

October 2018

An Examination of the Need for Campaign Finance Reform Through the Lens of the United States Treaty Clause and Environmental Protection Treaties

Jordan Smith

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Constitutional Law Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [International Law Commons](#), [Natural Resources Management and Policy Commons](#), and the [Oil, Gas, and Energy Commons](#)

Repository Citation

Jordan Smith, *An Examination of the Need for Campaign Finance Reform Through the Lens of the United States Treaty Clause and Environmental Protection Treaties*, 43 Wm. & Mary Envtl L. & Pol'y Rev. 299 (2018), <https://scholarship.law.wm.edu/wmelpr/vol43/iss1/10>

AN EXAMINATION OF THE NEED FOR CAMPAIGN FINANCE REFORM THROUGH THE LENS OF THE UNITED STATES TREATY CLAUSE AND ENVIRONMENTAL PROTECTION TREATIES

JORDAN SMITH*

INTRODUCTION

The United States' federal election system is constantly the focus of debate, including components from voting mechanisms, to candidate selection, and to the candidates themselves. Unsurprisingly, campaign finance has also been the source of much debate. For decades, scholars, politicians, lawyers, and laypersons have debated the merits and shortcomings of the campaign finance system¹ enumerated in the United States Code.² The landmark *Citizens United v. Federal Election Commission*³ ("FEC") decision in 2010, in which the United States Supreme Court equated corporate speech to human speech, merely added fuel to the fire.⁴ The considerable volume of scholarship based upon campaign finance reform covers a wealth of topics, but one stone has been left unturned: the impact of unfettered campaign expenditures on the development of multi-lateral international treaties.

It may be quite difficult for one to imagine a scenario in which campaign finance could impede the adoption of a treaty under American law. However, consider the Paris Climate Accord ("PCA").⁵ The PCA was

* JD Candidate, William & Mary Law School, 2019; BA Political Science, University of Charleston, 2015. I would like to thank my family and friends for their constant encouragement and support. I would also like to thank the staff of the *William & Mary Environmental Law and Policy Review*, without whom this Note would not have been possible.

¹ See, e.g., Tara Malloy & Bradley A. Smith, *A Debate on Campaign Finance Disclosure*, 38 VT. L. REV. 933, 933–35 (2014) (discussing the expansion of campaign finance debates).

² 52 U.S.C. §§ 30101–30146 (2017).

³ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁴ See generally Trevor Potter & Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, NOTRE DAME J.L. ETHICS & PUB. POLY 383 (2013) (detailing the history of the law related to election disclosures).

⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, in Rep. of the Conference of the Parties of the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, at 20–31 (2016).

developed in 2015 as a result of large-scale international consensus regarding the global need to reduce carbon emissions.⁶ The United States became a party to the PCA via an executive order signed by then-President Barack Obama.⁷ Debate soon arose as to whether the United States was bound to adhere to the provisions of the PCA, however, as the PCA was not adopted under the Treaty Clause of the United States Constitution.⁸ The Treaty Clause, in essence, provides that in order for the President to enter into a treaty, he must do so with the approval of two-thirds of the United States Senate.⁹ Under the executive order process, this approval did not happen; yet, the United States continued to adhere to the PCA's provisions until early 2017, when the Trump Administration announced that it planned to withdraw the United States from the PCA.¹⁰ Note that as of this writing, the United States is still a party to the PCA.¹¹

The PCA reinvigorates an intriguing, oft-debated question: Is the Treaty Clause dormant? In the last century, the United States government has made considerably little use of the Treaty Clause, despite the increasingly international modern world.¹² In many instances in which the Treaty Clause does arise (in fact, in the only instance in which many American law students study the Treaty Clause), the focus is upon environmental treaties. For example, *Missouri v. Holland*,¹³ the seminal constitutional law case on the subject, centered upon the enforcement of a wildlife protection treaty,¹⁴ the Migratory Bird Treaty Act.¹⁵ So one must wonder why international agreements like the PCA have bypassed

⁶ *Id.* at 2.

⁷ Joel Stonedale, *President Obama's signing of the Paris Agreement is only good for nine months*, THE HILL (Apr. 18, 2016, 12:11PM), <http://thehill.com/blogs/congress-blog/energy-environment/276668-president-obamas-signing-of-the-paris-agreement-is> [<https://perma.cc/FA2H-BHXV>]; *Statement by the President on the Paris Climate Agreement*, WHITE HOUSE (Dec. 12, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement> [<https://perma.cc/TX4D-BDQS>].

⁸ U.S. CONST. art. II, § 2, cl. 2.

⁹ *Id.*

¹⁰ Eugene Kontorovich, *The U.S. can't quit the Paris climate agreement, because it never actually joined*, WASHINGTON POST (June 1, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/01/the-u-s-cant-quit-the-paris-climate-agreement-because-it-never-actually-joined/?utm_term=.b9f096b26f84 [<https://perma.cc/BHC6-4Z2T>].

¹¹ *United Nations Treaty Collection: Status of Treaties*, UNITED NATIONS, https://treaties.un.org/Pages/Treaties.aspx?id=27&subid=A&clang=_en [<https://perma.cc/TC5Q-R24G>].

¹² U.S. DEPT. OF STATE, OFFICE OF THE LEGAL ADVISER, *TREATIES PENDING IN THE SENATE* (July 26, 2018), <https://www.state.gov/s/l/treaty/pending/> [<https://perma.cc/EX34-4X9E>].

¹³ See *Missouri v. Holland*, 252 U.S. 416 (1920).

¹⁴ *Id.*

¹⁵ Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2000).

the Treaty Clause in their adoption into United States law. There are a number of potential explanations for this, but this Note posits that one reason is the increasing difficulty individuals and environmental interest groups have in influencing politicians; this is a direct result of excessive corporate influence in campaign finance expenditures.

In the following discussion, I suggest that the Treaty Clause of the United States Constitution will lie dormant unless the American campaign finance system is reformed to regulate corporate influence. Major oil, gas, and energy companies will continue to utilize massive soft money expenditures to overshadow the political voices of environmental interest groups and individuals; as a result, no multinational environmental regulatory treaty will likely surpass the two-thirds majority senatorial threshold required to bring a treaty into full force in American law. To facilitate this discussion, I have broken this Note into four sections: (1) an overview of the Treaty Clause and its decline, (2) the basics of campaign finance law, (3) an empirical analysis of campaign contributions by the oil and gas industry and the voting patterns of a cross-section of United States Senators, and (4) a discussion connecting that data to the question of Treaty Clause dormancy. Along the way, I will also discuss possible legal rationales for reforming the campaign finance system and the future with or without such reform.

I. THE TREATY POWER

As the underlying current of this Note is the Treaty Clause of the United States Constitution, it is important to begin this discussion with a short overview of its legal history, interpretation, and language. The Treaty Clause, embodied at Article II, § 2, clause 2 of the United States Constitution, states “[The President] shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.”¹⁶ On its face, it is simple to denote the particular elements of this clause: (1) the President is afforded power to make treaties; (2) two-thirds of the U.S. Senate must consent to any treaty before said treaty can become binding upon the United States. As will be discussed later in this Note, in the modern age of consistent party-line votes, and where no party holds a two-thirds majority of the Senate, it comes as no surprise that methods of skirting the requirements of this Clause have arisen.¹⁷

¹⁶ U.S. CONST. art. II, § 2, cl. 2.

¹⁷ Note, *Restructuring the Modern Treaty Power*, 114 HARV. L. REV. 2478, 2494–95 (2001) (referring to the shift to congressional-executive agreements).

However, for the time being, this discussion will turn to early uses of the Treaty Clause.

As many first-year law students across the United States will attest, *Missouri v. Holland*¹⁸ is the seminal case in Treaty Clause jurisprudence; fitting to this discussion, *Holland's* focus is upon what is essentially an environmental treaty: the Migratory Bird Treaty Act ("MBTA").¹⁹ The MBTA sought to prevent the capture and slaughter of a variety of migratory birds which were essential in ensuring the health of subsistence crops in North America.²⁰ Congress previously attempted to regulate the capture and killing of these migratory birds under the Commerce Clause,²¹ but federal district courts in Arkansas and Kansas held the law invalid as an infringement upon state sovereignty.²² In *Holland*, however, the Supreme Court confirmed that, though Congress could not pass the MBTA pursuant to domestic law, the President and the Senate could bind the United States to the MBTA under the Treaty Clause.²³ Not only does the *Holland* decision confirm that the United States was empowered to enforce treaties upon the several states; the Court also closes with language that is particularly powerful in the environmental context:

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain²⁴

Perhaps inadvertently, yet fortuitously, the *Holland* court set forth a line of reasoning that is almost universally applicable to environmental treaties, particularly in the realm of climate regulation. A treaty may be

¹⁸ *Holland*, 252 U.S. at 416.

¹⁹ *Id.* at 431.

