

2012

## Updating Disclosure for the New Era of Independent Spending

Richard Briffault

*Columbia Law School*, [brfflt@law.columbia.edu](mailto:brfflt@law.columbia.edu)

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### Recommended Citation

Richard Briffault, *Updating Disclosure for the New Era of Independent Spending*, JOURNAL OF LAW & POLITICS, VOL. 27, P. 683, 2012; COLUMBIA PUBLIC LAW RESEARCH PAPER No. 12-297 (2012).

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# **Columbia Law School**

Public Law & Legal Theory Working Paper Group

Paper Number 12-297

Updating Disclosure for the New Era of Independent Spending

Richard Briffault  
Columbia Law School

April 16, 2012

## Updating Disclosure for the New Era of Independent Spending

Richard Briffault\*

### I. Introduction: Citizens United and the Independent Spending Challenge to Campaign Finance Disclosure

One of the most striking recent developments in campaign finance has been the surge in independent spending, that is, spending that promotes or opposes candidates for office that is undertaken not by a candidate or political party but by individuals, associations, firms, committees or other organizations that are not formally affiliated with candidates or parties.<sup>1</sup> Sometimes also referred to as “outside spending,” such independent spending was a relatively minor factor in most of our federal elections until the last decade. Independent spending amounted to less than \$17 million in the 2002 Congressional elections, tripled to \$52 million in 2006, and then nearly sextupled again to \$290 million in 2010.<sup>2</sup> The rise in independent spending in presidential election cycles began earlier, with such spending soaring from \$33 million in 2000 to \$169 million in 2004 before relatively plateauing at \$275 million in 2008.

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\* Joseph P. Chamberlain Professor of Legislation, Columbia Law School.

<sup>1</sup> In this article’s discussion of independent spending I will often be combining two categories of spending that are treated as distinct in federal election law and in the laws of many states – “independent expenditure” and “electioneering communication.” Under federal election law, an “independent expenditure” refers to an expenditure “expressly advocating the election or defeat of a clearly identified candidate” that is not coordinated with the candidate or a political party. 2 U.S.C. § 431(17). An “electioneering communication” is a broadcast, cable or satellite communication which “refers to a clearly identified candidate for Federal office” that is targeted to the candidate’s constituency and is made within thirty days before a primary election or sixty days before a general election. 2 U.S.C. § 434(f)(3)(A). An “electioneering communication” is broader than an “independent expenditure” in that it includes advertising that does not include words of express advocacy, although, unlike independent expenditures, electioneering communications consist solely of broadcast, cable or satellite ads aired within the defined preelection period. Unless otherwise indicated I will be using the term “independent spending” to refer to both independent expenditures and electioneering communications.

<sup>2</sup> See Center for Responsive Politics, Total Outside Spending by Election Cycle, Excluding Party Committees, OpenSecrets.org, [http://www.opensecrets.org/outsidespending/cycle\\_tots.php](http://www.opensecrets.org/outsidespending/cycle_tots.php). In my calculations I am combining the Center’s figures for independent expenditures and electioneering communications but excluding their figure for “communications costs,” which refers to *internal* political messages aimed by a union or association to its members or a corporation to its executives or shareholders. See *id.*

However, in the current election cycle, independent spending seems likely to explode again as it nearly reached the \$100 million mark before the end of March 2012, or more than triple the level of independent spending at this point in 2008.<sup>3</sup> Independent spending has also increased markedly in state elections. In ten states independent spending amounted to 19% of the total amount of money contributed to candidates between 2005 and 2010, and in three of those states independent spending was greater than 25% of the contributions given to candidates.<sup>4</sup>

At the federal level, independent spending has been dominated by two types of organizations -- Super PACs and 501(c) organizations, especially 501(c)(4) "social welfare" groups.<sup>5</sup> A Super PAC is a "political committee" within the meaning of federal election law<sup>6</sup> but unlike other political committees it can accept donations that are unlimited in amount from corporations, unions and wealthy individuals and use them for unlimited independent spending. Super PACs were first authorized in mid-2010,<sup>7</sup> and quickly emerged as major campaign players, spending more than \$65 million in 2010, even though they were in existence for only a few months of that year's campaigns.<sup>8</sup> As of late March 2012, Super PACs had already spent more than \$80 million

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<sup>3</sup> See Centerfor Responsive Politics, Outside Spending, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/index.php>.

<sup>4</sup> See Kevin McNellis, Independent Spending's Role in State Elections, 2005-2010, National Institute on Money in State Politics, March 15, 2012, <http://www.followthemoney.org/press/PrintReportView.phtml?r=481>.

<sup>5</sup> 501(c) refers to the section of the Internal Revenue Code, 26 U.S.C. 501(c) which exempts certain organizations from having to pay tax on their income. 501(c)(4) organizations are "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare." Other politically active 501(c) organizations are labor unions exempted from tax by 501(c)(5) and 501(c)(6) business leagues, chambers of commerce, and trade associations. A 501(c)(4) organization may engage in political campaign activities provided that political activity is not its primary activity.

<sup>6</sup> 2 U.S.C. § 431(4).

<sup>7</sup> See *SpeechNow.Org v. FEC*, 599 F.3d 686 (D.C. 2010); *Club for Growth, Inc., FEC Adv. Op. 2010-09* (July 22, 2010); *Commonsense Ten, FEC Adv. Op. 2010-11* (July 22, 2010). See also *Wis. Right to Life State Political Action Comm. v. Barland*, 644 F.3d 139 (7th Cir. 2011); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010).

<sup>8</sup> Center for Responsive Politics, 2010 Outside Spending by Super PACs, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S>.

to influence this year's elections.<sup>9</sup> According to many press accounts, Super PACs have been spending more than candidates' committees in many of the 2012 Republican presidential caucus and primary contests.<sup>10</sup>

501(c) organizations are technically not political committees within the meaning of federal election law. Most are organized as not-for-profit corporations aimed at advancing primarily nonelectoral goals. As corporations, prior to the Supreme Court's decision in *Citizens United v. Federal Election Commission*<sup>11</sup> they were barred from engaging in federal election spending. To be sure, by properly tailoring its message to avoid the specific restrictions of federal election law, as glossed by the Supreme Court,<sup>12</sup> a nonprofit corporation could have sponsored an electioneering message. But 501(c) nonprofits were only very minor players in the campaign finance system.<sup>13</sup> Their role began to expand in 2008, after the Supreme Court narrowed the reach of the ban on corporate campaign spending.<sup>14</sup> In that year nonprofits spent an estimated \$75 million in connection with federal elections; that nearly doubled to \$133 million in 2010 after *Citizens United*.<sup>15</sup>

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<sup>9</sup> Center for Responsive Politics, 2012 Outside Spending by Super PACs, OpenSecrets.org, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S>.

<sup>10</sup> See, e.g., Jeremy Peters, 'Super PACs,' Not Campaigns Do Bulk of Ad Spending, N.Y. Times, March 2, 2012, <http://www.nytimes.com/2012/03/03/us/politics/super-pacs-not-campaigns-do-bulk-of-ad-spending.html>; Dan Eggen, Super PACs dominating Republican presidential race, Washington Post, Feb. 20, 2012, [http://www.washingtonpost.com/politics/super-pacs-dominating-republican-presidential-race/2012/02/20/gIQANOaGQR\\_story.html](http://www.washingtonpost.com/politics/super-pacs-dominating-republican-presidential-race/2012/02/20/gIQANOaGQR_story.html); Nicholas Confessore, G.O.P. Campaigns Grow More Dependent on 'Super PAC' Aid, N.Y. Times, Feb. 20, 2012, <http://www.nytimes.com/2012/02/21/us/politics/super-pac-role-grows-for-republican-campaigns.html?pagewanted=all>

<sup>11</sup> 130 S.Ct. 876 (2010).

<sup>12</sup> See, e.g., *FEC v. Wisconsin Right to Life, Inc.* ("WRTL") 551 U.S. 449 (2007).

<sup>13</sup> The Center for Responsive Politics estimates the federal election spending of nonprofits at under \$6 million in 2004, and less than one million dollars in 2006. See 2004 Outside Spending, by Groups; 2006 Outside Spending, by Groups. <http://www.opensecrets.org/outsidespending/summ.php?cycle=2006&chrt=V&disp=O&type=U>, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=V&disp=O&type=U>.

<sup>14</sup> See *WRTL*, *supra*.

<sup>15</sup> See Center for Responsive Politics, 2008 Outside Spending, by Groups; 2010 Outside Spending, by Groups,

The explosion in spending by independent committees has posed a severe challenge for our campaign finance disclosure regime. Our campaign finance laws are reasonably effective at obtaining the disclosure of spending by and contributions to candidates and political parties, and of the disclosure of donors to committees that make contributions to candidates. But our laws fail to provide for effective reporting of the campaign finance activities of independent committees. Disclosure law falls especially short in requiring the public identification of the wealthy individuals who are bankrolling the activities of these committees.

501(c) organizations are not subject to election law disclosure requirements at all. They are required to file certain reports with the Internal Revenue Service that will identify some of their donors, but these reports are not subject to public disclosure. Super PACs, as political committees, are subject to campaign finance reporting and disclosure mandates. But a significant fraction of Super PAC money comes from non-disclosing 501(c) organizations<sup>16</sup> or limited liability corporations, with cryptic names like F8 LLC<sup>17</sup> or RTTA LLC<sup>18</sup> that tell voters nothing about the identity of the individuals paying for the ads that attack or promote candidates for office. If a donor to a Super PAC makes her contribution via a corporation, the Super PAC would report the corporate contribution but not the identity of the individual who is the actual source of the funds.

