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The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election

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ARTICLES

THE HISTORY OF UNDISCLOSED SPENDING IN U.S. ELECTIONS & HOW 2012 BECAME THE "DARK MONEY" ELECTION

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I. INTRODUCTION

An estimated $6 billion was spent on the 2012 federal elections in the United States, with more than $3.14 billion spent by federal candidates,[1] 2.07 billion spent by national political party committees,[2] and $1.03 billion spent by outside groups.[3] These amounts represent a continuation of the rapid growth in spend-

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1. *2012 Overview: Stats at a Glance*, OPENSECRETS.ORG, http://www.opensecrets.org/overview/index.php (last visited Apr. 17, 2013) (calculation by authors).

2. *Political Parties Overview: 2012*, OPENSECRETS.ORG, http://www.opensecrets.org/parties/index.php (last visited Apr. 17, 2013) (calculation by authors).

3. *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Apr. 17, 2013). We use the term "outside groups" to refer to individuals and organizations other than federal candidate committees and national political party committees, i.e., individuals, nonconnected political committees, super PACs, 527 organizations, 501(c) organizations, corporations, unions, and unincorporated organizations.

ing on federal elections in the United States in recent decades.[4] The contribution limits applicable to candidates and political party committees were increased in the Bipartisan Campaign Reform Act of 2002 (referred to herein as "BCRA" or "McCain-Feingold"), but subsequent decisions of the Supreme Court of the United States and regulatory agencies have resulted in enormous increases in independent spending by outside groups. The resulting growth in election spending is not surprising. The federal government's extensive and expanding role in the nation's economy, coupled with the potential for any given election cycle to swing control of the White House, the U.S. Senate, or the U.S. House of Representatives from one party to another, motivates individuals and interest groups to raise and spend increasing amounts on federal elections.

What is notable and deeply concerning to many observers, voters, and participants in the political process, however, is the dramatic increase in the percentage of this election spending that is not fully transparent, meaning that the sources of the funds used to make such expenditures are increasingly not disclosed to the public.[5] Indeed, of the estimated $1.03 billion spent by outside groups in 2012, it is estimated that only 40.8% of the sources of funds expended were publicly disclosed in 2012.[6] This figure represents a marked decline over the past decade in the transparency of outside spending. As recently as in 2006, 92.9% of outside spending was fully disclosed, and in 2004, the first election in which the McCain-Feingold disclosure provisions were in effect, 96.5% was fully disclosed.[7] The exact amount that

4. The 2012 spending was an increase of 20% over the amount spent in 2008. According to OpenSecrets.org, $5.2 billion was spent on federal elections in 2008, more than $4.1 billion was spent in 2004, and $3.08 billion was spent in 2000. *Historical Elections: The Money Behind the Elections*, OPENSECRETS.ORG, http://www.opensecrets.org/bigpicture/index.php (last visited Apr. 17, 2013). By comparison, in 1992, it is estimated that the total amount spent on federal elections was $1.2 billion. *See* Herbert E. Alexander, *Financing Presidential Election Campaigns*, ISSUES OF DEMOCRACY, Sept. 1996, 1–2, *available at* http://cfinst.org/pdf/HEA/137_financinpreselectusis.pdf.

5. *See, e.g.*, Joseph Sandler, Citizen United*'s Biggest Surprise: The Collapse of Disclosure*, ACSBLOG (Jan. 25, 2011), http://www.acslaw.org/acsblog/citizens-united%E2%80%99s-biggest-surprise-the-collapse-of-disclosure (referring to the recent "collapse of disclosure" as "stunning"); *see also* Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, 27 J.L. & POL. 683, 687 (2012) (noting that "decreasing disclosure of the donors funding independent spending has marked the growing role of that independent spending").

6. *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/disclosure.php (last visited Apr. 17, 2013).

7. *Id.*

special interests and mega-donors, such as billionaire casino magnate Sheldon Adelson, the Koch brothers of Koch Industries, Inc., or DreamWorks CEO Jeffrey Katzenberg spent to influence the 2012 presidential race will likely never be known,[8] and individuals considering running for president in 2016 have already begun courting such mega-donors.[9] This lack of disclosure is not to be confused with anonymity. The sources of these funds are likely well known to candidates and party elites, but withheld from the public.[10] As a result of these developments, the 2012 election is widely referred to as the "dark money" election.[11] How did we arrive at this point?

Disclosure of the sources of funds spent to influence federal elections has been a core tenet of federal campaign finance law in the United States for more than a century. Eradicating the corrupting influence of undisclosed political contributions and

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8. Theodoric Meyer, *How Much Did Sheldon Adelson Really Spend on Campaign 2012?*, PROPUBLICA (Dec. 20, 2012, 11:47 AM), http://www.propublica.org/article/how-much-did-sheldon-adelson-really-spend-on-campaign-2012 (last visited Apr. 17, 2013) ("Sheldon Adelson, the billionaire casino magnate and emblem of the *Citizens United*-era of campaign finance, spent gobs of money on the 2012 election—more money than anyone else in American history. Exactly how much you ask? We don't really know, and it's likely we never will."); Allison Fitzgerald, *Katzenberg Biggest Donor to Pro-Obama Political Group*, BLOOMBERG (Jul. 31, 2011, 6:59 PM), http://www.bloomberg.com/news/2011-07-31/katzenberg-biggest-donor-to-pro-obama-political-group.html; Robert Maguire, *Obama's Shadow Money Allies File First Report*, OPENSECRETS: BLOG (Jan. 8, 2013, 11:17 AM), http://www.opensecrets.org/news/2013/01/obamas-shadow-money-allie.html (noting that according to Priorities USA's tax filing with the IRS, "[o]ne donor alone gave more than 80 percent of Priorities' total revenue in 2011, or $1.9 million of about $2.3 million. . . . Whether the donors were corporations, individuals, unions or other nonprofits that also don't have to disclose their donors is impossible to know from the form.").

9. Kenneth P. Vogel, *2016 Contenders Court Mega-Donors*, POLITICO (Dec. 3, 2012, 4:29 AM), http://www.politico.com/story/2012/12/2016-contenders-courting-mega-donors-84497.html.

10. Indeed, in the seminal Supreme Court case, *McConnell v. Federal Election Commission*, the Court recognized that undisclosed donors of large amounts were well-known to candidates, elected officials, and party leaders. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 151–52 (2003). *See also* Joseph M. Birkenstock, *Three Can Keep a Secret, If Two of Them Are Dead: A Thought Experiment Around Compelled Public Disclosure of "Anonymous" Political Expenditures*, 27 J.L. & POL. 609, 610 (2012) ("There is strong evidence that funders of political activity generally do not desire to remain completely anonymous, but rather prefer to be known to elected officials, party insiders, and perhaps even the public more broadly.").

11. *See* Eliza Newlin Carney, *Rules of the Game: Shining a Light on Political 'Dark Money'*, ROLL CALL (Oct. 2, 2012, 12:00 AM), http://www.rollcall.com/issues/58_25/Rules-of-the-Game-Shining-a-Light-on-Political-Dark-Money-217922-1.html.

expenditures was a central focus of early twentieth-century progressivism,[12] and this early transparency effort enjoyed broad support from across the political spectrum.[13] Indeed, it was Republican President Theodore Roosevelt's fervent speeches before Congress decrying the influence of special interests and calling for disclosure legislation as well as other reforms that contributed to the enactment of the nation's first federal campaign finance disclosure requirement: The Publicity of Political Contributions Act of 1910 (Publicity Act).[14] This widespread agreement about (or at a minimum acquiescence in) the importance of transparent election spending was due to the fact that most citizens, public officials, and judges came to recognize, as Justice Louis Brandeis famously noted, "[s]unlight is said to be the best of disinfectants . . . ."[15] The elaborate efforts of corrupt actors to evade the federal disclosure requirements since the enactment of the Publicity Act, as demonstrated by scandals such as Teapot Dome and Watergate, which each prompted a tightening of disclosure requirements, has further validated the belief that disclosure does indeed act as a significant deterrent to corrupting campaign money.

Yet, a little more than one century after the enactment of the Publicity Act, and forty years after the Watergate reforms, our federal elections have again been flooded with hundreds of millions of dollars of undisclosed funds. What is particularly alarming is that this rapid increase in undisclosed spending has

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12. Richard L. McCormick, *The Discovery That Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AMER. HIST. REV. 247, 270–74 (1981). McCormick refers to the recognition of widespread corruption of government as the "the awakening of 1905 and 1906" that "was sufficiently genuine and widespread to dominate the nation's public life." *Id.* at 266, 274.

13. *See* LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT 3–6 (2011). In 1909, Perry Belmont, President of the National Publicity Law Organization, an organization with several state branches that advocated for the passage of state and federal laws requiring the disclosure of campaign contributions and expenditures, reported confidently that, "[a]t no stage of this movement has there been any open opposition in Washington." Perry Belmont, *Progress of Campaign-Fund Publicity*, 189 N. AMER. REV. 35, 40 (1909), *available at* http://www.archive.org/stream/northamreview189miscrich/northamreview189miscrich_djvu.txt. In 1960, political scientist Alexander Heard, an early pioneer in the study of campaign financing, would reflect on the era by noting that although disclosure was in theory "a controversial goal . . . the climate of politics discourages dissent from it." ALEXANDER HEARD, THE COSTS OF DEMOCRACY 356 (1960).

14. ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 4 (1988).

15. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933), *available at* http://www.law.louisville.edu/library/collections/brandeis/node/196.

occurred less than one decade after BCRA and other related federal campaign finance legislation had virtually eliminated undisclosed spending from federal elections. It also occurred during a period in which the Supreme Court of the United States on various occasions broadly endorsed the importance and constitutionality of "effective" disclosure requirements. If, as Samuel Issacharoff and Pamela Karlan famously wrote, "the central lesson of the post-Watergate experience" is that "political money . . . is a moving target[,]"[16] it is imperative that we understand exactly why the critical arrow of disclosure in the reformer's quiver missed its mark in the 2012 elections. The goal of this Article is to add to that understanding.

As explained in detail below, the re-emergence of dark money is best understood as primarily a failure of the Federal Election Commission (FEC), the federal agency charged with implementing and enforcing federal campaign finance laws. This is because the plain statutory language of the Federal Election Campaign Act of 1971 (FECA), and subsequent amendments to FECA, including McCain-Feingold, is sufficiently broad to provide for full disclosure of the sources of the vast majority of funds used to influence federal elections. In the case of organizations that register with the FEC as political committees, full disclosure is largely realized. But with regard to groups that do not trigger political committee status, the FEC has implemented and applied the disclosure provisions applicable to their expenditures in an extraordinarily narrow and illogical manner that effectively renders the statutory disclosure requirements meaningless.

The re-emergence of dark money did not occur primarily because Congress failed to foresee what types of entities would spend money to influence federal elections, or because Congress failed to enact sufficiently broad disclosure provisions. While those who are critical of the ability of corporations and unions to spend unlimited general treasury funds to influence federal elections do have legitimate grounds to complain about the Supreme Court's 2010 *Citizens United v. Federal Election Commission* decision,[17] the Court has not invalidated a single federal campaign finance disclosure requirement responsible for the rise of dark money. In fact, in two seminal Supreme Court decisions regarding federal disclosure requirements, *Federal Election Commission v.*

16. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707 (1999).

17. 130 S. Ct. 876 (2010).

Massachusetts Citizens for Life[18] in 1986 and *Citizens United* in 2010, the Court appears to have not fully understood the steps the FEC had already taken to undermine the statutory disclosure regime at issue. Were it not for these steps by the FEC, such spending would be fully disclosed today.

To be sure, many other factors, such as the Internal Revenue Service's apparent failure to enforce existing limits on the political activity of tax-exempt organizations, and the inability of the FEC to require a broader array of organizations to register as political committees due to the Supreme Court's seminal *Buckley v. Valeo*[19] decision, have also facilitated the re-emergence of dark money. The proximate cause of the re-emergence of dark money, however, has been the anti-disclosure movement's successful takeover or immobilization of the FEC.

II. The Historic Consensus in Favor of Disclosure

Mandated public disclosure of the funds spent to influence elections has long been the "essential cornerstone" of campaign finance laws in the United States, and is widely recognized as "fundamental to the political system."[20] This is because disclosure is thought to reduce corruption in an efficient manner, serving as "an automatic regulator, inducing self-discipline among political contenders and arming the electorate with important information."[21] Historically, disclosure requirements have enjoyed strong support from the public and from candidates and policymakers from across the political spectrum, and have continually been upheld by state and federal courts.[22] Opponents of disclosure have recently mounted numerous challenges to state and federal political disclosure laws, but have almost entirely failed in convincing state and federal courts to invalidate such laws. Indeed, the constitutionality of mandated disclosure of election spending has likely never been more firmly established than it is today. In recent years, however, those seeking to avoid

18. 479 U.S. 238 (1986).

19. 424 U.S. 1 (1976).

20. Herbert E. Alexander, Financing Politics: Money, Elections and Political Reform 194 (4th ed. 1992).

21. Buckley v. Am. Constitutional Law Found., 525 U.S. 182, 223 (1999) (O'Connor, J., dissenting).

22. *See* R. Sam Garrett, Cong. Research Serv., The State of Campaign Finance Policy: Recent Developments and Issues for Congress 15 (2010), *available at* http://fpc.state.gov/documents/organization/154166.pdf ("Historically, disclosure aimed at reducing the threat of real or apparent conflicts of interest and corruption have received bipartisan support. In fact, disclosure typically has been regarded as one of the least controversial aspects of an otherwise often-contentious debate over the nation's campaign finance policy.").

disclosure requirements have found avenues for corporations and individuals to spend vast sums on federal elections in an undisclosed and unaccountable manner. Further, opponents of disclosure have increased their public criticism of disclosure and attempted to portray disclosure requirements as chilling protected First Amendment speech and creating a threatening environment for speakers.

A. *The Supreme Court's Disclosure Jurisprudence*

The Supreme Court has generally upheld laws requiring the disclosure of the sources of funds spent to influence elections. In certain cases, such laws have even received high praise from conservative Justices. The Supreme Court has begun its analysis by noting that disclosure requirements can burden core constitutional rights, including the First Amendment rights of free speech and free association. The Court also has stated that compelled disclosure can violate the First Amendment in certain limited contexts, such as when disclosure may expose donors to severe politically-motivated threats, harassment, or reprisals. The Court, however, has recognized countervailing First Amendment interests that compelled disclosure advances by introducing important information about candidates and elected officials into the marketplace of ideas that assists voters to evaluate candidates and hold elected officials accountable.

In *Burroughs v. United States*, the first Supreme Court case dealing with the constitutionality of compelled political disclosure laws, the Court recognized the role of disclosure in preventing corruption, stating that such laws "tend to prevent the corrupt use of money to affect elections" which, according to the Court, was a conclusion that "reasonably cannot be denied."[23] The public interest in preventing corruption still serves as a primary justification of disclosure laws today. But the lodestar of the Court's treatment of disclosure laws came more than forty years later in the seminal 1976 case, *Buckley v. Valeo*,[24] wherein the Court determined that the proper level of judicial scrutiny to apply to political disclosure laws was "exacting scrutiny."[25] This means that compelled disclosure must be justified by "sufficiently important" public interests and have a "relevant correlation" or "substantial relation" to the public interests being served.[26]

23. Burroughs v. United States, 290 U.S. 534, 548 (1934).
24. 424 U.S. 1 (1976).
25. *Id.* at 64–65.
26. *Id.* at 64–66.

The *Buckley* Court identified three important public interests served by disclosure requirements: (1) the anti-corruption interest of deterring actual or apparent corruption of the nation's democratic processes by exposing campaign fundraising and spending to public scrutiny; (2) the informational interest of providing relevant information to voters to assist them "to place each candidate in the political spectrum more precisely," and to "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office," and "help[ ] voters to define more of the candidates' constituencies";[27] and (3) aiding in the enforcement of other campaign finance laws, such as contribution limits and prohibitions. To the Court, these interests were sufficiently important to justify compelled disclosure.

The *Buckley* Court did, however, indicate that in certain circumstances compelled disclosure could pose such a burden on First Amendment rights as to render mandated disclosure unconstitutional, such as when disclosure would expose individuals to severe threats, harassment, and reprisals.[28] In doing so, the Court drew heavily from the 1958 case *NAACP v. Alabama* ex rel. *Patterson*, in which the Court held that a spurious demand by Alabama authorities for a list of all NAACP members in Alabama failed to withstand "the closest scrutiny," because, as a group advocating views that at the time were "controversial" and "dissident," disclosing the NAACP's Alabama members carried the "likely" risk that those members would be exposed to "economic reprisal, loss of employment, threats of physical coercion, and other manifestations of public hostility."[29]

The underlying facts and historical context were crucial to the Court's 1958 decision. The Alabama Governor, Lieutenant Governor, state legislators, judges, and various state and local officials had vigorously opposed desegregation in open defiance of the Supreme Court's decision in *Brown v. Board of Education* in 1954.[30] Horrific acts of violence, in some cases perpetrated by the Ku Klux Klan, had been directed at the African American community and the whites who dared support their cause. These included targeted attacks, bombings and shootings of African American leaders, churches, buses, and homes. In many instances, Alabama authorities refused to protect the African American community from such violence, and in some instances,

27. *Id.* at 66–68, 81.
28. *Id.* at 69.
29. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460–63 (1958).
30. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

even perpetrated the violence themselves.[31] This deplorable state of race relations in Alabama at the time was central to the NAACP's argument for relief and central to the Court's holding granting an exception from the disclosure requirements to the NAACP.[32] With *NAACP v. Alabama* in mind, the *Buckley* Court upheld FECA's disclosure requirements provided that an exception be available to parties that could demonstrate a reasonable probability that disclosure would result in threats of actual physical harm.[33]

The strength of the voter information interest was underscored when, in *First National Bank of Boston v. Bellotti*, the Court stated that disclosure may enable voters to better evaluate a political speaker's credibility and thus better evaluate the credibility of his or her political communications.[34] But, following *Bellotti*, many wondered if the Supreme Court had taken a step back from its strong endorsement of the voter information interest when the Court issued its ruling in 1995 in *McIntyre v. Ohio Elec-*

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31. Brief for Petitioner at 12–17, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (No. 91) 1957 WL 87216.

32. *Patterson*, 357 U.S. at 461–62 (noting that the NAACP's argument for relief from the disclosure requirement was that "in view of the facts and circumstances shown in the record, the effect of compelled disclosure of the membership lists will be to abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs"); *see also* Brief for Petitioner at 12, *Patterson*, 357 U.S. 449 (arguing that "[t]his case cannot be properly considered without being viewed against the background and setting in which it arose").

33. *Buckley*, 424 U.S. at 74 (noting that "[m]inor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim" for a disclosure exception, and that "[t]he evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties"). The Court would again recognize such an exemption in *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 102 (1982), determining that the disclosure of contributors' names would have a severe chilling effect on the Party's First Amendment activities.

34. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791 (1978). For example, prospective voters in Nevada who viewed an advertisement aired by "Latinos for Reform" entitled *¡No Votes!* urging Latinos to not vote in the 2010 U.S. Senate race between incumbent Democratic Senator Harry Reid and Republican challenger Sharron Angle as a means of punishing Democrats for failing to pass comprehensive immigration reform would have perhaps been better positioned to evaluate that advertisement had they known that "Latinos for Reform" was founded by a conservative Republican with no Latino ties. *See* Andrea Nill Sanchez, *Breaking: Univision Will Not Air GOP Group's Ad Telling Latinos Not to Vote*, THINGPROGRESS.ORG (Oct. 19, 2010, 3:20 PM), http://thinkprogress.org/politics/2010/10/19/125117/latinos-for-reform-swift-boat/.

tions Commission.[35] In *McIntyre*, the Supreme Court applied exacting scrutiny to hold that the First Amendment prohibited Ohio from requiring handbills expressing opposition to a proposed school tax levy to contain the name and address of the person issuing the literature. Because the election at issue was an Ohio ballot initiative election and not a candidate election, the public interests in deterring actual or apparent corruption and enforcing contribution limits were not present. With the voter information interest left as the only remaining public interest furthered by the disclosure requirement, the Court held that the interest was insufficient to justify the Ohio statute.[36]

Following *McIntyre*, some state courts took the position that *Buckley* was to be read narrowly as upholding only laws requiring the disclosure of sources of political contributions and funding for communications that expressly advocated the election or defeat of political candidates.[37] Indeed, for some time it was unclear whether the mandated disclosure of the sources of funding for issue advocacy communications was constitutionally permissible.[38] The Court provided clarity in its seminal 2003 decision in *McConnell v. Federal Election Commission*. The Court upheld by an 8-1 margin McCain-Feingold's application of disclosure requirements to "electioneering communications" whether or not they contained express advocacy of a candidate's election or defeat, finding that the disclosure requirements furthered the three important public interests identified in *Buckley*.[39]

Since *McConnell*, the Supreme Court has maintained the *Buckley* and *McConnell* framework. In 2010, the Court upheld by an 8-1 margin the Washington Public Records Act (PRA), which

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35. 514 U.S. 334 (1995). *See* Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 272 (2000).

36. *McIntyre*, 514 U.S. at 348–49.

37. *See* Hasen, *supra* note 35, at 267. Courts taking this position included the U.S. Court of Appeals for the Second Circuit in *Vermont Right to Life Commission v. Sorrell*, 221 F.3d 376 (2d Cir. 2002) (striking down a Vermont law requiring disclosure for advertising that "explicitly or implicitly" rather than "expressly" advocated the election or defeat of a candidate), and the U.S. Court of Appeals for the Fourth Circuit in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 713 (4th Cir. 1999) (holding that a state disclosure law "subject[ed] groups engaged in only issue advocacy to an intrusive set of reporting requirements").

38. *See* Hasen, *supra* note 35, at 270.

39. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 194–98 (2003); *see also* Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 913–14 (2010) (reaffirming the Court's holding in *McConnell* that disclaimer and disclosure requirements could be applied to a broader category of election-related speech than express advocacy communications).

required the public release of a ballot petition containing the names and addresses of its 137,000 signatories.[40] In doing so, the Court stated that Washington's "interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional. . . ."[41] Chief Justice Roberts, writing for the Court, noted that the plaintiffs had offered "scant evidence" that disclosure would subject the plaintiffs to threats, harassment, or reprisals from government officials or private parties, but in keeping with *Buckley* and *NAACP v. Alabama*, noted that the plaintiffs could offer such evidence in other proceedings pending before the District Court.[42] In concurrence, Justice Scalia offered a ringing endorsement of disclosure laws, stating that,

> [r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[43]

The Court again reiterated the constitutionality of disclosure requirements in *Citizens United v. Federal Election Commission*.[44] Although the Court in *Citizens United* struck down a prohibition on the use of corporate and union general treasury funds to make expenditures that expressly influence federal elections, Justice Kennedy, writing for the Court, presumed that such spending would be disclosed in a "rapid and informative" manner.[45] As Justice Kennedy wrote:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today . . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.[46]

40. Doe v. Reed, 130 S. Ct. 2811, 2815 (2010).
41. *Id.* at 2814.
42. *Id.* at 2821.
43. *Id.* at 2837 (Scalia, J., concurring).
44. 130 S. Ct. 876 (2010).
45. *Id.* at 916.
46. *Id.*

Justice Kennedy's assumption that an "effective" disclosure system existed at the time of the Court's opinion is curious, because, as explained in great detail below, this was not and is not correct. Nevertheless, *Citizens United* demonstrates that political disclosure requirements currently stand on firm constitutional ground, with narrow exceptions for lone pamphleteers that use modest resources to make face-to-face election-related communications, and for groups that can demonstrate that disclosure will likely result in severe and palpable harm from government persecution or lack of government protection.[47]

B. *Rising Opposition to Disclosure*

During this same period of time in which the Court has firmly upheld the constitutionality of political disclosure requirements, however, a small but fervent group of academics, conservative policymakers, and free speech advocates have undertaken a concerted effort to repeal, undermine, and invalidate disclosure legislation at the federal, state, and local levels.[48] This anti-disclosure movement has gained significant traction in Republican circles, although in many instances, the leaders of this anti-disclosure movement previously lauded disclosure legislation as a less-restrictive alternative to outright bans on certain contributions or expenditures to influence elections. As recently as the late 1990s, Senator Mitch McConnell (R-KY) issued a ringing endorsement of campaign finance disclosure, arguing that, "[p]ublic disclosure of campaign contributions and spending should be expedited so voters can judge for themselves what is appropriate. These are the reforms which respect the Constitution and would enhance our democracy."[49] In 2007, then House Minority Leader John Boehner remarked on NBC's *Meet the Press* that elections "ought to have full disclosure, full disclosure of all of the money that we raise and how it is spent. And I think that sunlight is the best disinfectant."[50]

47. *See* Hasen, *supra* note 35, at 273.

48. *See* Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J.L. & POL. 557, 557 (2012) ("Everywhere you look, campaign finance disclosure laws are under attack.").

49. *The Republican 180 Degree Reversal on Disclosure*, DEMOCRATIC POLICY & COMMC'NS CTR. (July 17, 2012), http://www.dpcc.senate.gov/?p=blog&id=175 (citing NPR broadcast Aug. 5, 1997); *see also McConnell's Hypocrisy on Campaign Disclosure*, LEXINGTON HERALD-LEADER, Aug. 1, 2010, http://www.kentucky.com/2010/08/01/1372068/mcconnells-hypocrisy-on-campaign.html.

50. Sam Stein, *How the GOP Went from 48 to Zero in Support of Donor Disclosure*, HUFFINGTON POST, Oct. 13, 2010, http://www.huffingtonpost.com/2010/10/13/how-the-gop-went-from-48-_n_760962.html.

To be sure, these pro-disclosure statements were made in the context of arguing that a pure disclosure system would be better than a campaign finance system with limits on contributions. But the reversal of Republican support for disclosure is striking nonetheless. In 2012, Senate Minority Leader McConnell would lead the conservative opposition to the DISCLOSE Act—legislation designed to require full disclosure of the corporate and union spending to influence elections made permissible by the Supreme Court's recent rulings.[51] Whereas forty-eight of fifty-four Republicans in the Senate voted in favor of legislation in 2000 requiring the disclosure of donors to 527 organizations engaged in election-related spending, zero Republicans voted in favor of the DISCLOSE Act in 2010 or in 2012.[52]

Opposition to disclosure is at its most fervent with regard to mandating the disclosure of the sources of funds used to pay for advertisements that discuss public policy issues and also refer to candidates for elected office in the context of a campaign. Such ads are commonly referred to as "issue ads" or as "sham issue ads." And at the heart of this opposition is the claim that such laws result in the intimidation and harassment of disclosed donors. As Richard Hasen has recently noted, to some opponents of disclosure, "harassment of donors is commonplace and severe."[53] But the evidence is overwhelmingly to the contrary. Although in *Doe v. Reed* there was some limited evidence that signatories to a Washington anti-gay marriage amendment had been "mooned" or "flipped off" by political opponents, there is little evidence that political donors today have been subjected to anything like the systemic and severe harassment that the NAACP faced in Alabama in the 1950s or that the Socialist Workers Party faced in the 1970s.[54] Disclosure opponents argue that a loss of business resulting from economic boycotts warrants a disclosure exception. But such protests, which are themselves pro-

51. *See* Press Release, Growing Threats to Our First Amendment Rights: An Address by Senate Republican Leader Mitch McConnell (June 15, 2012), *available at* http://www.mcconnell.senate.gov/public/index.cfm?p=PressReleases&ContentRecord_id=10f84ce5-aba9-42e8-9119-fb88d2edb2e2&ContentType_id=c19bc7a5-2bb9-4a73-b2ab-3c1b5191a72b&Group_id=0fd6ddca-6a05-4b26-8710-a0b7b59a8f1f.

