declined to hear the age discrimination suit. Even if this does not represent a literal quid pro quo, it certainly wouldn’t pass the smell test for most of the American public. Having a camera on them might be just the corrective needed for the Court to reduce even the smallest hint of impropriety.

#### *Reclaiming America’s Last Public Square*

We, the American people, own the airwaves. And yet, we have permitted that precious public resource to be given away by Congress, and auctioned off to the highest bidder by the FCC, without ensuring that broadcasters serve our public

interest in return. In 1996, when Congress was debating the Telecommunications Act provision that would ultimately give broadcasters \$70 billion worth of digital frequency “beachfront property,” Senator Bob Dole quipped in his trademark wit, “We don’t give away trees to newspaper publishers. Why should we give away more airwaves to broadcasters?”<sup>173</sup>

Absent a mandate of free airtime for presidential candidates, the presidential public financing program, to the extent that it continues to be used in future elections, is the precise definition of corporate welfare: taking Treasury tax dollars from the American people and putting them into the thick pockets of the television broadcasters.

In conclusion, there is much that can be done, aside from hand-wringing and tweeting, to begin the process of pulling apart the political-media complex, if not to dismantle it entirely then to let enough sunshine in for the American people to see who is controlling what, whom, and how. The good news about our current moment in history may just be that it’s a low point grave enough to get the public’s attention and propel Congress and the regulatory agencies into action. As seen with Watergate, public opinion can create political will. So perhaps the silver lining on the current state of scandal(s) and crisis our democracy finds itself in is that nothing is better for generating public outrage and, therefore, political will. This is a moment to be capitalized upon.

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<sup>173</sup> <http://www.nytimes.com/1997/03/27/opinion/giving-away-the-airwaves.html>

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## **APPENDIX A**

*Needs to be scanned as PDF:*

NBA Form PB-18

WBUP

Filed by American Media & Advocacy Group  
on behalf of RNC/Trump for President

Broadcast Length: "See Schedule"

Time of Day, Rotation or Package: "See Schedule"

Days: "See Schedule"

Class: "See Schedule"

Times per Week: "See Schedule"

Number of Weeks: "See Schedule"