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<sup>16</sup> Eliza Newlin Carney, Rules of the Game: Bad News for Nation's Nonprofits, [http://www.google.com/webhp?sourceid=toolbar-instant&hl=en&ion=1&qscr=1&nord=1&rlz=1T4RNRN\\_enUS439US440#hl=en&qscr=1&nord=1&rlz=1T4RNRN\\_enUS439US440&sclient=psy-ab&q=roll%20call%20bad%20news%20for%20nonprofits&oq=&aq=&aqi=&aql=&gs\\_l=&pbx=1&fp=c1e3eb19567a799d&ion=1&bav=on.2,or.r\\_gc.r\\_pw.r\\_qf,.cf.osb&biw=1280&bih=874](http://www.google.com/webhp?sourceid=toolbar-instant&hl=en&ion=1&qscr=1&nord=1&rlz=1T4RNRN_enUS439US440#hl=en&qscr=1&nord=1&rlz=1T4RNRN_enUS439US440&sclient=psy-ab&q=roll%20call%20bad%20news%20for%20nonprofits&oq=&aq=&aqi=&aql=&gs_l=&pbx=1&fp=c1e3eb19567a799d&ion=1&bav=on.2,or.r_gc.r_pw.r_qf,.cf.osb&biw=1280&bih=874), March 20, 2012; Center for Public Integrity, Donors to conservative super PACs masked by nonprofit, iWatch News, <http://www.iwatchnews.org/2012/03/11/8360/donors-conservative-super-pac-masked-nonprofit>, March 11, 2012.

<sup>17</sup> Nicholas Confessore, Michael Luo, and Mike McIntire, In Republican Race, a New Breed of Superdonor, N.Y. Times, Feb. 21, 2012, [http://www.nytimes.com/2012/02/22/us/politics/in-republican-race-a-new-breed-of-superdonor.html?\\_r=1&ref=mikemcintire](http://www.nytimes.com/2012/02/22/us/politics/in-republican-race-a-new-breed-of-superdonor.html?_r=1&ref=mikemcintire).

<sup>18</sup> Jonathan D. Salant, Payday Lender Political Donors Hidden in Corporate Names, Bloomberg, Mar. 21, 2012, <http://www.bloomberg.com/news/2012-03-22/payday-lender-political-donors-hidden-in-corporate-names.html>

The lack of adequate disclosure of donations to Super PACs is especially troubling as Super PACs are particularly close to the candidates they are aiding. Although technically independent of the candidates, all that means is that they are barred from consulting with candidates concerning the specifics of the decisions of which ads to air and what to say in those ads. But many of the high spending Super PACs in the current election cycle – Restore Our Future, Winning Our Future, Red, White and Blue Fund, Priorities Action USA – are committed to advancing the election of a specific candidate. They are operated by former staffers or campaign operatives of those candidates. They may share office space, media strategists, and consultants with the candidates they are backing. Their ads track the same campaign themes as the candidates and can even use the same ad footage as the candidates’ ads.<sup>19</sup> The candidates may raise funds for the Super PACs, or send their surrogates to do so, and they may tell potential donors that contributing to the Super PAC is the same as contributing to the candidate.<sup>20</sup> Obtaining disclosure of the donors to a Super PAC is just as important as obtaining disclosure of the donors to a candidate.

Due to the rise of 501(c)’s and their use both as spending committees and as conduits for donations to Super PACs, and also due to the use of LLCs to veil donations to Super PACs, the percentage of independent spending paid for by undisclosed donors has risen sharply -- from less than one percent in 2006 to 27% in 2010,<sup>21</sup> with an estimated one-third to forty percent of the

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<sup>19</sup> See, e.g., Eliza Newlin Carney, The Super PAC Paradox, Roll Call, March 12, 2012 (shared consultants; ad footage, fundraising), [http://www.rollcall.com/issues/57\\_107/Super-PAC-Paradox-213021-1.html](http://www.rollcall.com/issues/57_107/Super-PAC-Paradox-213021-1.html); Mike McIntire and Michael Luo, Fine Line Between ‘Super PACs’ and Campaigns, N.Y. Times, Feb. 25, 2012 (shared offices and consultants), <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?pagewanted=all>.

<sup>20</sup> Scott Conroy, Obama, Romney Getting Cozier with Super PACs, Real Clear Politics, Feb. 14, 2012, (cabinet secretaries to appear at fund-raisers for Obama Super PAC); [http://www.realclearpolitics.com/articles/2012/02/14/obama\\_romney\\_getting\\_cozier\\_with\\_super\\_pacs\\_113120.html](http://www.realclearpolitics.com/articles/2012/02/14/obama_romney_getting_cozier_with_super_pacs_113120.html).

<sup>21</sup> Michael Hiltzik, Secret donors to ‘C4s’ play behind the scenes politics, latimes.com, <http://www.latimes.com/business/la-fi-hiltzik-20120301,0,573514.column>, March 2, 2012.

independent spending in the 2012 coming from undisclosed donors.<sup>22</sup> In other words, the growing role of independent spending has been marked by decreasing disclosure of the donors funding that independent spending.

*Citizens United* is at the root of the independent spending disclosure difficulty. *Citizens United* struck down the sixty-three-year-old federal ban on corporations and unions using treasury funds<sup>23</sup> to pay for independent spending, and implicitly invalidated comparable state and local laws as well.<sup>24</sup> The difficulty with corporate spending, from a disclosure perspective, is that it is very easy for wealthy individuals to create one or more corporations and use them to disguise their campaign participation by hiding behind the corporate veil. It is illegal for an individual to make a contribution through another individual as a conduit or intermediary<sup>25</sup> to avoid disclosure or contribution limits. But it is not clear whether this precludes an individual from creating a corporation, giving money to that corporation, and having the corporation make a contribution to a political committee. Whereas individuals cannot easily create other individuals for purposes of making campaign contributions, an individual can generate multiple corporations that may be legally independent of the creator, and may effectively shield the corporation's founder's identity.

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<sup>22</sup> Dan Eggen, Secret money is funding more election ads, Washington Post, Feb. 6, 2012, [http://www.washingtonpost.com/politics/secret-money-is-funding-more-election-ads/2012/02/03/gIQAfTxEuQ\\_story.html](http://www.washingtonpost.com/politics/secret-money-is-funding-more-election-ads/2012/02/03/gIQAfTxEuQ_story.html).

<sup>23</sup> "Treasury funds" is the term used to refer to money that is part of a corporation's or union's general fund. Prior to *Citizens United* a corporation or union could engage in federal election spending by creating a "separate, segregated fund," generally known as a political action committee or PAC. The corporation or union could solicit contributions—subject to statutory dollar limits—to its PAC from persons affiliated with the corporation or union, such as corporate directors, managers or shareholders, or union members, and use these contributions to pay for independent spending. The corporation or union could pay for the PAC's administrative costs, including its fundraising costs, from its general treasury funds and determine how the PAC money was spent, but the money devoted to campaign spending would have to come from individual donations to the PAC, not the corporate or union treasury. See 2 U.S.C. § 441b (2006).

<sup>24</sup> The Montana Supreme Court recently attempted to distinguish *Citizens United* so as to turn back a challenge to that state's 99-year-old ban on corporate campaign spending. See *W. Tradition P'ship v. Att'y Gen. of Mont.*, 363 Mont. 220 (2011).

<sup>25</sup> See 2 U.S.C. § 441a(a)(8) (2006); *United States v. O'Donnell*, 608 F.3d 546 (9th Cir. 2010).



The problem of piercing the corporate veil goes well beyond dummy or shell corporations created to hide the identity of the individuals behind them. The most prominent 501(c) nonprofits -- American Crossroads Grassroots Political Strategies (“GPS”), Americans for Job Security, American Future Fund, Americans for Prosperity<sup>26</sup> and Freedom Works, Inc.<sup>27</sup> –are not simple shell entities created solely for the purpose of hiding the identity of a specific donor. They are more like pooling mechanisms, enabling many wealthy individuals and firms to combine their resources, hire top-notch political talent, and together pursue a set of ideological or partisan goals. The anonymity they provide is a nice plus, and an attraction to potential donors, but these are very real organizations even if created solely for the purpose of aiding a specific party or party faction in election campaigns.<sup>28</sup> To a considerable degree, the corporate money problem is that corporations can be used to facilitate the aggregation of campaign funds from very wealthy individuals and to shield the role of those individuals from disclosure.

Yet, if *Citizens United* played a major role in giving rise to the disclosure problem, that decision also provides the doctrinal means for its solution. *Citizens United* enhanced the constitutionally protected status of disclosure by sharply contrasting the benefits of disclosure against the constitutional problems the Court has concluded are posed by restrictions on campaign money. Although *Citizens United* struck down any limitation on the use of corporate

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<sup>26</sup> See, e.g., Jim Rutenberg, Don Van Natta, Jr. & Mike McIntire, *Offering Donors Secrecy, and Going on Attack*, N.Y. TIMES, Oct. 11, 2010, <http://www.nytimes.com/2010/10/12/us/politics/12donate.html?pagewanted=all>; Matt Viser, *Donor Names Stay Secret As Nonprofits Politick*, BOSTON GLOBE, Oct. 7, 2010, [http://www.boston.com/news/politics/articles/2010/10/07/donor\\_names\\_stay\\_secret\\_as\\_nonprofits\\_politick/](http://www.boston.com/news/politics/articles/2010/10/07/donor_names_stay_secret_as_nonprofits_politick/); T.W. Farnam & Dan Eggen, *Interest-group Spending for Midterm Up Fivefold from 2006; Many Sources Secret*, WASH. POST, Oct. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/03/AR2010100303664.html>; Editorial, *Americans for Prosperity’s Big-bucks Attack Ads*, WASH. POST, Sept. 28, 2010, <http://postnewsletterarticles.blogspot.com/2010/09/washington-post-editorial-americans-for.html>; Felicia Sonmez, *Who is “Americans for Prosperity?”*, WASH. POST, Aug. 26, 2010, <http://voices.washingtonpost.com/thefix/senate/who-is-americans-for-prosperit.html>.