52. Stein, *supra* note 50; Tarini Parti, *DISCLOSE Act Fails Again in Senate*, POLITICO (July 16, 2012, 7:38 PM), http://www.politico.com/news/stories/0712/78576.html/.

53. Hasen, *supra* note 48, at 560.

54. *Id.* at 563.

tected First Amendment activity, have never served as the basis of a disclosure exemption.[55]

Despite their claims, there is no evidence that the Chamber of Commerce has been subjected to threats in any way comparable to those faced by the NAACP in Alabama in the 1950s or by the Socialist Workers Party in Ohio in the 1970s.[56] Even were there evidence of credible threats of violence against these groups, there is no reason to believe that political donors would not be adequately protected by law enforcement today, again unlike the NAACP in Alabama in the 1950s.[57] Indeed, as Justice Scalia noted in his *Doe* concurrence, there are numerous laws that would prevent the government and other individuals from retaliating against, harassing, or intimidating individuals and groups that engage in political activity.[58] State laws prevent speakers from violence, threats, and harassment at the hand of private parties. There also are several federal laws that specifically address reprisal, threats, harassment, or intimidation by *government* officials.[59] For example, President Nixon's misuse of

55. *See id.* at 564 (citing Elian Dashev, Note, *Economic Boycotts as Harassment: The Threat to First Amendment Protected Speech in the Aftermath of* Doe v. Reed, 45 LOY. L.A. L. REV. 207 (2011)).

56. Jake Tapper, *Chamber of Commerce: The White House Wants Our Donor Lists So Its Allies Can Intimidate Our Donors*, ABC NEWS (Oct. 13, 2010, 11:10 AM), http://abcnews.go.com/blogs/politics/2010/10/chamber-of-commerce-the-white-house-wants-our-donor-lists-so-its-allies-can-intimidate-our-donors/; Peter Overby, *Conservatives Invoke NAACP Case in Fight for Secret Donors*, NPR (Dec. 30, 2012, 5:10 PM), http://www.npr.org/blogs/itsallpolitics/2012/12/30/168216783/conservatives-invoke-naacp-case-in-fight-for-secret-donors?live=1 (quoting NAACP Legal Defense Fund lawyer Dale Ho as noting that "[o]ne of the reasons why the NAACP required special protections at that time [is] they were a minority group that law enforcement couldn't or wouldn't protect").

57. *Id.*

58. Doe v. Reed, 130 S. Ct. 2811, 2837 (Scalia, J., concurring).

59. *See, e.g.*, 18 U.S.C. § 600 (2006) (prohibiting promising any employment, position, contract, or other benefit as consideration, favor, or reward for past or future political activity); 31 U.S.C. § 1301(a) (2006) (providing that congressionally-appropriated funds are to be used only for the purposes for which they are appropriated, which serves as the basis of the House and Senate rules that prohibit the use of official resources for campaign or political purposes, and would similarly prohibit executive branch employees from using appropriated funds for campaign or political purposes); 18 U.S.C. § 242 (2006) (making it unlawful for anyone acting under color of law, statute, ordinance, regulation, or custom to willfully deprive a person of any right, privilege, or immunity secured or protected by the Constitution or laws of the United States); 18 U.S.C. § 241 (2006) (making it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any person in any State, Territory . . . or District in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States"); 18 U.S.C. § 610 (2006) (prohibiting intimidating or coercing a federal employee to induce or discourage any

federal government resources to further political purposes was an impeachable offense.[60] The District Court examining *Doe* on remand from the Supreme Court was correct to conclude that a majority of the Supreme Court would currently grant an exception from disclosure requirements only where there is a showing that a disliked minority group faces "a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control."[61]

The frequent citation to *NAACP v. Alabama* by campaign disclosure opponents, inferring that the Chamber of Commerce, anti-abortion, or anti-equal marriage activists face harassment and intimidation on par with what the NAACP faced in Alabama in the 1950s, is historically incorrect, and has likely done more to undermine their arguments than advance them.[62] Courts have overwhelmingly found it easy to distinguish such groups from members of the Alabama NAACP, and thus the anti-disclosure movement has largely failed before the courts.[63] The anti-disclosure movement has, however, had the support of the three

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political activity by the employee); 42 U.S.C. § 1973gg-10(1) (2006) (prohibiting, in any election for federal office, any person from intimidating, threatening, or coercing a prospective registrant or voter from registering to vote, voting, or attempting to register to vote, or for urging another to register to vote); 18 U.S.C. § 594 (2006) (prohibiting intimidating, threatening, or coercing voters); 18 U.S.C. § 610 (2006) (prohibiting intimidating, threatening, commanding, or coercing any employee of the executive branch in order to induce the employee to engage in or not engage in any political activity).

60. *See* STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., ARTICLES OF IMPEACHMENT, Art. 2 (July 27, 1974), *available at* http://watergate.info/impeachment/articles-of-impeachment.

61. Doe v. Reed, 823 F. Supp. 2d 1195, 1211 (W.D. Wash. 2011), *appeal dismissed*, 697 F.3d 1235 (9th Cir. 2012). This standard was set forth by Justice Sotomayor. *Doe*, 130 S. Ct. at 2829 (Sotomayor, J., concurring) ("Case-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner that discriminates based on the content of referenda or the viewpoint of petition signers, or in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control.").

62. Hasen, *supra* note 48, at 559 (stating that the anti-disclosure rhetoric is "overblown and unsupported—offered disingenuously with the intention to create a fully deregulated campaign finance system, in which large amounts of secret money flow in an attempt to curry favor with politicians, but avoid public scrutiny").

63. Professor Richard Hasen has documented these extensive failures, concluding that the anti-disclosure effort has largely failed in convincing state and federal courts to overturn political disclosure laws. *Id.* at 560–63. *See also* Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After* Citizens United *And* Doe v. Reed, 27 GA. ST. U. L. REV. 1057 (2011); Andy Kroll, *The Reformers Strike Back!*, MOTHER JONES (Aug. 13, 2012, 3:00 AM), http://www.motherjones.com/politics/2012/08/jim-bopp-dark-

Republican-affiliated commissioners on the FEC, who have repeatedly opposed stronger disclosure requirements. They have also had the support of Republican congressional leadership, which mounted opposition to efforts by the IRS to investigate and enforce existing regulations applicable to nonprofits spending funds to influence federal elections.[64] But, to fully understand how this anti-disclosure movement succeeded, one must first understand the broader history and vulnerabilities of campaign finance disclosure legislation in the United States.

III. The Early History of Disclosure Legislation in the United States

In early American politics, the financing of electoral campaigns was rarely a source of attention, let alone controversy.[65] This was in part because there was very little campaigning to be done. The franchise was restricted to male property owners, which in 1789, amounted to approximately 800,000 voters in the entire United States,[66] and for the most part [t]here were no primaries, conventions, caucuses, parades, bands, consultants, polls, advertising blitzes, or traveling and election day costs . . . ."[67] Moreover, politics was largely a gentleman's pursuit. Candidates did not "run" for elected office in the modern sense of the term. Instead, candidates "stood" for election, expecting to receive support from the electorate by virtue of their reputations. To the extent there were fears of corruption in early American elections, the primary fear was that candidates would improperly obtain the support of voters by "soften[ing] up the electorate with liquor shortly before and during election day."[68] Indeed, large expenditures by George Washington on "the customary means of winning votes"—rum, wine, beer, and cider royal—during his 1757 candidacy for the Virginia House of

money-citizens-united-super-pac (noting that anti-disclosure activists have "lost a slew of cases intended to gut existing political disclosure laws").

64. *See, e.g.*, Peter Schroeder, *Senators Warn IRS to Ignore Political Pressure to Rewrite Super-PAC Rules*, The Hill (Aug. 6, 2012, 1:49 PM), http://thehill.com/blogs/on-the-money/domestic-taxes/242383-gop-senators-to-irs-avoid-political-pressure-on-501c4-rules; *The IRS Gets Political: The Taxman Goes After Campaign Donors*, Wall St. J., May 18, 2011, http://online.wsj.com/article/SB1000142405274870373080457632109073794516.html?mod=WSJ_hpp_sections_opinion/.

65. Cong. Quarterly, Congressional Campaign Finances: History, Facts, and Controversy 29 (1992); Mutch, *supra* note 14, at xv.

66. George Thayer, Who Shakes the Money Tree? 24 (1973).

67. *Id.*

68. *Id.* at 25.

Burgesses drew considerable attention.[69] Washington avoided such controversy in 1789 by refusing altogether to promote his candidacy for the U.S. Presidency.[70]

The modern campaign was not born until the mid-nineteenth century, the era in which "the bonds between political and economic interests were first forged."[71] Jacksonian Democracy expanded the electorate dramatically, as one-by-one states eliminated property requirements and allowed presidential electors to be selected by popular vote.[72] Reaching this expanded electorate required resources and organization, and facilitated the rise of organized political parties operating at the federal, state, and local levels.[73] With the rise of political parties, and their thirst for funding, came the "spoils" system of patronage in which government positions were dolled out to party loyalists. But these positions came with a cost: an expectation, and in some cases a requirement, to support the political party in power. Thus the assessment of government workers by political parties began in order to satisfy this demand for campaign funds.[74] During the early-to-mid nineteenth century, candidates and political parties were free to raise campaign funds from any source, and were not required to disclose their donors to the public.[75] Large contributions of cash in carpetbags or handkerchiefs were commonplace and drew little attention.[76] Campaigns during this era were largely funded by a small number of wealthy donors and interested industries.[77] Both forms of corruption—candidates

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69. George Washington distributed rum, wine, beer, and cider royal during his 1757 campaign for the Virginia House of Burgesses in such large quantities that, according to George Thayer, "[e]ven in those days this was considered a large campaign expenditure." *Id.* By comparison, James Madison's refusal to distribute cider to voters during his 1777 candidacy for the Virginia House of Burgesses is credited for his defeat. *Id.*; RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 77 (1971).

70. THAYER, *supra* note 66, at 24.

71. *Id.* at 30.

72. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 26–29 (2000).

73. THAYER, *supra* note 66, at 28.

74. MUTCH, *supra* note 14, at xv; *see also* THAYER, *supra* note 66, at 24–36 (noting that, for example, New York City employees were required to contribute six percent of their weekly wages to the Tammany campaign fund).

75. THAYER, *supra* note 66, at 29.

76. *Id.*

77. For example, during the early nineteenth century, the Du Pont family served as the primary supporters of the Whigs, and August Belmont—the U.S. Representative of the Rothschilds—served as a primary backer of Democrats. *Id.* at 31. Following the Civil War, the Republican Party was supported heavily by the Astors and Vanderbilts. *Id.* at 35.

purchasing votes and the assessment of government employees—were addressed at the state and federal levels in the late 1800s.[78]

Accompanying the rise of the modern campaign was the rise of professional politicians: Individuals who were not independently wealthy and therefore depended on their salaries as elected officials for income and depended on contributions from others to finance their campaigns.[79] And the rise of the professional politician, combined with the rise of the modern campaigns and modern political parties and their accompanying financial needs gave rise to a new concern over corruption. Although concerns that candidates might corrupt voters remained, the new concern was primarily that the corruption might flow in the opposite direction, namely that "elected representatives might not be the real policymakers, that government might still be controlled by those who provided campaign funds."[80]

A movement arose to respond to this new concern. In the 1890s, inspired by the British Parliament's enactment of the British Corrupt and Illegal Practices Prevention Act of 1883 and motivated by concerns over the financing of the campaign of 1888, several states enacted political campaign disclosure legislation—referred to as "publicity" laws—that required candidates and political parties to disclose the sources of their campaign contributions and recipients of their campaign expenditures.[81] In 1890, New York became the first state to pass such a disclosure statute, which required candidates to disclose all contributions and all expenditures.[82] Colorado, Michigan, Massachusetts, California, Missouri, and Kansas followed closely thereafter.[83] By 1927, all but three states had adopted some form of political campaign disclosure legislation.[84]

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78. *See* LOUISE OVERACKER, MONEY IN ELECTIONS 289 (1932) ("The earliest state legislation in this field was directed at certain corrupt expenditures."). On March 2, 1867, federal legislation concerning naval appropriations for fiscal year 1868 prohibited federal officers and employees from requiring or soliciting contributions from "any workingman in any navy yard" to be used "for political purposes." CONG. QUARTERLY, *supra* note 65, at 29–30. Several states also began to regulate campaign finance in the late 1890's. *See* Melvin I. Urofsky, *Campaign Finance Reform Before 1971*, 1 ALB. GOV'T L. REV. 1, 13 (2008).

79. MUTCH, *supra* note 14, at xv.

80. *Id.* at xvii.

81. OVERACKER, *supra* note 78, at 291; MUTCH, *supra* note 14, at xvii.

82. An Act to Amend Title Five of the Penal Code Relating to Crimes Against the Elective Franchise, 1890 N.Y. Laws 265 § 41(d).

83. OVERACKER, *supra* note 78, at 291–94.

84. *Id.*

Many of these state statutes were broad enough to require disclosure by any individual or any group of two or more persons engaged in activity intended to influence elections.[85] However, these state-level statutes were easily evaded, rarely enforced,[86] and did not reach contributions to national political committees, which were the focus of intense concern in the 1890s as it became increasingly evident that corporations were covertly funding federal elections.[87] For example, in 1894, an investigation by a Special Committee of the U.S. Senate revealed that the American Sugar Refining Company had regularly made large contributions to state and local political parties while sugar tariff legislation was pending before the U.S. Senate.[88] In 1896 and 1900, Mark Hanna, Chairman of the National Republican Party, assessed large banks and corporations as much as one-quarter of one percent of their capital to fund the campaigns of Republican candidates, including President William McKinley. When McKinley defeated William Jennings Bryan in 1896, a great deal of criticism from Democrats was focused on these corporate donations, which led to the passage of disclosure legislation in Nebraska, Missouri, Tennessee, and Florida.[89]

A. *The First Federal Disclosure Legislation: The Publicity Act of 1910 and The Federal Corrupt Practices Act of 1925*

Concern over the role of undisclosed corporate money in federal elections reached a fever pitch following the 1904 presidential election.[90] In the campaign's waning days, Democratic candidate Alton B. Parker and Democratic-allied newspapers in New York that feared Parker's looming defeat alleged that Republican Theodore Roosevelt's campaign was funded by undisclosed contributions from corporations in return for promises of immunity from federal antitrust lawsuits.[91] Roosevelt believed the allegations to be unfounded, but directed the

85. *Id.* at 296 (noting that nine states—Montana, Nebraska, New Hampshire, New York, Ohio, Oregon, South Dakota, Wisconsin, and Wyoming—"extended filing requirements to individuals as well as political committees").

86. *Id.* at 321 (noting the ineffectiveness of state publicity legislation).

87. *Id.* at 291–92.

88. REPORT OF THE SPECIAL COMMITTEE OF THE UNITED STATES SENATE TO INVESTIGATE ATTEMPTS AT BRIBERY, S.REP. NO. 33-606, at iv (1894).

89. *See* MUTCH, *supra* note 14, at xvii; LARRY J. SABATO & HOWARD R. ERNST, ENCYCLOPEDIA OF AMERICAN POLITICAL PARTIES AND ELECTIONS 147 (2007).

90. OVERACKER, *supra* note 78, at 234 (noting that "there was no widespread interest in the . . . problems of party finance until the presidential campaign of 1904").

91. MUTCH, *supra* note 14, at 1.

Republican Party to respond in-kind by alleging that the Democratic Party and Parker had received large undisclosed contributions from banking interests.[92] Although the allegations are not believed to have influenced the election's outcome,[93] a 1905 investigation by a special committee of the New York State Assembly into New York insurance companies revealed that New York Life had contributed $48,702.50 to the Republican National Committee in 1904, with similar amounts contributed in 1896 and 1900.[94] The contributions were perfectly legal at the time, but the revelation was front-page news throughout the United States.[95]

In reaction, the National Publicity Bill Organization—an outgrowth of the New York State Publicity Law Organization that had pushed for disclosure legislation in New York in the 1890s—was formed to push for publicity legislation at the federal level.[96] The revelation, as well as the allegations made during the campaign, also prompted President Roosevelt to call for the disclosure of all contributions and expenditures by candidates and political parties and a ban on corporate contributions in his Annual Message to Congress on December 5, 1905. According to President Roosevelt,

> [i]f it be possible to secure by law the full and verified publication in detail of all the sums contributed to and expended by the candidates or committees of any political parties the result can not but be wholesome. All contributions by corporations to any political committee or for any political purpose should be forbidden by law . . . .[97]

Roosevelt would repeat these calls in his 1906 Annual Message, and his 1907 Annual Message he went even further, including a call for public financing of elections.[98] Congress would eventually react to these calls by dusting off and enacting, with little opposition, legislation previously introduced by New Hampshire Republican Senator William E. Chandler in 1901.[99] This

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92. *Id.*

93. *Id.* at 2.

94. *Id.*

95. *Id.*

96. Perry Belmont & Frank K. Foster, First Annual Report of the National Publicity Bill Organization, S. 58-195, at 3 (2d Sess. 1907), *available at* http://babel.hathitrust.org/cgi/pt?id=njp.32101059536688;seq=3;view=1up;num=1; *see also* Overacker, *supra* note 78, at 294, 235; Mutch, *supra* note 14, at 8.

97. 40 Cong. Rec. 96 (Dec. 5, 1905).

98. *Id.*

99. Mutch, *supra* note 14, at 4.

legislation, the Tillman Act of 1907, prohibited corporations from contributing to federal candidates.[100] Although the Tillman Act prohibited corporate political contributions in connection with federal elections, popular pressure for disclosure legislation persisted.

Leading up to the 1908 presidential election, the Democratic Party adopted a resolution demanding publicity legislation (including pre-election disclosure) and pledged to publish the names of all contributors of $100 or more to the Party by October 15, 1908 and to disclose its expenditures within thirty days following the election.[101] The Republican National Committee reportedly rejected a similar proposal by a vote of 880 to 94,[102] but in his speech accepting the Party's nomination for the presidency, William Howard Taft pledged to disclose the Committee's receipts and expenditures no later than twenty days after the election.[103] Editorials throughout the nation criticized the Republican Party for refusing pre-election disclosure,[104] which prompted Taft to call for the passage of disclosure legislation in his first message to Congress in 1909.[105] This legislation, the Publicity of Political Contributions Act of 1910 ("Publicity Act"), which was the first federal statute requiring disclosure of campaign receipts and expenditures, was enacted in 1910.[106] Although the legislation was pushed primarily by congressional Democrats, it enjoyed bipartisan support and was passed by the Republican-controlled House of Representatives leading up to the 1910 congressional elections.[107] The Publicity Act was then expanded one year later in 1911 after the Democratic Party took control of the House.[108]

As expanded in 1911, the Publicity Act, required all "political committees"[109] active in more than one state to disclose the

100. Tillman Act of 1907, ch. 420, Pub. L. No. 59-36, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441b(a) (2006)); CONG. QUARTERLY, *supra* note 65, at 31.

101. OVERACKER, *supra* note 78, at 237.

102. *Id.*

103. *Id.*

104. *Id.* at 237 n.5.

105. *Id.* at 237–38.

106. Publicity of Political Contributions Act, ch. 392, 36 Stat. 822 (1910) (amended in 1911 and in 1925; repealed in 1972).

107. HEARD, *supra* note 13, at 357.

108. *Id.*

109. The Publicity Act defined "political committee" as "the national committees of all political parties and the national congressional campaign committees of all political parties and all committees, associations, or organizations which shall in two or more States influence the result or attempt to influence the result of an election at which Representatives in Congress are to be

total amount of contributions received and expenditures made, as well as the name and address of each person that contributed an aggregate of $100 or more to the committee, or to whom disbursements of $10 or more were made from the committee.[110] These disclosure statements—required to be filed with the Clerk of the House of Representatives and to be made publicly available by the Clerk—were due at least ten days before the general election, required to be updated with a supplemental filing every six days between the original filing date and the general election, and then supplemented with a final statement due within thirty days after the general election.[111] In the case of candidates for the U.S. Senate, which would not be popularly elected until the ratification of the Seventeenth Amendment in 1913, these disclosures were required to be filed at least five days "before the day upon which the first vote is to be taken in the two houses of the legislature before which he is a candidate for election as Senator . . . ."[112] Notably, the Publicity Act did not apply to presidential campaign committees. And where it did apply, its weaknesses were revealed less than one decade later when the Teapot Dome scandal rocked the nation in the early 1920s.

The Teapot Dome scandal involved the bribery of Interior Department officials in return for lucrative non-competitively-bid leases to valuable Naval Department oil reserves.[113] One such developer, Harry F. Sinclair of the Sinclair Oil Corp., was granted such a lease for the drilling rights to the Teapot Dome oil reserve in Wyoming. Congressional investigations later revealed that Sinclair, in addition to bribing Interior Secretary Albert Fall,[114] had made large contributions in the form of Liberty Bonds to the Republican Party to help the Party retire its debt of nearly $1.5 million from the 1920 presidential election.[115] Sinclair's contributions were not required to be included on the Party's disclosure reports because the contributions were made in non-election years, and the Publicity Act was believed to only require

elected." 36 Stat. 822, 823 (1910) (codified as amended at 2 U.S.C. § 434 (1911)).

110. 36 Stat. 822–24. The Publicity Act also required political committees to appoint a treasurer, who was required "keep a detailed and exact account" of funds received or promised to "any person acting under its authority or in its behalf." *Id.*

111. *Id.*

112. *Id.*

113. *See generally* M. R. WERNER & JOHN STARR, TEAPOT DOME (1959).

114. *Id.* at 260–65.

115. OVERACKER, *supra* note 78, at 147–51; *see also* WERNER & STARR, *supra* note 113, at 260–65.

disclosure of election-year contributions and expenditures.[116] This explosive revelation, as well as other factors,[117] prompted Congress to expand the disclosure requirements of the Publicity Act with the passage of the Federal Corrupt Practices Act of 1925 (FCPA).[118] The Publicity Act, as amended by the FCPA, served as the principal federal political campaign disclosure legislation for a period of nearly five decades until 1972.

Although it closed the loophole that allowed Sinclair's contributions to go undisclosed, the Publicity Act, as amended by the FCPA, was still plagued by various shortcomings that prevented the legislation from establishing an effective disclosure system. Many of these shortcomings were the result of the limited scope of the disclosure provisions. The FCPA had expanded disclosure by requiring political committees to file quarterly reports in non-election years and to file quarterly and pre- and post-election reports in election years,[119] the FCPA did not require reports of contributions and expenditures by presidential candidates, or even cover congressional primary elections at all.[120] Political committees other than subdivisions of national party committees that restricted their activities to a single state also were not covered by the disclosure requirements.[121] Moreover, contribution disclosure requirements were easily circumvented by donating less than $100 (the threshold that triggered identification of a contributor in a disclosure report) to multiple committees or to a single committee using multiple different contributor names.[122]

116. OVERACKER, *supra* note 78, at 245–46 (noting that the FCPA was motivated by "a desire for continuous publicity of party funds").

117. Overacker notes that "numerous" factors led to the passage of the FCPA of 1925, including the Supreme Court's decision in *Newberry v. United States*, 256 U.S. 232 (1921), which held the application of the Publicity Act to primary elections to be outside of Congress's power, the ratification of the Seventeenth Amendment to the U.S. Constitution providing for the direct election of U.S. Senators in 1913 and making the Secretary of the Senate as opposed to state regulators the logical location for the filing of Senate disclosure reports, and the expansion of the franchise to women with the ratification of the Nineteenth Amendment in 1920. OVERACKER, *supra* note 78, at 245.

118. Federal Corrupt Practices Act, 43 Stat. 1070 (1925) (codified at 2 U.S.C. §§ 241–48) (repealed 1972).

119. MUTCH, *supra* note 14, at 24; 2 U.S.C. § 244 (1926).

120. This is because in *Newberry v. United States*, 256 U.S. 232, 280 (1921), the Supreme Court, dividing 5-4, held that Congress lacked the power to regulate primary elections. In response, the FCPA applied only to general or special elections. *See* 2 U.S.C. § 241(a) (1926).

121. 2 U.S.C. § 241(c) (1926).

122. A 1956 investigation revealed that many contributions to committees were made for the amount of $99.99; *see also* CONG. QUARTERLY, *supra* note 65, at 34; HEARD, *supra* note 13, at 359.

Other shortcomings in the disclosure system were a product of the way in which the disclosure requirements were administered and enforced. Although the FCPA required disclosure reports to be filed with the Clerk of the House of Representatives and the Secretary of the Senate and then be "open to public inspection," the reports were not required to be published or publicly disseminated.[123] Oftentimes "open to public inspection" meant little more than that an inquiring researcher was permitted to climb atop a chair and sift through stacks of boxes stored on an upper shelf in a Capital Hill restroom.[124] If a researcher wished to make copies of a report, they were charged as much as one dollar per page.[125]

The accuracy of the reports was questionable at best. The Clerk and Secretary did not examine the accuracy or completeness of the reports filed with their offices, and only in rare instances did they demand that reports be filed at all.[126] This was because although the FCPA enumerated penalties for failing to file reports, it did not require or expressly authorize the Clerk or Secretary to verify the completeness or accuracy of the reports they received, or require them to refer noncompliant committees and candidates to the Justice Department for prosecution.[127] In the rare instances in which the Clerk or Secretary notified organizations of their apparent failure to file, organizations frequently argued that they were not required to file. Such claims were accepted at face value by the Clerk who took the position

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123. 2 U.S.C. § 247(c) (1926).

124. OVERACKER, *supra* note 78, at 255 ("When one asks [to see the filed reports] . . . one is taken into a tiny wash room where a series of dusty, paper-covered bundles repose upon an upper shelf. By climbing upon a chair and digging about among the bundles one usually finds what one wants if one persists in this 'trial and error' method long enough, but there is no file and no system, and for some of the earlier campaigns no record of what is supposed to be there and what is not. When the strings are removed from the brown-paper parcels one is likely to find the oldest of these reports in a very mutilated condition. . . . In some cases one cannot be sure that parts of the report have not been lost.").

125. MUTCH, *supra* note 14, at 29 (noting the story of Rep. Wayne Hays (D-OH), then chair of the House committee with oversight of the Clerk's budget, retaliating against Common Cause for publicizing the fact that he had failed to file a disclosure report on time by increasing the cost of copying disclosure reports from 10 cents per page to one dollar per page). As Rep. Hays stated, "no one is interested in the reports, anyway, except the *New York Times*, the *Washington Post*, and Common Cause—and they can afford to pay." *Id.*

126. OVERACKER, *supra* note 78, at 258.

127. *See* 2 U.S.C. §§ 241–48 (1926); *see also* MUTCH, *supra* note 14, at 25; HEARD, *supra* note 13, at 359 ("No responsibility is placed on any public official to compel submission of the reports, to examine them, or to report seeming violations to the Attorney General.").

that it was not his duty "to say whether an organization, politically active, comes within the purview of the law or not."[128] But at the same time, the Justice Department's position was that the responsibility to identify violators rested with the Clerk and Secretary,[129] and in 1954, Attorney General Herbert Brownell reportedly ordered U.S. Attorneys not to act in the absence of a request from the Clerk or the Secretary.[130] In 1967 when the Clerk finally began sending the Department of Justice lists of violators for prosecution, the Department refused to act.[131] Only one prosecution was brought under the FCPA for a failure to file disclosure reports, which resulted in the Supreme Court upholding the Act's constitutionality but ended in an acquittal.[132] Indeed, the number of organizations that registered as "political committees" under the FCPA was suspiciously small. For example, in the 1950s, only 100 to 150 groups filed disclosure reports in election years, and less than fifty filed disclosure reports in non-election years.[133]

For those candidates and committees that did file disclosure reports, underreporting and falsification of contributions and expenditures was thought to be commonplace.[134] In particular, the use of "dummy" or "straw" contributors to conceal the identity of the true source of funds was widespread. A contemporary political scientist observed in 1960 that "[s]ecretaries, lawyers, public relations advisers, confidential friends, and relatives of prominent persons [who therefore wished to remain undisclosed] show up as handsome givers."[135] In 1948, Welburn Mayock, then counsel of the Democratic National Committee, testified that use of falsified donor names was illegal, but not unusual.[136] Many candidates claimed that they had little or no expenditures or contributions to report because their campaign

128. MUTCH, *supra* note 14, at 25.

129. CONG. QUARTERLY, *supra* note 65, at 3.

130. *To Amend the Federal Election Campaign Act of 1971 as Amended, and for Other Purposes, Hearing Before the Committee on Rules and Administration*, 96th Cong. 48 (1979) [hereinafter *To Amend the FECA*].