²⁰ See generally Migratory Bird Treaty Act, *supra* note 15.

²¹ U.S. CONST. art. I, § 8, cl. 3.

²² See *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914); *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915).

²³ *Holland*, 252 U.S. at 435.

²⁴ *Id.*

justified on the grounds that it concerns a national interest of great magnitude, and which can only be protected via “national action in concert with that of another power [or powers].”²⁵

The United States Supreme Court has continuously reaffirmed *Holland’s* core principles.²⁶ That said, in 2014, in *Bond v. United States*,²⁷ Justice Scalia (concurring in judgment) authored a vigorous re-examination of the *Holland* decision.²⁸ Scalia noted that at the time of *Holland’s* decision, the vast majority of treaties were bilateral, fairly nonpartisan, and singularly focused, but that in the present day, treaties frequently involve the agreement of multiple nations and touch upon every facet of life.²⁹ This, according to Justice Scalia, comes problematically close (“only one treaty away”) to a general police power.³⁰ Specifically, Justice Scalia seemed concerned about the use of the Necessary and Proper Clause³¹ to enact legislation disguised as furthering the directive of a treaty, but which, in fact, is solely designed to infringe upon a state’s rights.³² In the end, despite Justice Scalia’s criticism, the majority declined to reconsider *Holland*, instead insisting that the case could be decided on non-constitutional grounds.³³

Justice Scalia’s concerns are indeed pertinent for this Note, and will be revisited further below when discussing potential explanations for the decline in the use of the Treaty Clause in the environmental treaty context. For now, it is sufficient to acknowledge that the core of *Missouri v. Holland* has withstood nearly a century, and thousands of citing cases, of litigation. The principle holds strong, but we may be witnessing the first rumbles that will shake *Holland’s* foundation.

II. THE BASICS OF CAMPAIGN FINANCE

Modern campaign finance law has its origins in Congress’s 1974 amendments to the Federal Election Campaign Act (“FECA”), which instituted the first quantified limits on groups’ and individuals’ contributions

²⁵ *Id.*

²⁶ See *Kleppe v. New Mexico*, 429 U.S. 529 (1976); *North Dakota v. United States* 460 U.S. 300 (1983).

²⁷ *Bond v. United States*, 572 U.S. 844 (2014).

²⁸ *Id.* at 873–82.

²⁹ *Id.* at 877.

³⁰ *Id.* at 879.

³¹ U.S. CONST. art I, § 8, cl. 18.

³² *Bond*, 572 U.S. at 879.

³³ *Id.* at 855.

to candidates and their campaigns.³⁴ In addition to contribution limits, the 1974 amendments also imposed donor disclosure requirements and limits on independent campaign expenditures.³⁵

In the past forty years, a myriad of judicial decisions³⁶ and Congressional acts³⁷ have chipped away at the original campaign finance structure, and ultimately paved the way for substantial corporate influence in the campaign finance realm. Within months of the passage of the 1974 amendments, in *Buckley v. Valeo*, the United States Supreme Court invalidated FECA's restrictions on independent expenditures as burdens on political expression protected under the First Amendment.³⁸ The Court reasoned that such independent expenditures could not give the impression of corruption in the political sphere because the expenditures were not attached to candidates or their campaigns.³⁹ The Court did not invalidate restrictions on contributions to specific candidates or campaigns.

Under current federal law, corporations are prohibited from making political contributions directly from their treasuries; instead, they must have segregated funds set aside specifically for political activity.⁴⁰ The following cases have challenged laws of similar construction in their application of the First Amendment's protection of political speech to corporations. In *FEC v. Massachusetts Citizens for Life, Inc.* ("MCFL"),⁴¹ the Court again pulled back on the government's anti-corruption interest concerning corporate expenditures.⁴² The Court held that MCFL was not to be bound by the segregated fund requirement because, despite being incorporated, MCFL more closely resembled a voluntary political organization than a corporation.⁴³ The Court reasoned this was because: (1) MCFL was formed for the express purpose of promoting political ideas, and could not engage in political activities; (2) MCFL had no shareholders or persons claiming its assets; and (3) MCFL did not accept contributions from corporations or labor unions.⁴⁴

³⁴ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

³⁵ *Id.*

³⁶ See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976); *Citizens United*, 558 U.S. 310 (2010); *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 652.

³⁷ Bipartisan Campaign Reform Act of 2002, tit. I, Pub. L. No. 107-155, 116 Stat. 81.

³⁸ *Buckley*, 424 U.S. at 1.

³⁹ *Id.* at 14-19.

⁴⁰ 52 U.S.C. § 30118(b)(3)(2002).

⁴¹ *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 478 U.S. 238 (1986).

⁴² *Id.* at 264.

⁴³ *Id.* at 263-64.

⁴⁴ *Id.*

Next in this line of cases came *Austin v. Michigan Chamber of Commerce*.⁴⁵ There, the United States Supreme Court upheld a state law requiring corporate political expenditures to be made from a segregated political fund.⁴⁶ The Court distinguished this case from *MCFL* on the grounds that the Michigan Chamber of Commerce failed to meet any of the factors that distinguished *MCFL* from a business corporation: the Chamber of Commerce was designed as a business entity, it had several shareholders, and it received contributions (almost exclusively) from businesses and labor unions.⁴⁷

*McConnell v. FEC*⁴⁸ arose shortly after the passage of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), also known as the McCain-Feingold Act, which further amended FECA.⁴⁹ The BCRA brought a number of changes to campaign finance law, including the regulation of soft money contributions.⁵⁰ The Court in *McConnell* upheld a number of limitations on the use of soft money in federal elections, but struck down others.⁵¹

The final step in our historical overview is *Citizens United v. FEC*.⁵² This case completely overruled *Austin v. Michigan Chamber of Commerce* and partially overruled *McConnell v. FEC*.⁵³ In terms of the *Austin* ruling, the Court in *Citizens United* held that the government is unable to suppress political speech because the speaker has a corporate identity.⁵⁴ In so ruling, the *Citizens United* Court unequivocally held that independent corporate expenditures could not result in the appearance of political corruption and further found that the government’s asserted anti-distortion interest was simply not compelling.⁵⁵ In terms of *McConnell*, the Court held that a federal statute (arising from BCRA) which barred independent corporate expenditures for electioneering communications was in violation of the First Amendment.⁵⁶

Now that a very basic history is set forth, we will shift to the discussion of the actual campaign finance topics that are the focus of this

⁴⁵ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

⁴⁶ *Id.* at 669.

⁴⁷ *Id.* at 662–64.

⁴⁸ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

⁴⁹ Bipartisan Campaign Reform Act of 2002, 107 P.L. 155, 116 Stat. 81.

⁵⁰ *Id.*

⁵¹ *McConnell*, 540 U.S. at 223–24.

⁵² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁵³ *See generally id.*

⁵⁴ *Id.* at 342–43.

⁵⁵ *Id.* at 347–48.

⁵⁶ *Id.* at 366.

Note. In the next few paragraphs, I hope to set out the basic statutory guidelines for hard and soft money. Hard money can be covered exclusively with a discussion of the United States Code, but soft money, at least post-*Citizens United*, requires a more scholarly tactic. In that section, I will examine the *McConnell* approach to soft money and discuss a few academic works that have performed in-depth studies of the topic.

A. *Hard Money*

From its inception in the 1974 amendments to FECA into the modern day, statutory campaign finance law has instituted limits on hard money. Hard money includes any contributions and expenditures that can be attributed to a particular candidate or campaign, and are thus subject to limits imposed by federal law.⁵⁷ Today, these limitations are codified at 52 U.S.C. § 30116.⁵⁸

In essence, individuals, groups, and corporations are prohibited from making contributions to: (1) any candidate or the candidate's organized political committee in excess of \$2,000 per year;⁵⁹ (2) political committees organized by a national political party in excess of \$25,000 per year;⁶⁰ (3) political committees organized by a state committee or a political party in excess of \$10,000 per year;⁶¹ or (4) any other political committee in excess of \$5,000 per year.⁶²

Under this Code section, a contribution to a candidate or campaign includes the following: (1) donations to a named candidate or candidate's authorized political committee;⁶³ and (2) expenditures made in "cooperation, consultation, or concert with, or at the request or suggestion of, a candidate" or his or her authorized committee.⁶⁴ The Code also provides that individual financing of campaign broadcasts or materials prepared by the candidate, his or her political committee, or authorized agents will be considered a contribution if the broadcast or material meets the criteria for "electioneering communications" and the funding is coordinated with the candidate, his or her authorized committee, a

⁵⁷ Jeffrey Milyo, *The Political Economics of Campaign Finance*, 3 INDEP. REV. 537, 539 (1999).

⁵⁸ 52 U.S.C. § 30116 (1975).

⁵⁹ *Id.* § 30116(a)(1)(A).

⁶⁰ *Id.* § 30116(a)(1)(B).

⁶¹ *Id.* § 30116(a)(1)(D).