<sup>27</sup> See iWatch, *supra* note 16.

<sup>28</sup> On the implications of *Citizens United* for the election role of nonprofits, see Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELEC. L.J. 337 (2011).

treasury funds to pay for independent campaign ads, the Court by an 8-to-1 vote<sup>29</sup> held that disclosure requirements can be imposed on such corporate-funded ads. The Court determined not only that “disclosure is a less restrictive alternative to more comprehensive regulations of speech,”<sup>30</sup> but that disclosure actually vindicates constitutional values: “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.”<sup>31</sup> Indeed, *Citizens United* lowered the constitutional bar to the enactment of effective disclosure laws when it determined that the narrow definition of election-related spending it had previously held was constitutionally required for laws limiting corporate and union spending would not be applied to laws governing disclosure.<sup>32</sup>

The Court renewed *Citizens United*’s ringing endorsement of disclosure in a second decision handed down a few months later. *Doe v. Reed*<sup>33</sup> rejected the argument that applying Washington State’s Public Records Act – which makes public records available for public inspection and copying – to the names and addresses of the individuals who signed a petition to subject a law to public referendum is unconstitutional. Although not a campaign finance case, *Doe* drew expressly on two central themes of the Court’s campaign finance disclosure jurisprudence: (i) that the public records law “is not a prohibition on speech, but instead a *disclosure* requirement [that] ‘. . . do[es] not prevent anyone from speaking,’” and (ii) that such disclosure laws are subject only to “exacting scrutiny” and not the strict scrutiny that would be

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<sup>29</sup> Only Justice Thomas dissented.

<sup>30</sup> 130 S. Ct. at 915.

<sup>31</sup> *Id.* at 916.

<sup>32</sup> *Id.* at 915.

<sup>33</sup> 130 S. Ct. 2811 (2010).

applied to a spending limit.<sup>34</sup> The Court determined that public disclosure of the names and addresses of petition signers is justified by the state’s substantial interest in “preserving the integrity of the electoral process” by combating fraud, “ferret[ing] out invalid signatures caused . . . by simple mistake,” and “more generally [in] . . . promoting transparency and accountability in the electoral process.”<sup>35</sup> As the state’s interest in electoral integrity was sufficient to sustain the law, the Court declined to reach Washington’s additional argument that disclosure of petitioner names and addresses also served the goal of voter information that has been so central to the case for disclosure in the campaign finance context. But Chief Justice Roberts’s opinion for the Court connected the integrity and voter information concerns in pointing to an overarching public interest in monitoring and understanding the workings of the political process.

In light of *Citizens United* and *Doe v Reed* adapting our disclosure laws so that they can deal with the new and expanded role of independent committees in our elections raises few constitutional difficulties. The challenge is, instead, a political one for Congress and state and local governments to design and enact laws that provide for the effective disclosure of the wealthy donors who are using independent committees to have a major impact on our elections.

Part II of this article lays out a reform agenda for more effective disclosure of independent spending. This requires addressing four issues: how to obtain the identities of the donors who contribute to organizations that make independent expenditures; how to define the election-related activity that triggers a duty to disclose; how to obtain disclosure of the natural persons behind corporate contributions and expenditures; and how to assure that disclosure is made in a timely fashion. Part II presents a series of proposals to address these issues and indicates how these proposals are consistent with *Citizens United*’s approach to disclosure.

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<sup>34</sup> *Id.* at 2818, 2820 n.2.

<sup>35</sup> *Id.* at 2819.

Part III concludes with further consideration of the proper scope of disclosure laws in our campaign finance system. In earlier work, I suggested that we require too much disclosure of personal information concerning relatively small donors.<sup>36</sup> Such information is of little use in helping voters make decisions about the candidates or propositions presented to them on election ballots. On the other hand, we currently provide too little information about the donors who are financing the independent committees that loom increasingly large over our election contests. “Rightsizing” disclosure to enable voters to understand the financial forces behind our election campaigns requires that we both raise the monetary thresholds for disclosure and extend the ambit of disclosure to include the donors paying for independent spending.

## II. Making Disclosure of Independent Spending Effective

As the Supreme Court has put it, the disclosure of campaign donors matters because disclosure improves the ability of voters to evaluate candidates: “[I]t allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”<sup>37</sup> By informing voters about the sources of a candidate’s funds, disclosure also “alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office.”<sup>38</sup> Indeed, whereas limits on contributions and expenditures can raise First Amendment concerns by threatening to restrict the extent of campaign communications activity, disclosure actually “further[s] First Amendment values by opening the basic processes of our federal election system to public

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<sup>36</sup> See, e.g., Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 279-80 (2010); Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM & M. B.RTS. J. 983, 1000-1005 (2011).

<sup>37</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

<sup>38</sup> *Id.*

view.”<sup>39</sup> As *Citizens United* explained, the “transparency” disclosure provides “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”<sup>40</sup>

The voter information value of disclosure is even greater for independent committees. A voter may have some sense of where a candidate stands on the issues or how she is likely to perform in office based on the candidate’s past record, debate performance, or media coverage, but with campaign spending increasingly dominated by independent committees with meaningless names, like Americans for Prosperity, Restore Our Future, Winning Our Future, Our Destiny, or Red, White and Blue Fund, requiring these committees to disclose their donors is essential if voters are to be able to understand just who those organizations speak for. Revealing who is paying for that independent spending “increases the fund of information concerning those who support candidates” and “helps voters to define more of the candidates’ constituencies.”<sup>41</sup> As the United States Court of Appeals for the Ninth Circuit has observed, disclosure can improve voter decision-making by “providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas.”<sup>42</sup> Disclosure of donors can be required even in ballot proposition elections “so that the people will be able to evaluate the arguments to which they are being subjected.”<sup>43</sup>

Current campaign finance laws, however, are better at obtaining the disclosure of donors to candidates and political parties and the fact and amounts of spending undertaken by non-candidate and non-party groups than at making public the identities of the individuals whose

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<sup>39</sup> *Id.* at 82.

<sup>40</sup> 130 S. Ct. at 916.

<sup>41</sup> *Buckley*, 424 U.S. at 81.

<sup>42</sup> *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1008 (9th Cir. 2010); *accord* *Family PAC v. McKenna*, Nos. 10-35832, 10-35893, 2012 WL 266111, at \*5 (9th Cir. Jan. 31, 2012).

<sup>43</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978).

funds are actually paying for that independent spending. Under current law, disclosure of donors is required only of organizations that are subject to FECA's reporting requirements for "political committee," that is, organizations that raise and spend above a threshold amount of money for the purpose of influencing federal elections.<sup>44</sup> The relatively crabbed definition of what counts as election-related spending, and the Supreme Court's reading of the law in *Buckley v. Valeo* to limit the reporting requirement to those organizations whose "major purpose"<sup>45</sup> is electoral has had the effect of exempting many electorally active organizations from reporting their donors. In addition, although federal election law requires that even organizations that do not qualify as political committees must report their independent expenditures above a threshold amount, the FEC has interpreted its own regulations to effectively eliminate any requirement that independent spenders actually disclose the donors whose funds have paid for that spending.

The next two sections of this Part address the issues of the disclosure of donations to organizations that engage in independent spending, and the definition of what ought to count as an election-related expenditure. The two sections after that more briefly address the need to identify the individuals behind the corporations that are nominal donors to independent committees, and the timing of disclosure reports.

#### A. Disclosing the Donors Behind Independent Spending

Many groups or organizations accept contributions and use them to pay for electioneering activity but are not subject to the reporting requirements applicable to political committees. They can claim exemption from political committee status by asserting that their activities are not primarily electoral; that is, their electioneering activities are part of a broader program of expenditures that include general public education, lobbying, and communications views about

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<sup>44</sup> 2 U.S.C. § 431(4) (2006).

<sup>45</sup> *Buckley*, 424 U.S. at 79.

political affairs but not elections per se. One way to promote disclosure would be to expand the category of political committee, either by broadening the definition of what constitutes an electoral expenditure, or by treating an organization as a political committee for campaign finance reporting purposes if it engages in a threshold level of electoral activity even though most of its expenditures are not for electoral purposes. Although in Section B, *infra*, I shall make the case for expanding the definition of electoral activity, in this section I shall suggest that the better way to obtain the disclosure of the donors financing independent spending is not to broaden the definition of political committee but instead to require the disclosure of donations to organizations that engage in a threshold level of independent expenditures, whether or not they are political committees. To be sure, treating independent spending groups and organizations as political committees has the advantage of obtaining more comprehensive reporting by these increasingly important campaign finance actors. But redefining political committee presents two potential constitutional questions.