131. CONG. QUARTERLY, *supra* note 65, at 35.

132. *See* Burroughs v. United States, 290 U.S. 534 (1934). With regard to the constitutionality of the FCPA, the Court reasoned that "Congress reached the conclusion that public disclosure of political contributions, together with the names of contributors and other details, would tend to prevent the corrupt use of money to affect elections. The verity of this conclusion reasonably cannot be denied." *Id.* at 548.

133. HEARD, *supra* note 13, at 366 (noting the number of committees registered from 1949 to 1958).

134. OVERACKER, *supra* note 78, at 255.

135. HEARD, *supra* note 13, at 361.

136. *Id.* at 359.

committees had been working without their "knowledge and consent."[137] As researchers noted at the time, the reports were "so carelessly drawn as to be valueless,"[138] were "sad commentaries on public accounting,"[139] and were "a hodge-podge of financial statements . . . made available to the public as though it were a coherent body of data."[140] Were it not for frequent congressional investigations into the funding of federal elections, and for extraordinary private efforts to compile and publish campaign finance information, very little would be known today about the funding of federal elections during this period.[141]

B. *Disclosure by Persons "Other Than Political Committees" Under the Publicity Act and the FCPA*

One of the most vexing challenges facing campaign finance regulators is effectively applying disclosure requirements to groups other than political committees, such as multi-purpose organizations whose primary or major purpose is not to influence federal elections, but rather to pursue profit, advance the social welfare, charity, or other non-electoral interests. This challenge remains today, but is not a new phenomenon. Indeed, the Publicity Act and FCPA's disclosure requirements extended far beyond national political parties and the narrow scope of groups that we consider to be political committees today. The definition of "political committee" under the Act encompassed "any committee, association, or organization" that accepted contributions or made expenditures "for the purpose of influencing or attempting to influence" federal elections in two or more states or that was a branch or subsidiary of a national committee, association, or organization.[142] The Publicity Act and FCPA did not

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137. CONG. QUARTERLY, *supra* note 65, at 32. MUTCH, *supra* note 14, at 22. Although suspicious on its face, this claim was made slightly more plausible by the Supreme Court's holding in *Newberry v. United States* in 1921 that only those expenditures "in which the candidate actively participates, or assists, or advises, or directs, or induces, or procures" could be considered to have been made with the candidate's "knowledge and consent." Newberry v. United States, 256 U.S. 232, 272–73 (1921).

138. OVERACKER, *supra* note 78, at 270.

139. JAMES KERR POLLOCK, JR., PARTY CAMPAIGN FUNDS 188 (1926).

140. HEARD, *supra* note 13, at 367.

141. *See* MUTCH, *supra* note 14, at 26–27 (referring to the Senate Privileges and Elections Subcommittee investigation into the 1956 presidential election, and the efforts of the Citizens' Research Foundation to gather and disseminate campaign finance information); *see also* OVERACKER, *supra* note 78, at 285–88 (listing congressional investigations into campaign finance during the 1910s and 1920s).

142. 2 U.S.C. § 241(c) (1926).

define the term "contribution" to include only those funds received that were intended by *the donor or payor* to be used to influence federal elections, nor was the term "expenditure" confined to those disbursements that, when viewed objectively, were designed to influence elections.[143] Any organization that had received funds or made disbursements with the intent to influence federal elections in two or more states was subject to the disclosure requirements. Importantly, it was the intent of the organization receiving and expending funds, and not the intent of the donor, that mattered.

The broad scope of that era's disclosure requirements is best illustrated by a catchall provision within the Publicity Act and preserved in the FCPA requiring every person "other than a political committee" that spent or promised to spend $50 or more, other than in the form of a contribution to a political committee, "for the purpose of influencing" federal elections in two or more states to disclose such expenditure(s) in the same manner as a political committee.[144] This requirement appears to have been intended to apply to individuals, because again, even unincorporated associations of two or more persons that made expenditures or received contributions fell within the definition of "political committee."[145] Thus, if an individual acting on his or her own behalf spent their own funds to influence federal elections in more than one state, or donated funds to another individual for that purpose, he or she was required to disclose such spending to the Clerk and Secretary.

At the time the Publicity Act and FCPA were adopted, corporations and labor organizations were prohibited from making contributions to federal political candidates or political parties, but remained free to make expenditures to influence federal elections. Thus, it appears that the many organizations, including corporations, religious organizations, labor organizations, unincorporated associations, and other interest groups, and indeed individuals acting on their own behalf, that actively influenced federal elections in more than one state during the period between 1910 and 1947[146] were required by federal law to file disclosure reports, even if they successfully contended that they

143. 2 U.S.C. §§ 241(d), (e) (1926).

144. 2 U.S.C. § 245 (1926).

145. 2 U.S.C. § 241(c) (1926).

146. The Taft-Hartley Act of 1947 extended the Tillman Act's ban on corporate political contributions to labor union treasury funds, primary elections, and nominating conventions; and it prohibited corporate and union expenditures in connection with federal elections. Pub. L. No. 80-101, 61 Stat. 136 (1947).

did not meet the FCPA's definition of "political committee."[147] For example, one contemporary researcher noted that the Anti-Saloon League of America spent significant sums during the 1910s in support of pro-prohibition federal candidates, but failed to file a single disclosure report, arguing that the League's activities were "educational, scientific and charitable, rather than political."[148] At the urging of the Clerk of the House, the League began filing disclosure reports in the late-1920s, but these reports failed to accurately reflect their spending on federal elections. For example, in 1928, the League disclosed just over $165,000 in contributions received, but a Senate investigation later revealed that the League had in fact received close to $1.4 million in contributions that year. The League avoided disclosing all of their contributors by claiming that their activities were "educational" and therefore not subject to the FCPA. Elsewhere, however, the League had bragged that, "[m]ore than ninety per cent of the Anti-Saloon League's activities cluster about elections."[149] Various religious organizations actively supported Hoover in the 1928 presidential election, but similarly failed to file disclosure reports, maintaining that their activities were not "political."[150] These claims of a lack of intent to influence federal elections were the first signs of what has become another incredibly challenging issue in campaign finance regulation—how to determine the proper scope of the activity that is intended to influence elections and is therefore subject to disclosure requirements.

Yet disclosure reports were rarely filed by such groups and individuals, and even when they were filed, they suffered from the same deficiencies noted above as the reports filed by political committees. To the extent that disclosure reports were filed by individuals and multi-purpose organizations during the 1910s and 1920s, the reports were "carelessly prepared and show[ed] a very sketchy appreciation of bookkeeping technique."[151] A contemporary researcher wrote in 1932 in reference to the disclo-

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147. At the time, this disclosure requirement was understood to be very broad. Indeed, Overacker noted in 1932 that groups that failed to meet the definition of "political committee" were nevertheless subject to disclosure requirements. OVERACKER, *supra* note 78, at 266 n.2 ("Does a permanent church organization which engages in educational and publicity work come within the scope of the law if it attacks or supports a particular candidate in the course of a campaign? The Methodist Board says 'No,' but 'Yes' would seem to be a proper answer from a careful perusal of the act.").

148. OVERACKER, *supra* note 78, at 258–59.

149. *Id.* at 268–69.

150. *Id.* at 259–62.

151. *Id.* at 267 ("To say these reports are as complete and accurate as they should be, however, is far from the truth.").

sure requirements, that "[t]o say that these provisions were openly flouted in the early years of their operation is no exaggeration."[152] In 1960, Alexander Heard rendered a more grim assessment, writing that, "[t]he federal requirement that individuals who spend $50.00 or over in more than one state . . . on behalf of a candidate for either house of Congress must submit reports has not produced any worth mention."[153]

IV. Disclosure Under the Federal Election Campaign Act of 1971

The disclosure of federal campaign contributions and expenditures under the Publicity Act and FCPA languished in a state of disarray for nearly five decades. Various attempts at reform were made during the 1950s and 1960s, but were ultimately unsuccessful.[154] Many of the legislative proposals focused on providing some measure of public financing for federal campaigns, and on fixing the broken disclosure system.[155] President Kennedy's Commission on Campaign Costs, established by an Executive Order of the President in 1961, examined potential improvements to the financing and disclosure requirements applicable to presidential campaigns.[156] The Commission's report called for "an effective system of public disclosure," and a requirement that "the principal sources and uses of money in presidential campaigns be reported to a Registry of Election Finance[.]"[157] The report's author, political scientist Alexander Heard, noted the failures of the Clerk of the House and Secretary of the Senate and concluded that "a stable staff insulated from the harsher political pressures is essential to an effective reporting system."[158] This era also witnessed public calls for reform. President Lyndon Johnson noted in his 1967 message to Congress that the disclosure requirements were, "[i]nadequate in their scope when enacted, they are now obsolete. More loophole than law, they invite evasion and circumvention."[159]

During the late 1960s and early 1970s, increasing concern about the skyrocketing costs of campaigns, the overwhelming evi-

152. *Id.* at 258.

153. Heard, *supra* note 13, at 367.

154. Cong. Quarterly, *supra* note 65, at 35.

155. Mutch, *supra* note 14, at 29–32.

156. Exec. Order No. 10,974, 26 Fed. Reg. 10,585 (Nov. 8, 1961).

157. President's Comm'n on Campaign Costs, Financing Presidential Campaigns 5 (1962), *available at* http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-093-002.aspx.

158. Heard, *supra* note 13, at 467.

159. Cong. Quarterly, *supra* note 65, at 33.

dence demonstrating the ineffectiveness of the FCPA's disclosure requirements, and the widespread evasion of the prohibition on corporate contributions and expenditures in connection with federal elections, which was "honored more in the breach than in the observance," finally created enough momentum for reform.[160] Spending on elections had also risen dramatically. In 1956, the total amount spent on all political campaigns in the United States was estimated by the Citizens' Research Foundation as $155 million.[161] This amount nearly doubled by 1968 to reach $300 million. More concerning to many, especially Members of Congress who feared being outspent by well-funded challengers, was the rapid increase in the amount spent on radio and television advertising. In 1956, only an estimated $9.8 million was spent on such advertisements, but by 1968 this figure would increase by more than 500% to $58.9 million.[162] As with the rise of the publicity organizations of the progressive era, this period also witnessed the rise of so-called "good-government," groups dedicated to campaign finance reform, such as Common Cause founded in 1970.

Congress reacted by passing the Federal Election Campaign Act of 1971 (FECA), which was signed into law by President Nixon on February 7, 1972.[163] FECA focused heavily on disclosure. FECA required all federal candidates and political committees active in federal elections to file quarterly disclosure reports, and any contribution of $5,000 or more was required to be reported in an additional filing due within forty-eight hours of receipt.[164] The disclosure requirements also were extended to presidential candidates (reporting to the Comptroller General), primary elections, political conventions, and to political committees operating even in a single state that received contributions or made expenditures of $1000 or more in a calendar year.[165]

Disclosure reports were also required to be made available for public inspection within forty-eight hours of being received,[166] periodically published, and filed with and made available by the chief election officer in each state in which the candidate or committee was active.[167] Reports were required to

160. MUTCH, *supra* note 14, at 166.

161. CONG. QUARTERLY, *supra* note 65, at 36.

162. *Id.* at 36.

163. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 2 U.S.C. §§ 431 *et seq.* (2006)).

164. § 304(a), 86 Stat. at 14.

165. *Id.*; CONG. QUARTERLY, *supra* note 65, at 40.

166. § 308(a)(4), 86 Stat. at 17.

167. CONG. QUARTERLY, *supra* note 65, at 40.

be maintained by the Clerk, Secretary, and Comptroller General for ten years in the case of political committees and candidates for the Senate and President, and five years in the case of candidates for the House of Representatives.[168] To ease the burden of reporting and to account for six decades of inflation, the threshold for disclosing itemized information about expenditures was raised from $10 to $100.[169]

Importantly, FECA continued the Publicity Act and FCPA's application of disclosure requirements to persons "other than political committees" that made "contributions or expenditures" (other than by contribution to a political committee or candidate) in excess of $100 in a calendar year, but whose activities did not rise to the level of triggering "political committee" status.[170] The only change to this disclosure requirement was it now applied even if a person influenced a federal election in a single state.[171]

To address problems with the accuracy of reports, the Clerk, Secretary, and Comptroller General were not only empowered to audit filings, but were required to "make from time to time audits and field investigations" to verify the accuracy of reports.[172] Enforcement also was streamlined. If the Clerk, Secretary, or Comptroller determined that there was "substantial reason to believe" a violation had occurred, they were *required* to "expeditiously make an investigation," and if a violation was found, the Attorney General was *required* to "institute a civil action for relief."[173] FECA's enhanced disclosure requirements were widely regarded as effective,[174] and although the Justice Department brought only a handful of prosecutions for failures to comply with the disclosure requirements, the threat of prosecution had significantly increased from the pre-FECA era.[175]

The effectiveness of FECA's enhanced disclosure requirements is perhaps best illustrated by the efforts of President Nixon's campaign committee, the Committee for the Reelection of the President (CREEP), to receive as many contributions as possible before FECA's enhanced disclosure provisions took effect. More than $11 million was raised by the Nixon campaign during the month before FECA's disclosure rules took effect on

168. § 308(a)(5), 86 Stat. at 17.
169. §§ 302(d), 304(b)(10).
170. § 305.
171. § 306(c).
172. § 308(a)(11).
173. § 308(d)(1).
174. Cong. Quarterly, *supra* note 65, at 42.
175. *Id.* at 43.

April 7, 1972, with $2.3 million received on April 5, and $3 million received on April 6.[176]

The Nixon campaign had good reason to fear FECA's enhanced disclosure requirements. Reports filed by the campaign after FECA took effect revealed a proliferation of contributions made through shell organizations and to committees created to prevent large donors from being inhibited by gift taxes, which at the time could be triggered by contributions of more than $3,000.[177] For example, Nixon had 220 separate campaign committees for the 1972 presidential election, and on the Democratic side, George McGovern's national campaign treasurer, Mariam Perlman, admitted that 785 separate committees had been created just for General Motors heir Stewart Mott leading up to the 1972 presidential election.[178] The American Milk Producers, Inc. avoided being disclosed as providing a $2 million contribution to the Nixon campaign by dividing the funds into $2,500 contributions to hundreds of political committees, with no more than $2,500 going to any single committee.[179]

The Watergate scandal would later reveal even more disturbing violations of federal campaign finance laws, including campaign contributions being exchanged for official actions, and the receipt of millions in illegal corporate contributions. The Senate Select Committee on Presidential Campaign Activities, more popularly known as the Senate Watergate Committee, discovered that the Nixon campaign had received more than $780,000 in illegal corporate contributions.[180] Some of the corporate contributions to CREEP were laundered though a Mexico City bank and used to fund the Watergate burglary.[181] Watergate also revealed several instances of campaign contributions being given in exchange for specific official actions by the Nixon Administration. The Milk Producers donation of $2 million to various Nixon campaign committees was made in exchange for federal price supports.[182] The Department of Justice—then led by Attorney General John Mitchell, who in a striking example of

176. HERBERT E. ALEXANDER, FINANCING THE 1972 ELECTION 7 (1976).

177. *See* J. ANTHONY LUKAS, NIGHTMARE: THE UNDERSIDE OF THE NIXON YEARS 132 (1976).

178. CONG. QUARTERLY, *supra* note 65, at 43.

179. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 120 n.6 (2003).

180. CONG. QUARTERLY, *supra* note 65, at 41.

181. MUTCH, *supra* note 14, at 47; *see also* SENATE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, FINAL REPORT, S. REP. No. 93–981, 93rd Cong., 2d Sess., at 1181 n.54 (1974) [hereinafter FINAL REPORT] (noting that "the Watergate break-in was financed by money from the Committee to Re-Elect").

182. RICHARD REEVES, PRESIDENT NIXON: ALONE IN THE WHITE HOUSE 308–09 (2001).

conflicted interests, was also in charge of CREEP[183]—dropped a federal antitrust investigation into International Telephone & Telegraph (ITT) after ITT donated $400,000 to fund the 1972 GOP Convention in San Diego.[184] In the end, at least thirty-one individuals and nineteen corporations, including American Airlines, Braniff Airways, Goodyear Tire & Rubber, Greyhound, Gulf Oil Corp., and Time Oil Corp. were prosecuted.[185] Corporate executives such as Harold S. Nelson (General Manager of Associated Milk Producers, Inc.) and David L. Parr (Special Counsel, American Milk Producers) went to jail. George Steinbrenner, long-time Yankees owner and then Chairman of the Board of American Ship Building, was indicted for reimbursing employees for contributions to the Nixon campaign. He pleaded guilty on August 23, 1974 and was fined $15,000.[186]

Understandably, the Watergate scandal prompted widespread calls for further reform and led to an expansion of federal regulation of campaign finance law with the 1974 and 1976 amendments to FECA. With regard to disclosure, these amendments left the 1971 FECA disclosure system largely intact, but the 1974 amendments closed the loophole that had permitted candidates to establish multiple political committees by requiring candidates to establish one central campaign committee through which all contributions and expenditures on behalf of the candidate were required to be received and made, and disclosure reports were now required to be filed with the newly-established Federal Election Commission, except in the case of Senate reports.[187] Disclosure reports were also required to list the employers of contributors in order to prevent and facilitate the detection of the reimbursement of employees for political contri-

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183. FINAL REPORT, *supra* note 181, at 1184 (noting that "the Attorney General . . . ran the President's reelection campaign while still in office at the Justice Department").

184. The connection between the donation and the lawsuit was later revealed by ITT lobbyist Dita Beard. MICHAEL A. GENOVESE, THE WATERGATE CRISIS 22–24 (1999).

185. WATERGATE, A BRIEF HISTORY WITH DOCUMENTS 212–17 (Stanley I. Kutler ed., 2d ed. 2010).

186. *Id.* at 217.

187. In 1995, FECA section 302(g) (2 U.S.C. 432(g)) was amended to require candidates for the U.S. House to file directly with the Federal Election Commission. No such amendment has been made with regard to Senate candidate committees, who are still required to file paper reports with the Secretary of the Senate, who then transmits the reports to the Federal Election Commission, which makes the reports publicly available on its website. *See* Pub. L. No. 104-79, § 3, 109 Stat. 791, 792 (1995); *see also* Pub. L. No. 93-443, title II, §§ 204(a)-(c), 208(c)(4), 88 Stat. 1276, 1277, 1286 (1974).

butions and to facilitate the tracking of contributions by certain companies and industries.[188]

A. Buckley v. Valeo

Before the newly-established Federal Election Commission could even complete implementing FECA's requirements,[189] the Supreme Court issued its landmark ruling on the constitutionality of FECA in *Buckley v. Valeo*.[190] The ruling was a rare per curiam decision, and it is still not known precisely which Justices authored the various portions of the opinion.[191] Notwithstanding, the *Buckley* ruling has served as the foundation of the Court's modern campaign finance jurisprudence.[192] We do not seek to address *Buckley's* various holdings in detail, but generally speaking, the Court in *Buckley* upheld FECA's limits on campaign contributions and its extensive disclosure requirements, but struck down its limits on campaign expenditures, and its ceiling on expenditures made "relative to a clearly identified candidate for federal office" by individuals acting independently of candidates, political parties, and political committees.[193] In striking down the independent expenditure ceiling, the Court famously held FECA's $1000 calendar-year limit on expenditures made by an individual "relative to a clearly identified candidate" to be impermissibly vague, and construed the limit to only reach "communications that include explicit words of advocacy of election or defeat of a candidate" such as "vote for," "elect," "support," "defeat," and "reject."[194] The determination of whether or not a particular communication contained such language became commonly known as the "magic words" test.

The Court also specifically reviewed FECA's disclosure requirements imposed on persons other than political commit-

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188. Pub. L. No. 93-443, § 208(a), 88 Stat. 1263, 1279 (1974).

189. FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE: MYTHS AND REALITIES 238 (1992).

190. 424 U.S. 1 (1976).

191. *See* Richard L. Hasen, *The Untold Drafting History of* Buckley v. Valeo, 2 ELEC. L.J. 241 (2003).

192. SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 334 (3d ed. 2007) (referring to *Buckley* as the "one inevitable starting point" of the Court's campaign finance jurisprudence, and that "[t]he legal regulation of campaign finance is dominated" by the ruling).

193. Among the provisions held unconstitutional by the Court was FECA's imposition of a $1000 expenditure limit on the amount that individuals could spend relative to a clearly identified candidate for federal office. *Buckley*, 424 U.S. at 45.

194. *Id.* at 43–44.

tees making "contributions or expenditures" (other than by contribution to a political committee or candidate committee) in excess of $100 in a calendar year, analyzing the disclosure requirements in the absence of the independent expenditure ceiling the Court had held unconstitutional. In doing so, the Court narrowed the coverage of the disclosure provision by holding that the phrase "makes contributions or expenditures"—by virtue of incorporating the terms "contribution" and "expenditure,"[195]—was unconstitutionally vague, and therefore construed "contribution" to include only those amounts provided "to other organizations or individuals but earmarked for political purposes,"[196] and "expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate."[197] The Court likewise construed "expenditures" to encompass only "funds used for communications that expressly advocate the election or defeat of a clearly identified candidate . . . ."[198] In short, the "magic words" test was grafted onto FECA's "persons other than political committees" expenditure disclosure requirements.[199]

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195. The terms "expenditure" and "contribution," were defined as the use of money or other items of value "'for the purpose of . . . influencing' the nomination or election of candidates for federal office." *Id.* at 77. The Court noted that "[t]here is no legislative history to guide us in determining the scope of the critical phrase 'for the purpose of . . . influencing.'" *Id.*

196. The Court offered no guidance on what the important phrase "earmarked for political purposes" meant. *See* Fed. Election Comm'n v. Survival Educ. Fund., Inc., 65 F.3d 285, 294 (2d Cir. 1995) (noting that the phrase "earmarked for political purposes" was "used but not explained in *Buckley*").

197. *Buckley*, 424 U.S. at 78.

198. *Id.* at 78–79.

199. Interestingly, the district court had struck down a broader disclosure requirement in the 1974 FECA amendments that required

> [a]ny person (other than an individual) who expends any funds or commits any act directed to the public for the purpose of influencing the outcome of an election, or who publishes or broadcasts to the public any material referring to a candidate . . . advocating the election or defeat of such candidate, setting forth the candidate's position on any public issue, his voting record, or other official acts . . . .

to file reports with the Commission "as if such person were a political committee." Federal Election Campaign Act, Pub. L. No. 92-225, § 308, 88 Stat. 1279 (codified as amended at 2 U.S.C. 437a (repealed 1976)). The district court struck this provision down finding it unconstitutionally vague and overbroad on the ground that the provision is "susceptible to a reading necessitating reporting by groups whose only connection with the elective process arises from completely nonpartisan public discussion of issues of public importance." *Buckley*, 424 U.S. at 11 (internal citation omitted). This ruling by the district court was not appealed, and therefore not reviewed by the *Buckley* Court.

Having thus construed the terms "contributions" and "expenditures" narrowly, the Court upheld the disclosure requirement, noting that one reason the disclosure requirement was enacted alongside the $1000 ceiling on independent expenditures was "to aid in the enforcement of that provision."[200] The Court recognized the breadth of this disclosure provision, as construed by the Court, as serving FECA's purpose of "achiev[ing] total disclosure by reaching every kind of political activity" in response to "the legitimate fear that efforts would be made, as they had been in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act."[201] The Court also correctly noted that the requirement "does not seek contribution lists of any association," but "[i]nstead, it requires direct disclosure of what an individual or group contributes or spends."[202] Indeed, imposing disclosure obligations on individual donors and spenders was a key feature of the pre-1979 disclosure regime in the United States. Because whether or not funds donated by an individual constituted a "contribution" or "expenditure" hinged on the intent of that individual, placing the disclosure obligation at the individual donor level made sense.

The *Buckley* decision also had the effect of significantly expanding the coverage of the "persons other than political committees" disclosure requirement, because the decision significantly narrowed the definition of "political committee." FECA, like its preceeding statutes, defined "political committee" broadly as "any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000."[203] Prior to *Buckley*, this relatively low $1000 threshold meant that the vast majority of groups active in federal elections were required to register with the FEC as political committees and were subject to FECA's more extensive disclosure requirements applicable to political committees, including the obligation to disclosure donor identities. It was also at this point—when the group receiving funds triggered political committee status—that a person other than a political committee that donated funds to that group was absolved of the requirement to file their own disclosure reports, because contributions to political committees were not required to be separately disclosed by the donor. Prior to

200. *Buckley*, 424 U.S. at 75.
201. *Id.* at 76.
202. *Id.* at 74–75.
203. Pub. L. No. 94-283, title I, § 104, 90 Stat. 480, 481 (1976).

Buckley, the only situations in which an individual or group was required to file their own disclosure reports with the Commission was if they made expenditures acting alone or in concert with others of $1000 or less; if they made a contribution to an individual person; or if they made a contribution to an organization that received $1000 or less in contributions.

But the *Buckley* Court dramatically narrowed the definition of "political committee," by adding the additional requirement that a "political committee" "need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate," which, according to the Court captured all groups that "are, by definition, campaign related."[204] Thus, following *Buckley*, organizations whose political activity did not rise to the level of constituting their "major purpose" were not required to register as political committees, and therefore not required to report the identities of their contributors. However, if such an organization or individual spent more than $100 in a calendar year on "express advocacy" communications independently of candidates or political parties, or in donations "earmarked for political purposes" to other non-committee persons, they were required to file

> a statement with the FEC disclosing the full name, mailing address, occupation, and principal place of business of the person making the expenditure, the names of each person to whom such person made an expenditure in aggregate amount in excess of $100, including the amount, date, and purpose of each such expenditure, and the office sought by each candidate for whose benefit the expenditure was made.[205]

The independent expenditure disclosure reports filed with the FEC following *Buckley* did, in fact, result in almost full disclosure of the sources of the funds used to air such advertisements. In 1977, thirty-one independent expenditure filers disclosed a total of $16,809 in expenditures, of which $10,090 was reported as coming from specific donors.[206] In 1978, sixty-nine filers disclosed total independent expenditures of $116,016, of which $86,824 was reported as coming from specific donors.[207] In 1979, 160 filers disclosed independent expenditures totaling

204. *Buckley*, 424 U.S. at 79 (emphasis added).

205. 2 U.S.C. §§ 434(e), (b)(9) (1976).

206. FED. ELECTION COMM'N, ANNUAL REPORT 68 (1977), *available at* http://www.fec.gov/pdf/ar77.pdf.

207. *Id.* at 90.