⁶² *Id.* § 30116(a)(1)(C).

⁶³ *Id.* § 30116(a)(7)(A).

⁶⁴ 52 U.S.C. § 30116(a)(7)(B)(i).

federal, state, or local political party or committee, or an agent of any such candidate, party, or committee.⁶⁵ Electioneering communications include any “broadcast, cable, or satellite communication[s] which [refer] to a clearly identified candidate for Federal office” and which are made within sixty days of a general election, or thirty days of a primary election.⁶⁶

As these hard money contributions are so quantifiably limited by federal law, they are not necessarily the focus of this Note; this is largely because hard money contributions have a rather insubstantial impact when compared to soft money contributions.

B. *Soft Money*

Soft money contributions and expenditures are those allocations of money which are not subject to federal regulation, for example, issue-advocacy campaigns.⁶⁷ The *McConnell* court took precisely this approach in its discussion of soft money; there, the Court stated that under FECA requirements, hard money contributions were only “made with funds that are subject to [FECA’s] disclosure requirements and source and amount limitations” and only targeted *federal* elections.⁶⁸ Soft money, on the other hand, encompassed “[d]onations made solely for the purpose of influencing *state or local* elections [and] are therefore unaffected by FECA’s requirements and prohibitions.”⁶⁹ According to the *McConnell* Court, soft money took on a life of its own and its permitted uses continued to expand; the uses enumerated by the Court included mixed-purpose activities (get-out-the-vote drives and generic party advertising) and legislative advocacy advertisements (which could include the names of federal candidates so long as they did not advocate for the defeat or support of said candidate).⁷⁰

Even in the *McConnell* Court’s view, soft money contributions were skyrocketing and often surpassing hard money contributions.⁷¹ Further, the Court recognized that many soft money contributions, though in the state and local sphere, were designed to gain access to candidates in the federal realm, and were quite often solicited by candidates who directed donors to contribute to “party committees and tax-exempt organizations

⁶⁵ *Id.* § 30116(a)(7)(C).

⁶⁶ *Id.* § 30101(f)(3)(A)(i).

⁶⁷ Milyo, *supra* note 57, at 540.

⁶⁸ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 122 (2003).

⁶⁹ *Id.* at 122–23 (emphasis added).

⁷⁰ *Id.* at 123–24.

⁷¹ *Id.* at 124.

that could legally accept soft money.”⁷² Recall that the Court upheld a number of BCRA regulations of soft money contributions in *McConnell*, including a prohibition on national party committees and their agents from soliciting, receiving, directing, or spending soft money, effectively removing the federal candidates from the soft money game.⁷³ The Court justified this on the ground that the prohibition on the use of soft money limits the source and amount of donations, but does not reach the level of expenditure limitations.⁷⁴

As we now know, however, the *McConnell* Court’s approach did not last. As the years progressed, several challenges saw the gradual dismantling of the BCRA’s soft money limits. Two cases in particular, *EMILY’s List v. FEC*⁷⁵ and *Citizens United v. FEC*,⁷⁶ brought about the insurgence of unlimited, unregulated soft money contributions that are now commonplace in elections. *EMILY’s List* permitted nonprofit, unconnected political committees to make unlimited independent expenditures funded with soft money, so long as any direct contributions to candidates were made with hard money.⁷⁷ *Citizens United* extended this to corporations and labor unions.⁷⁸ Further, in overruling *Austin* and part of *McConnell*, the Court in *Citizens United* effectively permitted unions and corporations to expend unlimited amounts of soft money in *express advocacy* campaigns, something which had been explicitly prohibited under BCRA.⁷⁹

III. THE RELATIONSHIP BETWEEN CAMPAIGN FINANCE AND THE VOTING PATTERNS OF SENATORS

Most of us are familiar with the notion that “money talks” when it comes to persuading politicians. For decades, political scientists have studied the interplay between politicians’ voting patterns and the amount of lobbying and campaign contributions directed toward those politicians.⁸⁰

⁷² *Id.* at 125.

⁷³ *Id.* at 133.

⁷⁴ *McConnell*, 540 U.S. at 139.

⁷⁵ *EMILY’s List v. Fed. Election Comm’n*, 581 F.3d 1 (2009).

⁷⁶ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁷⁷ *EMILY’s List*, 581 F.3d at 12.

⁷⁸ *Citizens United*, 588 U.S. at 399–401.

⁷⁹ *Id.* at 365–66.

⁸⁰ See Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528 (2011). See generally Ivan Pastine & Tuvana Pastine, *Soft Money and Campaign Finance Reform*, 54 INT’L ECON. REV. 1117 (2013); D.E. Apollonio & Raymond J. La Raja, *Who Gave Soft Money? The Effect of Interest Group Resources on Political Contributions*, 66 J. OF POL. 1134 (2004).

This Note also analyzes this interplay, but not in the depth that many political scientists have. This Part will examine the voting patterns of a number of United States senators who have received campaign contributions from both Big Oil & Energy and environmental interest groups. In addition, this Part will examine the shift, post-*Citizens United*, from direct campaign contributions (hard money) to contributions to outside spending groups (soft money).

The following analysis is limited to senatorial votes and campaign contributions between the years 2010 and 2016 (just prior to *Citizens United*, through the most recently completed election cycle). Further, for the purposes of this discussion, presidential candidates have been eliminated from the analysis, as there are likely significant increases in donations to these candidates from all sectors solely for the purpose of the presidential election. As a result, this examination will focus upon a group of senators who consistently rank within the top twenty recipients of campaign contributions from both Big Oil & Energy and environmental interest groups.⁸¹

Finally, as the United States Senate has not approved any environmental treaties in the time frame upon which this discussion focuses, Senate roll call votes on environmentally focused legislation will be examined to infer the potential success or defeat of an environmental treaty brought before the Senate. As of this writing, from the 112th Congress through the 115th Congress, only a single piece of environmental legislation which is now public law resulted in a Senate roll-call vote: a joint resolution to nullify the Stream Protection Rule promulgated by the Department of the Interior.⁸² However, several roll call votes are available for amendments to pieces of environmental legislation, confirmations, and reversals of presidential vetoes. For the purposes of this Note, these voting records will be sufficient.

A. *Senators*

Between 2010 and 2016, Big Oil & Energy and environmental groups consistently contributed to the campaigns of several senators.⁸³ Two Republican politicians have received contributions from both groups in

⁸¹ *Environment: Top Recipients*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?cycle=2016&ind=Q11> [<https://perma.cc/EXE5-26PQ>]; *Oil & Gas: Top Recipients*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=E01&recipdetail=S&sortorder=U&mem=Y&cycle=2016> [<https://perma.cc/8FEW-DCZU>].

⁸² *Vote Report—2017 Senate Roll No. 43: Hearing on H.J. Res. 38*, 115th Cong. (Feb. 2, 2017).

⁸³ See *infra* notes 84–87.

at least two of the last four election cycles: David Vitter (Louisiana)⁸⁴ and Richard Burr (North Carolina).⁸⁵ Two Democrats have also received contributions from both groups in two of the last four election cycles: Michael Bennet (Colorado)⁸⁶ and Mark Begich (Alaska).⁸⁷ Finally, one Independent (and later Republican), Lisa Murkowski (Alaska), received contributions from Big Oil & Energy and environmental groups in 2010, but only received contributions from Big Oil & Energy in subsequent election cycles.⁸⁸

B. Contributions

Beginning with Senator David Vitter, the senator received \$475,550 from Big Oil & Energy contributors,⁸⁹ and \$13,700 from environmental groups in the 2010 cycle.⁹⁰ In the 2012 cycle, Vitter received \$101,400 from Big Oil & Energy,⁹¹ and \$8,000 from environmental group contributors.⁹²

⁸⁴ *Oil & Gas: Top Recipients 2010*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=E01&recipdetail=S&sortorder=U&mem=Y&cycle=2010> [<https://perma.cc/C4N9-CPEE>] [hereinafter *Oil & Gas Recipients 2010*]; *Oil & Gas: Top Recipients 2012*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=E01&recipdetail=S&sortorder=U&mem=Y&cycle=2012> [<https://perma.cc/5EUQ-42EQ>] [hereinafter *Oil & Gas Recipients 2012*]; *Environment: Top Recipients 2010*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=Q11&cycle=2010&recipdetail=S&mem=Y&sortorder=U> [<https://perma.cc/G552-CJZN>] [hereinafter *Environment Recipients 2010*]; *Environment: Top Recipients 2012*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=Q11&recipdetail=S&sortorder=U&mem=Y&cycle=2012> [<https://perma.cc/ay5D-GHZ9>] [hereinafter *Environment Recipients 2012*].