First, it is not clear whether an organization that devotes less than half of its expenditures to electioneering can be treated as a political committee. In *Buckley v. Valeo*, the Supreme Court considered FECA's requirements for political committees, which were defined by statute as organizations that receive more than \$1000 in contributions, or make more than \$1000 in expenditures, in a calendar year. Concerned that the law "could be interpreted to reach groups engaged purely in issue discussion,"<sup>46</sup> that Court held that the statutory words "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."<sup>47</sup> "The major purpose" has

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* (emphasis added).

been construed by some courts to mean that election spending has to be the most important single spending activity of the organization in question.<sup>48</sup>

It is uncertain whether the constitution requires that “the major purpose” of an organization is elections in order for the organization to be subject to election regulation. “The major purpose” might just be an interpretation of FECA. In an analogous situation, the Court in *Buckley* initially held that to be treated as election-related speech for purposes of FECA disclosure a communication by an independent committee must consist of “express advocacy” of the election or defeat of a federal candidate, but then subsequently, in *McConnell v. FEC*, the Court determined that *Buckley*’s narrow reading of FECA was merely “an endpoint of statutory interpretation, not a first principle of constitutional law,”<sup>49</sup> and it held that Congress could regulate more broadly than *Buckley*’s standard .

The lower federal courts have divided over whether “major purpose” – in the sense of primary purpose -- is constitutionally required. The United States Court of Appeals for the Fourth Circuit has said that it is,<sup>50</sup> while the Ninth<sup>51</sup> and First Circuits<sup>52</sup> have said that it is not. In the First Circuit’s view, *Buckley*’s “major purpose” standard, like its definition of “express advocacy,” was merely “an artifact of the Court’s construction of a federal statute.”<sup>53</sup> The First and Ninth Circuits have rejected constitutional challenges to state laws requiring political committees active in state elections to abide by recordkeeping, organizational, reporting, and

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<sup>48</sup> See, e.g., *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 247, 286-89 (4th Cir. 2008); cf. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981).

<sup>49</sup> 540 U.S. 93, 190 (2003).

<sup>50</sup> *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 247, 286-89 (4th Cir. 2008); cf. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981).

<sup>51</sup> *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 995 (9th Cir. 2010); see also *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495 (Colo. App. 2010); *Independence Inst. v. Coffman*, 209 P.3d 1130 (Colo. App. 2008).

<sup>52</sup> *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34, 58-59 (1st Cir. 2011); see also *Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994 (N.D. Ill. 2010).

<sup>53</sup> *McKee*, 649 F.3d at 59.



disclosure requirements if the money they raise for or spend on electoral activities crosses a monetary threshold, even if electioneering is not their primary activity.

Second, *Citizens United* suggests that the more detailed reporting that accompanies political committee status can also trigger constitutional concern. A group that raises or spends money above a reporting threshold may be required to register with a state agency; submit the names and addresses of its principal organizers or members; name a treasurer; open and report a bank account; keep detailed records concerning its receipts, expenditures, and balances, often for years after the election; and file periodic reports with the regulatory body, with more frequent reports required during election years, or with respect to expenditures in the pre-election period above a threshold level. *Citizens United* indicated that the paperwork burden imposed on political committees may be constitutionally problematic.<sup>54</sup> The Court noted the complex array of registration, reporting, and recordkeeping requirements imposed on political committees in explaining why the ability of corporations and unions to create political action committees (“PACs”) and use them to engage in independent spending did not ameliorate the restriction imposed by the ban on the use of treasury funds for electioneering.<sup>55</sup>

Indeed, plaintiffs in a number of recent challenges to state reporting and disclosure laws have claimed that state registration, reporting, and disclosure requirements impose burdens comparable to those cited by *Citizens United*.<sup>56</sup> Although these laws have consistently survived facial challenges, courts have been willing to grant as-applied exceptions from registration and

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<sup>54</sup> See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL’Y 643, 663-70 (2011).

<sup>55</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 896-98 (2010); see also *Hatchett v. Barland*, No. 2:10-CV-00265, 2011 WL 4336740, at \*16 (E.D. Wis. Sept. 14, 2011).

<sup>56</sup> See, e.g., *Nat’l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011); *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010); *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010); *Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009); *Hatchett v. Barland*, No. 2:10-CV-00265, 2011 WL 4336740 (E.D. Wis. Sept. 14, 2011); *Ctr. for Individual Freedom, Inc. v. Tennant*, Nos. 1:08-cv-00190, 1:08-cv-01133, 2011 WL 2912735 (S.D. W.Va. July 18, 2011).

reporting requirements in a handful of cases involving groups that accept or spend relatively small amounts of money.<sup>57</sup>

Neither the “major purpose” nor regulatory burden objections to expanding the definition of “political committee” status is insuperable. The First and Ninth Circuits have the better of the argument that “*a* major purpose,” defined by the expenditure of a significant amount of money on electioneering, not “*the* major purpose” is all that ought to be required in order to avoid the farcical result of an organization that spends tens of millions of dollars on electioneering being able to claim it is not a political committee because it spends even more money on legislative and grass-roots lobbying and ideological public affairs advertising. Still, such an expanded definition would face an uncertain judicial reception. In any event, expanding the definition of political committee at the federal level would – given the Supreme Court’s governing interpretation of FECA – require legislative action, which is extremely unlikely from the current Congress. The possibility of a challenge based on the undue burden of compliance could be addressed by setting a relatively high monetary threshold for campaign activity before an organization is required to register and report as a political committee. But the question of when an organization engages in both electoral and non-electoral activities can be required to register and report as a political committee, and disclose its donors, would remain.<sup>58</sup>

However, even though the obstacles to expanding the definition of political committee could be overcome, it would probably be more straightforward, and certainly less legally problematic, to sidestep the issue of political committee status and simply require that any individual, group, or organization that spends more than a threshold amount on an independent electioneering expenditure – say \$10,000 in a Congressional election – report all donations it receives above a

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<sup>57</sup> See, e.g., *Sampson*, 625 F.3d at 1249, 1259-61; *Canyon Ferry Rd.*, 556 F.3d at 1033-34.

<sup>58</sup> For a more in-depth treatment of the issues referred to in this paragraph, see Richard Briffault, *Nonprofits and Disclosure in the Wake of Citizens United*, 10 ELECTION L.J. 337, 352-55 (2011).

contribution threshold amount – say \$5000 – in the current or preceding calendar year. This is close to current federal statutory law, although the current contribution-reporting threshold is actually \$1000.<sup>59</sup> However, the requirement that such independent spenders report their contributors was effectively neutered by the FEC in 2010 in *Matter of Freedom's Watch*.<sup>60</sup>

Federal law currently provides that a person who spends more than \$10,000 on electioneering communications within a calendar year must file a report with the FEC within twenty-four hours that includes the names and addresses of all persons “who contributed an aggregate amount of \$1000 or more to the person making the disbursement” since the start of the preceding calendar year.<sup>61</sup> In *Citizens United*, the Supreme Court upheld the application of this provision to Citizens United, a 501(c)(4) nonprofit corporation,<sup>62</sup> although the Court did not consider which donors the organization would be required to disclose. The FEC, however, has adopted a regulation providing that for organizations like corporations, unions, and nonprofits that receive funds from many sources – shareholders, union members, donors – who do not necessarily support the organization’s electoral activity, disclosure would be required only of those donations “made for the purpose of furthering electioneering communications.”<sup>63</sup> In *Freedom's Watch*, the FEC treated the regulation as exempting from disclosure all contributions given to an independent spender that were not given expressly “for the purpose of furthering the electioneering communication that is the subject of the report.” Freedom’s Watch had spent \$126,000 on electioneering ads in a Congressional special election held in the spring of 2008. It reported the spending to the FEC but not the identities of any of its donors – or the identities of *any* of the

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<sup>59</sup> 2 U.S.C. § 434(f)(2)(E) (2006).

<sup>60</sup> Freedom’s Watch, Inc., MUR 6002 (FEC July 8, 2010) (complaint dismissed and file closed), <http://www.fec.gov/press/press2010/20100608MUR.shtml>.

<sup>61</sup> 2 U.S.C. § 434(f) (2006).

<sup>62</sup> *Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010).

<sup>63</sup> 11 C.F.R. § 104.20(c)(9) (2012).

donors whose funds had paid for Freedom's Watch's electioneering in 2008 – claiming that, as all the donations had been given to support the organization's general purposes, and none were earmarked for specific electioneering ads, then, as a result of the FEC's regulation, they were not subject to the statutory disclosure requirement. The FEC divided over the issue, with two commissioners rejecting Freedom's Watch's interpretation and three accepting it, and the complaint was dismissed.

With no majority of the six-member commission for either position, *Freedom's Watch* is not a formal ruling. But the case gives independent committees that are not federal “political committees” a green light to accept contributions and spend them on electioneering communications without disclosing their donors except in the unlikely event that a donor earmarks his contribution for a specific election campaign. *Freedom's Watch*, however, involved only the FEC's interpretation of its own regulations. It was not a constitutional decision: it has no effect on state disclosure law, and it does not limit the ability of the FEC to revise its position.<sup>64</sup>

There still remains the question underlying the division in *Freedom's Watch*: what to do about donations to organizations that engage in both electoral and non-electoral activity? Can organizations that engage in independent election spending be required to disclose all their donations above a monetary threshold even if much of their spending is for purposes other than electioneering? Doctrinally, the question involves holding together the Supreme Court's recognition that voters have a significant “interest in knowing who is speaking about a

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<sup>64</sup> On March 30, 2012, the United States District Court for the District of Columbia granted summary judgment to the plaintiffs in a suit brought to challenge the requirement that a corporation or union that engages in electioneering communication subject to federal reporting requirements need to disclose only those donors above a threshold level who earmarked their donations for the purpose of furthering electioneering communications. *Van Hollen v. FEC*, \_\_\_ F.Supp.2d \_\_\_, 2012 WL 1066717, D.D.C., Mar. 30, 2012 (No. CIV A 11-0766 (ABJ)). The regulation which the court struck down is the one underlying the opinion of the three FEC Commissioners declining to seek the disclosure of donors in *Freedom's Watch*. As of this writing the ultimate effect of the *Van Hollen* decision is unknown, but it certainly supports the point in text the identities of donors to organizations that engage in campaign spending, even if the organization is not a political committee and even if the donors do not earmark their funds for campaign spending, may be required.

candidate”<sup>65</sup> so that the donors who pay for independent spending can be subject to disclosure with the lack of any comparable provision for the disclosure of donors who pay for non-electoral activity. Indeed, the Court’s freedom of association decisions indicate the constitution may provide some protection from disclosure to donors to organizations than undertake non-electoral political activities.<sup>66</sup> Practically, the answer must take into account the fact that independent spending fueled by large donations plays an increasingly large role in shaping the electoral debate, as well as the fact that many politically active groups engage in both electoral spending and other political spending that is not considered electoral. It is possible that at least some of the donors to such a group intend to support only its non-electoral activity.