$967,662, with $985,646 in donations for such ads reported from specific donors.[208] For the three years following *Buckley*, the sources of 98.3% of the funds spent on independent expenditures were disclosed. But this high level of disclosure would drop dramatically following the FEC's issuance of a rule significantly narrowing the scope of the independent expenditure disclosure provision following the enactment of the 1979 FECA Amendments.

B. *1979 FECA Amendments: A Move to Organization-Based Disclosure*

FECA was amended in early January of 1980.[209] These amendments—called the "1979 Amendments" because they were debated by Congress in 1979—have been commonly viewed as "noncontroversial changes" to FECA that merely incorporated the Court's holding in *Buckley*.[210] However, the amendments made two important changes to FECA: They significantly altered the disclosure requirements imposed on individuals and organizations other than political committees, and stripped the FEC of its authority to conduct random audits of political committees.[211] Whereas, as the *Buckley* Court noted, the pre-1979 FECA independent expenditure disclosure provision did not require persons or organizations that made contributions or expenditures to influence federal elections to disclose their donors—that obligation being placed on the donors themselves—the new statutory requirement did include such a requirement. And, whereas the pre-1979 provision placed a disclosure obligation on individuals and organizations donating funds to another individual or organization for the purpose of influencing federal elections, the new provision did not.

Under the new FECA independent expenditure disclosure provision, which remains in effect today,[212] every person other

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208. *Id.* at 55.

209. Pub. L. No. 96-187, 93 Stat. 1348 (1980).

210. Anthony Corrado, Thomas E. Mann, Daniel R. Ortiz & Trevor Potter, New Campaign Finance Sourcebook 29 (2005).

211. Prior to 1979, the FEC had conducted extensive auditing of political committees. For example, following the 1976 election, the FEC reportedly audited ten percent of House and Senate candidates. *Id.* at 30.

212. The full text of the provision is as follows:

> (1) Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person. (2) Statements required to be filed by this subsection shall be filed in accordance with subsection (a)(2) and

than a political committee who makes "independent expenditures"[213] in an aggregate amount of more than $250 in a calendar year is required by the plain language of the statute to comply with a two-tiered disclosure requirement. First, they are required to file a statement containing the same information registered political committees are required to disclose regarding the contributions they receive: The identity of each person "whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year . . . together with the date and amount of any such contribution . . . ."[214] Second, they are required to also include in the disclosure statement the identity of "each person who made a contribution in excess of $200 to the person . . . *for the purpose of furthering an independent expenditure.*"[215] In the case of independent expenditures aggregating $1000 or more made within twenty days of an election, these disclosures were required to be made within twenty-four hours.[216]

The new FECA independent expenditure disclosure provision appears to have been adopted at the urging of the FEC, which, in annual reports submitted to Congress and in testimony before a hearing of the Senate Committee on Rules and Administration on July 13, 1979,[217] recommended that the reporting requirements for independent contributions and independent expenditures by "individuals" be consolidated into a single reporting requirement placed only on the group or individual making the expenditure.[218] An early draft of the 1979 Amend-

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> shall include— . . . (C) the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure.

Pub. L. No. 96-187, 93 Stat. 1354 (1980) (codified as amended at 2 U.S.C. § 434(c) (2006)).

213. *See* 2 U.S.C. § 431(17) (2006). The term "expenditure" in the 1972 FECA was changed to "independent expenditures" to reflect the *Buckley* Court's construction of the term "contribution" to include expenditures not made "totally independently" of federal candidates and political parties. *See* Buckley v. Valeo, 424 U.S. 1, 78 (1976).

214. 2 U.S.C. § 434(b)(3)(A) (2006).

215. 2 U.S.C. § 434(c)(2)(c) (2006) (emphasis added).

216. 2 U.S.C. § 434(c)(2) (2006).

217. *See To Amend the FECA*, *supra* note 130, at App'x 24.

218. FED. ELECTION COMM'N, ANNUAL REPORT 81 (1975), *available at* http://www.fec.gov/pdf/ar75.pdf (recommending "consolidation" of the independent expenditure reporting provisions); FED. ELECTION COMM'N, ANNUAL REPORT 67 (1976), *available at* http://www.fec.gov/pdf/ar76.pdf; FED. ELECTION COMM'N, ANNUAL REPORT 40 (1978), *available at* http://www.fec.gov/pdf/ar78.pdf ("The Commission recommends that independent contributors not be

ments was described by the Committee as merely requiring that "the person who receives the contribution, and subsequently makes the independent expenditure, would report having received that contribution to the Commission."[219] The Senate Report explained that the reports required of "individuals" who made "independent contributions would be relieved of reporting, that responsibility being transferred to the recipient of such a contribution."[220] The new provision faced no discernible opposition, and was praised as merely "simplifying the disclosure and reporting processes."[221] Importantly, the legislative history of the 1979 Amendments contains little discussion of the critical "for the purpose of furthering an independent expenditure" language in the second tier of the two-tiered disclosure provision.[222]

One explanation for the absence of debate over the provision is that at the time the 1979 amendments were adopted, all corporations—for profit or nonprofit—were flatly prohibited from using their general treasury funds to make expenditures in connection with any federal election unless the expenditure was financed with voluntary contributions to a separate segregated fund that registered as a political committee (commonly referred to as a "PAC").[223] Thus, the range of entities and individuals that were understood to be subject to the disclosure requirement was very small, and hence the repeated references in the legislative history that the provision applied to "individuals" rather than "persons," despite the fact that the text of FECA and the 1979 amendments used the term "person," which was defined to include both individuals and entities.[224] But due to the prohibition on corporate and union independent expenditures that was in operation at the time, the disclosure provision as a practical matter applied only to individuals.

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required to report to the Commission. Instead, persons who file independent expenditure reports should be required to report the sources of any contributions in excess of $100 which is donated with a view toward bringing about an independent expenditure."); *see also To Amend the FECA*, *supra* note 130, at 19.

219. *To Amend the FECA*, *supra* note 130, at 97.

220. S. Rep. No. 96-319, at 3 (1979).

221. *To Amend the FECA*, *supra* note 130, at 40 (statement of Fred Wertheimer referring to the FEC's recommendations for altering FECA's reporting requirements as "excellent proposals").

222. Legislation that was passed by the Senate in 1979 (S. 926), but that stalled in the House, included the "for the purpose of furthering" language, but similarly received little discussion. *See* 123 Cong. Rec. 26,342 (1977). Passed by the Senate on August 3, 1977, Roll Call # 331 (88-1): 123 Cong. Rec. 26,340–41 (1977).

223. *See* 2 U.S.C. § 441b (1982).

224. *See* 2 U.S.C. § 431(11) (1982).

Although thought of at the time as merely a "consolidation" of the independent expenditure disclosure requirement, shifting the disclosure obligation from contributors, who know exactly whether they intend to influence federal elections, to the recipients of such funds had dramatic consequences on transparency. Donors rarely reveal the intent behind their donations. Yet because an intent to influence elections is a necessary predicate for donated funds to constitute a "contribution" under FECA, requiring groups to disclose their contributors placed the FEC and multi-purpose groups in the unenviable position of formulating workable standards for determining when a donor is presumed to have intended that their funds be used to influence federal elections.[225] Divining donor intent is a difficult task, especially in the case of large multi-purpose organizations that engage in many activities other than influencing federal elections, i.e., groups that do not meet *Buckley's* "major purpose" test for political committee status. Indeed, as explained below, the FEC has gone to great lengths to dodge this thorny issue ever since the enactment of the 1979 Amendments.

C. Federal Election Commission v. Massachusetts Citizens for Life *& The FEC's 1980 Rule Implementing the 1979 FECA Amendments*

As explained above, due to the longstanding prohibition on corporate and union expenditures in connection with federal elections, FECA's independent expenditure disclosure requirements were understood to apply primarily to individual persons as well as small class of unincorporated associations and partnerships. It was against this backdrop that the 1979 FECA Amendments shifted the independent expenditure disclosure burden from spenders to the recipients of contributions. But, the narrow reach of the independent expenditure disclosure provisions was expanded six years later when the Supreme Court issued a landmark ruling in *Federal Election Commission v. Massachusetts Citizens for Life* (*MCFL*).[226]

In *MCFL*, the Court, by a 5-4 vote, invalidated FECA's prohibition on corporate expenditures as applied to organizations that met three strict criteria. The organization had to: (1) be formed

225. This is not to suggest that such standards do not exist. *See* Tara Malloy, *A New Transparency: How to Ensure Disclosure from "Mixed-Purpose" Groups After* Citizens United, 46 U.S.F. L. REV. 425 (2011) (discussing various approaches); *see also* Richard Briffault, *Nonprofits and Disclosure in the Wake of* Citizens United, 10 ELECTION L.J. 337 (2011).

226. 479 U.S. 238 (1986).

"for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) have "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) not have been established by a business corporation or a labor union, and must adopt a policy "not to accept contributions from such entities."[227] Entities that met these strict criteria would become commonly referred to in campaign finance circles as "MCFL" organizations or "QNCs." Congress never anticipated that MCFL organizations would make expenditures to influence federal elections, and Congress never intended that the disclosure requirements FECA imposed on persons "other than political committees" would be applied to MCFL organizations. Yet these facts did not lead the Court to conclude that MCFL groups were therefore exempt from FECA's persons "other than political committees" disclosure requirements.[228]

To the *MCFL* Court, the fact that the sources of funds used by MCFL corporations were required to be fully disclosed by FECA's independent expenditure provision was cited by the Court as an argument *in favor* of allowing such groups to engage in independent expenditures. The FEC had argued that MCFL organizations should be required to form a political committee if they wished to make expenditures to influence elections, and warned that permitting MCFL organizations to engage in expenditures other than through a political committee "would open the door to massive undisclosed political spending by similar entities, and to their use as conduits for undisclosed spending by business corporations and unions."[229] The Court dismissed the FEC's concerns, stating:

> We see no such danger . . . an independent expenditure of as little as $250 by MCFL will trigger the disclosure provisions of § 434(c). As a result, MCFL will be required to identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections, will have to specify all recipients of independent spending amounting to more than $200, *and* will be bound to identify all persons making contributions over $200 who request that the money be used for independent expenditures. These reporting obligations provide precisely the information necessary to monitor MCFL's independent

227. *Id.* at 264.

228. As explained below, two decades later, however, analogous arguments would carry considerable weight with the FEC with regard to BCRA's electioneering communication disclosure requirement.

229. *MCFL*, 479 U.S. at 262.

> spending activity and its receipt of contributions. The state interest in disclosure therefore can be met in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under the Act.[230]

It is clear that the Court understood FECA's disclosure requirements applicable to persons "other than political committees" to require the two–tiers of disclosure noted above, namely an identification of all contributors of more than $200, and additionally all contributors who earmarked their contribution to be used toward independent expenditures. Indeed, such a two-tiered disclosure requirement makes sense, particularly as applied to a group that makes independent expenditures to influence more than one election. This is because the disclosure reports also were required to indicate which candidate was supported or opposed by the independent expenditure. FECA's requirement that the disclosure statement identify not only all contributors, but those who earmarked their funds for a specific independent expenditure, would allow the public to identify which of an organization's many contributors intended to influence a particular election.

What the *MCFL* Court failed to mention, or perhaps even failed to understand, was that a rule issued by the FEC six years prior in 1980 implementing the FECA independent expenditure disclosure provision contained in the 1979 FECA Amendments had actually collapsed the two-tiered disclosure requirement into a single—and dramatically narrower—rule. This FEC regulation, which remains in effect today at section 109.2 of the Code of Federal Regulations, does *not* require an organization to disclose the identity of *all* contributors, but instead only those contributors who made a contribution "for the purpose of furthering the reported independent expenditure."[231] As explained above, requiring a group that engages in independent expenditures to disclose precisely which donors funded a particular expenditure makes sense, but is woefully inadequate unless coupled with the broader requirement to disclose *all* contributors who provide funds with the intent to influence federal elections more generally, i.e., in *Buckley*'s language, "earmarked for political purposes." Yet the FEC rule entirely omitted the first-tier of FECA's two-tiered disclosure provision from its rule, a move that appears

230. *Id.* (emphasis added).
231. 11 C.F.R. § 109.20 (2012).

to have gone unnoticed by the *MCFL* Court.[232] Even opponents of campaign finance laws have admitted that the first tier of FECA's two-tiered disclosure requirement "has gone largely unnoticed by the Commission" and the 1980 Rule "has been too generous to *MCFL* organizations" as they "have not been asked to disclose contributors above $200 that influence elections . . . ."[233] The result of the FEC's 1980 rule was a dramatic decrease in the percentage of independent expenditures that were tied back to specific donors. Whereas in the years preceding the 1980 rule, the sources of 98.3% of the funds spent on independent expenditures were disclosed, no receipts were reported in the period between 1980 and 1990.[234]

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232. The Court was briefed on the requirements of 2 U.S.C. § 434(c) by the FEC, which explained in its Reply Brief that 2 U.S.C. § 434(c) would only require the disclosure of "contributions . . . that are earmarked for independent expenditures," warning that "it would take an excessively naive corporation to earmark its funding of an ideological corporation for independent expenditures" and arguing that "[n]othing in the Act requires such general funding to be disclosed . . . [or] to report the names of all of its general contributors." Brief of Appellant at 31, Fed. Election Comm'n v. Mass. Citizens for Life, Inc. No. 85-701 (1st Cir. 1986). The Court appears to have rejected the FEC's narrow reading of § 434(c).

233. E-mail from Steve Hoersting to Joseph M. Birkenstock, Rick Hasen, and the Election Law Listserv (Apr. 26, 2010).

234. In 1980 there were 355 filers, filing 1537 reports disclosing no gross receipts and expenditures of $11,235,247. FED. ELECTION COMM'N, ANNUAL REPORT 57 (1980), *available at* http://www.fec.gov/pdf/ar80.pdf. In 1981 there were 193 filers, filing 210 reports and spending $133,270, but disclosing no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 49 (1981), *available at* http://www.fec.gov/pdf/ar81.pdf. In 1982 there were 128 filers, filing 238 reports and spending $287,008, but disclosing no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 55 (1982), *available at* http://www.fec.gov/pdf/ar82.pdf. In 1983 there were 89 filers, filing 38 reports disclosing $333,592 in expenditures, and no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 55 (1983), *available at* http://www.fec.gov/pdf/ar83.pdf. In 1984, 163 filers, filing 291 reports disclosing expenditures of $1,335,824, but no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 61 (1986), *available at* http://www.fec.gov/pdf/ar84.pdf. In 1985, 61 filers, filing 87 reports disclosing $75,759, but no receipts. FED. ELECTION COMMI'N, ANNUAL REPORT 65 (1985), *available at* http://www.fec.gov/pdf/ar85.pdf. In 1986, 7 filers, filing 10 reports, $622,972, but no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 69 (1986), *available at* http://www.fec.gov/pdf/ar86.pdf. In 1987, 78 filers, filing 112 reports, $983,641, but no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 57 (1987), *available at* http://www.fec.gov/pdf/ar87.pdf. In 1988, 163 filers, filing 299 reports, $358,863, but no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 61 (1988), *available at* http://www.fec.gov/pdf/ar88.pdf. In 1989, 133 filers, filing 18 reports, $125,218, but no receipts. FED. ELECTION COMM'N, ANNUAL REPORT 73 (1989), *available at* http://www.fec.gov/pdf/ar89.pdf. In 1990, 157 filers, filing 56 reports, disclosing $0 in receipts and $576,330 in expenditures. FED. ELECTION COMM'N, ANNUAL REPORT 71 (1990), *available at* http://www.fec.gov/pdf/ar90.pdf.

In promulgating the 1980 rule, the FEC merely explained that it "incorporated the changes . . . regarding reporting requirements for persons, other than a political committee, who make independent expenditures."[235] The Commission's hearings discussing the various changes to Commission regulations necessitated by the 1979 FECA amendments included no discussion of the new independent expenditure reporting rule.[236] When the FEC issued the rule in 1980, like Congress, the Commission could not have anticipated that the rule would apply to any corporations at all. And the small number of persons who filed independent expenditure disclosure reports at the time perhaps explains why the FEC's elimination of the first tier of the statute's two-tier disclosure requirement received little attention. But a significant disconnect between the FECA's statutory requirement and Commission regulations was born.

This disconnect between the FECA independent expenditure disclosure provision enacted in the 1979 FECA Amendments and the Commission's 1980 rule implementing that provision would remain largely unnoticed until 2007, and went unchallenged until 2011.[237] By this time, however, the Commission's rule would prove consequential in two ways. First, the rule's narrow single-tiered "for the purpose of furthering" test of donor intent would be used as the basis for the Commission to also depart from the plain text of the electioneering communications disclosure provision contained in BCRA to graft an intent-based

235. 45 Fed. Reg. 15,080, 15,087 (Mar. 7, 1980).

236. *See* Fed. Election Comm'n, *Meeting on New Election Law Regulations* (Jan. 30, 1980) (audio file available from Federal Election Commission); Fed. Election Comm'n, *Meeting on New Election Law Regulations* (Jan. 31, 1980) (audio file available from Federal Election Commission); Fed. Election Comm'n, *Meeting on New Election Law Regulations* (Feb. 6, 1980) (audio and partial transcript available from Federal Election Commission).

237. On April 21, 2011, Representative Chris Van Hollen, Jr. (D-MD) submitted a Petition for Rulemaking to the FEC, asking the Commission to revise its regulations regarding the reporting of independent expenditures by persons other than political committees. Fred Wertheimer, Donald J. Simon, Trevor Potter, J. Gerald Hebert, Paul S. Ryan & Tara Malloy, *Petition for Rulemaking: To Revise and Amend Regulations Relating to Disclosure of Independent Expenditures* (Apr. 21, 2011), *available at* http://www.fec.gov/agenda/2011/mtgdoc_1136.pdf. On June 15, 2011, the Commission sought comment on the petition, and on December 15, 2011, the Commission deadlocked by a three-to-three vote on whether to adopt a Draft Notice of Proposed Rulemaking in response to the petition. Press Release, Fed. Election Comm'n, FEC Approves Notices of Availability, Advisory Opinions and Audit Memorandum (Dec. 16, 2011), *available at* http://www.fec.gov/press/press2011/20110615openmeeting.shtml (certifying that "the Commission failed by a vote of three-to-three to approve Agenda Document No. 11-74").

test onto BCRA's electioneering communication disclosure requirements following the Supreme Court's 2007 decision in *Federal Election Committee v. Wisconsin Right to Life, Inc.* (*WRTL I*).[238] Second, following the Supreme Court's decision in *Citizens United*, the Commission's 1980 rule would be applied to corporations and labor organizations that, for the first time in more than sixty years, were permitted to make independent expenditures.

V. The Bipartisan Campaign Reform Act of 2002 & *McConnell v. Federal Election Commission*

A. *The Rise of Soft Money, Sham Issue Ads, and 527s*

Prior to BCRA, the FEC's unduly narrow independent expenditure reporting rule was not the subject of much attention because any controversy over the rule was eclipsed by two more significant developments in federal campaign financing that began in the late 1970s and flourished in the 1980s and 1990s: The rise of "soft money" and "sham issue ads."

"Soft money" is the term commonly used to describe funds not subject to federal campaign finance laws and regulations, including disclosure requirements, meaning that such funds could be raised in unlimited amounts from individuals, corporations, and unions and spent to influence federal elections without triggering a disclosure requirement. FECA subjected all "contributions" to political committees to amount and source limitations, as well as the Act's disclosure requirements. FECA defined "contribution" to include the gift or advance of anything of value made "for the purpose of influencing any election for *Federal* office."[239] During the 1970s, political parties began circumventing FECA's expenditure and contribution limits by soliciting and receiving contributions intended to influence federal and *state* elections. In the late 1970s, the FEC issued advisory opinions that permitted this practice by allowing parties to solicit and use soft money for administrative costs and mixed-purpose activities such as generic party-promoting activities and get-out-the-vote efforts.[240] The 1979 FECA amendments further facilitated the rise of soft money because they allowed party committees to use regulated—referred to as "hard"—money for certain activities without the expenditures counting toward the limitations imposed on the amount a party could spend to elect one of

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238. 551 U.S. 449 (2007).

239. 2 U.S.C. § 431(8)(A)(i) (2006) (emphasis added).

240. *See* Application of the Federal Election Campaign Act of 1971, Fed. Election Comm'n, Adv. Ops. 1978-10, 1978-50, 1979-17.

its candidates.[241] Thus, as one observer noted, "Congress was loosening the restrictions on party spending, while the FEC was loosening the restrictions on party fundraising."[242]

Over the course of the next decade, soft money became a major source of political party funds, "with both parties spending tens of millions of soft dollars on staff salaries, overhead, voter turnout programs, and other political efforts designed to affect the outcome of federal contests, especially the presidential race."[243] Soft money was mostly raised from corporations and labor organizations—entities that had long been banned from making contributions and expenditures in connection with federal elections.[244] And, prior to regulations issued by the FEC in 1990 in response to a suit by Common Cause seeking increased regulation of soft money, national political parties were not even required to disclose their soft money receipts and expenditures.[245]

After a 1995 Advisory Opinion,[246] the national political parties also began spending soft money on "legislative advocacy media advertisements," which would become commonly referred to as "sham issue ads." These advertisements technically focused on an issue, but named candidates, challengers, or officeholders alike and had the unmistakable effect of promoting a federal candidate's election or defeat.[247] Issue ads carefully avoided the "magic words" of express advocacy identified in *Buckley*, and could therefore be funded with soft money.

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241. 2 U.S.C. §§ 431(9)(B)(vii), (ix) (2006).

242. Anthony Corrado, *Money and Politics: A History of Federal Campaign Finance Law, in* THE NEW CAMPAIGN FINANCE SOURCEBOOK 7, 32 (2005).

243. *Id.* at 32.

244. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 124 (2003).

245. *See* 11 C.F.R. § 106.5 (2012); Common Cause v. Fed. Election Comm'n, 692 F. Supp. 1391 (D.D.C. 1987); Common Cause v. Fed. Election Comm'n, 692 F. Supp. 1397 (D.D.C. 1988); *see also* Donald J. Simon, *Soft Money: The "End Run" Around Federal Campaign Finance Laws,* 10 STAN. L. & POL'Y REV. 75 (1998) (noting that the 1990 regulations "require[d] the national parties to disclose their soft money receipts and disbursements").

246. Application of the Federal Election Campaign Act of 1971, Fed. Election Comm'n, Adv. Op. 1995-25.

247. *See Soft Money—A Look at the Loopholes*, WASH. POST: CAMPAIGN FIN. SPECIAL REPORTS, http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm (last visited Apr. 17, 2013) ("Starting in late 1995, the Democratic National Committee used soft money to pay for a months-long blitz of television commercials, basically indistinguishable from campaign ads, that bolstered Clinton in the polls. The Republican National Committee at one point spent soft money on a 60-second commercial crafted by Dole's advertising team with footage originally shot for the Dole campaign. The ad devoted 56 seconds to Dole's biography and four seconds to the issues.").

The political parties dramatically increased their spending on sham issue ads, which in turn increased the demand for soft money to fund such ads. In 1992, the national political parties raised an estimated $86 million in soft money.[248] In 1996, this figure would top $262 million, with about $120 million spent on issue ads by the Republican and Democratic parties.[249] In 2000, the total amount of soft money raised increased to more than $495 million.[250] Soft money also became an increasing source of the total amount spent by the Republican and Democratic parties. In 1984, soft money accounted for only 5% of party spending. In 2000, this figure rose to 42%.[251]

But political parties were not the only entities taking advantage of the "sham issue ad" tactic during this era. Accompanying the rise in party-related soft money was a dramatic increase in direct spending by organizations, including corporations and labor unions, on such issue ads. The ads could be aired using corporate or union general treasury funds and were not required to include FECA's disclaimer requirements. Between $135 and $150 million was spent by corporations and unions on such ads in the 1996 federal elections.[252] In the 1998 congressional elections, "77 organizations aired 423 ads at a total cost between $270 million and $340 million," and in the 2000 presidential election the figures nearly doubled: "130 groups spent over an estimated $500 million on more than 1,100 different ads."[253] During the 2000 cycle, only one-third of such spending (approximately $162 million) was attributable the Republican and Democratic parties.[254] The remainder was attributable to outside groups—often with obscure names such as Citizens for Reform, Citizens for Better Medicare, or the Coalition to Protect America's Health Care—that received donations from corporations and unions.[255]

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248. Corrado, *supra* note 242, at 33.

249. *Soft Money—A Look at the Loopholes*, *supra* note 247.

250. *See* Corrado, *supra* note 242, at 33.

251. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 124 n.8 (2003) (citing 81 Defense Exhibit, Tab 1, Tbl. 2 (report of Thomas E. Mann, Chair & Sr. Fellow, Brookings Institution)).

252. *Id.* at 129 n.20.

253. *Id.*

254. In the 2000 cycle, the Republican and Democratic parties accounted for almost $162 million (32%) of the spending on issue advocacy. McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 304 (D.D.C. 2003).

255. In 1996 Citizens for Reform spent $2 million on television issue ads that did not expressly advocate the election or defeat of any candidate but were directed at influencing congressional races. That year it sponsored the notorious "Bill Yellowtail" ad, which aired during the final weeks of a Montana congressional race and accused Yellowtail, the challenger, of spousal abuse: "He preaches family values but he took a swing at his wife." *See* Viveca Novak &

In 1996, the groups airing issue ads were primarily 501(c)(4) organizations that were and are permitted by federal tax law to receive donations in unlimited amounts from corporations, unions, and individuals, including foreign nationals.[256] But following the 1996 election "[e]nthusiasm for section 501(c)(4) campaign finance vehicles disappeared when contributors realized that their contributions could be subject to gift tax if they exceeded the annual gift tax limitation of $10,000."[257] Thus, a search for an alternative vehicle emerged. That alternative vehicle would be section 527 of the Internal Revenue Code. Section 527 was added to the Internal Revenue Code in 1974 to exempt "political organizations" from federal income taxes, but also to ensure they paid taxes on income earned from the investment of campaign funds.[258] Other than paying taxes on certain investment income, however, very little is required of an entity to qualify as a 527 organization.[259] This is because implicit in the creation of section 527 was the assumption "that section 527 organizations would be subject to the FECA"[260] by registering as political committees. But by avoiding express advocacy, 527s were able to avoid the application of FECA, including registering with and disclosing their donors to the FEC. The advantages that 527s had to offer—unlimited contributions from unlimited sources with no disclosure requirements and no threat of gift tax—were clear. Groups, individuals, and even Members of Congress began to sponsor or establish 527s and use these entities to

Michael Weisskopf, *The Secret G.O.P. Campaign*, CNN (Oct. 27, 1997), http://www.cnn.com/ALLPOLITICS/1997/10/27/time/gop.tricks.html. Citizens for Better Medicare accounted for $65 million (13%) in 2000. The Coalition to Protect America's Health Care accounted for $30 million (6%). McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 304–05 (D.D.C. 2003).

256. Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, TAX NOTES, 388 (Jan. 17, 2000), *available at* http://fackler.webhost.utexas.edu/gov370-money/reports/Hill_527article.pdf.

257. *Id.* at 389.

258. *Id.* at 389–90.

259. Section 527 political organizations are defined as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." An exempt function within the meaning of section 527

> means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.