⁸⁵ See *id.*; *Oil & Gas: Top Recipients 2016*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=E01&recipdetail=S&sortorder=U&mem=Y&cycle=2016> [<https://perma.cc/5SJT-4Q4P>] [hereinafter *Oil & Gas Recipients 2016*]; *Environment: Top Recipients 2016*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=Q11&recipdetail=S&sortorder=U&mem=Y&cycle=2016> [<https://perma.cc/TRU2-BRX7>] [hereinafter *Environment Recipients 2016*].

⁸⁶ *Id.*

⁸⁷ See *Oil & Gas Recipients 2012* and *Environment Recipients 2012*, *supra* note 84; *Oil & Gas: Top Recipients 2014*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=E01&recipdetail=S&sortorder=U&mem=Y&cycle=2014> [<https://perma.cc/2QHW-JNGT>] [hereinafter *Oil & Gas Recipients 2014*]; *Environment: Top Recipients 2014*, OPENSECRETS, <https://www.opensecrets.org/industries/recips.php?ind=Q11&recipdetail=S&sortorder=U&mem=Y&cycle=2014> [<https://perma.cc/S967-XMTL>] [hereinafter *Environment Recipients 2014*].

⁸⁸ See *supra* notes 84–87.

⁸⁹ See *Oil & Gas Recipients 2010*, *supra* note 84.

⁹⁰ See *Environment Recipients 2010*, *supra* note 84.

⁹¹ See *Oil & Gas Recipients 2012*, *supra* note 84.

⁹² See *Environment Recipients 2012*, *supra* note 84.

Vitter did not rank within the top twenty recipients of contributions from either Big Oil & Energy or environmental interest groups in 2014 or 2016.⁹³

Senator Burr received contributions from both ends of the spectrum in the 2010 and the 2016 cycles.⁹⁴ In 2010, Burr received \$195,500 from the energy sector,⁹⁵ and \$13,250 from the environmental sector.⁹⁶ In the 2016 cycle, Burr received \$289,907 from Big Oil & Energy,⁹⁷ and \$9,000 from environmental groups.⁹⁸

Senator Bennet only received major contributions in 2010 and 2016.⁹⁹ In 2010, Bennet received \$126,120 from the energy sector,¹⁰⁰ and \$166,221 from the environmental sector.¹⁰¹ In 2016, Bennet's receipts from the energy sector were roughly similar, at \$138,940.¹⁰² However, the senator saw a dramatic increase in contributions from environmental groups in 2016: \$504,561.¹⁰³

Senator Begich is an interesting case, as he lost his bid for reelection in the 2014 cycle,¹⁰⁴ yet he received substantial contributions from both the energy and environmental groups in the 2012 and 2014 cycles. In 2012, energy groups contributed \$78,950 to Begich,¹⁰⁵ while environmental organizations only contributed \$11,500.¹⁰⁶ In 2014, Begich saw a substantial increase in contributions from both energy and environmental groups, receiving \$201,700 from energy¹⁰⁷ and \$103,771 from environmental groups.¹⁰⁸ The latter is nearly a tenfold increase from the previous cycle.

Finally, Senator Murkowski received substantial contributions from the energy sector in each of the election cycles between 2010 and

⁹³ See *Oil & Gas Recipients 2014* and *Environment Recipients 2014*, *supra* note 87; *Oil & Gas Recipients 2016* and *Environment Recipients 2016*, *supra* note 85.

⁹⁴ See *Oil & Gas Recipients 2010* and *Environmental Recipients 2010*, *supra* note 84. See also *Oil & Gas Recipients 2016* and *Environment Recipients 2016*, *supra* note 85.

⁹⁵ See *Oil & Gas Recipients 2010*, *supra* note 84.

⁹⁶ See *Environment Recipients 2010*, *supra* note 84.

⁹⁷ See *Oil & Gas Recipients 2016*, *supra* note 85.

⁹⁸ See *Environment Recipients 2016*, *supra* note 85.

⁹⁹ See *Oil & Gas Recipients 2010* and *Environment Recipients 2010*, *supra* note 84.

¹⁰⁰ See *Oil & Gas Recipients 2010*, *supra* note 84.

¹⁰¹ See *Environment Recipients 2010*, *supra* note 84.

¹⁰² See *Oil & Gas Recipients 2016*, *supra* note 85.

¹⁰³ See *Environment Recipients 2016*, *supra* note 85.

¹⁰⁴ Russell Berman, *Another Senate Loss for Democrats*, THE ATLANTIC (Nov. 12, 2014), <https://www.theatlantic.com/politics/archive/2014/11/another-senate-loss-for-democrats/382660/> [<https://perma.cc/3MA7-Y8YC>].

¹⁰⁵ See *Oil & Gas Recipients 2012*, *supra* note 84.

¹⁰⁶ See *Environment Recipients 2012*, *supra* note 84.

¹⁰⁷ See *Oil & Gas Recipients 2014*, *supra* note 87.

¹⁰⁸ See *Environment Recipients 2014*, *supra* note 87.

2016.¹⁰⁹ In 2010, while still registered as Independent, Murkowski received contributions from energy and environmental groups in the amounts of \$340,855¹¹⁰ and \$8,450,¹¹¹ respectively. However, after becoming a registered Republican, Murkowski failed to receive any contributions from environmental groups.¹¹² The senator consistently received contributions from Big Oil & Energy in the amount of \$84,450 (2012),¹¹³ \$132,046 (2014),¹¹⁴ and \$593,100 (2016).¹¹⁵

IV. THE SURGE IN SOFT MONEY EXPENDITURES

The contributions outlined in the above discussion are general contributions from the energy and environmental sectors as a whole, and as such, no specific donors are listed for each senator; these totals include contributions from political action committees (“PACs”) and interest groups.¹¹⁶ However, it is possible to examine changing trends in donor habits, and this discussion will briefly turn to that examination before the voting pattern analysis.

Recall from the campaign finance discussion, *supra*, that soft money contributions are contributions that do not go directly to a candidate, but to outside groups which indirectly support the candidate.¹¹⁷ Further recall that, in general, soft money is virtually unregulated by the Federal Election Commission.¹¹⁸

The election cycle ending in 2010 (the year *Citizens United* was decided) saw significantly less soft money activity by both Big Oil & Energy and environmental interest groups. Koch Industries, Chevron Corp.,

¹⁰⁹ See *Oil & Gas Recipients 2010* and *Oil & Gas Recipients 2012*, *supra* note 84; *Oil & Gas Recipients 2014*, *supra* note 87; *Oil & Gas Recipients 2016*, *supra* note 85.

¹¹⁰ See *Oil & Gas Recipients 2010*, *supra* note 84.

¹¹¹ See *Environment Recipients 2010*, *supra* note 84.

¹¹² See *Environment Recipients 2012*, *supra* note 84; *Environment Recipients 2014*, *supra* note 87; *Environment Recipients 2016*, *supra* note 85.

¹¹³ See *Oil & Gas Recipients 2012*, *supra* note 84.

¹¹⁴ See *Oil & Gas Recipients 2014*, *supra* note 87.

¹¹⁵ See *Oil & Gas Recipients 2016*, *supra* note 85.

¹¹⁶ *Oil & Gas: Top Contributors 2010*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=E01&Bkdn=DemRep&cycle=2010> [<https://perma.cc/LRV2-2ENP>] [hereinafter *Oil & Gas Contributors 2010*] (“Methodology: The numbers on this page are based on contributions from donors (individuals as well as corporations and unions that give directly from their treasuries) to outside groups and from PACs (including super PACs) and individuals giving more than \$200 to candidates and party committees.”).

¹¹⁷ See discussion of soft money, *supra* Section II.B.

¹¹⁸ See discussion of *McConnell*, 540 U.S. at 122; *supra* Section II.B.

and ExxonMobil have consistently fallen within the top energy industry contributors; in 2010 each contributed \$10,000 or less to outside spending groups.¹¹⁹ By 2012, Chevron increased its contributions to outside groups to \$2,502,115, while ExxonMobil increased outside spending to \$25,000.¹²⁰ Koch Industries engaged in no outside group spending in 2012.¹²¹ By 2014, Koch Industries had re-entered the outside spending game, contributing a whopping \$7,010,000 to outside groups, almost \$5,000,000 more than it spent on direct contributions to candidates.¹²² Chevron contributed \$1,002,675 to outside groups, almost half of its total political spending for the cycle, while ExxonMobil reduced its outside spending to just \$4,650.¹²³ In 2016, Koch Industries contributed \$6,050,000, more than half of its total political spending in the cycle, to outside groups.¹²⁴ Meanwhile, Chevron increased its outside group spending to \$3,340,685.¹²⁵ ExxonMobil, for the first time, failed to rank in the top five contributors.¹²⁶

Shifting to environmental groups, the same trend is glaringly apparent. Between 2010 and 2016, three groups remained within the ranks of leading environmental group contributors: the League of Conservation Voters, the Sierra Club, and Environment America.¹²⁷ In 2010, the League of Conservation Voters spent a total of \$1,615,750 in political spending,

¹¹⁹ See *Oil & Gas Contributors 2010*, *supra* note 116 (Koch Industries: \$10,000; Exxon: \$3,206; Chevron: \$250).