The appropriate solution is to provide that any group, organization, or person required to report independent spending must also disclose the identities of all donors above a relatively high threshold amount, but to also enable an entity that engages in both electoral and non-electoral spending to set up a non-electoral account. Donors to the non-electoral account – which could not be used to pay for independent spending – would not be subject to disclosure. All other donations, which could be used to pay for electoral activity, would be subject to disclosure. Alternatively, instead of enabling non-electoral donors to opt out of disclosure by earmarking their contributions for a non-electoral account, an entity that engages in both election-related and non-election-related spending could be required to set up a dedicated campaign account and pay for all its electioneering activity from that account. Only donations earmarked for the campaign account could be used for election activities, and only donors to that account would be subject to disclosure. The first approach is less burdensome for the groups, as an organization would not be required to segregate its funds; however, if it did not, all contributions above a threshold level

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<sup>65</sup> *Citizens United*, 130 S. Ct. at 915.

<sup>66</sup> *See, e.g.,* Briffault, *Campaign Finance Disclosure 2.0*, *supra* note 36, 9 ELEC. L.J. at 279-80.

would be subject to disclosure. The DISCLOSE Act of 2012, introduced by Senator Whitehouse in late March 2012 to reform federal disclosure laws, relies on a mechanism like this.<sup>67</sup> The second approach is more protective of the rights of donors. It imposes a greater administrative burden on the groups, but the burden would be relatively minor – and much less than the burden *Citizens United* suggested was created by the requirement that corporations and unions spend through their PACs. Such an account would be essentially no more than a bookkeeping device, not a separate organization. There would be no need for a separate administrative structure to control or oversee the account, and, of course, there would be no dollar limit on how much donors could give to the account. This approach safeguards the interests of donors to mixed electoral/nonelectoral organizations in not having their donations used for electoral activity unless they have affirmatively signaled that is their desire.

Either of these approaches would protect both the public’s interest in learning the identities of the individuals whose contributions are actually financing the spending of independent committees and the interest of the non-electoral donor to such a group in not having his or her identity revealed. The precise mechanism could be left to the individual groups to decide.

## B. Defining Electoral Activity

Once federal, state, or local regulators decide to require the disclosure of all donors who provide funds for independent spending, it becomes critical to determine what activities by non-candidate, non-political-party organizations are to be treated as election-related and, thus, subject to election law disclosure. One of the oldest and most difficult questions in campaign finance law has been just this question of the definition of election-related communications.<sup>68</sup> As previously

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<sup>67</sup> See S. 2219, 112<sup>th</sup> Cong., 2<sup>nd</sup> Sess.

<sup>68</sup> See generally Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999).

indicated, in *Buckley* the Court, focusing on the constitutional difficulties posed by what it found to be FECA's vague and broad language, determined that it would construe "expenditure" under federal election law "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."<sup>69</sup> The "express advocacy" definition of election-relatedness restricted FECA to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"<sup>70</sup> This became known as the "magic words" test.<sup>71</sup> Political advertising by individuals, organizations, and groups that avoided use of the magic words of express advocacy – speech that became known as "issue advocacy" – was exempt from reporting and disclosure requirements.<sup>72</sup>

By the 1990s, the "express advocacy" requirement had become an easy escape hatch for many electorally active groups. Political parties, interest groups, and campaign specialists had little difficulty producing ads that effectively promoted or opposed federal candidates while eschewing the magic words of express advocacy. One legally-validated technique was the use of ads that sharply criticized a candidate with respect to an election issue, but then included a tag line providing the sponsor's telephone number and making a request that the viewer call the sponsor for more information, or providing the criticized candidate's number and urging the viewer to call the candidate and "tell him what you think." By advocating an action other than voting, these ads evaded the express advocacy label and became constitutionally protected issue advocacy.<sup>73</sup>

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<sup>69</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

<sup>70</sup> *Id.* at 44 n.52.

<sup>71</sup> See Briffault, *supra* note 67, at 1755.

<sup>72</sup> *Buckley*, 424 U.S. at 80.

<sup>73</sup> Briffault, *supra* note 67, at 1759-60.

One of the central goals of Bipartisan Campaign Reform Act of 2002 (“BCRA”) was to close the issue advocacy loophole.<sup>73</sup> Mindful of the Court’s concerns with vagueness and overbreadth, Congress created a new category of “electioneering communication” consisting of (i) “broadcast, cable, or satellite communications” that (ii) refer “to a clearly identified candidate for Federal office,” (iii) are aired within sixty days before a general election or thirty days before a primary election, and (iv) are targeted at the candidate’s constituency.<sup>75</sup> In *McConnell* the Court upheld BCRA’s extension of the disclosure and corporate and union expenditure restrictions from magic-words-style express advocacy to “electioneering communication.”<sup>75</sup> Looking to the development of the issue advocacy loophole and the practical impact of issue ads on campaigns,<sup>76</sup> the record before Congress,<sup>77</sup> and the expert evidence presented to and the findings of the district court,<sup>79</sup> *McConnell* determined that “the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the functional equivalent of express advocacy.”<sup>80</sup> *McConnell* found the BCRA definition avoided the Charybdis and Scylla of vagueness and overbreadth.<sup>81</sup> Its components “are both easily understood and

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<sup>73</sup> *McConnell*, 540 U.S. at 129-33; *see also* COMM. ON GOVERNMENTAL AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FED. ELECTION CAMPAIGNS, S. REP. NO. 105-167, Vol. 3, at 4535 (2d Sess. 1998) (noting the need for new legislation to close soft money and issue advocacy loopholes); *see also id.* Vol. 4, at 4611 (“The most insidious problem with the campaign finance system involved soft (unrestricted) money raised by both parties. The soft-money loophole, though legal, led to a meltdown of the campaign finance system that was designed to keep corporate, union and large individual contributions from influencing the electoral process.”).

<sup>75</sup> BCRA, 2 U.S.C. § 434(f)(3)(A)(i)(I)-(III) (2006); *McConnell*, 540 U.S. at 190 n.73.

<sup>75</sup> *See id.* at 207 (finding that even if the BCRA might inhibit some constitutionally protected speech, this still wouldn’t be enough to “justify prohibiting all enforcement” of the law) (citation omitted).

<sup>76</sup> *See id.* at 126-30 (highlighting examples of the many ways interest groups and others circumvented the restrictions).

<sup>77</sup> *See id.* at 131-32 (summarizing the findings of the 1998 report by the Senate Committee on Governmental Affairs).

<sup>79</sup> *Id.* at 193-94, 196-97.

<sup>80</sup> *Id.* at 206; *see also id.* at 126 (“While the distinction between ‘issue’ and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects.”).

<sup>81</sup> *Id.* at 194.



objectively determinable,”<sup>82</sup> and therefore not vague. Nor was the definition overly broad. Although some broadcast ads that air in the pre-election periods and refer to clearly identified candidates might have “no electioneering purpose,” the Court concluded that “the vast majority of ads clearly had such a purpose.”<sup>83</sup> Whether “in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion” that BCRA’s regulation of non-electioneering, or “true” issue ads, is not substantial.<sup>84</sup>

*McConnell* appeared to settle the authority of Congress to redefine the scope of campaign finance regulation in light of the realities of modern electoral campaigns, but little more than four years later the Court shifted back to a much narrower definition of election-related activity. In *FEC v. Wisconsin Right to Life*<sup>85</sup> (“*WRTL*”) the Court held that Congress could not apply the corporate spending ban beyond communications that are the “functional equivalent of express advocacy,” which would occur “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”<sup>86</sup> *WRTL* did not quite go back to *Buckley*’s “magic words” test. In emphasizing that the *WRTL* ads “do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office,”<sup>87</sup> Chief Justice Roberts’s opinion suggested that ads including such terms or positions could be treated as express advocacy even if they lacked the magic words. But the decision appeared to indicate that Congress could not regulate much beyond the magic words either.

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 206; see also Craig Holman & Luke McLoughlin, *Buying Time 2000: Television Advertising in the 2000 Federal Elections*, BRENNAN CTR. FOR JUSTICE AT NYU SCHOOL OF LAW 73 (Dec. 31, 2001), [http://www.brennancenter.org/stack\\_detail.asp?key=97&subkey=10675](http://www.brennancenter.org/stack_detail.asp?key=97&subkey=10675) (select hyperlink for “Chapter 8: Closing the Loopholes: Assessing the Impact of Reform”) (“Of all group-sponsored issue ads that depicted a candidate within 60 days of the election, 99.4% were found to be electioneering issue ads.”).

<sup>84</sup> *McConnell*, 540 U.S. at 207.

<sup>85</sup> 551 U.S. 449 (2007).

<sup>86</sup> *Id.* at 469-70.