26 U.S.C. § 527(e)(2) (2006).

260. *See* Hill, *supra* note 256, at 400.

run issue ads supporting or attacking federal candidates.[261] For example, one 527, Republicans for Clean Air, reportedly spent $25 million on broadcast advertisements against Senator John McCain and for then-Governor George W. Bush during the 2000 presidential primaries.[262]

Exemplary of the pro-disclosure consensus in Congress that was characteristic of the period between 1971 FECA and the passage of BCRA in 2002, Congress acted quickly to close this 527 disclosure loophole. In 2000, Congress passed and President Clinton signed legislation that required most 527s not registered with the FEC to file annual statements disclosing all contributors of $200 or more during a calendar year and all expenditures of more than $500 made during the calendar year.[263] These disclosure requirements, which remain in place today, were required to be submitted on a quarterly, pre-election, and post-election basis during election years, semi-annually during non-election years, and required to be made publicly available by the Secretary of the Treasury.[264] Under the legislation, a 527 that failed to properly report a contribution or expenditure would be subject to a tax of 35% of the unreported amount.[265]

Although applying disclosure requirements to 527s enhanced the transparency of their spending, substantial concerns remained. Investigations by Congress, the Department of Justice, and the FEC into campaign practices during the 1996 federal elections would highlight the corrosive effect of soft money on the federal political system, including the solicitation of soft money by elected officials and instances of special access being provided to large soft money contributors.[266] The Democratic National Committee had received at least $3 million in contributions from illegal or questionable sources; President Clinton had attended at least 103 "coffee klatches" with donors who contributed more than $26 million to Democrats in 1996; and Vice President Al Gore had repeatedly made fundraising

261. *See* Corrado, *supra* note 242, at 35. In 2002, Public Citizen documented that sixty-three Members of Congress in leadership positions had their own 527 group. *Congressional Leaders' Soft Money Accounts Show Need for Campaign Finance Reform Bills*, PUB. CITIZEN (Feb. 26, 2002), http://www.citizen.org/congress/article_redirect.cfm?ID=7188.

262. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 128 n.23 (2003) (citing McConnell v. Fed. Election Comm'n, 251 F. Supp. 2d 176, 232–33 (D.D.C. 2003)); *see also* Corrado, *supra* note 242, at 35.

263. Pub. L. No. 106-230, 114 Stat. 477 (2000).

264. *Id.*

265. Pub. L. No. 106-230, 114 Stat. 477, § 2(a) (2000). *See infra* note 433.

266. *McConnell*, 540 U.S. at 129 n.24.

phone calls from his vice-presidential office.[267] The Republican National Committee's donor recognition programs—"Team 100" and the "Republican Eagles"—promised "special access to high-ranking Republican elected officials," which at least some donors understood could lead to favorable legislative outcomes.[268] Both the majority- and minority-party reports of the Senate Committee on Governmental Affairs investigation into the 1996 elections agreed that soft money had resulted in a "meltdown" of FECA.[269] These concerns, among others, would ultimately lead to the passage of the Bipartisan Campaign Reform Act of 2002 (BCRA).

B. *The Bipartisan Campaign Reform Act of 2002*

Sponsored by Senators John McCain (R-AZ) and Russell Feingold (D-WI) and Representatives Christopher Shays (R-CT) and Marty Meehan (D-MA), BCRA's primary focus was "to address Congress' concerns about the increasing use of soft money and the use of issue advertisements to influence federal elections."[270] BCRA eliminated soft money by prohibiting national political party committees, agents of such committees, and federal candidates and officeholders from soliciting, receiving, directing, or spending soft money,[271] and prohibiting state and local party committees from using soft money for "Federal election activities," a term that was defined to include mixed-purpose activities.[272] In order to prevent circumvention of these restrictions, BCRA also addressed the role of outside groups by prohibiting political parties and officeholders from soliciting soft money or soliciting donations directly to any nonprofit organization "that makes expenditures or disbursements in connection with an election for Federal office," including expenditures or disbursements for Federal election activity.[273]

To address sham issue ads, BCRA created a new category of advertisements, known as "electioneering communications"—broadcast, cable, or satellite advertisements that refer to one or more clearly identified candidates for federal office, are aired

267. S. REP. NO. 105-167, vol. 4, pt. 4611 (1998); *see also* Corrado, *supra* note 242, at 36.

268. S. REP. NO. 105-167, vol. 5, pt. 7971–74 (1998).

269. S. REP. NO. 105-167, vol. 5, pt. 4611, at 7515 (1998).

270. *McConnell*, 540 U.S. at 132.

271. 2 U.S.C. §§ 441(a); 2 U.S.C. 441i(e) (repealed 1976).

272. 2 U.S.C. § 441i(b) (2006); 2 U.S.C. § 431(20)(A) (2006).

273. 2 U.S.C. § 441i (2006). The term "Federal election activity" was defined in BCRA to include public communications that promote or attack a candidate for federal office. 2 U.S.C. § 431(20)(A)(iii) (2006).

within thirty days of a primary election or within sixty days of a general election and, in the case of U.S. Senate and U.S. House candidates, are targeted to the relevant electorate.[274] As introduced and passed, BCRA included both an electioneering communications prohibition and a comprehensive electioneering communication disclosure requirement.[275] Like FECA's prohibition of corporate and union independent expenditures, BCRA flatly prohibited corporations and unions from funding electioneering communications with their general treasury funds other than through the use of a PAC. Those entities that could air electioneering communications were subject to a new and comprehensive disclosure requirement.

This new disclosure requirement is characterized by two key features: the breadth of its application to any person or group engaging in a certain threshold of election activity, and the move away from a disclosure requirement that was triggered only by a specific intent on the part of the donor to influence federal elections. Specifically, any "person"[276] that makes disbursements totaling more than $10,000 during a calendar year for producing and airing one or more electioneering communications is required to file a disclosure statement with the FEC within twenty-four hours.[277] Thereafter, those persons must also file an additional report after each additional public distribution of an electioneering communication in excess of $10,000.[278] These disclosure statements are required to disclose, *inter alia*, the name(s) of the candidate(s) identified in the communication(s), the amount of each disbursement of more than $200, and if the disbursement was made from a segregated account consisting of funds donated by U.S. citizens, nationals, or permanent resident aliens to the account for electioneering communications, the "names and addresses of all contributors who contributed an aggregate amount of $1000 or more to that account" since the first date of the preceding calendar year, or if such a segregated account was not used, "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to

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274. 2 U.S.C. § 434(f)(3) (2006).

275. *See* 147 CONG. REC. S2433 (daily ed. Mar. 19, 2001) (statement of Senator Feingold).

276. The definition of the term "person" was not altered by BCRA, and therefore included "an individual, partnership, committee, association, corporation, labor organization, and any other organization or group of persons . . . ." 2 U.S.C. § 431(11) (2006).

277. 2 U.S.C. § 434(f) (2006); Reporting Electioneering Communications, 11 C.F.R. § 104.20(b) (2012).

278. *Id.*

the person making the disbursement" since the first date of the preceding calendar year.[279]

Importantly, rather than tying disclosure to whether or not the donor intended to influence elections, BCRA afforded persons making electioneering communications two options for disclosing the source of the funds used to pay for those advertisements: (1) establish and use a segregated bank account to fund such advertisements and be required to disclose the identities of only those individuals who contributed $1000 or more to that account, or (2) opt not to establish a segregated account, but instead disclose all contributors of $1000 or more in the preceding calendar year. Importantly, this disclosure scheme was deliberately chosen as an alternative to basing disclosure on donor intent. As Professor Richard Briffault has noted, lawmakers have limited policy options for obtaining the disclosure of the identities of those who pay for campaign ads.[280] These options include expanding the definition of political committee for the purpose of disclosure requirements; providing standards for determining whether a donation was given for an electoral purpose; mandating the use of segregated accounts for election-related spending; and presuming that donors above a certain threshold have given their funds for an electoral purpose unless the donor specifically requested otherwise.[281] BCRA chose to combine the latter two of these options; narrowing the reach of the disclosure requirement by allowing for the establishment of a segregated account and by setting the disclosure threshold at $1000, five times the amount for the mandated disclosure of "contributions" to political committees.

The FEC and opponents of disclosure have repeatedly claimed that BCRA's electioneering communications disclosure provision was modeled on the independent expenditure disclosure required of persons other than political committees in FECA,[282] arguing that "the legislative history of BCRA indicated that Congress intended electioneering communications to be

279. 2 U.S.C. § 434(f)(2)(F) (2006).

280. Briffault, *supra* note 225, at 352.

281. *Id.*

282. *See* FED. ELECTION COMM'N, IN THE MATTER OF ELECTIONEERING COMMUNICATIONS: NOTICE 2007-16, at 48–49 (2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4979 (statement of Michael Trister arguing that "if you look at the legislative history, Congress essentially said, we are extending the IE reporting to ECs. That is all they thought they were doing. . . . [T]hey basically said, we are trying to extend IE reporting to EC reporting."); *see also* Brief for the Appellant at 5–7, Ctr. for Individual Freedom v. Van Hollen, Nos. 12-5117 & 12-5118 (2012), *available at* http://www.fec.gov/law/litigation/van_hollen_cfif_brief.pdf.

treated similarly to independent expenditures."[283] This is simply incorrect. BCRA's legislative history contains no evidence that Congress intended the two disclosure requirements to be coextensive, and actually contains very few references to FECA's independent expenditure disclosure provision.[284] The only discussion in the legislative record that even compared the electioneering communication and independent expenditure provisions is a reference to a statement by Senator McCain that BCRA's provision prohibiting corporations and unions from engaging in electioneering communications would be subject to an exception for MCFL corporations similar to the exception granted by the Supreme Court to MCFL corporations from FECA's independent expenditures prohibition.[285]

But one need not dig through the thousands of pages of BCRA's legislative history to reach the obvious and unmistakable conclusion that Congress did not model the electioneering communication disclosure requirements on FECA's independent expenditure disclosure provision. A simple comparison of the two statutory provisions' plain text is all that is necessary. Whereas FECA's independent expenditure disclosure requirement incorporates the disclosure required of all political committees—namely disclosing every contributor of more than $200—and additionally requires the identification of those contributors who contributed "for the purpose of furthering an independent expenditure," BCRA's electioneering communication disclosure requirement is markedly different. The threshold for disclosure is five times higher ($1000 as opposed to $200), and as explained above, the electioneering communications disclosure provision required identifying all persons who donated $1000 or more to the entity making electioneering communications in the preceding calendar year, but allowed such entities to narrow the scope of the donors subject to disclosure by establishing a segregated account dedicated to funding electioneering communications.[286]

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283. Defendant Fed. Election Comm'n Motion for Summary Judgment at 11, Van Hollen v. Fed. Election Comm'n, No. 1:11-cv-00766 (2011), *available at* http://www.fec.gov/law/litigation/van_hollen_fec_msj.pdf.

284. *See* LEGISLATIVE HISTORY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002 (William H. Manz ed., 2003).

285. Electioneering Communications, 67 Fed. Reg. 65,204 (Oct. 23, 2002) ("Senator McCain's statement thus recognizes that *MCFL* will have the same effect under BCRA for electioneering communications as it did under the FECA for independent expenditures.").

286. 2 U.S.C. § 434(f)(2) (2006).

If BCRA's electioneering communication disclosure provision was intended to be modeled on FECA's independent expenditure disclosure provision, we would expect to see at least some discussion of the FECA provision as well as the FEC's implementation and administration of such provision in the legislative history. But no such discussion took place. There was simply no discussion of the "for the purpose of furthering" language in FECA or any reference to the FEC's regulations further narrowing the disclosure requirement to only those donors who intended to further "the reported" independent expenditure.[287]

Indeed, BCRA did not alter FECA's disclosure requirements for independent expenditures in any way.[288] Given that the FEC's 1980 rule had significantly narrowed the application of the independent expenditure disclosure provision, Congress's failure to clarify the breadth of the independent expenditure disclosure requirements in BCRA may appear to be an oversight, but there were several reasons why Congress may not have believed it was necessary or important to do so. First, it may not have been entirely clear to Congress that there was a problem with the FEC's 1980 independent expenditure disclosure rule at the time BCRA was pending before Congress. This is because in the federal elections immediately preceding the passage of BCRA, persons other than political committees making independent expenditures largely disclosed the sources of the funds used to air such communications. For example, 95% of such spending was fully disclosed in 1998.[289] And, to the extent there was a problem with the independent expenditure disclosure requirements, the problem was found in the FEC's issuance and enforcement of its independent expenditure rule, and not in FECA's text itself.

Second, at the time BCRA was considered only an exceedingly narrow subset of the entities spending money to influence federal elections were even permitted to air independent expenditures. The longstanding prohibition on corporate and union independent expenditures was still in effect and could not have been reasonably thought to be of questionable constitutionality given the Court's endorsement of special restrictions on corporate political activity in *Austin v. Michigan Chamber of Commerce* in 1990.[290] And finally, to the extent that the independent

287. *See* LEGISLATIVE HISTORY OF THE BIPARTISAN CAMPAIGN REFORM ACT OF 2002, *supra* note 284.

288. *Compare* 2 U.S.C. § 434(c) (1982), *with* 2 U.S.C. § 434(c) (2006).

289. FED. ELECTION COMM'N, ANNUAL REPORT 81 (1998), *available at* http://www.fec.gov/pdf/ar98.pdf.

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

expenditure reporting requirements were perceived to be in need of reform, Congress's overwhelming concern at the time was that the term "independent expenditure"—defined to be limited to advertisements containing express advocacy—was too narrow and easily evaded by omitting "magic words" from an advertisement.

Following *Buckley*, the Commission amended its rules defining "express advocacy" to include—and attempted to enforce—a somewhat broader conception of express advocacy, arguing that the statute reached advertisements that omitted magic words, but when taken in context, such as the proximity to the election, could "only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates."[291] Several circuit courts, however, rejected such efforts, limiting the scope of the term "independent expenditure" to only those communications that contained express advocacy.[292] Thus, the FEC and Congress's attention had turned

291. 11 C.F.R. § 100.22(b) (2012). Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35,292, 35,292–94, 35,304–05 (July 6, 1995).

292. *See* Paul S. Ryan, Wisconsin Right to Life *and the Resurrection of* Furgatch, 19 STAN. L. & POL'Y REV. 130 (2008). For example, following the 1996 presidential election, the FEC sued the Christian Action Network for failing to file independent expenditure disclosure reports for television advertisements that described Bill Clinton and Al Gore's positions regarding homosexuality and asked viewers, "Is this your vision for a better America?" The Fourth Circuit disagreed with the FEC, finding that the advertisement was not express advocacy under *Buckley*'s magic words test, because it failed to contain "an explicit directive to voters to take some course of action." Fed. Election Comm'n v. Christian Action Network, 110 F.3d 1049, 1054 (4th Cir. 1997). A notable exception was the Ninth Circuit, which in *Federal Election Commission v. Furgatch,* 807 F.2d 857, 864 (9th Cir. 1987), held that express advocacy extended to speech that is "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate." However, this broader conception of express advocacy that was thought dead in the 1990s found new life following Supreme Court's decision in *McConnell v. Federal Election Commission*, in which the Court held that "the express advocacy limitation . . . was the product of statutory interpretation rather than a constitutional command," thus opening the door for the expansion of express advocacy to include, as the Court wrote, communications that are "the functional equivalent of express advocacy." McConnell v. Fed. Election Comm'n, 540 U.S. 93, 206 (2003). Most recently, in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469–70 (2007), Chief Justice Roberts, writing for the Court, held that "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." Thus it now appears that the Commission would be "on solid legal ground" in enforcing a broader conception of the term "independent expenditure" to include communications that contain a clear and unambiguous call to oppose a candidate. Ryan, *supra* note

from using the independent expenditure reporting requirements as a tool of disclosure to the creation of an entirely new and broader category of advertisements: electioneering communications. Given Congress's broader and more urgent concerns with soft money and sham issue advocacy, it is not surprising that Congress failed to take a close look at the FEC's independent expenditure disclosure rule, which at the time was little more than federal campaign finance law's equivalent of a dark corner in a dusty attic.

C. *The FEC's Implementation of the Bipartisan Campaign Reform Act of 2002*

The FEC promulgated regulations implementing BCRA, including BCRA's electioneering communication disclosure requirements, in early 2003.[293] The regulations implementing BCRA's electioneering communication disclosure requirements tracked the language of BCRA closely. As with the text of BCRA, the electioneering communication disclosure rule preserved BCRA's two reporting options: If the disbursements were paid exclusively from a segregated bank account funded solely by individuals, then the group was only required to disclose "the name and address of each donor who donated an amount aggregating $1,000 or more to the segregated bank account, aggregating since the first day of the preceding calendar year."[294] If the person opted not to avail themselves of the segregated bank account option, then the person was required to disclose "the name and address of each donor who donated an amount aggregating $1000 or more to the person making the disbursement, aggregating since the first day of the preceding calendar year."[295] The FEC did not alter the reporting requirements for persons other than political committees making independent expenditures.[296]

The only difference between the Commission's electioneering communication disclosure rule and BCRA's statutory lan-

292, at 159. Most recently, the Fourth Circuit upheld the expanded conception of express advocacy against overbreadth and vagueness challenges in *The Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544, 550–53 (4th Cir. 2012).

293. *See* Electioneering Communications, 67 Fed. Reg. 65,190 (Oct. 23, 2002); Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404,413 (Jan. 3, 2003).

294. Reporting Electioneering Communications, 11 C.F.R. § 104.20(c)(7)(i) (effective until Dec. 26, 2007).

295. 11 C.F.R. § 104.20(c)(8) (effective until Dec. 26, 2007).

296. *Compare* Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. at 420, *with* 11 C.F.R. § 104.4 (2012).

guage was that the rule correctly substituted the term "donor" for BCRA's usage of the term "contributor." This reflected the Commission's view, as clearly indicated by BCRA's definition of electioneering communication and its move away from an intent-based disclosure rule, that funds given to persons that make electioneering communications are not "contributions" under the Act, meaning that they need not be intended to influence federal elections in order to be subject to the disclosure requirements.[297] Instead, the Commission's rule treated such funds as "donations" rather than contributions, because electioneering communications need not be intended to influence federal elections, and therefore do not fall within FECA's definition of "contribution" or "expenditure."[298] No commenters disagreed with the Commission on this matter.[299]

At the time the FEC issued the post-BCRA electioneering disclosure rule, the Commission also understood that the rule could potentially apply to non-individual entities other than MCFL corporations. While the FEC's rule, as proposed, would have limited the use of a segregated bank account "only to qualified nonprofit corporations" (the FEC's term for MCFL corporations), at the urging of commenters, the Commission's final rule, like BCRA, made the segregated account option "available to all persons who make electioneering communications, and not just QNCs."[300] As the Commission noted, the final rule "sought to clarify that all persons" would be covered by the final rule, correctly reflecting the broad scope of the BCRA electioneering communication disclosure provision.[301]

The Commission also rejected the notion that BCRA's electioneering communication disclosure provision was meant to be similar to FECA's independent expenditure disclosure provision. A joint commenter urged that the Commission's electioneering communications disclosure rule should "impose the same requirements for disclosure of electioneering communications as it does for independent expenditures arguing that legislative history indicates that Congress intended them to be treated similarly."[302] The Commission also rejected this contention, noting the critical differences between the two provisions in stating that

297. *See* 11 C.F.R. § 104.20(c) (effective Feb. 3, 2003 to Dec. 25, 2007); 68 Fed. Reg. at 413 (stating that "the Commission proposed to treat funds given to persons who make electioneering communications as 'donations'").

298. 68 Fed. Reg. at 413.

299. *Id.*

300. *Id.*

301. *Id.* at 414.

302. *Id.* at 413.

"[w]hile reporting of independent expenditure contributors is limited to those who contributed specifically for independent expenditures," although the electioneering communication provision was not limited in this manner, "QNCs can also reduce their reporting obligations by using separate bank accounts . . . ."[303]

D. McConnell v. Federal Election Commission

In 2003, eight Justices voted in *McConnell v. Federal Election Commission* to uphold BCRA's electioneering communications disclosure requirements against First Amendment challenge,[304] stating that *Buckley*'s express advocacy test "was an endpoint of statutory construction, not a first principle of constitutional law."[305] In doing so, the Court settled the long-standing dispute about whether federal election law could regulate non-express advocacy speech consistent with the Constitution. The Court recognized that "the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad" and recognized that "the unmistakable lesson from the record in this litigation . . . is that *Buckley*'s magic-words requirement is functionally meaningless."[306] To the Court, the electioneering communication disclosure provision, like FECA's independent expenditure disclosure provision, furthered "the important state interests that prompted the *Buckley* Court to uphold FECA's disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce the more substantive electioneering restrictions . . . ."[307] But the *McConnell* Court recognized the important differences between the independent expenditure disclosure provision in FECA and BCRA's electioneering communication disclosure requirement, noting that the disclosure requirements for electioneering communications "are actually somewhat less intrusive than the comparable requirements that have long applied to persons making independent expenditures."[308]

The Court also upheld BCRA's prohibition on the use of corporate and labor treasury funds for electioneering communi-

303. *Id.*
304. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 196 (2003) (upholding BCRA section 201); *see also id.* at 321 (Kennedy, J., joined by Rehnquist, C.J. and Scalia, J.) (voting with majority to uphold § 201).
305. *Id.* at 190.
306. *Id.* at 193.
307. *Id.* at 103.
308. *Id.* at 196 n.81.

cations, because the Court viewed the restriction as still permitting corporations and labor organizations to engage in electioneering communications through their political committees, and the Court deferred to Congress's "legislative judgment that the special characteristics of the corporate structure require particularly careful regulation."[309] The Court added, however, that although the prohibition did not on its face contain an exception for *MCFL* organizations, the Court "presume[d] that the legislators who drafted [the prohibition] were fully aware that the provision could not validly apply to *MCFL*-type entities."[310]

E. *The Post-BCRA Strong Mandate for Disclosure*

BCRA, as upheld by the Court in *McConnell*, successfully eliminated soft money, expanded the types of advertisements that were prohibited from being funded with corporation and union treasury funds to include electioneering communications, and successfully broadened disclosure requirements to require that the funds used to pay for such advertisements be fully disclosed. The success of BCRA's disclosure provisions is demonstrated by the 2004 and 2006 federal elections—the two election cycles immediately following BCRA's implementation—which marked a high point in U.S. history for the disclosure of the sources of funds spent to influence federal elections. It is estimated that 96.5% of the funds spent by outside groups in 2004 was fully disclosed, and in 2006, 92.9% was fully disclosed.[311]

This is not to say that the 2004 and 2006 federal elections were without campaign finance controversy. Section 527 organizations such as Swift Boat Veterans and POWs for Truth, MoveOn.org Voter Fund, America Coming Together, League of Conservation Voters, and others spent more than $250 million to air advertisements during the 2004 federal elections, with Democratic-leaning groups spending $188 million, outpacing Republican-leaning 527s, which are estimated to have spent a total of $62 million.[312] In 2006, 527s spent approximately $143 million.[313]

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309. *Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/disclosure.php (last visited Apr. 17, 2013). While the figures demonstrate that in the 1990s a higher percentage of outside spending was subject to full disclosure, the spending subject to disclosure prior to BCRA was woefully inadequate because it did not include sham issue ads.

310. *Id.*

311. *Id.*

312. Michael Janofsky, *Advocacy Groups Spent Record Amount on 2004 Election*, N.Y. TIMES, Dec. 17, 2004, at A31.

Unincorporated 527s were permitted to air electioneering communications provided they could demonstrate through a reasonable accounting procedure that they had not used corporate or union funds to pay for such advertisements.[314] Unincorporated 527s also could air independent expenditures, but ran a risk that such advertisements would result in the 527 being required to register as a political committee. Although, as discussed above, legislation enacted in 2000 required 527s to publicly disclose their donors, some groups opted to withhold the names of certain donors and instead pay the 35% tax on such donations.[315]

But the heart of the controversy over 527s in the 2004 and 2006 elections was about the application of contribution limits on incoming funds, not about disclosure. Indeed, 527s that aired electioneering communications did in fact disclose the identities of the individuals who had donated $1000 or more to the 527. The focus of the controversy was that such groups could raise unlimited funds by avoiding political committee registration. And, in stark contrast with the deadlocked FEC of today, the FEC responded rather quickly following the 2004 elections—effectively closing this 527 loophole. The FEC did so by slightly expanding the definition of express advocacy used to determine whether a group, such as a 527, had received "contributions" that would trigger a review of the organization's political committee status, and by pursuing the most active 527s for failing to register as political committees.[316] In 2006 and 2007, the FEC successfully assessed hundreds of thousands of dollars in civil penalties against these groups.[317] During this same period, House Repub-

313. STEPHEN R. WEISSMAN & KARA D. RYAN, CAMPAIGN FIN. INST., SOFT MONEY IN THE 2006 ELECTION AND THE OUTLOOK FOR 2008, at 1 (2007), *available at* http://www.cfinst.org/books_reports/pdf/NP_SoftMoney_0608.pdf.

314. 11 C.F.R. § 114.2(b) (2012).

315. Suzanne Nelson, *Loophole in 527s Shields Donors*, ROLL CALL (Apr. 27, 2005), http://www.rollcall.com/issues/50_106/-9036-1.html.

316. Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056–58 (Nov. 23, 2004) (stating that any solicitation indicating funds would "be used to support or oppose the election of a clearly identified candidate" would result in the funds received in response to the solicitation being deemed "contributions" for the purposes of the $1000 political committee status threshold).

317. Press Release, Fed. Election Comm'n, FEC Collects $630,000 in Civil Penalties from Three 527 Organizations (Dec. 13, 2006), *available at* http://www.fec.gov/press/press2006/20061213murs.html. For example, America Coming Together was assessed a $775,000 fine. Press Release, Fed. Election Comm'n, FEC to Collect $775,000 Civil Penalty from America Coming Together (Aug. 29, 2007), *available at* http://www.fec.gov/press/press2007/20070829act.shtml. Club for Growth paid a $350,000 fine. Press Release, Fed.

licans passed legislation that would have imposed the same contribution limitations that applied to political committees on 527 organizations, vowing to "use every opportunity to seek a crackdown on the 527s' potent political power."[318] In the Senate, the 527 Reform Act of 2006 was introduced by Senator John McCain, which would have required all 527 organizations except those focusing purely on state and local elections to register as political committees with the FEC.[319]

The aggressive response by the FEC and Congress made it evident that 527s were a high-risk vehicle for groups that wished to accept unlimited contributions from individuals, let alone shield such contributions from disclosure.[320] A group that operated a 527 to influence federal elections could be found to have triggered political committee status by having the "major purpose" of influencing federal elections and perhaps be required to pay a hefty fine for failing to register as political committee. Donors to 527s could be found to have exceeded the $5000 limit on contributions to political committees by giving more than that amount to a 527 that failed to register as a political committee. And while a 527 that wished to shield its donors from disclosure could opt to pay a 35% tax on any undisclosed donations, it ran the risk of being required to register as a political committee and disclose its donors notwithstanding the payment of the tax. By the time the 2008 presidential primaries neared, these risks had deterred many from donating to 527s, resulting in a significant drop off in 527 spending during the 2008 federal elections.[321] And, groups that could qualify for MCFL status opted to forgo the 527 vehicle to instead form a 501(c)(4) social welfare organization; recognizing that MCFL status would permit the organiza-

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Election Comm'n, Club for Growth Agrees to Pay $350,000 Penalty for Failing to Register as a Political Committee (Sept. 5, 2007), *available at* http://www.fec.gov/press/press2007/20070905cfg.shtml.

318. Elana Schor, *Republicans Vow to Pass Limits on 527s*, THE HILL (Mar. 28, 2006, 7:00 PM), http://thehill.com/homenews/news/10221-republicans-vow-to-pass-limits-on-527s. Tory Newmyer, *527s Back in Lobby Bill*, ROLL CALL (Apr. 26, 2006, 12:00 AM), http://www.rollcall.com/issues/51_112/-12999-1.html.