¹²⁰ *Oil & Gas: Top Contributors 2012*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=E01&Bkdn=DemRep&cycle=2012> [<https://perma.cc/S3HZ-65YR>] [hereinafter *Oil & Gas Contributors 2012*].

¹²¹ *Id.*

¹²² *Oil & Gas: Top Contributors 2014*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=E01&Bkdn=DemRep&cycle=2014> [<https://perma.cc/USG2-KZ3S>] [hereinafter *Oil & Gas Contributors 2014*].

¹²³ *Id.*

¹²⁴ *Oil & Gas: Top Contributors 2016*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=E01&Bkdn=DemRep&cycle=2016> [<https://perma.cc/9ZAT-64DS>] [hereinafter *Oil & Gas Contributors 2016*].

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Environment: Top Contributors 2010*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=Q11&Bkdn=DemRep&cycle=2010> [<https://perma.cc/9JPZ-H9UC>] [hereinafter *Environment Contributors 2010*]; *Environment: Top Contributors 2012*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=Q11&Bkdn=DemRep&cycle=2012> [<https://perma.cc/YCA9-2NEY>] [hereinafter *Environment Contributors 2012*]; *Environment: Top Contributors 2014*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=Q11&Bkdn=DemRep&cycle=2014> [<https://perma.cc/PSN7-FKQC>] [hereinafter *Environment Contributors 2014*]; *Environment: Top Contributors 2016*, OPENSECRETS, <https://www.opensecrets.org/industries/contrib.php?ind=Q11&Bkdn=DemRep&cycle=2016> [<https://perma.cc/F4RY-MVL8>] [hereinafter *Environment Contributors 2016*].

of which \$560,353 went to outside groups.¹²⁸ The Sierra Club spent \$454,178 in total, of which \$53,855 went to outside groups.¹²⁹ Environment America spent a total of \$182,276 and contributed \$177,611 of that to outside spending groups.¹³⁰ In 2012, each of these numbers increased dramatically: the League of Conservation Voters sent \$2,430,639 to outside spending groups; the Sierra Club sent \$703,002 to outside spending groups; and Environment America sent \$5,271,994 to outside spending groups.¹³¹ Each of these contributions constitutes significantly more than half of the groups' total political spending for the cycle.¹³²

In 2014, the League of Conservation Voters contributed just shy of \$2,000,000 to outside spending groups, slightly less than half of the group's total expenditures for the cycle.¹³³ The Sierra Club increased its outside spending to \$990,500, well above half of its total expenditures.¹³⁴ Environment America saw a considerable decrease in total cyclical expenditures, but still contributed \$1,225,000 to outside spending groups—just \$99,800 less than its total spending.¹³⁵ This decrease was short-lived, however, as 2016 saw Environment America contribute \$6,875,000 to outside spending groups.¹³⁶ The League of Conservation Voters invested only \$1,000 to outside groups in this cycle, expending over \$4,100,000 on candidates.¹³⁷ Finally, the Sierra Club significantly curtailed its political spending, totaling only \$436,707, of which only \$400 went to outside groups.¹³⁸

Despite the general fluctuations in the amount of contributions, there can be little doubt, after having seen the above numbers, that both energy and environmental groups capitalized on the state of campaign finance post-*Citizens United*. Soft money contributions were significantly less restricted than direct contributions to candidates, thus giving rise to the significant spike in said contributions illustrated above.¹³⁹ The question remains, of course, what impact this sudden influx of money into the campaign realm had upon legislators' voting habits, and while

¹²⁸ See *Environment Contributors 2010*, *supra* note 127.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *Environment Contributors 2012*, *supra* note 127.

¹³² *Id.*

¹³³ See *Environment Contributors 2014*, *supra* note 127.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See *Environment Contributors 2016*, *supra* note 127.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See discussion of contributions, *supra* Section II.B.

this Note seeks to address that topic in a limited fashion, a number of academics have performed in-depth political science analyses of the consequences of unfettered soft money contributions.¹⁴⁰ That said, there can be little doubt that, in general, exceptionally more wealth was pouring into the political realm post-2010.

V. VOTING PATTERNS

This Note now shifts to the discussion of voting patterns. To focus the examination, Senate roll call votes will be broken down by congressional session and by “positive environmental” legislation and “negative environmental” legislation. For the purposes of this analysis, positive environmental legislation includes amendments to bills that would promote or expand the following: (1) environmental regulations; (2) recognition of manmade climate change; or (3) climate change education. Negative environmental legislation includes efforts to reduce environmental regulation and efforts to expand development of the fossil fuel sector (including tax breaks for that industry).

In the 112th Congress (2011–2012), six votes relating to environmental legislation were held, of which four were negative environmental legislation,¹⁴¹ one was positive environmental legislation,¹⁴² and one was neither positive nor negative.¹⁴³ Table 1.1 breaks down the votes of the selected senators on these pieces of legislation.

¹⁴⁰ See Note, *supra* note 80; Pastine & Pastine, *supra* note 80; Apollonia & La Raja, *supra* note 80; Milyo, *supra* note 57.

¹⁴¹ Moving Ahead for Progress in the 21st Century Act, 158 CONG. REC. S1504 (daily ed. Mar. 8, 2012) [hereinafter 112th Roll Vote No. 34] (seeking to approve the Keystone XL Pipeline project); SBIR/STTR Reauthorization Act of 2011, 157 CONG. REC. S2154 (daily ed. Apr. 6, 2011) [hereinafter 112th Roll Vote No. 54] (prohibiting the EPA from promulgating regulation concerning the emission of greenhouse gas to address climate change); SBIR/STTR Reauthorization Act of 2011, 157 CONG. REC. S2154 (daily ed. Apr. 6, 2011) [hereinafter 112th Roll Vote No. 53] (suspending action under the Clean Air Act with respect to carbon dioxide or methane emissions); SBIR/STTR Reauthorization Act of 2011, 157 CONG. REC. S2154 (daily ed. Apr. 6, 2011) [hereinafter 112th Roll Vote No. 51] (prohibiting regulation of greenhouse gases from certain sources).

¹⁴² Moving Ahead for Progress in the 21st Century Act, 158 CONG. REC. S1504 (daily ed. Mar. 8, 2012) [hereinafter 112th Roll Vote No. 32] (providing for the restoration of natural resources, ecosystems, and wildlife habitats in the Gulf Coast States).

¹⁴³ Export-Import Bank Reauthorization Act of 2012, 158 CONG. REC. S3155 (daily ed. May 15, 2012) [hereinafter 112th Roll Vote No. 94] (restricting the financing of certain fossil fuel projects in foreign countries, and prohibiting financing of renewable energy products manufactured in foreign countries).

TABLE 1.1¹⁴⁴

	Begich	Bennet	Burr	Vitter	Murkowski
112th Roll Vote No. 51	Yea	Nay	Nay	Nay	Nay
112th Roll Vote No. 53	Nay	Nay	Nay	Nay	Nay
112th Roll Vote No. 54	Nay	Nay	Yea	Yea	Yea
112th Roll Vote No. 34	Yea	Yea	Nay	Yea	Yea
112th Roll Vote No. 32	Nay	Nay	Yea	Yea	Yea
112th Roll Vote No. 94	Yea	Nay	Yea	Yea	Yea

In the 113th Congress (2013–2014), three votes on environmental matters were conducted: one was the confirmation of Regina McCarthy as Director of the Environmental Protection Agency;¹⁴⁵ one was a piece of negative environmental legislation centering on exemptions from emissions standards;¹⁴⁶ and one was a piece of negative environmental legislation focusing on prohibiting further greenhouse gas regulations.¹⁴⁷ Table 1.2 illustrates the votes of the selected senators on these items.

TABLE 1.2¹⁴⁸

	Begich	Bennet	Burr	Vitter	Murkowski
113th Roll Vote No. 180	Yea	Yea	Nay	Nay	Nay
113th Roll Vote No. 72	Nay	Nay	Yea	Yea	Yea
113th Roll Vote No. 76	Nay	Nay	Yea	Yea	Yea

In the 114th Congress (2015–2016), eleven votes relating to environmental matters were conducted. Of these, five derived from

¹⁴⁴ See 112th Roll Votes, *supra* notes 141–43.

¹⁴⁵ *Cloture Motion*, 159 CONG. REC. S5776 (daily ed. July 18, 2013) [hereinafter 113th Roll Vote No. 180] (Confirmation of Regina McCarthy, of Massachusetts, to be Administrator of the Environmental Protection Agency).

¹⁴⁶ *Concurrent Budget Resolution on the Budget, Fiscal Year 2014*, 159 CONG. REC. S2235 (daily ed. Mar. 22, 2013) [hereinafter 113th Roll Vote No. 72].