<sup>87</sup> *Id.* at 470,

*WRTL*, however, dealt only with the ban on corporate and union speech; it did not consider the applications of the statute’s expanded definition of election-related spending to disclosure. That issue was considered and resolved in *Citizens United*. *Citizens United* addressed the regulation of a film, *Hillary: The Movie*, which Citizens United, a conservative advocacy nonprofit corporation, sought to air while then-Senator Clinton was running for the Democratic nomination for president in 2008. The film was not itself an “electioneering communication” within BCRA, as it was not broadcast or distributed by satellite or cable, which is a statutory prerequisite for coverage. Instead, it was released in theaters and on DVD. However, Citizens United also sought to air television commercials promoting sale of the film during the pre-election period. As those ads were to appear on television, they could be subject to regulation – including disclosure – if their content qualified as electioneering. Although the ads mentioned Senator Clinton, they were ostensibly selling a movie not calling for a vote, and so Citizens United claimed the ads were exempt from disclosure because they fell outside of *WRTL*’s “no reasonable interpretation other than as an appeal to vote” for a candidate standard.

The Supreme Court rejected that argument and the broader “contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.”<sup>88</sup> The Court denied the applicability of the *WRTL* test to disclosure laws, thereby cabining the “functional equivalent” and “no reasonable interpretation tests” to spending limits – which after *Citizens United* are now unconstitutional. Instead, the Court found that “[e]ven if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”<sup>89</sup> Thus, by an 8-to-1 vote,<sup>90</sup> *Citizens United* reinstated

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<sup>88</sup> 130 S. Ct. 876, 915 (2010).

<sup>89</sup> *Id.* at 915.

<sup>90</sup> Only Justice Thomas dissented. *See* 130 S. Ct. at 979 (Thomas, J., concurring in part and dissenting in part).

*McConnell*'s endorsement<sup>91</sup> of Congress's broad, politically informed definition of what constitutes electioneering speech when that definition is used for the purpose of effective disclosure.<sup>92</sup> Indeed, given the Court's emphasis on disclosure's benefits in informing voters and enabling them to respond to campaign spending "in a proper way" and its endorsement of disclosure as a "less restrictive alternative to more comprehensive regulation of political speech,"<sup>92</sup> there is a good argument that even broader definitions of election-related speech than BCRA's "electioneering communication" are constitutional.

First, disclosure could be required of those who fund election-related activity by media in addition to satellite, cable and broadcast. A North Carolina law adopted in 2010 defines "electioneering communication" to include "mass mailing" and "telephone banks."<sup>93</sup> A federal district court in South Carolina, relying on *Citizens United*, upheld a South Carolina law including telephone banks, direct mail, and any paid advertisements "conveyed through an unenumerated medium that cost more than five thousand dollars" in its definition of electioneering communication subject to disclosure.<sup>94</sup> Similarly, another federal district court rejected a challenge to a Florida law that defined electioneering communication to include communications "publicly distributed by . . . newspaper, magazine, direct mail, or telephone."<sup>95</sup> Although a federal district court in West Virginia rejected that state's effort to include print media in the definition of electioneering communication, it emphasized that its ruling "do[es] not speak to the West Virginia Legislature's ability to regulate non-broadcast media," but rather was based on the court's finding that the legislature had failed to provide sufficient evidence that

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<sup>91</sup> *McConnell*'s rejection of the constitutional challenge to BCRA's expanded disclosure requirement was also by an 8-1 vote, with Justice Thomas again the lone dissenter. 540 U.S. at 264 (Thomas, J., concurring in part and dissenting in part).

<sup>92</sup> *Accord Ctr. for Individual Freedom v. Madigan*, 735 F. Supp. 2d 994 (N.D. Ill. 2010).

<sup>93</sup> 130 S. Ct. at 915.

<sup>94</sup> N.C. GEN. STAT. ANN. § 163-278.6(8j) (West 2010).

<sup>95</sup> *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 726 (D.S.C. 2010).

<sup>96</sup> *Nat'l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1219 (N.D. Fla. 2010).

print media play an important role in state elections.<sup>97</sup> Indeed, the court hinted that it might allow a statute treating mass mailings as electioneering communications to withstand challenge because there was evidence indicating they play a substantial role in campaigns in the state.<sup>98</sup> Moreover, the West Virginia court failed to appreciate just how much support *Citizens United* provides for disclosure laws. The court noted that *WRTL* “tipped the scale back toward First Amendment rights” after *McConnell*<sup>99</sup> but failed to adequately acknowledge that *WRTL* was a spending limits and not a disclosure case, and that *Citizens United* in effect “tipped the scale back” toward regulation when it comes to disclosure. *Citizens United*’s concern for voter information provides real support for the argument that communications disseminated via general circulation newspapers and periodicals, mass mailings and telephone banks ought to be treated as electioneering communications, at least where the communications cross an appropriate regulatory threshold, such as dollars spent or volume of messages sent.

Second, with independent committees increasingly airing campaign ads long before election day,<sup>100</sup> the temporal component of the definition of what constitutes an electioneering communication ought to be expanded. A federal district court upheld South Carolina’s modest expansion of the pre-primary period to forty-five days<sup>101</sup> – compared with BCRA’s thirty days – and the federal DISCLOSE Act, which passed the House of Representatives in June 2010 but succumbed to a Senate filibuster that fall,<sup>102</sup> sought to extend the federal statutory pre-general-

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<sup>97</sup> *Ctr. for Individual Freedom, Inc. v. Tennant*, Nos. 1:08-cv-00190, 1:08-cv-01133, 2011 WL 2912735, at \*29 (S.D. W.Va. July 18, 2011).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at \*24.

<sup>100</sup> See, e.g., Tom Hamburger & Melanie Mason, “*Super PACs*” Showing Their Power, L.A. TIMES, Jan. 1, 2012, <http://articles.latimes.com/2012/jan/01/nation/la-na-money-election-20120101> (noting that even before the start of 2012, \$3 million in ads “funded by secret donors” have been aired against the state’s incumbent Democratic Senator Sherrod Brown who is not up for reelection until November 2012).

<sup>101</sup> *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 726 (D.S.C. 2010).

<sup>102</sup> Democracy Is Strengthened by Casting Light On Spending in Elections Act, H.R. 5175, 111th Cong. (2010). The measure passed the House of Representatives by a vote of 219-206, but the motion for cloture to end debate and

election period from sixty days to 120 days. BCRA's tight temporal definition of electioneering communication was adopted when Congress expanded both disclosure and the more constitutionally problematic – and now unconstitutional – ban on corporate and union campaign spending. After *Citizens United*, the sole purpose of the “electioneering communication” definition is effective disclosure. Candidates and parties are required to disclose their donors throughout the electoral cycle. As independent spending is increasingly associated with specific parties and candidates, it would make sense to expand the period in which communications by independent organizations are subject to disclosure.

The recently proposed DISCLOSE Act of 2012 defines the election period as the entire calendar year in which the election takes place for Senate and House elections, and the period beginning 120 days before the first caucus or primary as the election period for Senate elections. Campaign ads are now aired long before the onset of the traditional pre-election period, with independent committees spending money attacking general election candidates as early as the opening months of the election year<sup>103</sup> and presidential election spending starting even earlier. The definition of the election period ought to reflect Congress's special expertise in understanding just when election campaigns now begin.

Indeed, there is a good argument that for disclosure purposes the definition of electioneering should drop the specific time and media constraints of BCRA's “electioneering communication” standard and instead turn to the so-called PASO the test the statute uses for

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bring the measure up for consideration received only fifty-nine votes in the Senate, or one vote shy of the sixty needed to end a filibuster.

<sup>103</sup> See, e.g., Eliza Newlin Carney, Super PACs Target Congressional Races, Roll Call, [http://www.rollcall.com/issues/57\\_103/Super-PACS-Target-Congressional-Races-212830-1.html](http://www.rollcall.com/issues/57_103/Super-PACS-Target-Congressional-Races-212830-1.html), March 5, 2012 (as of beginning of March, Super PACs had spent \$1.4 million on November Montana Senate election and \$1.5 million on November Virginia Senate race); Dan Eggen, Super PACs Target Congressional Races, Washington Post, Jan. 29, 2012 (Super PACs had spent millions of dollars on November Ohio Senate race by late January), [http://www.washingtonpost.com/politics/super-pacs-target-congressional-races/2012/01/26/gIQAyRfnaQ\\_story.html](http://www.washingtonpost.com/politics/super-pacs-target-congressional-races/2012/01/26/gIQAyRfnaQ_story.html).

determining when money raised and spent by state and local political parties is subject to federal election law. BCRA provides that state and local party spending on public communications that “promote, attack, support, or oppose”<sup>104</sup> (“PASO”) federal candidates<sup>107</sup> constitutes “federal election activity” subject to federal restrictions and requirements. *McConnell* sustained this portion of BCRA, noting that PASO communications “undoubtedly have a dramatic effect on federal elections.”<sup>105</sup> *McConnell* determined that PASO avoids vagueness: “These words ‘provide explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is’” regulated.<sup>106</sup> Nor is PASO unduly broad. Rather, it reflects the common sense judgment that “any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating.”<sup>107</sup> The PASO standard is an appropriate basis for determining when independent spending ought to be subject to disclosure. To be sure, the PASO test upheld in *McConnell* was applied by Congress to political parties,<sup>108</sup> and there is a good argument that given the traditional focus of parties on the election of candidates it makes sense to treat all party spending that promotes or attacks, or supports or opposes, candidates as election-related even if words of express advocacy are not used. Non-party committees, by contrast, may have a mix of electoral and non-electoral goals so it may be a stretch to define all of their PASO spending as electoral

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<sup>104</sup> 2 U.S.C. § 431(20)(A)(iii) (2006).