319. 527 Reform Act of 2006, S. 2511, 109th Cong. (2006).

320. For example, the Club for Growth reportedly abandoned its 527 structure in favor of a 501(c)(4) entity in response to the FEC's response to 527 organizations. *See* WEISSMAN & RYAN, *supra* note 313, at 9.

321. *See 527s: Advocacy Group Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/527s/index.php?filter=F (last visited Apr. 17, 2013) (select federally-focused only); *see also* Jason Horowitz, *Clinton 527 Will Endure Unbearable, Life-Changing Misery, Obama Lawyer Says*, N.Y. OBSERVER, Feb. 21, 2008, http://observer.com/2008/02/clinton-527-will-endure-unbearable-lifechanging-misery-obama-lawyer-says/.

tion to engage in express advocacy without being required to publicly disclose their donors due to the narrow Commission rule promulgated in 1980 regarding independent expenditure disclosure requirements.[322]

So, in short, although a very limited set of groups of organizations were able to take advantage of the 1980 independent expenditure rule issued by the FEC prior to *Citizens United*, the period immediately following the enactment and implementation of BCRA marked a high point for disclosure—a time in which nearly all spending to influence federal elections was fully disclosed to the public. This high point for disclosure was short lived.

VI. *Federal Election Comission v. Wisconsin Right to Life* & the FEC's 2007 Electioneering Communication Disclosure Rule

A. Federal Election Commission v. Wisconsin Right to Life

In 2007, the Supreme Court held in *WRTL II* that BCRA's *prohibition* on the use of corporate and union treasury funds to air electioneering communications was unconstitutional under the First Amendment as applied to electioneering communications that did not constitute "express advocacy" or "the functional equivalent of express advocacy."[323] The ruling followed the retirement of Justice O'Connor (who co-authored the Court's 5-4 majority opinion in *McConnell* upholding BCRA's electioneering communication provisions) and her replacement by Justice Alito, who joined with the 5-4 majority in *WRTL II*, and struck a severe blow to BCRA's electioneering communications prohibition. Following the ruling, all unions and corporations (not just those that qualified for MCFL status) were free to make electioneering communications, provided they did not contain express advocacy language.

Importantly, however, the statutory disclosure requirements applicable to electioneering communications remained unal-

322. For example, in 2006, the Club for Growth announced that it would replace its 527 with a new 501(c)(4) because under *MCFL* and the Commission's 1980 independent expenditure disclosure rule, the Club could "have a significant new ability to run advertisements that directly call for the election or defeat of candidates for Congress" and "[u]nlike in the past . . . donations to the Club [by virtue of being a 501(c)(4) *MCFL* organization] will not be disclosed to the public, except in very limited circumstances." Weissman & Ryan, *supra* note 313, at 9–11 (citing "Club for Growth—Club Bulletin," E-mail from Patrick J. Toomey, President, Club for Growth, to a member (identified only by first name) (2007)).

323. FEC v. Wis. Right to Life, 551 U.S. 449, 469–76 (2007).

tered, and corporations and unions were still prohibited from engaging in express advocacy by making independent expenditures.[324] Notwithstanding, the decision prompted the FEC to revisit how its existing electioneering disclosure rule would apply to the expanded number of corporations and unions that could now make electioneering communications following the *WRTL II* decision.

B. *The FEC's 2007 Electioneering Communications Disclosure Rule*

In the summer of 2007, at the urging of the James Madison Center for Free Speech and its general counsel James Bopp, the FEC initiated a rulemaking to amend the Commission's rules to reflect the *WRTL II* decision.[325] While the primary focus of the proposed rulemaking was to amend Commission regulations to permit corporate and union electioneering communications, the Commission's Notice of Proposed Rulemaking also sought comment on two alternatives for amending its electioneering communication disclosure rule. One alternative proposed to entirely exempt advertisements aired by corporations and labor organizations, other than MCFL corporations, from the definition of "electioneering communication," thereby also completely exempting such advertisements from the electioneering communication disclosure requirements.[326] This approach was vigorously supported by the James Madison Center for Free Speech, which argued that the reasoning, if not the exact holding, of the *WRTL II* decision mandated that "the Commission exempt . . . 'genuine issue ads,' . . . or 'issue advocacy' . . . from all electioneering communication restrictions" including the disclosure

324. The *WRTL II* case did not even raise the question of the constitutionality of BCRA's electioneering disclosure requirements, because the plaintiffs in the case had not challenged the disclosure provisions. *See* Verified Complaint for Declaratory and Injunctive Relief ¶ 37, Wis. Right to Life, Inc. v. FEC, 466 F. Supp. 2d 195 (D.D.C. 2007) (No. 04-1260) ("WRTL does not challenge the reporting and disclaimer requirements for electioneering communications, only the prohibition on using its corporate funds for its grass-roots lobbying advertisements.").

325. *See* James Bopp, Jr. & Richard E. Coleson, James Madison Ctr. for Free Speech, Petition for Rulemaking: Protecting "Genuine Issue Ads" from the "Electioneering Communication" Prohibition & Repealing 11 C.F.R. § 100.22(b) (July 18, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=103465. Press Release, Fed. Election Comm'n, Commission to Conduct Rulemaking Following Supreme Court Ruling (July 19, 2007), *available at* http://www.fec.gov/press/press2007/20070719rule.shtml.

326. Electioneering Communication, 72 Fed. Reg. 50, 261, 50,272 (Aug. 31, 2007).

requirements.[327] Other commenters urged the Commission to not extrapolate too far from the text of Chief Justice Roberts' majority opinion in *WRTL II* striking down the electioneering communication prohibition in an effort to "predict how or whether the Court would extend the same analysis to disclosure laws."[328]

The second alternative proposed by the Commission would have preserved the application of the electioneering communication disclosure requirements for non-MCFL corporations and unions. But, with regard to this alternative, the FEC requested comments on whether the Commission should "limit the 'donation' reporting requirement to funds that are donated for the express purpose of making electioneering communications?"[329] In comments to the Commission on the proposed alternatives, the conservative nonprofit Citizens United—which would become famous for its eponymous Supreme Court victory less than three years later—urged the Commission to consider narrowing BCRA's electioneering disclosure requirements, because, according to the group, they would "likely prove difficult, if not impossible" to comply with, especially with regard to disclosing the sources of "revenues . . . generated through sales, investment capital or a combination thereof. . . ."[330] Opponents of this approach claimed that this argument was little more than a straw man: no reasonable interpretation of BCRA's phrase "contributed" or the FEC's 2003 regulation which substituted the term "donated" for "contributed," would have extended the disclosure requirements to require listing the sources of transactional or investment revenue. As one commenter noted, "whether you're talking about contributed or donated, those words only mean

327. James Bopp, Jr. & Richard E. Coleson, James Madison Ctr. for Free Speech, Comments Responding to Notice of Proposed Rulemaking 2007-16 (Electioneering Communications) (Sept. 29, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4963.

328. Allison Hayward, Request for Comment, Notice 2007-16: Electioneering Communications (Sept. 28, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4944.

329. Electioneering Communication, 72 Fed. Reg. at 50,271.

330. Michael Boos, Citizens United, Comments on Proposed Exemptions from Electioneering Communications Definition (Notice 2007-16, 72 Fed. Reg. 50,261 (Aug. 31, 2007)) (Oct. 1, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4954 (stating that "[t]he difficulties of compliance would be most acute where revenues are generated through sales, investment capital or a combination thereof, which is generally the case with a commercial business. At the very least, this particular reporting requirement would probably impose such a high burden that it would in practical effect amount to a ban on the ads for some businesses.").

some type of voluntary transfer, without any consideration, and without an exchange, without purchasing value."[331]

What does appear to have persuaded certain commissioners, however, was the warning by commenters representing unions, specifically the AFL-CIO, AFSCME, NEA, and the SEIU, that the plain language of BCRA's electioneering communication disclosure provision and the Commission's 2003 rule would require unions to disclose the names of individuals who paid annual union dues in excess of $1000.[332] According to union representatives, the potential application of this disclosure requirement to union dues presented a "remarkable" increase in the already-existing disclosure obligations placed on unions under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) and the Civil Service Reform Act of 1978 (CSRA), which require unions to publicly disclose receipts of $5000 or more, including membership dues, from a single source in a calendar year.[333] Union representatives stressed that without the creation of an exception for union dues, the electioneering communication disclosure requirement "would be a tremendous burden on unions" that "could not possibly be good public policy."[334] These concerns about burdensome disclosure requirements prompted Commissioner Weintraub to ask commenters whether the Commission could fashion the electioneering communication disclosure rule "in such a way that we exempted from disclose [sic] membership dues, business income?"[335] The union representatives proposed a solution, urging the Commission to "require reporting only for those

331. FED. ELECTION COMM'N, IN THE MATTER OF ELECTIONEERING COMMUNICATIONS: NOTICE 2007-16, at 154 (2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4978 (statement of Laurence E. Gold). Indeed, the Commission had already addressed the issue of funds received from market transactions, as the Commission's rules, for example, had already exempted funds received in the course of bona fide market transactions from BCRA's prohibition on the use of corporate and union funds on electioneering communications. *See* 11 C.F.R. § 114.14(c)(3) (2012) (exempting funds "representing fair market value for goods provided or services rendered" from being prohibited from being used by a person to air electioneering communications).

332. FED. ELECTION COMM'N, *supra* note 331, at 155–57 (statement of Laurence E. Gold); *see also* Larry P. Weinberg et al., Re: Notice of Proposed Rulemaking, "Electioneering Communications," 72 Fed. Reg. 50261 (Oct. 1, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4942.

333. 29 U.S.C. § 431(b)(2) (2006); *see also* FED. ELECTION COMM'N, *supra* note 331, at 155–57 (statement of Laurence E. Gold); Weinberg et al., *supra* note 332.

334. FED. ELECTION COMM'N, *supra* note 331, at 155–57 (statement of Laurence E. Gold).

335. *Id.* at 164.

people who earmark funds to be used for *WRTL II*-type communications."[336]

Union representatives urged the Commission to look no further than FECA's independent expenditure reporting provision, as implemented by the Commission's 1980 rule, arguing that "if you look at the legislative history, Congress essentially said, we are extending the IE reporting to ECs."[337] This same commenter admitted, however, that the plain language of BCRA's electioneering communication disclosure provision differed from FECA's independent expenditure disclosure provision, noting that Congress "didn't write it that way, and if they had been more careful we wouldn't have this issue . . . ."[338] As discussed above, the legislative history does not indicate that Congress intended to model the electioneering communication disclosure provision on FECA's independent expenditure disclosure provision, let alone the Commission's much narrower 1980 regulations implementing that requirement. Congress could have easily borrowed from FECA's independent expenditure disclosure language, but chose not to do so. This fact is significant, as in general, "whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject."[339] Pro-disclosure commenters urged the Commission to not depart from the plain language of BCRA's electioneering disclosure provision, arguing that the Commission should not graft an intent-based standard onto the provision when it was clear Congress had carefully drafted the disclosure provision, and had explicitly chosen to provide the segregated account option and the increased $1000 donation threshold as the exclusive means of limiting the breadth of the disclosure requirements.[340] Commenters also rightly suggested that the Commission could require corporations or labor organizations that opted to forego the segregated account option to "disclose the name and address of all of its donors of $1000 or more," subject to a narrow exception providing that, "[i]n the situation where a corporation . . . pays for an electioneering communication out of general treasury funds consisting of income

336. *Id.* at 236 (statement of Jessica Robinson).

337. FED. ELECTION COMM'N, *supra* note 282, at 48–49 (statement of Michael Trister).

338. Id. at 49.

339. FAIC Sec., Inc. v. United States, 768 F.2d 352, 363 (D.C. Cir. 1985) (citing Erlenbaugh v. United States, 409 U.S. 239, 244 (1972)) (noting, in context of canon of construction that provisions in *pari materia* must be construed together, "that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject").

340. FED. ELECTION COMM'N, *supra* note 282, at 43 (statement of Brian Svoboda).

from business activities, it would simply report that the corporation itself was the source of the funds."[341] Commission Vice Chairman David Mason also urged caution, arguing that an exception for "dues" could easily be exploited by nonprofit organizations that could grant large donors some form of token membership status and call their donations "dues" in order to exempt their donations from triggering a disclosure obligation.[342]

But Commissioner Weintraub continued, asking "[i]s there some way we can exempt membership dues and still catch the Wyly brothers?"[343] Leading up to the 2000 presidential primaries, Charles and Samuel Wyly, billionaire brothers from Dallas, Texas supporting George W. Bush's bid for the Republican nomination, financed nearly $2.1 million worth of television advertisements lauding Bush's environmental record.[344] Until Samuel Wyly stepped forward as a result of media pressure on the Bush campaign, the source of the money used to fund the ads was a complete mystery, because the ads were aired under the name "Republicans for Clean Air."[345] The Wyly brothers became synonymous with so-called "false-front" groups—organizations formed with obscure or generic names in order to air electioneering advertisements without revealing the sources of their funding.

It is clear from BCRA's legislative history that Congress intended to prohibit these types of organizations from airing advertisements to influence federal elections without being required to disclose the sources of their funds, in this instance, the Wylys.[346] The legislative history supports their arguments. For example, in a debate over an identical disclosure provision proposed in 1998, Senator McConnell, an outspoken opponent of campaign finance reform, understood the breadth of the disclosure requirements as "requir[ing] of the group its membership list or its donations to be handed over to the government."[347]

341. Fred Wertheimer et al., Comments on Notice 2007-16: Electioneering Communications 15 (Oct. 1, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=19905.

342. FED. ELECTION COMM'N, *supra* note 331, at 276–78 (statement of Vice Chairman David Mason).

343. *Id.* at 168 (statement of Chairman Weintraub).

344. John Mintz, *Texan Aired 'Clean Air' Ads*, WASH. POST, Mar. 4, 2000, at A6.

345. *Id.*

346. FED. ELECTION COMM'N, *supra* note 331, at 166–67 (statement of Donald Simon).

347. 144 CONG. REC. S994, S998 (daily ed. Feb. 25, 1998).

Commenters opposing disclosure also argued that the ability of corporations and unions to use general treasury funds for electioneering communications was entirely unforeseen by Congress when it enacted BCRA.[348] As FEC Commissioner Ellen Weintraub, a self-described "big advocate of transparency and disclosure," remarked, "Congress may not have thought through what it was going to mean for [corporations and unions] to have disclosure because they were not anticipating that these entities would be able to make electioneering communications."[349] It is correct that in drafting the electioneering communication disclosure requirement, Congress operated under the primary assumption that corporate and labor organization funds could not be used to fund such advertisements. For example, the segregated account reporting option was available only to groups spending funds "contributed solely by individuals" permitted to make contributions in federal elections.[350]

But it is also likely that Congress did in fact anticipate that the electioneering disclosure requirements could be applied to a broader range of corporations and labor organizations than just MCFL corporations. The plain text of BCRA supports this conclusion, as the critical term "person" was defined broadly to include corporations and labor organizations. Also, as the Court in *Buckley* recognized, the fact that a disclosure requirement overlapped with a prohibition did not mean that the disclosure requirement was not intended to apply to the prohibited activities, but rather, that the disclosure was designed "to aid in the enforcement" of and "play a role in the enforcement of" the prohibition.[351] As one commenter noted at the Commission's hearings, "a corporation that was illegally spending treasury funds on electioneering communications nonetheless would be subject to the disclosure requirements . . . ."[352]

Additionally, at the time BCRA was enacted, there was considerable uncertainty about whether or not the express advocacy test was a constitutional requirement, and if it was, whether the Court would find the prohibition on the use of corporate and

348. FED. ELECTION COMM'N, *supra* note 331, at 170 (statement by Jan Baran that "Congress, and perhaps in BCRA, never contemplated this disclosure issue, because unions and corporations are going to be banned from making electioneering communications").

349. *Id.* at 8.

350. 2 U.S.C. § 434(f)(2)(E) (2006).

351. Buckley v. Valeo, 424 U.S. 1, 75 (1976) (speaking with regard to FECA's overlapping independent expenditure prohibition and disclosure requirements in sections 434(e) and 608(e)(1)).

352. FED. ELECTION COMM'N, *supra* note 282, at 65 (statement of Brian Svoboda).

union treasury funds for electioneering communications to be unconstitutional. Indeed, the specter of constitutional challenge—and considerable uncertainty about the outcome of such challenge with regard to the electioneering communication prohibition—hung over the entire consideration of BCRA. BCRA also included a severability provision, providing that "[i]f any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby."[353] As, BCRA's sponsors would later explain to the FEC, the statute's electioneering disclosure provision was intended to be "completely independent of" the electioneering communication prohibition and "the severability clause . . . was meant to underscore congressional intent that even if [the prohibition] was declared unconstitutional, other sections of the bill . . . should survive."[354]

At the FEC's public hearings on the proposed regulatory changes, Commission Vice Chairman Mason expressed concern that importing the intent-based "for the purpose of furthering" standard from the independent expenditure rule would require the Commission to engage in fact-intensive inquiries into whether or not funds had in fact been earmarked to go towards electioneering communications.[355] But the Commission was also under considerable pressure to issue a clear and manageable rule in time for the impending 2008 presidential election, because the electioneering communications window for the 2008 primary elections was set to open in less than two months on December 6, 2007.[356] Even if the Commission wished to engage in an in-depth analysis of how the expanded disclosure requirements could apply to false front organizations and simultaneously exempt union dues, the Commission likely lacked the time to do so.[357] However, once the Commission untethered the electioneering disclosure requirements from the plain language of BCRA and its own previous disclosure rule in order to exempt union dues, the Commission was left searching for a way to distinguish between bona fide membership dues and donations to

353. 2 U.S.C. § 454 (2006).

354. Senator John McCain, Senator Russell D. Feingold, Senator Olympia Snowe, and Representative Christopher Shays, Notice 2007-16: Electioneering Communications 2 (Oct. 1, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4964.

355. FED. ELECTION COMM'N, *supra* note 331, at 49.

356. FED. ELECTION COMM'N, *supra* note 282, at 27–28.

357. As Vice Chairman Mason noted, although "cogent criticisms" were presented, "we don't have the choice of going back to the drawing board." *Id.*

false front organizations, such as Republicans for Clean Air, that could easily be labeled as "dues" in order to avoid disclosure.

The legislative history is clear that the ways in which Congress intended to alleviate the potentially burdensome disclosure requirements was the selection of $1000 as the disclosure threshold and the inclusion of the segregated account alternative. There is no evidence that Congress intended to tie donor disclosure to a specific expressed intent by the donor to fund certain types of advertisements, let alone sufficient ambiguity to displace the plain text of the provision, which provides otherwise. But, the Commission's record reflects more concern on the part of the commissioners with minimizing disclosure obligations and providing stability to the regulated community than in effectuating congressional intent, and the "for the purpose of furthering" language was a familiar standard that would significantly reduce the disclosure burden and minimize the uncertainties surrounding the electioneering communication disclosure requirements.

On November 20, 2007, the Commission approved the new electioneering communication disclosure rule.[358] The new regulation[359] ultimately received the support of four out of the five commissioners,[360] and incorporated language similar—but not exactly identical to—FECA's independent expenditure disclosure requirements. Under the rule, any corporation or labor organization making electioneering communications in excess of $10,000 in a calendar year from a non-segregated account is required to disclose "the name and address of each person who made a donation aggregating $1000 or more to the corporation or labor organization, aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications*."[361] The Commission noted that the

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358. FED. ELECTION COMM'N, MINUTES OF AN OPEN MEETING OF THE FEDERAL ELECTION COMMISSION (Nov. 20, 2007), *available at* http://sers.nictusa.com/fosers/showpdf.htm?docid=4980.

359. 11 C.F.R. § 104.20(c)(9) (2012).

360. FED. ELECTION COMM'N, *supra* note 358, at 4 (Commissioner Hans A. van Spakovsky, dissenting). Commissioner van Spakovsky also moved to amend the proposed rule to eliminate the requirement for corporations and labor organizations to file electioneering communication disclosure reports at the Commission's November 20, 2007 meeting. This motion failed by a vote of two-to-three, with Commissioners Mason and von Spakovsky voting affirmatively, and Commissioners Lenhard, Walther, and Weintraub dissenting. *Id.*

361. Electioneering Communications, 72 Fed. Reg. 72,899-01, 72,913 (Dec. 26, 2007) (to be codified at 11 C.F.R. pt. 104, 114) (emphasis added). By way of contrast, Commission regulations with regard to independent expenditures state that the contributions must be made for the purpose of furthering "the reported" independent expenditure. *See* 11 C.F.R. § 109.10(e)(1)(vi) (2012).

"for the purpose of furthering" language in the rule was "drawn from the reporting requirements that apply to independent expenditures made by persons other than political committees,"[362] and explained that the purpose element would be satisfied if funds were "received in response to solicitations specifically requesting funds to pay for" electioneering communications, or if the funds were "specifically designated for electioneering communications by the donor."[363]

The FEC identified two reasons narrowing the disclosure requirement. First, the Commission stated that they wished to require disclosure of the identities of only those persons who "actually support the message conveyed."[364] Second, the Commission stated that it wanted to avoid "impos[ing] on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members."[365] In doing so, the Commission disregarded the importance of the $1000 disclosure threshold and the segregated bank account option in reducing the burden of disclosure, and in doing so, disregarded Congress's intent.[366] The Commission also chose to interpret BCRA's electioneering communication disclosure provision differently than it had previously interpreted it in its 2003 rule, which, as noted above, tracked BCRA's language closely. In doing so, the Commission chose not to treat corporations and labor organizations similarly to unincorporated associations and corporations that were permitted to fund electioneering communications prior to *WRTL II,* which are still required to disclose each donor of $1000 or more regardless of the intent of the donor.[367] The result of this disparate treatment is that unincorporated associations and partnerships are now subject to more extensive disclosure obligations than their incorporated counterparts.

Notably, the Commission's differing interpretations of BCRA's electioneering communication disclosure provision as applied to incorporated as opposed to unincorporated entities was not the result in any change in BCRA's statutory language,

362. 72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007).

363. *Id.*

364. *Id.* at 72,913.

365. *Id.*

366. Under the plain language of BCRA, the segregated bank account option is available only to corporations and unions that are willing to forego using general treasury funds or donations from other corporations or unions to fund electioneering communications. This is because the segregated account must consist of "funds contributed solely by individuals . . . ." 2 U.S.C. § 434(f)(2)(E) (2006).

367. 11 C.F.R. § 104.20(c)(8) (2012).

but rather, a change in how broadly the provision applied following the *WRTL II* decision. The FEC effectively decided that given the broad application of the disclosure requirement following *WRTL II*, the Commission needed to act to pair the disclosure requirement back. And, the most readily available option for doing so—and an option that gained the support of one of the Democratic commissioners due to its ability to reduce the burden of disclosure on unions—was to read an intent requirement into the provision's terms "contributors" and "contributed"—terms the Commission had previously decided did not include an intent requirement. In this regard, BCRA's only shortcoming with regard to electioneering communication disclosure may have been that the provision drafted by Congress was too strict.[368]

C. *Challenges to the 2007 Electioneering Communications Disclosure Rule*

The Commission's 2007 electioneering communications disclosure rule has not gone unchallenged. After the FEC deadlocked on party lines on a petition by Representative Chris Van Hollen, Jr. (D-MD) to establish new electioneering disclosure regulations in line with the plain language of BCRA, Representative Van Hollen brought a lawsuit before the U.S. District Court for the District of Columbia.[369] On March 30, 2012 Judge Amy Berman Jackson granted Van Hollen's motion for summary judgment, finding that the Commission impermissibly "undertook a legislative, policymaking function that was beyond the scope of its authority and that fails at the first step of the *Chevron* test."[370]

But on appeal, the D.C. Circuit reversed and returned the question to the District Court, holding that "[t]he statute is anything but clear, especially when viewed in the light of the Supreme Court's decisions" in *Citizens United* and *WRTL II*, and finding that Congress did not have "an intention on the precise

368. In Cass Sunstein's seminal work, *Paradoxes of the Regulatory State*, Professor Sunstein argues that "overregulation produces underregulation." According to Sunstein, "especially aggressive statutory controls frequently produce too little regulation . . . . This surprising outcome arises when Congress mandates overly stringent controls, so that administrators will not issue regulations at all, or will refuse to enforce whatever regulations they or Congress have issued." Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 413 (1990). In this case, the Commission did just that—believing that the provision reached too far, the Commission refused to enforce BCRA's disclosure requirements and altered their own previously-issued regulation.

369. Van Hollen v. Fed. Election Comm'n, 851 F. Supp. 2d 69 (D.C. Cir. 2012).

370. *Id.* at 72.

question at issue" and therefore "the District Court erred in disposing of this case under *Chevron* Step One."[371] Finding it inappropriate to proceed to a *Chevron* Step Two or *State Farm* analysis given the FEC's abstention from participating in the appeal, the Court of Appeals remanded the case to the District Court to refer the matter to the FEC and then conduct the *Chevron* Step Two and *State Farm* analyses, subject to expedited review by the D.C. Circuit.[372] On October 4, 2012, and again on March 7, 2013, the FEC, in a three-to-three vote, deadlocked over issuing new electioneering communications disclosure regulations.[373] In March of 2013, the District Court announced an expedited briefing process for the *Chevron* Step Two and *State Farm* issues.[374]

Graphically illustrating the steps to which actors will go to avoid disclosure, in the period of time between the District Court's opinion and the D.C. Circuit's reversal, many groups, including the U.S. Chamber of Commerce, shifted the content of their advertising to avoid disclosure by including express advocacy in their communications, thus subjecting the advertisements to the independent expenditure disclosure requirements, and the permissive "for the purpose of furthering the reported independent expenditure" regulation.[375] They did so despite the fact that some of these groups had previously argued that their advertising mentioning candidates was intended to be purely informational and did not represent advocacy of the election of any one candidate over another.[376] When using terms of express advocacy afforded a disclosure advantage, however, they did not appear hesitant to do so. When the D.C. Circuit reversed,

371. Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108, 110–11 (D.C. Cir. 2012).

372. *Id.* at 112.

373. FED. ELECTION COMM'N, MINUTES OF AN OPEN MEETING OF THE FEDERAL ELECTION COMMISSION 9 (Oct. 4, 2012), *available at* http://www.fec.gov/agenda/2012/approved2012_73.pdf. *See generally* Kenneth P. Doyle, *Judge's Order in* Van Hollen *Case Could Put Disclosure Litigation Back on Track*, BLOOMBERG BNA, Mar. 13, 2013, http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=29986656&vname=mpebulallissues&jd=a0d6x2j5f6&split=0.

374. Doyle, *supra* note 373.

375. Kenneth P. Doyle, *District Court Ruling on Funding Disclosure Halts 'Electioneering Communication' Filings*, BLOOMBERG BNA (May 5, 2012), http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=26038259&vname=mpebulallissues&jd=a0d1v6b6e9&split=0.