¹⁴⁷ *Concurrent Budget Resolution on the Budget, Fiscal Year 2014*, 159 CONG. REC. S2235 (daily ed. Mar. 22, 2013) [hereinafter 113th Roll Vote No. 76].

¹⁴⁸ See 113th Roll Votes, *supra* notes 145–47.

positive environmental legislation,¹⁴⁹ five were derived from negative environmental legislation (including the passage of the Keystone XL Pipeline Act),¹⁵⁰ and one was neither positive nor negative.¹⁵¹ Note that Senator Begich was not present in this Congress, as he failed to secure re-election.¹⁵² Table 1.3 illustrates the votes cast by the selected senators on these matters.

TABLE 1.3¹⁵³

	Bennet	Burr	Vitter	Murkowski
114th Roll Vote No. 31	Nay	Nay	Nay	Nay
114th Roll Vote No. 12	Yea	Nay	Nay	Nay
114th Roll Vote No. 115	Yea	Nay	Nay	Yea

¹⁴⁹ Energy Policy Modernization Act of 2015, 162 CONG. REC. S470 (daily ed. Feb. 2, 2016) [hereinafter 114th Roll Vote No. 11] (seeking to establish a federal energy efficiency resource standard for electricity and natural gas suppliers); Every Child Achieves Act of 2015, 161 CONG. REC. S5092 (daily ed. July 15, 2015) [hereinafter 114th Roll Vote No. 238] (seeking to establish a climate change education program); *Concurrent Resolution on the Budget, Fiscal Year 2016*, 161 CONG. REC. S1960 (daily ed. Mar. 26, 2015) [hereinafter 114th Roll Vote No. 115] (seeking to establish a reserve fund for responding to economic and national security threats posed by human-induced climate change); Keystone XL Pipeline Act, 161 CONG. REC. S555 (daily ed. Jan. 28, 2015) [hereinafter 114th Roll Vote No. 31] (seeking public health risk assessment for potential rupture of Keystone XL Pipeline); Keystone XL Pipeline Act, 161 CONG. REC. S311 (daily ed. Jan. 21, 2015) [hereinafter 114th Roll Vote No. 12] (seeking to express the sense of Congress regarding climate change).

¹⁵⁰ Energy and Water Development and Related Agencies Appropriations Act, 162 CONG. REC. S2424 (daily ed. Apr. 26, 2016) [hereinafter 114th Roll Vote No. 63] (seeking to withhold certain funds for the construction of environmental infrastructure); Energy Policy Modernization Act of 2015, 162 CONG. REC. S470 (daily ed. Feb. 2, 2016) [hereinafter 114th Roll Vote No. 12.2] (seeking to establish deadlines and expedite permits for natural gas gathering lines on federal and Indian lands); *Concurrent Resolution on the Budget, Fiscal Year 2016*, 161 CONG. REC. S1960 (daily ed. Mar. 26, 2015) [hereinafter 114th Roll Vote No. 116] (seeking to prohibit withholding highway funds for states' failure to comply with Clean Power Plan implementation requirements); *Keystone XL Pipeline Approval Act—Veto*, 161 CONG. REC. S1274 (daily ed. Mar. 4, 2015) [hereinafter 114th Roll Vote No. 68] (overriding Presidential veto to approve Keystone XL Pipeline Act); Keystone XL Pipeline Act, 161 CONG. REC. S620 (daily ed. Jan. 29, 2015) [hereinafter 114th Roll Vote No. 49] (approving the Keystone XL Pipeline Act).

¹⁵¹ Keystone XL Pipeline Act, 161 CONG. REC. S372 (daily ed. Jan. 22, 2015) [hereinafter 114th Roll Vote No. 20] (seeking to express the sense of the Senate regarding the conditions for the President entering into bilateral or other international agreements regarding greenhouse gas emissions).

¹⁵² See Berman, *supra* note 104.

¹⁵³ See 114th Roll Votes, *supra* notes 149–51.

	Bennet	Burr	Vitter	Murkowski
114th Roll Vote No. 238	Yea	Nay	Nay	Nay
114th Roll Vote No. 11	Yea	Nay	Nay	Nay
114th Roll Vote No. 116	Nay	Yea	Yea	Yea
114th Roll Vote No. 63	Nay	Nay	Nay	Nay
114th Roll Vote No. 12.2	Nay	Yea	Yea	Yea
114th Roll Vote No. 49	Yea	Yea	Yea	Yea
114th Roll Vote No. 68	Yea	Yea	Yea	Yea
114th Roll Vote No. 20	Nay	Yea	Yea	Yea

Finally, in the 115th Congress (2017–2018), two confirmation hearings have taken place for the Administrator¹⁵⁴ and Assistant Administrator¹⁵⁵ of the Environmental Protection Agency. Table 1.4 illustrates the results of the selected senators' votes in these confirmation proceedings. Note that only Senators Bennet, Burr, and Murkowski are still in office during the 115th Congress.

TABLE 1.4¹⁵⁶

	Bennet	Burr	Murkowski
115th Roll Vote No. 71	Nay	Yea	Yea
115th Roll Vote No. 268	Nay	Yea	Yea

VI. ANALYSIS

The 2010 election cycle had the most direct impact upon the voting decisions in the 112th Congress. As set out above, the impact of *Citizens United* had not yet been felt in the campaign finance realm, as

¹⁵⁴ On the Nomination (Confirmation of Scott Pruitt, of Oklahoma, to be Administrator of the Environmental Protection Agency), 115th Cong. (Feb. 17, 2017) [hereinafter 115th Roll Vote No. 71].

¹⁵⁵ On the Nomination (Confirmation of William L. Wehrum, of Delaware, to be Assistant Administrator of the Environmental Protection Agency), 115th Cong. (Nov. 9, 2017) [hereinafter 115th Roll Vote No. 268].

¹⁵⁶ See 115th Roll Votes, *supra* notes 154–55.

direct candidate contributions were still the prevailing source of funding.¹⁵⁷ Note, however, that the voting patterns also appear to be more sporadic, with Democratic and Republican senators voting less frequently along party lines.¹⁵⁸

By the 113th Congress, both energy and environmental groups dramatically increased their political spending directly to candidates and to outside spending groups.¹⁵⁹ Simultaneously, the data reflects a hard shift to party-line votes among the analyzed senators, including Senator Murkowski, who was officially a Republican in this cycle.¹⁶⁰ In this and the following Congresses, Senator Murkowski saw steady increases in donations from Big Oil & Energy, and consistently voted in favor of negative environmental legislation.¹⁶¹

In the 114th Congress, a new problem arose in negative environmental legislation: the Keystone XL Pipeline Act. Keystone XL was viewed by some Americans as a potential source of a vast number of jobs for working class persons.¹⁶² Despite still-significant hard and soft money expenditures by the environmental community,¹⁶³ the voting data show a deviation from the hard party-line votes of the 113th Congress, specifically in legislation relating to the Keystone XL Pipeline¹⁶⁴ and the creation of environmental infrastructure¹⁶⁵ (which could have been viewed as hindering the passage of the Keystone XL Pipeline Act). Assuming, *arguendo*, that job creation is a more politically powerful tool than environmental regulation, this could explain the voting pattern deviations displayed above.

Finally, in the 115th Congress, the only data currently extant refers to the confirmations of Scott Pruitt and William Wehrum to the Administrator and Assistant Administrator posts at the EPA.¹⁶⁶ Again,

¹⁵⁷ See *Oil & Gas Contributors 2010*, *supra* note 116; *Environment Recipients 2010*, *supra* note 84.

¹⁵⁸ See 112th Roll Votes, *supra* notes 141–43.

¹⁵⁹ See discussion of contributions, *supra* Section III.B.

¹⁶⁰ See 113th Roll Votes, *supra* notes 145–47.

¹⁶¹ See 113th Roll Votes, *supra* notes 145–47; 114th Roll Votes, *supra* notes 149–51; 115th Roll Votes, *supra* notes 154–55.

¹⁶² Glenn Kessler, *Will Keystone XL pipeline create 42,000 'new' jobs?*, WASHINGTON POST (Jan. 6, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/01/06/will-keystone-xl-pipeline-create-42000-new-jobs/?utm_term=.cccdb116fba1 [<https://perma.cc/CZ9U-THKG>].

¹⁶³ See *Environment Contributors 2014*, *supra* note 127.

¹⁶⁴ See 114th Roll Vote No. 49 and 114th Roll Vote No. 68, *supra* note 150.

¹⁶⁵ See 114th Roll Vote No. 63, *supra* note 150.