<sup>104</sup> As the FEC has observed, although PSAO would be a literally more accurate shorthand for BCRA’s test, PASO is more pronounceable and thus “has emerged as a convenient acronym for ‘promote, support, attack or oppose.’” Political Committee Status, Definition of Contribution, and Allocation of Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,062 n.2 (Nov. 23, 2004).

<sup>105</sup> 540 U.S. at 169.

<sup>106</sup> *Id.* at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

<sup>107</sup> 540 U.S. at 170.

<sup>108</sup> *McConnell* also found that the PASO test was neither vague nor unduly broad setting when it upheld the BCRA provision prohibiting state and local candidates and officeholders from using funds that do not comply with federal elections law to pay for PASO statements concerning federal candidates. 540 U.S. at 184. This does extend PASO outside the party context, but it could also be argued that state and local candidates are more comparable to political parties than to non-party committees.

advocacy. However, Congress limited the PASO test to state and local parties as part of a statutory scheme for requiring state and local parties to use only funds that comply with federal restrictions and prohibitions when they engage in federal election activity. My proposal would extend the PASO test – which does incorporate a requirement of advocacy -- to non-party actors only for the more limited purpose of disclosure and the voter-education goal disclosure is intended to advance. Using the PASO test for disclosure builds on *Citizens United*'s recognition that the public has an interest in knowing who is promoting or attacking candidates. The PASO test would more effectively facilitate disclosure of the financial forces behind the ads that are increasingly used to shape the campaign environment.

Moreover, today's independent committees are now far more clearly electoral than in the past.<sup>109</sup> Many of these committees, including the most highly publicized campaign finance actors in the 2010 election -- American Crossroads GPS, American Action Network, Americans for Job Security, American Future Fund, and Americans for Prosperity -- are not longstanding organizations with public policy agendas distinct from their electoral goals, but are instead closely affiliated with one or the other of the two major parties, with party factions, or with specific candidates. Many of their organizers and directors used to work for party committees, candidates' campaign committees, or the candidates themselves, and their aim is to advance the electoral fortunes of parties or candidates. Although they avoid formal coordination with the parties or candidates, they work as closely with the candidates and parties as the law allows. They are, in effect, shadow parties or campaign committees politically linked to the ballot-line parties or candidates even they are legally independent.

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<sup>109</sup> See, e.g., Diana Dwyre, After *Citizens United* and *SpeechNow.org*: Considering the Consequences of New Campaign Finance Rules, Paper Prepared for Delivery at the Am. Political Sci. Ass'n Meeting (Sept. 1-4, 2011).

If disclosure is to serve its purpose of informing the voters of who is paying for advertising that supports or opposes candidates, the PASO test should be applied to require financial disclosures by these organizations when their spending crosses a reasonably high monetary threshold. Or, if this is seen as unduly burdening organizations that combine electoral and non-electoral activities, the PASO test could be used for those independent committees whose principal officers and directors had within a defined period of time – say, five years – served as officers, directors, or paid employees of a political party committee, candidate’s campaign committee, leadership PAC,<sup>110</sup> or elected official. Similarly, the PASO test could be used for organizations that have benefited from the fundraising efforts of officeholders or candidates. These and similar tests could be a means of distinguishing the “shadow party” or candidate-collaborator committees from committees that have political goals other than simply aiding candidates, parties, or party factions. Moreover, the political privacy of donors to organizations that engage in both electoral and non-electoral activity could be protected by the proposal put forward in section A, *supra*, that such mixed organizations be allowed to create campaign accounts with disclosure limited only to donors to those campaign accounts, provided that only the campaign account be used to pay for campaign activity.

Stimulated at least in part by *Citizens United*, many non-candidate, non-party committees have come to play a significant candidate-like or party-like role during much earlier phases of the campaign process than BCRA’s thirty-day and sixty-day windows, and their activities are not necessarily limited to broadcast media. If their finances are to be subject to the disclosure that *Citizens United* deems the “proper way” to regulate campaign finance, then BCRA’s media and

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<sup>110</sup> A leadership PAC is a political committee “directly or indirectly established, financed, maintained, or controlled” by a candidate for federal office or a federal officeholder, 11 C.F.R. § 100.5(e)(6) (2011), that is not the federal official’s or candidate’s own campaign committee but is used by its sponsor to provide financial support for candidates for other offices.



temporal limitations on the definition of what counts as election-related spending should be dropped and replaced by something like the PASO test, either across the board, or, at least for those organizations that are particularly close to candidates or parties. Such committees are most likely to be the ones that serve as vehicles for corporations barred from giving to candidates and national parties or wealthy individuals who already hit the statutory ceiling on donations to candidates – to channel money into elections.

### C. Piercing the Corporate Veil

A central challenge for disclosure in the post-*Citizens United* independent spending era will be ferreting out the identities of the people who are actually the sources of funding for the independent committees that loom so large in our election campaigns. Paradoxically, this is not likely to be a problem when the reported donor to a committee is the sort of publicly held, publicly traded corporation that is the focus of concern for people troubled by the thought of corporate campaign spending. These corporations will often be well known to the public or at least better known than their officers, directors, or principal shareholders. The disclosure that, say, the Target Corporation has made a substantial donation to an independent committee<sup>111</sup> is likely to be at least as meaningful to voters if not more so than a disclosure accompanied by additional information concerning Target's officers, directors, or principal shareholders. So, too, there is not much of a disclosure concern when a union or other mass membership organization gives a campaign contribution to an independent committee. When the Service Employees International Union, the American Federation of Teachers, or the National Rifle Association engage in independent spending in their own name or contribute to other independent

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<sup>111</sup> See, e.g., Martiga Lohn, *Target Corp. Spending Company Money On Candidates*, REALCLEARPOLITICS (July 27, 2010), [http://www.realclearpolitics.com/news/ap/us\\_news/2010/Jul/27/target\\_corp\\_\\_spending\\_company\\_money\\_on\\_candidates.html](http://www.realclearpolitics.com/news/ap/us_news/2010/Jul/27/target_corp__spending_company_money_on_candidates.html).

committees, their funding reflects reflect broad support from a large number of small donors and their organizational names alone provide adequate information to the voters. There would be little point in requiring independent committees that receive donations from these organizations to also report their officers, directors, or principal individual donors.

The real disclosure issue arises when a 501(c)(4) social welfare organization, 501(c)(6) trade association, or Super PAC reports donations from a dummy or shell corporation or LLC which gets its funds from one or a small number of shareholders, or from a nonprofit that does not have a mass membership base but serves primarily as a vehicle for pooling funds from a small number of large donors and channeling them to independent spending committees. The potential for abuse by shell or dummy corporations was sharply underscored in August 2011 when reporters noted that the Romney Super PAC, Restore Our Future, had reported in its June 30th filing receipt of a \$1 million donation from “W Spann LLC,” a Delaware corporation with a Manhattan address that had been formed in March, made its contribution in April, and dissolved in July, with no apparent activity other than the donation to Restore Our Future. To tamp down the resulting controversy, the anonymous donor — a former executive at the investment firm Romney once headed — soon came forward.<sup>111</sup> But that is unlikely to be the last time such a device is used to avoid disclosure. Indeed, Super PAC filings in early 2012 reported donations from such supporters as F8 LLC and RTTTA LLC – entities whose names are so non-descriptive that the donations might as well be treated as anonymous. Fittingly, the comedian Stephen Colbert, who had already created his own Super PAC, Americans for a Better Tomorrow, Tomorrow, to draw attention to the Super PAC phenomenon,<sup>112</sup> announced he would form an

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<sup>111</sup> See Michael Isikoff, *Mystery Million-Dollar Romney Donor Revealed*, NBC NEWS (Aug. 6, 2011), <http://www.msnbc.msn.com/id/44046063/ns/politics/t/mystery-million-dollar-romney-donor-revealed/#.T0qcaYeffng>.

<sup>112</sup> See FEC Adv. Op. 2011-11 (*Colbert*) (June 30, 2011), 2011 WL 2662412.

anonymous shell corporation — appropriately named “Anonymous Shell Corporation” — to provide his donors with the same opportunity that donors to other Super PACs enjoy.<sup>113</sup> And if it should happen that a corporation contributes to a trade association, which in turn contributes to a Super PAC, the Super PAC would only have to report the trade association as the donor, without any reference to the corporation behind the trade association.<sup>114</sup> Similarly if a 501(c)(4) were to make a contribution to its affiliated Super PAC, the Super PAC would report the (c)(4) as the donor, not the individuals behind it. That appears to be the case, for example, with the conservative Super PAC FreedomWorks for America which received nearly half its funding from its affiliated – and non-disclosing -- nonprofit FreedomWorks, Inc.<sup>115</sup>

If disclosure is to successfully inform the public who is providing the funds that are paying for an election campaign, then independent committees, when they are required to report their donors, should be required to source all contributions back to a publicly held corporation, a mass membership organization, or to an individual. If a trade association provides a contribution, disclosure would have to include the public corporations and individuals that provide the trade association with its campaign funds. If a contribution is provided by a nonprofit corporation that relies on individual contributions for its funds, the independent committee’s contribution report would have to include the principal individual donors to the nonprofit, defined either as those who provided more than a threshold fraction (say five percent) of the nonprofit’s funds or, given that such a fraction may be a moving target, those who donated more than \$10,000 to the

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<sup>113</sup> See Justin Sink, *Colbert Creates Shell Corporation To Lampoon Karl Rove’s Groups*, THE HILL, Sept. 30, 2011, <http://thehill.com/video/in-the-news/184755-colbert-creates-shell-corporation-to-lampoon-rove-money-laundering>.