376. Dan Eggen, *Chamber Says It Will Evade Disclosure Ruling by Tweaking Ads*, WASH. POST, May 30, 2012, http://articles.washingtonpost.com/2012-05-30/politics/35454730_1_issue-ads-groups-disclosure (noting that the Chamber "has long characterized itself as focusing primarily on policy rather than politics").

these same groups reverted back to airing electioneering communications.[377]

D. *The Impact of the 2007 Electioneering Communication Disclosure Rule*

In practice, the FEC's 2007 electioneering communication disclosure rule has allowed corporations and unions that engaged in electioneering communications to disclose few, if any, of their donors. Following the issuance of the 2007 rule, groups seized on the opportunity to evade disclosure provided by the Commission and virtually all disclosure of the sources of funds used for electioneering communications ceased.[378] In 2010, persons (including corporations and unions) disclosed the sources of the funds used to air electioneering communications for less than ten percent of the total $79.9 million spent during that election cycle on such communications.[379] The ten groups that spent the largest amount on electioneering communications in the 2010 election cycle disclosed sources for only five percent of the money they spent, and only three disclosed any information at all about their funders.[380]

VII. *Citizens United* & Other Factors Leading to the Complete Re-Emergence of Dark Money

A. Citizens United v. Federal Election Commission

It is difficult to overstate the impact of the Court's 2010 decision, *Citizens United v. Federal Election Commission*.[381] Justice Kennedy, writing for a 5-4 majority of the Court, significantly narrowed the Court's concept of "corruption" by holding that, "[w]hen *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to *quid pro quo* corruption . . . .

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377. Kenneth P. Doyle, *AFP President Says Group Went Back to 'Issue Ads' Because of* Van Hollen *Case*, BLOOMBERG BNA (Sept. 27, 2012), http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=28113334&vname=mpebulallissues&jd=a0d4u8y7m6&split=0.

378. *See* TAYLOR LINCOLN & CRAIG HOLMAN, PUB. CITIZEN, FADING DISCLOSURE: INCREASING NUMBER OF ELECTIONEERING GROUPS KEEP DONORS' IDENTITIES SECRET (2010), *available at* http://www.citizen.org/documents/Disclosure-report-final.pdf.

379. Defendant Federal Election Commission's Answer, Van Hollen v. Fed. Election Comm'n, 851 F. Supp. 2d 69 (D.C. Cir. 2012) (Nos. 12-5117, 12-5118).

380. *Id.* ¶ 30.

381. 130 S. Ct. 876 (2010).

Ingratiation and access, in any event, are not corruption."[382] Just seven years earlier in *McConnell*, Justices Stevens and O'Connor, writing for the Court, had criticized Justice Kennedy's narrow conception as a "crabbed view of corruption . . . [that] ignores precedent, common sense, and the realities of political fundraising . . . ."[383] Crabbed as it may be, Justice Kennedy's conception prevailed in *Citizens United*, leading the Court to overturn its own precedent as well as either directly or implicitly overturning the myriad federal, state, and local statutes—many of which had been in place for decades—prohibiting corporations and unions from spending funds from their general treasuries on express advocacy.

With regard to federal elections, *Citizens United* means that corporations and labor organizations are now free to engage in express advocacy using their treasury funds, provided that their expenditures are "independent" of federal candidates and political parties, meaning that they must not "coordinate" their communications with federal candidates or political parties or their agents. Corporations took advantage of this newly gained ability to influence federal elections, spending significant sums in 2012.[384] With regard to the disclosure of such expenditures, the *Citizens United* Court stated that the newly-permissible corporate and union independent expenditures would be fully disclosed in an "effective" and "rapid and informative" manner.[385] The Court also went to great lengths to laud the benefits of disclosure, writing that:

> Shareholder objections raised through the procedures of corporate democracy . . . can be more effective today because modern technology makes disclosures rapid and informative. A campaign finance system that pairs corporate independent expenditures with effective disclosure

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382. *Id.* at 909–10. Previous opinions of the Court defined the government's interest in preventing corruption and the appearance of corruption broadly, extending beyond mere *quid pro quo* arrangements to include "improper influence" that undermines confidence in representative government. *See* Buckley v. Valeo, 424 U.S. 1, 27 (1976). As recently as the 2003 decision in *McConnell v. Federal Election Commission*, the Court endorsed a broad notion of corruption that included threats to officeholders' independent judgment, increased influence and access provided to donors, and the appearance of such increased influence. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 150 (2003).

383. *McConnell*, 540 U.S. at 152.

384. *See* Ciara Torres-Spelliscy, *What a Waste of Corporate Money*, JURIST: FORUM (Dec. 3, 2012), http://jurist.org/forum/2012/12/torres-spelliscy-campaign-finance.php.

385. 130 S. Ct. at 916.

> has not existed before today. It must be noted, furthermore, that many of Congress' findings in passing BCRA were premised on a system without adequate disclosure . . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are "in the pocket" of so-called moneyed interests. . . . The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.[386]

Perhaps it was a reading of the plain language of FECA's independent expenditure disclosure provision and ignorance of the FEC's 1980 and 2007 FEC regulations that led Justice Kennedy to believe that such disclosure would in fact be required. The difficulties caused by the 2007 FEC disclosure rule had not been briefed by any party or amici in the case. And indeed, as explained above, FECA's independent expenditure provision appears to have tricked the Court once before in *MCFL* in 1986. But, just like the Court two decades earlier, Justice Kennedy appears to have failed to understand how the disclosure requirement had been implemented by the FEC. As discussed at length above, the FEC's 1980 independent expenditure rule significantly narrowed the disclosure requirements imposed on individuals and organizations other than political committees that make independent expenditures. Now that following *Citizens United* corporations and labor organizations were permitted to make independent expenditures, what had previously been a flaw in the Commission's regulations of very limited applicability became a significant loophole.

B. *Vehicles for Unlimited, Undisclosed Spending*

Citizens United stands directly only for the limited proposition that a corporation may make independent expenditures on its own behalf and under its own name. Yet very few corporations wish to be publicly identified with their political spending,

386. 130 S. Ct. at 916 (internal citations omitted).

because in doing so they risk alienating their customers, shareholders, and employees. For example, Target Corp. faced widespread protests, including calls for boycotts, when it was revealed that the corporation donated $150,000 to Minnesota Forward in 2010, which used the funds to broadcast advertisements supporting an anti-gay marriage gubernatorial candidate in Minnesota.[387] Rather than risk facing this sort of backlash, corporations sought the ability to contribute funds for political purposes to entities that could air advertisements in their own names and, in certain instances, entirely shield them from being disclosed. Two related rulings of the U.S. Court of Appeals for the D.C. Circuit and Advisory Opinions issued by the FEC in July 2010 created these vehicles for corporate and union independent expenditures.[388]

1. Super PACs

The first vehicle for unlimited independent spending, technically labeled by the FEC as an "independent expenditure-only political committee" but more popularly known as a "super PAC," was created by the U.S. Court of Appeals for the D.C. Circuit to allow an entity that wished to raise unlimited corporate and union funds to operate as a federally-registered political committee, provided that it conducted its activities independently of political candidates and political parties.[389] However, as creatively and comedically demonstrated by Stephen Colbert and *Comedy Central*'s Peabody Award-winning *Colbert Report*, preserving independence from candidates and political parties is relatively simple due to the FEC's permissive regulations defining when activities are deemed not to be independent, or in the FEC's parlance, deemed to be "coordinated" with a candidate or political party.[390]

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387. *See* Brian Montopoli, *Target Boycott Movement Grows Following Donation to Support "Antigay" Candidate*, CBS NEWS (July 28, 2010, 4:10 PM), http://www.cbsnews.com/8301-503544_162-20011983-503544.html.

388. Fed. Election Comm'n Adv. Ops. 2010-11, 2010-09; SpeechNow v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010) (holding that individuals may make unlimited independent expenditures and unlimited contributions to independent expenditure-only committees); EMILY's List v. Fed. Election Comm'n, 581 F.3d 1, 10 (D.C. Cir. 2009) (holding that if a federal PAC does not make contributions to candidates, it may accept contributions that exceed federal contribution limits).

389. *SpeechNow*, 599 F.3d at 689.

390. Under 11 C.F.R. § 109.21 (2012), in order to be considered "coordinated" with a federal candidate, an advertisement must satisfy the fairly stringent prongs of the FEC's three-part coordination test: payment, content, and conduct. For example, provided that a federal candidate did not request or

For example, candidates are free to endorse and solicit contributions for groups that run ads benefitting their candidacy, and can even be fully briefed on the outside group's plans and messaging strategy. In certain periods, the FEC's coordination regulations even permit a group to sit down with a candidate, plan the message of the ad together, feature the candidate in the ad, and target the ad to that candidate's electorate.[391] Indeed, as if to demonstrate the permissive nature of the FEC's coordination regulation, the super PAC American Crossroads, argued to the FEC that the regulations allowed its ads to be "fully coordinated" with candidates even if such collaboration did not meet the FEC's narrow legal definition of "coordination."[392] The FEC deadlocked, failing by a split three-to-three vote to reach agreement on the matter.[393] In fact, the current phenomenon of supposedly "independent" super PACs is reminiscent of the Publicity Act and FCPA era in which candidates dubiously claimed that they had zero campaign expenditures to report because any campaign activity that happened to take place was conducted without their specific "knowledge and consent."[394]

Although the FEC managed to deadlock on the question of whether super PACs are free to "fully coordinate" some of their activities with candidates, registering as a super PAC does subject an entity to the requirements imposed on all political committees, including a requirement to disclose the identities of all contributors of more than $200.[395] But, the FEC's existing disclosure rules applicable to political committees, including super PACs, have significant flaws that undermine that transparency. In 2012, the rules failed to prevent persons and organizations from passing contributions to super PACs through shell

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suggest that an advertisement be aired, and provided they do not become materially involved in its production, an advertisement is likely to not be deemed coordinated with that candidate.

391. For example, in 2011 the Nebraska Democratic Party aired advertisements in Nebraska featuring Nebraska Senator Ben Nelson. Eric Lichtblau, *Democratic Senator's Ads May Break New Ground*, N.Y. TIMES, Oct. 12, 2011, http://www.nytimes.com/2011/10/13/us/politics/ben-nelsons-campaign-ads-may-break-new-ground.html?pagewanted=all&_r=0.

392. Am. Crossroads, Fed. Election Comm'n Adv. Op. Request, at 2 (Oct. 12, 2011) (arguing that its proposed advertisements, which would feature interviews with congressional candidates, "would be fully coordinated with incumbent Members of Congress facing re-election in 2012," but would "not qualify as 'coordinated communications'" under FEC regulations).

393. *See* Certification In the Matter of Am. Crossroads, Fed. Election Comm'n, Adv. Op. 2011-23 (Dec. 5, 2011), *available at* http://saos.nictusa.com/aodocs/1189803.pdf.

394. CONG. QUARTERLY, *supra* note 65, at 32; MUTCH, *supra* note 14, at 22.

395. 2. U.S.C. § 434(b)(3)(A) (2006).

corporations in order to disguise the true source of the funds. The Commission's regulations do not require super PACs (or any other type of political committee) to ensure that they report the original source of the contributions they receive. While FECA and Commission regulations do prohibit individuals and entities from making contributions in the name of another person, and entities that form for the sole purpose of passing through contributions may risk violating this prohibition[396] or even triggering political committee status, existing law does not subject the recipient super PAC to any consequences for unknowingly receiving such contributions, nor require them to conduct a thorough inquiry into the source of funds upon receiving a contribution.[397]

At the time the Commission was weighing whether or not to give its blessing of approval to super PACs, some warned that allowing corporations and unions to make contributions to such entities would "make it much more likely that the public will be unaware of the identity of corporate and union backers of campaign ads."[398] And this is exactly what occurred on repeated occasions in the 2012 election cycle. Most famously, Restore Our Future, the most prominent super PAC supporting Mitt Romney's presidential campaign, received a $1 million contribution in April 2011 from "W Spann LLC." According to the *Washington Post*, W Spann LLC "was formed in March and then dissolved in July, with no record of any shareholders, executives or business activities."[399] The donor was later revealed to be Ed Conrad, a former Bain Capital partner.[400] On the left, the Democratic-leaning Priorities USA made a sizable contribution of $215,000 to the Priorities USA Action super PAC in 2011, which permitted

396. *See* Briffault, *supra* note 5, at 687–88 (noting that while individuals may pass their contribution through other individuals in order to avoid disclosure, it is unclear whether the prohibition on making contributions in the name of another would "preclude[ ] an individual from creating a corporation, giving money to that corporation, and having the corporation make a contribution to a political committee").

397. *See* 2 U.S.C. § 441(f) (2006).

398. Rick Hasen, *Very Big News: Draft FEC Advisory Opinion to Allow Corporations and Unions to Make Unlimited Contributions to Independent Expenditure Committees*, ELECTION LAW BLOG (July 20, 2010, 7:35 PM), http://electionlawblog.org/?p=15302.

399. Dan Eggen, *Mystery Firm's $1 Million Donation to Pro-Romney PAC Raises Concerns over Transparency*, WASH. POST, Aug. 4, 2011, http://www.washingtonpost.com/politics/short-lived-firms-1m-donation-to-gop-fund-raises-concern-over-transparency/2011/08/04/gIQAvczruI_story.html.

400. Maggie Haberman, *Mystery Mitt Romney Donor Comes Forward*, POLITICO (Aug. 5, 2011, 7:46 PM), http://www.politico.com/news/stories/0811/60776.html.

the contributor to be reported as "Priorities USA" rather than listing the true source of the funds.[401] Given the current anti-disclosure disposition of the FEC, the prospects that the Commission will take proactive steps to require political committees to more carefully screen for pass-through contributions and disclose the original source of the funds are very slim.

Additionally, donors to super PACs can often remain undisclosed until after the election that the super PAC seeks to influence has passed. This is because the timing of receiving contributions as well as the super PAC filing schedule can be easily manipulated to avoid disclosing such donors before a primary or general election takes place. For example, if a super PAC simply opted for a monthly—as opposed to quarterly—reporting schedule, contributions to the super PAC made leading up to the January 10, 2012 New Hampshire Republican Primary were not required to be disclosed until the super PAC filed its January 31, 2012 disclosure report with the FEC.[402] Yet, notwithstanding these glaring weaknesses in the Commission's disclosure rules, in the vast majority of cases funds donated to super PACs are disclosed. For this reason, an aggressive search for an entity that could spend unlimited corporate and union funds without being required to publicly disclose its contributors ensued.

2. 501(c)s & The Major Purpose Test

Groups would find just such an entity, the 501(c)(4) social welfare organization, that provided the attractive combination of the ability to raise funds in unlimited amounts from any source, but without subjecting donors to the disclosure requirements imposed on super PACs. Due to the Court's narrowing of the term "political committee" in *Buckley* to include only those groups with the "major purpose" of influencing elections, 501(c) groups could engage in substantial political activity without risking triggering political committee status and its accompanying disclosure requirements.

The importance of avoiding disclosure was key to the decision by many groups to opt for the 501(c)(4) form. Although it initially promised to disclose its donors because of its professed commitment to "full accountability" and "transparency," the Karl Rove-backed super PAC American Crossroads initially struggled

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401. Maguire, *supra* note 8.

402. *See, e.g.*, Dave Levinthal, *Jon Huntsman Super PAC Seeks Filing Delay*, POLITICO (Dec. 28, 2011, 12:02 PM), http://www.politico.com/news/stories/1211/70901.html.

to raise funds.[403] Formed in the summer of 2010, American Crossroads raised only $7 million in its first two months of operation, and the sticking point for many donors appears to have been public disclosure of their donations.[404] To remedy this, American Crossroads spun off a 501(c)(4) "social welfare organization" counterpart, Crossroads GPS, in September 2010.[405] As American Crossroads political director Carl Forti later admitted, "some donors didn't want to be disclosed and, therefore, a (c)4 was created."[406]

Unlike its super PAC counterpart, Crossroads GPS is not required to publicly disclose its donors. This is because while 501(c)(4) organizations are required to disclose each source of donations of $5000 or more in a calendar year to the Internal Revenue Service in their annual tax return, donor information is specifically prohibited by federal law from being made public by the IRS.[407] With this new structure in hand— American Crossroads for donors comfortable with being disclosed and Crossroads GPS for those uncomfortable with disclosure—the two organizations combined to raise and spend more than $21 million in the 2010 election cycle and more than $175 million in the 2012 cycle.[408] Democrats took advantage of this dual-entity strategy as well, forming the pro-Obama super PAC Priorities USA Action and creating a 501(c)(4) counterpart, Priorities USA.

The ability of 501(c)(4)s to protect donors from being publicly disclosed is supposed to be accompanied by a limitation on the ability of the organization to engage in candidate election-related activity. This is because while organizations, including political committees, formed under section 527 of the Internal

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403. Kenneth P. Vogel, *Secrecy Flip-Flop Fueled Crossroads*, POLITICO (Oct. 25, 2010, 4:33 AM), http://www.politico.com/news/stories/1010/44104.html#ixzz13PsTNUD.

404. Am. Crossroads, FEC Form 3X: Report of Receipts and Disbursements (filed Aug. 20, 2012), *available at* http://images.nictusa.com/pdf/074/10931172074/10931172074.pdf; Am. Crossroads, FEC Form 3X: Report of Receipts and Disbursements (filed Sept. 20, 2010), *available at* http://images.nictusa.com/pdf/075/10931311075/10931311075.pdf.

405. Crossroads Grassroots Policy Strategies, FEC Form 1024: Application for Recognition of Exemption Under Section 501(a) (filed Sept. 7, 2010), *available at* http://www.propublica.org/documents/item/537045-crossroads-gps-application-to-irs#document/p4/a84315.

406. Kenneth P. Vogel, *SEIU, American Crossroads Look Back at 2010 Spending*, POLITICO (Dec. 13, 2010, 11:51 PM), http://www.politico.com/news/stories/1210/46355.html.

407. *See* 26 U.S.C. § 6033 (2006); 26 U.S.C. § 6104 (2006).

408. *American Crossroads/Crossroads GPS*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=American%20Crossroads/Crossroads%20GPS (last visited Apr. 17, 2013).

Revenue Code must be "organized and operated primarily" to influence candidate elections,[409] 501(c)(4) social welfare organizations must be "operated *exclusively* for the promotion of social welfare."[410] Treasury regulations clarify that the "direct or indirect participation in political campaigns on behalf of or in opposition to any candidate for public office" is not considered within the scope of promoting social welfare.[411] And, according to Treasury Regulations, in order for an organization to maintain tax-exempt status as a 501(c)(4), it must not be found to have the "primary purpose" of influencing candidate elections in any given tax year.[412] Although the IRS has never reduced the primary purpose test to a specific numerical percentage of expenditures, some practitioners argue that the test is satisfied so long as an organization's political activity constitutes forty-nine percent or less of its total expenditures.

For this reason, Crossroads GPS and other 501(c)(4) organizations that were actively involved in the 2010 and 2012 elections represented to the IRS in their applications to the IRS for formal recognition of their tax-exempt status that they would engage in only a "limited" amount of candidate-related advocacy, and such activity would "not constitute the organization's primary purpose."[413] Importantly, despite some reports suggesting Crossroads GPS had promised the IRS that it would "stay out of politics," the application only noted that its candidate election-related activity would be limited, not prohibited outright.[414]

Thus, because it represents the line between permissible and excessive political activity by 501(c)(4) organizations, the enforcement of the primary purpose test—and indeed the test itself—has attracted increased attention. Some argue that by allowing 501(c)(4)s to engage in any political activity at all, the

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409. 26 U.S.C. § 527(e)(2) (2006).

410. 26 U.S.C. § 501(c)(4)(A) (2006 & Supp. IV) (emphasis added).

411. Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii) (2010).

412. Treasury Regulations state that a 501(c)(4) entity must be "operated primarily for the purpose of bringing about civic betterments and social improvements." Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2010).

413. *See* Crossroads Grassroots Policy Strategies, *supra* note 405 ("Consistent with the Supreme Court's decision in Citizens United v. Federal Election Commission, the organization may, in the future, develop and/or distribute independent political communications. Any such activity will be limited in amount, and will not constitute the organization's primary purpose."); *see also* Kim Barker, *Controversial Dark Money Group Among Five That Told IRS They Would Stay Out of Politics, Then Didn't*, ProPublica (Jan. 2, 2013, 11:34 AM), http://www.propublica.org/article/controversial-dark-money-group-among-five-that-told-irs-they-would-stay-out.

414. Barker, *supra* note 413.

test contravenes the statutory requirement that a 501(c)(4) social-welfare organization be operated "exclusively" to promote social welfare.[415] Others simply argue that the current application of the primary purpose test permits too much political activity by such groups. For example, in March 2012, Democratic Senators urged the IRS to "adopt a bright line test . . . that is consistent with the . . . exclusivity language."[416] In response, in July of 2012 the IRS suggested that it would "consider proposed changes" regarding 501(c)(4) eligibility for tax-exempt status,[417] but Republican Senators responded in kind, urging the IRS to issue "no sub-regulatory guidance nor engage in any similar efforts that would effectuate immediate changes without a lengthy period of review, separated in time from the current heated political environment."[418] This warning appears to have been heeded, because despite the suggestion that the IRS would consider changes to the primary purpose test, the IRS's 2012–2013 Priority Guidance Plan issued in November 2012 and updated most recently in February 2013 does not include any priorities dealing with the political activities of 501(c)(4) groups.[419]

Others have expressed concern that 501(c)(4) organizations are engaging in more candidate election-related activity than should be permissible even under the permissive primary purpose test, with some critics suggesting that the IRS may be abdicating its enforcement responsibilities.[420] For example, no

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415. *See* Complaint at 3, Gill v. I.R.S., No. 13-213 (D.D.C. Feb. 19, 2013), *available at* http://www.citizensforethics.org/page/-/PDFs/Legal/CREW%20vs.%20IRS/021913_IRS_Lawsuit_Complaint.pdf?nocdn=1.

416. Letter from Senators Charles E. Schumer, Michael Bennet, Sheldon Whitehouse, Jeff Merkley, Tom Udall, Jeanne Shaheen and Al Franken to Douglas Shulman, Comm'r, Internal Revenue Serv. (Mar. 12, 2013), *available at* http://www.schumer.senate.gov/Newsroom/record.cfm?id=336270.

417. Peter Schroeder, *Senators Warn IRS to Ignore Political Pressure to Rewrite Super-PAC Rules*, THE HILL (Aug. 6, 2012, 12: 49 PM), http://thehill.com/blogs/on-the-money/domestic-taxes/242383-gop-senators-to-irs-avoid-political-pressure-on-501c4-rules.

418. *Id.*

419. DEP'T OF THE TREASURY, OFFICE OF TAX POLICY & INTERNAL REVENUE SERV., 2012–2013 PRIORITY GUIDANCE PLAN 10–11 (2012), *available at* http://www.irs.gov/PUP/pub/irs-utl/2012-2013_pgp.pdf. DEP'T OF THE TREASURY, OFFICE OF TAX POLICY & INTERNAL REVENUE SERV., 2012–2013 PRIORITY GUIDANCE PLAN 12–13 (2013), *available at* http://www.irs.gov/pub/irs-utl/2012-2013_pgp_2nd_quarter_update.pdf.

420. Letter from J. Gerald Hebert, Exec. Dir., Campaign Legal Ctr., and Fred Wertheimer, President, Democracy 21, to Steven T. Miller, Acting Comm'r, Internal Revenue Serv., and Lois Lerner, Dir. of the Exempt Orgs. Div., Internal Revenue Serv. (Dec. 3, 2012), *available at* http://www.democracy21.org/money-in-politics/letters-to-the-irs/democracy-21-and-the-campaign-legal-center-charge-the-irs-with-indefensible-abdication-of-responsibility/.

action appears to even have been taken as of yet against American Tradition Partnership, which told the IRS that it would engage in no campaign-related activities, despite doing so on repeated occasions *before* and after its application for recognition of tax-exempt status was submitted to the IRS.[421] Similar complaints have been made with regard to the American Future Fund and Americans for Responsible Leadership, but again, with no discernible action to date from the IRS.[422]

Although it appears that the IRS does not plan to alter the primary purpose test in the immediate future, it is too early to tell how the IRS will enforce the permissive primary purpose test for the 501(c)(4)s that were active in the 2010 and 2012 election cycles. This is because a determination that a group has failed the primary purpose test by engaging in excessive candidate election-related activity cannot be made by merely examining an organization's application for tax-exempt status or an organization's activities in the months preceding an election.[423] The IRS does not conduct audits of an organization's expenditures in the midst of the tax year in question, and there is no mechanism whereby a group may be enjoined from engaging in further political activities because such activities may cause the organization to fail the primary purpose test. Rather, a determination that a group has exceeded the primary purpose test is made only upon auditing the organization's activities undertaken over the course of an entire tax year, as reported by the organization on its annual tax return filed with the IRS (Form 990) covering the tax year in question in order to determine how the election-related expenditures compare to other non-election spending. Even if an organization makes a single or even a series of large political

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421. *See Watchdog Groups Call on IRS to Investigate American Tradition Partnership*, DEMOCRACY 21 (Jan. 15, 2013), http://www.democracy21.org/money-in-politics/letters-to-the-irs/watchdog-groups-call-on-irs-to-investigate-american-tradition-partnership-cite-its-reported-submission-of-apparent-false-information-to-the-irs-regarding-its-application-for-tax-exempt-status/.

422. Michael Beckel, *Nonprofit Spends Big on Politics Despite IRS Limitation*, CTR. FOR PUB. INTEGRITY (Jan. 28, 2013, 5:00 AM), http://www.publicintegrity.org/2013/01/23/12066/nonprofit-spends-big-politics-despite-irs-limitation; Barker, *supra* note 413.

423. Some have argued that the IRS may and should pursue certain groups for filing false information on their applications for exempt status, as such statements may constitute perjury or false statements. *See* Letter from J. Gerald Hebert, Exec. Dir., Campaign Legal Ctr., and Fred Wertheimer, President, Democracy 21, to Steven T. Miller, Acting Comm'r, Internal Revenue Serv., and Lois Lerner, Dir. of the Exempt Orgs. Div., Internal Revenue Serv. (Jan. 16, 2013), *available at* http://www.democracy21.org/wp-content/uploads/2013/01/IRS-LETTER-WESTERN-TRADITION-PARTNERSHIP-1-15-13.pdf.

expenditures, such as a large political advertisement buy, those expenditures standing alone do not mean that the organization necessarily violated the primary purpose test. Organizations are also permitted to adjust their tax years, meaning that an organization can ensure that a period of anticipated political activity falls into the same tax year as other significant non-political expenditures, thereby tipping the primary purpose scales in favor of the non-political activity for that year.[424]

Additionally, even if an organization's expenditures are audited by the IRS, such an audit will likely not take place until years after the election in question passes. Indeed, it is entirely possible that the IRS is either currently auditing Crossroads GPS and other 501(c)(4) organizations or will initiate such audits in the future. This extended lag in enforcement is in large part due to the fact that an organization's tax return is not required to be filed with the IRS until at least five months after its tax year closes. For example, an organization that selected to end its fiscal year on December 31, 2012 is not required to file its tax return for that year until May 15, 2013 at the earliest. If an organization applies for and receives filing extensions, which are routinely granted, its return may not be due until six months after this deadline, or November 15, 2013. Additionally, the organization may select a tax year that further extends these deadlines. For example, a group wishing to be active late in the general election cycle could have opted to begin a tax year on October 1, 2012. This tax year will not end until September 31, 2013, meaning that their tax return covering their activities in the weeks leading up to the general election will not be due until March 15, 2014 at the earliest or, with the available extensions, September 15, 2014. And, once the tax return is filed, the IRS may not begin conducting audits of the returns for that tax year

424. For example, Crossroads GPS changed its tax year from beginning on June 1 in 2010 and 2011 to begin on January 1, 2012, ostensibly so that the substantial political spending that it anticipated would come only in late 2012 (Crossroads GPS did in fact spend more than $70 million on independent expenditures and electioneering communications between July 27, 2012 and November 6, 2012, with no such expenditures before July 27 in 2012) could be balanced against its expenditures in early 2012 for purposes of the primary purpose test rather than against expenditures it would have to made in 2013, after the election had taken place. *Compare* Crossroads Grassroots Policy Strategies, FEC Form 990: Return of Organization Exempt from Income Tax (filed Apr. 12, 2012), *available at* http://www.propublica.org/documents/item/339122-crossroads-gps-990-2010, *with* Crossroads Grassroots Policy Strategies, Form 990: Return of Organization Exempt from Income Tax (filed Apr. 13, 2012), *available at* http://images.politico.com/global/2012/04/crossroadsgps_990_2011.html.

until years later. For example, the IRS is currently conducting audits of returns filed for tax year 2010.