¹⁶⁶ See 115th Roll Votes, *supra* notes 154–55.

in the 2016 contribution cycle, environmental and energy groups increased their expenditures¹⁶⁷ (potentially as a result of the presidential election), but we again see a hard shift to party-line voting.¹⁶⁸ Of course, much like the Keystone XL Pipeline in the 114th Congress, there is potentially a driving force behind this party-line shift: these votes concerned confirmation proceedings. There is further support for this theory, as these confirmations were only successful as a result of a very narrow Republican majority in the Senate, and the lowering of the threshold number of approving senators to a simple majority.¹⁶⁹

VII. DISCUSSION AND NEED FOR REFORM

To sum up the above discussion, based upon the very brief cross-section analyzed above, there is evidence of a general shift to party-line voting on environmental matters post-*Citizens United*, except in the case of the Keystone XL Pipeline Act (a deviation which is potentially explained by the prevailing political importance of job creation). This discussion is not meant to suggest that the correlation between sharp increases in soft money expenditures and senators' voting patterns is evidence of causation; rather, this discussion is merely designed to illustrate one potential explanation for the shift to party-line voting: the sheer increase in soft money political spending by both the energy and environmental sectors after 2010 and *Citizens United v. FEC*.

At this point, the reader may be wondering how this relates to the decline of the use of the Treaty Clause for environmental treaties. Several factors tie these topics together: (1) treaties require the consent of at least two-thirds of the United States Senate to become legally binding; (2) environmental legislation is becoming increasingly partisan, potentially as a result of significant increases in both energy and environmental spending; and (3) the increase in party-line votes is making the two-thirds majority hurdle much harder to pass.

Without modifying the current structure of the campaign finance system, unlimited, unregulated, and unreported contributions to politicians,

¹⁶⁷ See *Oil & Gas Contributors 2016*, *supra* note 85; *Environment Contributors 2016*, *supra* note 127.

¹⁶⁸ See 115th Roll Votes, *supra* notes 154–55.

¹⁶⁹ Carol Davenport, *Senate Confirms Scott Pruitt as E.P.A. Head*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/us/politics/scott-pruitt-environmental-protection-agency.html> [<https://perma.cc/V9ZJ-XHE7>].

their campaigns, and their political committees will continue to increase. Since at least the late 1990s, scholars and politicians have identified a major need for soft money regulation.¹⁷⁰ Despite an attempt to legislate in this area via BCRA in 2002, the United States Supreme Court and lower federal courts have consistently pulled back on Congress's efforts to regulate the influx of unconnected (meaning not connected to a particular candidate) money into federal elections.¹⁷¹ In reducing the effectiveness of Congress's attempted regulations (or invalidating them altogether) the courts have perhaps inadvertently fostered a campaign finance system in which the political voices of the less financially powerful are drowned out by major industries. In this Note, I have not sought to compare the voice of the solitary person to that of ExxonMobil; rather, I have sought to compare the effectiveness of the voices of large voluntary political organizations, like the League of Conservation Voters, to those of major industrial speakers.

One can hardly deny that oil and energy companies are some of the most profitable companies in the United States, as they provide two of the most essential resources for everyday American life: gasoline for transportation and energy to power American homes and businesses. This is reflected in the amounts these companies currently spend on political activity. However, current spending does not reflect the potential influence major corporations *could* have if they chose to channel more of their profits into segregated funds or into outside groups which do not directly benefit candidates. For example, Exxon Mobil reported a profit of \$7.8 billion in 2016 alone.¹⁷² Chevron, while reporting a surprising loss in 2016 of nearly \$500 million, saw a profit of \$4.5 billion in 2015.¹⁷³ Koch Industries is not included because it is a privately held company and does not release financial statements; the SEC, however, reports that Koch Industries has an annual revenue of approximately \$60 billion.¹⁷⁴

¹⁷⁰ See Milyo, *supra* note 57; see also Bipartisan Campaign Reform Act of 2002, tit. I, Pub. L. 107-155, 116 Stat. 81, 81–88 (2002).

¹⁷¹ See *EMILY's List v. Fed. Election Comm'n*, 581 F.3d 1 (2009); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹⁷² *ExxonMobil Earns \$7.8 Billion in 2016; \$1.7 Billion During Fourth Quarter*, EXXONMOBIL (Jan. 31, 2017, 8:00 AM), <http://news.exxonmobil.com/press-release/exxonmobil-earns-78-billion-2016-17-billion-during-fourth-quarter> [https://perma.cc/C288-WFFF].

¹⁷³ CHEVRON, 2016 ANNUAL REPORT, <https://www.chevron.com/-/media/chevron/annual-report/2016/2016-Annual-Report.pdf> [https://perma.cc/9VJB-ZW4Z].

¹⁷⁴ SEC, *FACTS ABOUT KOCH INDUSTRIES, INC.*, <https://www.sec.gov/Archives/edgar/data/41077/000119312505225958/dex993.htm> [https://perma.cc/CJ3L-E23C].

Contrast these numbers with the total annual revenues of four major environmental organizations in the United States¹⁷⁵: the Conservation Fund reported a total revenue of \$171 million; the Natural Resources Defense Council reported \$110 million; the Nature Conservancy reported \$926 million; and the Sierra Club reported just \$56 million.¹⁷⁶ Combined, these environmental groups cannot eclipse the spending power of the least powerful of the three energy companies mentioned above.

As is established in the preceding section, it is clear that none of the corporate entities listed, nor any of the environmental organizations discussed, are funneling the entirety of its annual revenue into political spending. One should, however, use this comparison as a tool to understand the disparity in influence that energy and oil companies *could* have in the political realm if they chose to do so. At present, however, the contributions discussion above¹⁷⁷ show the current state of affairs, and while the contribution levels of energy giants and environmental groups are disparate, they are not as dramatically disparate as they have the potential to be. If the above voting shifts are, in fact, attributable to the disparities in contributions at the current levels, one need only imagine the problems that would ensue from *dramatic* contribution disparity; this is why it is politically and democratically important to stymie this possibility before it gets out of hand.

In campaign finance cases, the Supreme Court has repeatedly rejected the notion that monetary distortion of influence in the political sphere is a compelling government interest sufficient to justify imposing limits on protected political speech of corporations.¹⁷⁸ Solely for the sake of argument, return to the now-overruled *Austin v. Michigan Chamber of Commerce* decision: there, the Court unequivocally upheld a Michigan state law which regulated independent corporate expenditures on the ground that the law sought specifically to eliminate the distortion caused

¹⁷⁵ Note that Environment America and the League of Conservation Voters do not publish financial records indicating the total donations received by their organizations. If they did, those groups would be listed here with the Sierra Club instead of the other organizations listed.

¹⁷⁶ *The 200 Largest U.S. Charities—Environmental/Animal*, FORBES, https://www.forbes.com/lists/2011/14/200-largest-us-charities-11_rank-environment-animal.html [<https://perma.cc/WC6J-ZC9F>].

¹⁷⁷ See discussion of contributions, *supra* Section III.B.

¹⁷⁸ See *Citizens United*, 558 U.S. at 310. *But see Austin*, 494 U.S. at 652 overruled by *Citizens United*, 558 U.S. at 310 (discussing distortion rationale).

by corporate spending.¹⁷⁹ The majority noted that the law at issue ensured that corporate expenditures (from the segregated fund) reflected “actual public support for the political ideas espoused by corporations.”¹⁸⁰ This argument gives rise to yet another potential justification for instituting regulations on corporate expenditures in political campaigns: the distinction between corporate and human speakers.

Fundamentally, there is a difference between a corporation and a voluntary interest group like the environmental groups listed above. Voluntary political associations are comprised of human speakers with a shared common interest seeking to further that interest through political speech, and that goal tends to be their only activity (there is usually no sole-profit business interest).¹⁸¹ In terms of the groups mentioned above, all are dependent upon private donors to fund their activist efforts.¹⁸²

Corporate entities, on the other hand, do not fit the same mold. It is generally safe to assume that many Americans work for corporations with whom they do not share common political interests. Further, unlike voluntary political associations, corporations do not engage in solely political activity: by definition, corporations engage in business activity, usually for the purpose of gaining profit.¹⁸³ In essence, this analysis harkens back to the framework set forth in *MCFL*.¹⁸⁴ Recall that the framework there was designed to create exceptions to corporate expenditure limits for corporations that did not act as businesses, but as voluntary political associations.¹⁸⁵ The pertinent criteria were: (1) the corporation was formed for the express purpose of promoting political ideas and cannot engage in business activity; (2) the corporation has no shareholders or other claimants to its assets or earnings; and (3) the corporation does not accept contributions from business corporations and labor unions.¹⁸⁶

¹⁷⁹ *Austin*, 494 U.S. at 661.

¹⁸⁰ *Id.*

¹⁸¹ *See generally Political Organizations*, ENCYCLOPEDIA.COM (2018), <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/political-organizations> [<https://perma.cc/3WCP-FZRC>].

¹⁸² *See* FORBES, *supra* note 176 (the Conservation Fund reported \$57 million from private donors, the Natural Resources Defense Council reported \$95 million from private donors, the Nature Conservancy reported \$527 million from private donors, and the Sierra Club reported \$49 million from private donors).