But, we mean not to suggest that the IRS is powerless to take other actions to deter 501(c)(4) groups from exceeding the limits of the primary purpose test. The IRS recently sent letters to more than 1300 self-declared section 501(c)(4), (c)(5), and (c)(6) organizations, requesting that they complete a questionnaire regarding their activities in tax years 2010 and 2011, including political activities.[425] At best, this is the first step in what will likely be a long process of developing an enforcement program to audit 501(c)(4)s that may have exceeded the primary purpose test. Nothing prevents the IRS from immediately announcing an enforcement program focused on examining the political activities of 501(c)(4)s, or at a minimum, announcing that it is considering such a program. Nothing prevents the IRS from including such a plan in its Priority Guidance Plan. And nothing prevents the IRS from more closely scrutinizing the activities of 501(c)(4)s that apply for recognition of their tax-exempt status, comparing the representations made to the IRS regarding planned activities with the organization's actual activities and statements in other contexts.[426] Taking any of these steps would almost immediately cause 501(c)(4) organizations to take the limits of the primary purpose test much more seriously.

Until it becomes apparent that the IRS is auditing 501(c)(4) political activities or until the IRS announces an enforcement program to police such activities, very politically active 501(c)(4) organizations can reasonably believe they have a green light to spend hundreds of millions to influence federal elections, without any apparent risk of immediate scrutiny or action by the IRS. As Marcus Owens, former director of the IRS's Exempt Organizations Division noted, "[t]he government's going to have to investigate them and prosecute them . . . . In order to maintain the

425. CCH, *IRS Asks Self-Declared Exempt Organizations to Respond to Compliance-Check Questionnaire*, 13 FED. TAX WKLY. 149 (2013), *available at* http://www.bssf.com/downloads/CCHTax/Federal_Tax_Weekly_2013_13.pdf. *See Self-Declarers Questionnaire for Section 501(c)(4), (5), and (6) Organizations*, IRS, http://www.irs.gov/Charities-&-Non-Profits/Other-Non-Profits/Self-declarers-questionnaire-for-section-501-c-4-5-and-6-organizations (last visited Apr. 17, 2013).

426. For example, if a 501(c)(4) indicates in its representations to other persons, including donors, that the overarching purpose of its activities are electoral in nature, the IRS could more closely scrutinize that organization's eligibility for 501(c)(4) status. *See, e.g.*, Justin Horwath, *Real, Clear Politics: A New 501(c)4: "Social Welfare" Group or Political Machine?*, SANTA FE REP., Apr. 2, 2013, http://www.sfreporter.com/santafe/article-7337-real-clear-politics.html.

integrity of the process, [the IRS is] going to be forced to take action."[427]

Importantly, the IRS's tools for combating dark money are not limited to enforcing the primary purpose test. The IRS also could more adequately police the disclosure requirements that were enacted in 2000 requiring 527s to publicly disclose their donors,[428] and could decide to apply the gift tax to donations made to 501(c)(4) organizations, thereby further disincentivising large donations to such groups for political purposes.

Enacted in 1932 to prevent taxpayers from avoiding the estate tax or avoid paying taxes at a higher rate than a friend or relative in another tax bracket or another state by making inter vivos transfers, the gift tax imposes tax on the transfer of property by gift, subject to a current annual exclusion of $13,000 per donor per donee per year.[429] Federal tax law excepts donations to section 501(c)(3) charitable organizations and section 527 political organizations from gift tax, but there is no similar exception for donations to section 501(c)(4) organizations. And whether or not this tax would be applied by the IRS to donations made to 501(c)(4) organizations "has long been a matter of uncertainty," because the IRS had not enforced the gift tax on donations to 501(c)(4)s for decades,[430] leading many to believe that a sudden reversal of the IRS's position would be unlikely and perhaps even unfair. Nevertheless, the threat of the gift tax combined with limitations on the activities of 501(c)(4) stemming from the "primary purpose" test reportedly steered many donors

427. Andy Kroll, *Ex-IRS Director on Dark-Money Groups: "Investigate Them and Prosecute Them,"* MOTHER JONES (Jan. 14, 2013), http://www.motherjones.com/politics/2013/01/irs-crossroads-gps-dark-money-karl-rove-investigate. Marcus Owens is a partner at Caplin & Drysdale, Chtd.

428. According to a report issued in 2010 by the Treasury Department's Inspector General for Tax Administration, about one quarter of the disclosure reports filed by 527s "had incomplete or missing contributor or recipient information," "[p]olitical organizations are intentionally withholding required information regarding their contributors and expenditures," and "the IRS is not reviewing these filings to determine if they are complete or if penalties should be assessed." TREASURY INSPECTOR GEN. FOR TAX ADMIN., IMPROVEMENTS HAVE BEEN MADE, BUT ADDITIONAL ACTIONS COULD ENSURE THAT SECTION 527 POLITICAL ORGANIZATIONS MORE FULLY DISCLOSE FINANCIAL INFORMATION (2010), *available at* http://www.treasury.gov/tigta/auditreports/2010reports/201010018fr.pdf.

429. 26 U.S.C. § 2501 (2006).

430. Ellen P. April, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 291 (2012).

away from making large donations to 501(c)(4) organizations in the 1996 elections.[431]

In early 2011, the IRS sent letters to several 501(c)(4)s notifying them that, "[d]onations to 501(c)(4) organizations are taxable gifts."[432] This letter prompted considerable concern in the nonprofit community and generated a swift response from Republican members of the Senate Finance Committee and the House Ways and Means Committee, who wrote to IRS Commissioner Douglas Shulman inquiring whether the application of the tax to 501(c)(4)s had been ordered by political appointees and claiming that the IRS was "targeting constitutionally-protected political speech."[433] The IRS quickly backed down, suspending all pending examinations, stating that it would not impose the gift tax on transfers to 501(c)(4)s until further examination and notice, and stating that to the extent that the gift tax is applied in the future, it would be "prospective and after notice to the public."[434] Leading into the 2012 federal elections, it was thus clear that donations to 501(c)(4) organizations in 2011 and 2012 would not be subjected to gift tax, thus eliminating one potential drawback from the use of such entities as vehicles to influence federal elections.

In focusing on the IRS's apparent failures, it is important to note that, the 501(c)(4) entity would not be able to serve as a vehicle for such extensive political expenditures and operate beyond the purview of the FEC were it not for the Supreme Court's narrow construction of FECA's term "political committee" in *Buckley* to extend only to those groups that have "the major purpose" of influencing federal elections.[435] By narrowing political committee status, *Buckley* limited the ability of the FEC

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431. Hill, *supra* note 256, at 389.

432. April, *supra* note 430, at 291 (citing Letter from Internal Revenue Serv. to (taxpayer name redacted) (Feb. 6, 2011)(on file with author)).

433. *Camp Demands IRS Answer Questions About Gift Tax Investigation*, COMM. ON WAYS & MEANS (June 15, 2011), http://waysandmeans.house.gov/news/documentsingle.aspx?DocumentID=246630; *see also Senators to IRS: Questions Raised by Agency's Recent Actions into Gift Tax Enforcement; Concern About Political Influence*, U.S. SENATE COMM. ON FIN. (May 18, 2011), http://www.finance.senate.gov/newsroom/ranking/release/?id=ec29441e-aefd-4192-a628-d96966cf4231.

434. Memorandum from Steven T. Miller, Deputy Comm'r for Servs. & Enforcement, Internal Revenue Serv., to the Comm'r, Small Bus./Self-Employed Div., Internal Revenue Serv., and Comm'r, Tax-Exempt & Gov't Entities Div. (July 7, 2011), *available at* http://www.irs.gov/pub/newsroom/guidance_for_irs_sbse_estate_and_gift_tax_and_tege_exempt_organizations.pdf; *see also IRS Suspends Exams on Application of Gift Tax to Contributions Made to Some Exempt Orgs*, TAX NOTES TODAY, July 18, 2011.

435. Buckley v. Valeo, 424 U.S. 1, 79 (1976).

to bring many multi-purpose organizations within the more comprehensive disclosure requirements applicable to political committees, including the public disclosure of each person who donates more than $200 to the committee. In this way, the major purpose test allows groups to operate as 501(c) organizations and outside the more transparent "political committee" regulatory framework, permitting them to take advantage of the unduly narrow disclosure requirements contained in the Commission's electioneering communications and independent expenditure reporting rules, that are, as explained above, applicable only to entities *other than political committees*.[436]

Buckley's major purpose test also requires the FEC to engage in a fact-intensive and highly contextual analysis of multi-purpose organizations' activities in order to determine whether they have triggered political committee status.[437] The test also places the Commission in the difficult position of applying FECA and BCRA's disclosure obligations to complex and highly-regulated organizations—such as labor unions, nonprofits, and trade associations—with which the Commission is not entirely familiar and is demonstrably hesitant to regulate. For example, as explained above, the Commission was not well-positioned following *WRTL II* in 2007 to understand how BCRA's electioneering disclosure rules might be effectively applied to the "arcane complexities of dues structures for labor organizations."[438] The difficulty of formulating a disclosure rule that would prove workable for unions, corporations, and nonprofits appears to have played a role in the Commission's decision to narrow its electioneering communication disclosure rule following *WRTL II*.

C. *FEC Deadlock on Enforcement*

The FEC was established by the 1974 FECA amendments, which were enacted in response to the Watergate scandals, to serve as an independent agency to oversee and enforce federal

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436. *See generally* Briffault, *supra* note 5, at 692–93.

437. The FEC's explanation of its multi-factored test for determining whether a group has "the major purpose" of influencing federal elections can be found at 72 Fed. Reg. 5595 (Feb. 7. 2007). The Fourth Circuit recently upheld this multi-factored test against First Amendment challenge in *Real Truth About Abortion, Inc. v. Federal Election Commission*, 681 F.3d 544 (4th Cir. 2012).

438. Fred Wertheimer & Don Simon, Am. Constitution Soc'y for Law & Policy, The FEC: The Failure to Enforce Commission (2013), *available at* http://www.democracy21.org/wp-content/uploads/2013/02/Wertheimer-and-Simon-The-Failure-to-Enforce-Commission-.pdf; *see also* Fed. Election Comm'n, *supra* note 331, at 235–36 (statement of Jessica Robinson).

campaign finance laws.[439] Given the extensive failures of the Clerk of the House and Secretary of the Senate to enforce federal political disclosure requirements, as explained above, the establishment of a new and independent agency made sense. But, the FEC suffers from a key structural defect: The Commission consists of six commissioners, no more than three of whom are allowed to be "affiliated with the same political party," meaning that Democratic and Republican-affiliated commissioners are evenly divided.[440] This three-to-three split creates great potential for deadlock, as the FEC requires the vote of four commissioners to undertake an investigation, impose penalties, file court cases, adopt regulations, or issue advisory opinions.[441]

The FEC's structural defect and failures have been extensively documented.[442] Although since its establishment in 1974, the Democratic and Republican commissioners have at times worked cooperatively, especially with regard to enforcing clear campaign finance violations,[443] the Commission's recent failures have led many to more fervently argue that it should be discarded in favor of an alternate enforcement entity.[444] All indications suggest that the FEC has reached a low point. For example, as explained above, in the early 2000s the Commission took action to bring several 527s under the Commission's oversight by fining such groups for failing to register and report as political committees. But in 2008, the Commission deadlocked three-to-three over whether or not to accept a conciliation agreement that was favorable to the FEC (the FEC's equivalent of a negotiated settlement agreement) with regard to a "functionally identical" complaint filed against the November Fund, a 527 established and funded by a $3 million contribution from the U.S. Chamber of Commerce.[445] The Republican commissioners

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

440. Federal Elections Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

441. *See* 2 U.S.C. § 437c(c) (2006).

442. *See, e.g.*, PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS (2002), *available at* http://www.democracy21.org/vertical/Sites/%7B3D66FAFE-2697-446F-BB39-85FBBBA57812%7D/uploads/%7BB4BE5C24-65EA-4910-974C-759644EC0901%7D.pdf.

443. Michael M. Franz, *The Devil We Know? Evaluating the FEC as Enforcer*, 8 ELECTION L.J. 167 (2009).

444. *See* Wertheimer & Simon, *supra* note 438; *see also* PROJECT FEC, *supra* note 442.

445. Paul S. Ryan, *The FEC Reaches a New Low*, CAMPAIGN LEGAL CTR. (Dec. 23, 2008), http://clcblog.org/blog_item-270.html.

refused to authorize the deal even though the November Fund had already agreed to the conciliation agreement.[446] And in doing so, the Republican commissioners questioned whether the group met the major purpose test, entirely refusing to give any weight to such factors as "the name of the organization, the timing of its formation, or 'that some of its communications criticized a Federal candidate.' "[447]

With regard to disclosure, following the promulgation of the 2007 electioneering communications rule, key Commission deadlocks further weakened BCRA's electioneering communications disclosure requirements. In the summer of 2010, the three Republican FEC commissioners voted against proceeding with an investigation into the conservative group Freedom's Watch, funded by casino mogul Sheldon Adelson, for failing to disclose its donors on an electioneering communications disclosure report concerning advertisements aired leading up to the special general election for Louisiana's Sixth Congressional District in May 2008. The FEC's Office of General Counsel recommended finding reason to believe that Freedom's Watch violated the electioneering disclosure requirements by failing to disclose Sheldon Adelson as a donor.[448] The three Republican commissioners rejected this recommendation, arguing that the Commission's 2007 electioneering communications disclosure rule "must be construed consistently" with the independent expenditure disclosure rule, and therefore construed to require disclosure of a donor only if that donor provided funds "for the purpose of furthering the electioneering communication *that is the subject of the report.*"[449]

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446. Fred Wertheimer, *Mayday, Mayday at the Federal Election Commission*, DEMOCRACY 21 (May 1, 2009), http://www.democracy21.org/archives/issues/fec/mayday-mayday-at-the-federal-election-commission-a-report-on-the-unprecedented-campaign-by-the-republican-fec-commissioners-to-shut-down-enforcement-of-the-campaign-finance-laws/.

447. Robert F. Bauer, *The Republican Commissioners' Statement on the November Fund—and the State of Campaign Finance Doctrine and Enforcement*, MORE SOFT MONEY HARD LAW (Jan. 26, 2009), http://www.moresoftmoneyhardlaw.com/news.html?AID=1408 (citations omitted); *see also* Fed. Election Comm'n, Statement of Reasons of Vice Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn (Jan. 22, 2009) (MUR 5541), *available at* http://eqs.nictusa.com/eqsdocs/29044223819.pdf.

448. Fed. Election Comm'n, First General Counsel's Report (Mar. 12, 2010) (MUR 6002), *available at* http://eqs.nictusa.com/eqsdocsMUR/10044272054.pdf.

449. Fed. Election Comm'n, Statement of Reasons of Chairman Matthew S. Petersen and Comm'rs Caroline C. Hunter and Donald F. McGahn, 1, 5 (Aug. 13, 2010) (MUR 6002), *available at* http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf (emphasis added).

To the Republican commissioners, no violation had occurred because there was no specific evidence that the advertisement at issue was "financed . . . with funds donated for the purpose of furthering that particular advertisement . . . ."[450] The implications of this extreme anti-disclosure interpretation of the Commission's already unduly narrow electioneering communication disclosure rule is that currently donors who provide an organization funds need only be disclosed in the extremely rare case that they specify which particular advertisement(s) they wish to fund, i.e., the advertisement running on October 5–7 at 7:30 pm on the CBS affiliate in Pittsburgh against candidate X.

In 2012, the Commission also deadlocked by a three-to-three party-line vote over whether advertisements that criticize "the White House," "the administration" and feature audio of President Obama's voice refer to a "clearly identified candidate" such that they can be considered electioneering communications.[451] The Commission also deadlocked in late 2012 with regard to whether the super PAC Make Us Great Again, Inc. that supported Texas Governor Rick Perry in the 2012 Republican presidential primaries had made a prohibited campaign contribution by providing Perry's campaign video footage to be used in a Perry-sponsored campaign advertisement.[452] And in 2013 the Commission deadlocked three-to-three over whether to investigate charges of illegal coordination between Representative Howard Berman's congressional campaign and a pro-Berman super PAC; between Crossroads GPS and then-Representative Roy Blunt's 2010 campaign; and between Democratic candidate Laura Ruderman and a super PAC funder by her mother, indicating little appetite on the part of the Commission to police the critical firewall of "coordination" that separates super PACs and other outside groups from campaigns and political parties.[453] In a rare display of agreement, both the *Washington Post* and *Washington Times* have recently concluded that the FEC has become "toothless" and "dysfunctional" by issuing fewer warnings, con-

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450. *Id.*

451. Fed. Election Comm'n, Adv. Op. No. 2012-19 (June 13, 2012), *available at* http://saos.nictusa.com/aodocs/AO%202012-19.pdf; *see also* Kenneth P. Doyle, *FEC Dismissal of Super PAC Cases Raises Questions About Future Rulings*, BLOOMBERG BNA (Dec. 26, 2012).

452. *See* Fed. Election Comm'n, Complaint (Dec. 14, 2011) (MUR 6514), *available at* http://eqs.sdrdc.com/eqsdocsMUR/12044322741.pdf; *see also* Doyle, *supra* note 446.

453. Kenneth P. Doyle, *FEC Deadlock on Berman Super PAC Previews Struggle With Flood of Cases*, BLOOMBERG BNA (Jan. 13, 2013); Kenneth P. Doyle, *FEC Deadlocks Derail Matters Involving Crossroads GPS, Family-Member Super PAC*, BLOOMBERG BNA (Feb. 19, 2013).

ducting fewer audits, not enforcing fines, and failing to reach agreement on even routine applications of the Commission's regulations or enforcement matters.[454]

D. *President Obama's Reversal on Campaign Finance Reform*

Despite pledging to "challenge the broken system in Washington, and to stop letting lobbyists use their clout to get their way,"[455] President Obama has done very little to strengthen federal campaign finance laws.[456] The President's dramatic movement from self-proclaimed reformer to insider began when he broke his November 2007 pledge to participate in the presidential public financing system for the 2008 general election. In doing so, President Obama became the first presidential candidate in U.S. history to decline public financing for the general election.[457] During his tenure, President Obama has also allowed five of the six FEC commissioners' terms to expire without nominating new pro-disclosure and pro-enforcement commissioners to replace the now deadlocked hold-over commissioners.[458] When campaign-finance reformers gathered the then-requisite 25,000 signatures to demand that the President respond to a petition submitted to the White House demanding reform of the FEC, the response merely restated the

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454. *Compare* Luke Rosiak, *Toothless, Overwhelmed FEC Is Ignored by Campaigns*, WASH. TIMES, Sept. 17, 2012, http://www.washingtontimes.com/news/2012/sep/17/fec-falls-behind-in-campaign-spending-oversight/?page=all, *with* Editorial Board, *The Toothless Watchdog FEC*, WASH. POST, Dec. 29, 2012, http://articles.washingtonpost.com/2012-12-29/opinions/36071872_1_recess-appointments-fec-campaign-finance.

455. Conor Friedersdorf, *Why Hasn't Obama Governed the Way He Promised in 2008?*, THE ATLANTIC (May 23, 2008, 10:56 AM), http://mobile.nationaljournal.com/politics/why-hasn-t-obama-governed-the-way-he-promised-in-2008—20120523 (citing a speech by Barack Obama in Indianapolis, Indiana on April 25, 2008).

456. Edward Luce, *Dangers Lurk in US Permanent Campaign*, FIN. TIMES, Mar. 17, 2013, http://www.ft.com/cms/s/0/f69c985c-8d65-11e2-a0fd-00144feabdc0.html#axzz2Nvmw7zAV.

457. Justin Elliott, *Obama's Flip-Flops on Money in Politics: A Brief History*, PROPUBLICA (Jan. 30, 2013, 3:00 PM), http://www.propublica.org/article/obamas-flip-flops-on-money-in-politics-a-brief-history.

458. President Obama has nominated only one person to be Commissioner of the FEC, John J. Sullivan, who withdrew from consideration after his confirmation was delayed for nearly sixteen months. Michael Beckel, *Gridlocked Election Commission Awaits Action by Obama*, CTR. FOR PUB. INTEGRITY (Nov. 20, 2012, 6:00 AM), http://www.publicintegrity.org/2012/11/20/11819/gridlocked-election-commission-awaits-action-obama.

President's commitment "to nominating highly qualified individuals to lead the FEC."[459]

If President Obama were to make reforming the FEC a priority, many factors contributing to the re-emergence of dark money could be quickly reversed by a pro-disclosure Commission. Yet the President may have moved in the opposite direction. Most recently, President Obama launched Organizing for Action (OFA), a privately funded 501(c)(4) organization created by the President and former Obama for America staffers and White House officials to advance the President's policy agenda.[460] OFA has pledged to disclose its donors, and under considerable pressure from campaign finance reformers, decline corporate contributions, but there is no legal requirement or effective guarantee that OFA will actually and accurately do so.[461] The President's ability to solicit donations to OFA under federal ethics laws has recently been called into question,[462] but there is no question that the President's close ties to OFA raises concerns about the actuality or appearance of access—and indeed administration policy—being sold to the highest bidders.[463]

VIII. Conclusion: The Perfect Storm

It is all too easy to point to the Supreme Court and its controversial *Citizens United* decision as the source of the undisclosed spending that has recently flooded federal elections.[464] Although the *Citizens United* decision and Justice Kennedy's narrow conception of regulable corruption has freed corporations and unions and others to spend unlimited sums to influence federal elections, standing alone, the decision did not directly result in any undisclosed election spending. Rather, it is only when the *Citizens United* decision is placed in the broader firmament of fed-

459. Dave Levinthal, *White House Answers FEC Petition*, Politico (June 15, 2012, 6:26 PM), http://www.politico.com/politico44/2012/06/white-house-answers-fec-petition-126337.html.

460. *See* Letter from J. Gerald Hebert, Exec. Dir., Campaign Legal Ctr., and Fred Wertheimer, President, Democracy 21, to President Barack Obama (Mar. 13, 2013), *available at* http://www.democracy21.org/wp-content/uploads/2013/03/OFA-LETTER-3-13-13.pdf.

461. Matea Gold, *Pro-Obama Group to Decline Corporate Donations, Disclose More*, L.A. Times, Mar. 7, 2013, http://articles.latimes.com/2013/mar/07/nation/la-na-ofa-money-20130308.

462. *Id.*

463. Luce, *supra* note 456.

464. *See* Justin Leavitt, *Confronting the Impact of* Citizens United, 29 Yale L. & Pol'y Rev. 217 (2010) (noting that *Citizens United*'s "impact on the scope of permissible campaign finance regulation is far less substantial than commonly assumed").

eral campaign finance law that we can see how the decision contributed to, but did not directly cause, the re-emergence of dark money in our federal elections.

Indeed, as this Article has demonstrated, the complete story of the rise of dark money is quite complex. Achieving full disclosure of the funds spent to influence federal elections has been a goal of citizens and reformers since the early twentieth-century Progressives, but this achievement has most recently been frustrated only a few short years after McCain-Feingold effectively achieved the full disclosure of election spending. Importantly, McCain-Feingold was frustrated not because Congress failed to enact sufficiently broad statutory requirements, or because the Supreme Court overturned disclosure legislation. Rather, it was the FEC's failure to accurately implement congressional intent, as evidenced by the plain language of FECA as understood by the Supreme Court, that created an enormous loophole in FECA's independent expenditure disclosure requirements in 1980. This loophole, which was of limited applicability at the time of its creation, was later utilized in 2007 by commissioners of the FEC—some opposing disclosure outright, and others seeking to limit the disclosure burden on unions—as the basis for again frustrating Congress's carefully-crafted disclosure requirements in McCain-Feingold with regard to the sources of funding of electioneering communications.

Admittedly, several other factors facilitated the FEC's anti-disclosure commissioners in this deregulatory crusade. Were it not for the Supreme Court's *WRTL II* and *Citizens United* decisions, these anti-disclosure commissioners would not have had the opportunity to apply loophole-ridden disclosure rules to corporate and union electioneering communications and independent expenditures. Such spending would be impermissible absent these Court rulings. Were it not for the Supreme Court's narrow conception of what types of entities may be required to register as political committees and thereby be required to more fully disclose their activities, such substantial election-related spending would not be conducted out of the general treasury funds of multi-purpose organizations. Congress's shift of disclosure obligations in the 1979 FECA amendments from individuals making donations to the organizations receiving those donations, although uncontroversial at the time, raises the difficult question of when a multi-purpose organization that may not be aware of a donor's motivations is deemed to have received funds intended by the donor to influence federal elections. This difficult question has been answered by various state-level regulators, but has been dodged by the FEC. And, were it not for the IRS's apparent refusal to enforce the legal requirements that apply to nonprofits active in federal elections, such groups would be more limited in their ability to spend undisclosed funds to influence federal elections.

Importantly, however, although the story of the rise of dark money is complex, the solution is surprisingly simple. Nothing stands in the way of the FEC revising its disclosure regulations to more faithfully apply FECA and BCRA's disclosure requirements. With regard to independent expenditures, the FEC would be required to determine how an organization will determine whether or not a donor intended their funds be used to influence federal elections, but various models exist at the state level that efficiently and effectively require exactly that.[465] With regard to electioneering communications, BCRA's statutory language need only be enforced, and if the $1000 disclosure threshold is too burdensome, the threshold could be increased to $5000 or even $10,000 by Congress.[466] Other avenues for achieving enhanced transparency in federal election spending exist as well, including requiring publicly held companies to disclose their political spending to shareholders; pressuring the IRS to enforce the existing limitations on election activity by tax-exempt organizations; and requiring broadcasters to disclose more information about political advertising buys and the persons funding such advertisements.[467] Yet, as this Article demonstrates, even the most comprehensive of statutory or regulatory disclosure requirements can be frustrated if regulators lack the will to enforce them.

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465. *See* Malloy, *supra* note 225 (discussing various state-level approaches); *see also* Briffault, *supra* note 225, at 355 (noting North Carolina's four criteria for determining whether an organization that undertakes independent expenditures or electioneering communications must disclose a donor who gave "to further" those activities).

466. For example, the Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act) would have increased the donor disclosure threshold from $1000 to $10,000. *See* S. 3369, 112th Cong. (2012). The DISCLOSE Act was narrowly defeated in the U.S. Senate on July 17, 2012 by a 53-45 failed vote to invoke cloture. Other proposals would impose a far reaching disclosure requirement on all tax-exempt organizations, requiring them to reveal all donors of $25,000 or more regardless of whether or not the organization engaged in election related activity. Donald B. Tobin, *Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing* 30 (Ohio State Pub. Law, Working Paper No. 151, Aug. 31, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1920269.

467. We have outlined such avenues of reform in detail in Trevor Potter & Bryson B. Morgan, *Campaign Finance: Remedies Beyond the Court*, 27 DEMOCRACY: A JOURNAL OF IDEAS 38 (2013), *available at* http://www.democracyjournal.org/27/campaign-finance-remedies-beyond-the-court.php?page=1.