¹⁸³ *Corporation*, INVESTOPEDIA (2018), <https://www.investopedia.com/terms/c/corporation.asp> [<https://perma.cc/Z3J9-YY3V>].

¹⁸⁴ *Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 478 U.S. 238 (1986).

¹⁸⁵ *Id.* at 263–64.

¹⁸⁶ *Id.* at 264.

The Court's reasoning in *MCFL* resonates today, as it leaned heavily on precedent pointing to the need to restrict the influence of corporate wealth in political expenditures. The Court was focused primarily upon the government's interest in preventing corruption, or the appearance of corruption, in political expenditures,¹⁸⁷ but the same reasoning easily transfers to the anti-distortion principle. For example, consider the following rationales considered by the Court in support of curtailing corporate spending: "restricting 'influence of political war chests funneled through the corporate form,'"¹⁸⁸ the need to "eliminate the effect of aggregated wealth on federal elections,"¹⁸⁹ the need to "curb the political influence of 'those who exercise control over large aggregations of capital,'"¹⁹⁰ and the regulation of "substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization."¹⁹¹

Each and every rationale cited by the *MCFL* Court could feasibly justify corporate expenditure regulations on the basis that the mass aggregation of wealth possessed by corporations allows said corporations to funnel wealth into post-*Citizens United* unlimited soft money spending. One need only look to the 2010 and 2012 election cycles, discussed above,¹⁹² to see the significant jump in soft money expenditures. Permitting corporations to do so has effectively allowed them to inject significantly more monetary influence into the political stream than any other private voice, whether it be an individual or a voluntary political organization.¹⁹³ This is a particular concern in the realm of environmental activism, as there is such a massive disparity in wealth between the opposing sides of the political fight.¹⁹⁴ Privately funded voluntary political organizations and special interest groups stand to lose some level of influence when competing with the contributions and expenditures of the fossil fuel and energy industries.

¹⁸⁷ *Id.* at 256–57.

¹⁸⁸ *Id.* at 257 (citing *Fed. Election Comm'n v. Nat'l Conservative PAC*, 470 U.S. 480, 499 (1985)).

¹⁸⁹ *Id.* (citing *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 413–15 (1972)).

¹⁹⁰ *MCFL*, 479 U.S. at 257 (citing *United States v. Int'l Union United Auto., Aircraft and Agr. Implement Workers of America*, 352 U.S. 567, 584 (1957)).

¹⁹¹ *Id.* (citing *Fed. Election Comm'n v. Nat'l Right to Work Comm.*, 459 U.S. 197, 206 (1982)).

¹⁹² See discussion of contributions, *supra* Section III.B.

¹⁹³ See, e.g., *Oil & Gas Contributors 2014*, *supra* note 122; *Environment Contributors 2014*, *supra* note 127 (Koch Industries contributed \$7.1 million to outside groups, nearly double the combined contributions of the top three environmental groups).

¹⁹⁴ See discussion of profit margins, *supra* Part VII; see also discussion of contributions, *supra* Section III.B.

Encouraging campaign finance reform that comports with the framework established in *MCFL* would place corporations under more scrutiny while still permitting them to engage in the political speech protected under the First Amendment. The purpose is not to chill or prohibit corporate political speech, but to ensure that it is not so powerful as to drown out the voices of noncorporate entities in order to prevent dramatically disproportionate corporate influence over legislators.¹⁹⁵ By preventing further increases in disparity between Big Oil & Energy corporations and environmental voluntary political associations, it is possible to ensure that both groups have an opportunity to persuade Senators to support their respective interests. While this course of action may not increase the potential success of future potential environmental treaties, it will at least ensure such treaties will be afforded a healthy, vigorous debate rather than a mere party-line vote.

CONCLUSION

This Note has, against the backdrop of environmental treaties and the Treaty Clause of the United States Constitution, sought to illustrate the effect *Citizens United v. FEC* has had upon senators' voting habits regarding environmental matters. In the years since *Citizens United*, corporate entities of all kinds (including those in Big Oil & Energy) have channeled large portions of their political activity into contributions to outside spending groups, also known as soft money expenditures. Nonprofit entities, including environmental interest organizations and voluntary political associations, have also increased their contributions to outside spending groups, but some organizations are beginning to pull back on this course of action.¹⁹⁶ The continued non-regulation of soft money contributions in campaign finance has the potential to create a massive disparity in the influence corporate entities (like Big Oil & Energy) and American voters, by way of voluntary political associations, have over federal legislators. This disparity in influence will almost certainly impact the decisions of United States senators in deciding whether to enter into binding international environmental treaties.

¹⁹⁵ See, e.g., *Citizens United*, 558 U.S. at 394–95, 420–21 (Stevens, J., dissenting) (discussing the Court's long history of distinguishing between corporate and human speech, as well as current comparable distinctions between student speech, foreign speech, and speech by prisoners).

¹⁹⁶ See *Environment Contributors 2016*, *supra* note 127.

Again, however, the purpose of this Note is not to state that the contributions discussed above were the direct cause of the voting habits of the senators.¹⁹⁷ Rather, the purpose is to illustrate one potential explanation for the increasing number of party-line votes cast in the Senate, and note that such an increase will burden the ability of the President and the Senate to surpass the two-thirds Senate majority required to bind the United States to multinational environmental treaties. I have chosen to focus upon environmental treaties specifically because the United States has simply not entered into any in recent memory,¹⁹⁸ but the nation has regularly considered and adopted other types of treaties in the last ten years.¹⁹⁹ Rather, the United States has shifted to a practice of executive-congressional agreements (much like the Paris Climate Accord) meant to bypass the requirements of the Treaty Clause in agreeing to international climate frameworks.²⁰⁰

Noting this shift in agreement mechanisms brings this Note to its final remarks. Of course, the preceding discussion cannot exist without an acknowledgment of a number of potential counterpoints. The most obvious counter-argument is that a plethora of factors impact the voting preferences of elected legislators, including everything from the general political climate, the geographic region represented, the State represented, the types of campaign contributors, and the amount of contributions received from those donors. In response, I again note that the preceding is merely an exploration of one potential explanation for the post-*Citizens United* voting shifts. Another counter is that energy giants and environmental groups traditionally contribute to the opposite parties (energy to

¹⁹⁷ See discussion of voting patterns, *supra* Part V.

¹⁹⁸ The last comprehensive environmental treaty the Senate seems to have considered was the United Nations Framework Convention on Climate Change, in which the United States failed to sign onto the Convention via the Kyoto Protocol. See United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

¹⁹⁹ See, e.g., Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing, Can.-U.S., Nov. 22, 2009, S. TREATY DOC. NO. 112-4 (2011) (fishing); Treaty with Russia on Measures for Further Reduction and Limitation of Strategic Offensive Arms, Russ.-U.S., Apr. 8, 2010, S. TREATY DOC. NO. 111-6 (arms regulation).

²⁰⁰ This is perhaps best explained by constitutional law professor, Noah Feldman, who states that executive agreements, unlike treaties, do not become the supreme law of the United States. In essence, the executive agreements simply do not bind the United States to the framers' terms, but do acknowledge the United States' intention to adhere to said terms. See Noah Feldman, *The Paris Accord and the Reality of Presidential Power*, BLOOMBERG (June 2, 2017, 1:00 PM), <https://www.bloomberg.com/view/articles/2017-06-02/trump-paris-climate-change-and-constitutional-realities> [<https://perma.cc/43RM-6CFY>].

Republicans, environment to Democrats). I have attempted to reduce this concern by analyzing a cross-section of senators who receive contributions from both groups.

A final counterpoint is that the United States simply does not need to enter environmental treaties when we have the executive agreement process. In response, it suffices to say that this Note derived from the uncertainty the United States faced regarding the Paris Climate Agreement, including whether the States were bound by its terms, and how the nation could rescind its agreement to the Accord. Had the United States entered the Paris Climate Accord under the Treaty Clause, these concerns would never have arisen, as the answers are clearly found in our jurisprudence.²⁰¹

Even if the United States' shift to a practice of congressional-executive agreements ensures that the nation continues to engage in global environmental efforts without the need for multinational treaties, many environmental efforts must be handled domestically, and that will require the cohesion and cooperation of both leading political parties. While campaign finance is surely only one of the myriad causes of party-line voting, reforming the campaign finance system and regulating soft money will go far in quelling the expansive influence corporate donors have in the electoral system. That, in itself, will go a long way toward closing the rift between the controlling parties and fostering a political system in which all legislation, environmental or otherwise, is not controlled by the industry or group with the largest wallet, but by the ideals of the American voters.

²⁰¹ See *Baldwin v. Franks*, 120 U.S. 678, 683 (1887) (confirming that valid treaties under the Treaty Clause are binding on the States); *Goldwater v. Carter*, 444 U.S. 996 (1979) (affirming that the President may unilaterally withdraw from a treaty).