<sup>114</sup> See, e.g., R. SAM GARRETT, CONG. RESEARCH SERV., R42042, “SUPER PACS” IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS (2011).

<sup>115</sup> See Eliza Newlin Carney, *Super PAC Money Getting More Scrutiny, Complaints, Roll Call*, Feb. 21, 2012, [http://www.rollcall.com/news/super\\_pac\\_money\\_getting\\_more\\_scrutiny\\_complaints\\_rick\\_santorum-212571-1.html](http://www.rollcall.com/news/super_pac_money_getting_more_scrutiny_complaints_rick_santorum-212571-1.html)

nonprofit (or if the nonprofit segregates campaign and noncampaign funds, more than \$10,000 to the nonprofits campaign account).

The key point would be to make public when large donors, not small shareholders or a mass membership base, are behind the intermediaries who formally make the donations to the independent spenders that are aiding or attacking candidates. This need not be administratively burdensome. The FEC (and state regulators for state elections) could simply require that a Super PAC or other independent spender subject to donor disclosure requirements may not use funds for independent spending unless those funds come from an individual, a publicly held business corporation, a labor union, or a mass membership organization, or if its funds do come from a nonprofit corporation, trade association, or closely held corporation, it may use those funds only if the independent spender publicly reports the requisite information concerning the natural persons or public corporations that provided the nominal donor with campaign funds above a threshold level. This would not bar the use of corporate funds, but simply require that trade associations and nonprofits that rely on donations from other firms or individuals reveal the sources of their funds. To reduce the administrative burden, if the donating trade association or \$10,000 or more to its campaign account), then the reporting independent committee could simply list the contributing trade association or 501(c)(4) and provide a link to its website to satisfy the requirement that all campaign expenditures be traced to the individuals, business corporations, or unions that provide their campaign funds.

Such a rule requiring that all campaign spending by independent committees be traceable to individuals, business corporations, labor unions, or mass membership organizations would go far towards assuring that disclosure serves its intended function of letting the voters know who is paying for the campaign messages they are hearing. With more and more campaign funds being

routed through independent committees rather than candidates' committees or parties, and with corporations able to give to such independent committees and, arguably more importantly, wealthy individuals able to give unlimited amounts through shell corporations and nonprofit corporations, adopting disclosure rules requiring that spending be traced back to the firms and individuals that are the real sources of campaign spending is of increasing importance. With limits on spending by and donations to independent committees gone, disclosure of the individuals behind the independent committees becomes more critical. If disclosure is to be meaningful, rules requiring that spending be linked to the underlying donors – not the nominal donors -- are essential.

#### D. Providing for Timely Disclosure

In addition to expanding the period in which ads that support or oppose candidates are treated as election-related, those organizations that pay for such ads ought to be required to disclose the donors behind the ads in a timely fashion. One of the striking features of Super PAC spending at the outset of the 2012 presidential election was the lack of any formal disclosure of the identity of Super PAC donors before the first four crucial presidential nominating contests: the Iowa caucuses and the New Hampshire, South Carolina, and Florida primaries. Although Super PACs, like other federal political committees, are required to disclose all donors who give more than \$200, federal law permits them to report on a semi-annual basis in a non-election year, such as 2011. As a result, none of the Super PACs active in the summer and fall of 2011 had to report any information concerning their donors in the six months between June 30, 2011, and the end of the year. As many of the Super PACs did not come into existence until after June 30th, there was no reported information concerning those Super PACs at all. Indeed, of the twenty Super PACs identified by the media as playing a role in the presidential election in 2011, only five had

reported any contributions to the FEC by the end of 2011, and all of that information was as of June 30th.<sup>116</sup>

Moreover, although federal law requires committees reporting on a semi-annual or quarterly basis to also file a pre-election report twelve days before an election, which would have given primary voters in New Hampshire, South Carolina, and Florida some sense of who was paying for the spending in their states – as they are not technically an election, the Iowa caucuses did not trigger the pre-election reporting requirement at all – the law also contains a loophole that enabled all the Romney, Gingrich, Santorum, Paul, Perry, and Huntsman Super PACs to defer donor disclosure until January 31, 2012. Political committees can switch their filing schedule from semi-monthly or quarterly with a pre-election report requirement to monthly with no pre-election report requirement. Unsurprisingly, in late December and early January all the major Super PACs took advantage of this option. The committees filed terse statements with the FEC changing their filing schedule, thereby postponing their disclosure obligation until after the first four big contests in January 2012.<sup>117</sup> Strikingly, the FEC even provided the Super PACs with guidance as to just how to do this.<sup>118</sup> Thus, although perhaps \$27 million had been spent by Super PACs by mid-January 2012, with Super PAC television advertising in connection with the January 21, 2012, South Carolina Republican presidential primary significantly outpacing spending by the Republican candidates' authorized committees, no information concerning

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<sup>116</sup> See Keenan Steiner, *Presidential Super PAC Disclosures May Leave Voters In The Dark*, SUNLIGHT FOUNDATION REPORTING GROUP (Dec. 22, 2011, 11:56), <http://reporting.sunlightfoundation.com/2011/presidential-super-pac-disclosures-may-leave-voters-in-the-dark/>.

<sup>117</sup> See Dave Levinthal, *Pro-Paul Super PAC Ducks Disclosure*, POLITICO (Jan. 9, 2012, 16:31), <http://dyn.politico.com/printstory.cfm?uid=0A410C75-F8B0-458D-98DF-8C084474FCCC>; Jack Gillum, *What Donors? Super Pacs Buy Time To Secret the Names of Donors Ahead of GOP Primaries*, THE COLUMBIAN, Jan. 7, 2012, <http://www.columbian.com/news/2012/jan/07/what-donors-super-pacs-buy-time-keep-secrets/>; Dave Levinthal & Kenneth P. Vogel, *Super Pacs Go Stealth*, POLITICO (Dec. 30, 2011, 04:35), <http://www.politico.com/news/stories/1211/70957.html>.

<sup>118</sup> *Resources for Committee Treasurers: Tips for Treasurers*, FEDERAL ELECTION COMMISSION, <http://www.fec.gov/info/TipsforTreasurers.shtml> (last visited Feb. 26, 2012).

Super PAC donors had been reported to the FEC or disclosed to the public since the preceding June 30th.<sup>119</sup>

This is one loophole that ought to be easy to close. At the very least, Super PACs should be required to make the same pre-election disclosures as are candidates' authorized campaign committees. More generally, disclosure schedules and practices ought to be significantly updated to take into account both the early starts that mark many campaigns, and the availability of technology that makes the filing of campaign reports easy and instantaneous. In many hotly contested elections, there is no such thing as a pre-election year any more. Certainly, in presidential elections, with many key nomination contests now in early January, the last quarter, if not the last half, of the pre-election year is part of the election period. In major Senate races, too, millions of dollars may be spent on ads before New Year's Day of the election year.<sup>121</sup> At the very least, monthly reports ought to be required of all political committees that raise or spend over a threshold amount of money, in addition to the pre-election reports.

More fundamentally, with current electronic technology there is no reason to limit reports to calendar periods. Reports are no longer typed up and mailed in, as they were in 1976; they are filed electronically over the Internet. It would make sense to require instantaneous – e.g., within twenty-four hours – reporting at least of large donations, such as those above, say, \$10,000. FEC regulations currently require political committees and other persons who make independent expenditures at any time during the calendar year up to and including the twentieth day before an election to disclose this activity within forty-eight hours each time that the expenditures

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<sup>119</sup> See Matea Gold & Melanie Mason, *'Super PACS' Dominate the Political Landscape*, L.A. TIMES, Jan. 18, 2012, <http://www.latimes.com/news/nationworld/nation/la-na-super-pacs-20120119,0,1538469.story>.

<sup>121</sup> See Tom Hamburger & Melanie Mason, *'Super Pacs' Are Showing Their Power*, L.A. TIMES, Jan. 1, 2012, <http://articles.latimes.com/print/2012/jan/01/nation/la-na-money-election-20120101> (observing that \$3 million in ads already aired against the state's incumbent Democratic Senator Sherrod Brown, a year before the election).

aggregate \$10,000 or more.<sup>122</sup> In addition, independent spenders must report within twenty-four hours when disbursements for independent expenditures aggregate at or above \$1000 during the last twenty days – up to twenty-four hours – before an election.<sup>123</sup>

Expedited reporting of independent expenditures ought to be supplemented by expedited reporting of the identity of major donors. Indeed, it is probably more important to report the donors than the spending. Any voter watching television, listening to radio, or logged on to the Internet can tell when someone is spending campaign money. What the voters do not know – and what could influence their appraisal of what they are being told, and, ultimately, their voting decision – is who is paying for those campaign ads. Relatively instantaneous electronic disclosure of the major donors to Super PACs – and, for that matter, to the campaign accounts of independent spenders that are not political committees -- is critical if disclosure is to accomplish the goal of timely voter information.

### III. Conclusion: Rightsizing Disclosure

In prior work, I have been somewhat skeptical about disclosure.<sup>123</sup> There is a limit to the ability of voters to absorb and respond to disclosed campaign finance information. Even if a voter is troubled about reports concerning a candidate's donors, if the voter thinks that candidate dominates her opponent on experience, character, or the most salient issues, the voter will be unable to act on her campaign finance concerns.<sup>124</sup> Moreover, with low reporting thresholds in effect in many jurisdictions and with politically active citizens able to disseminate disclosed contribution information through the Internet to the political opponents of donors' cause, it has

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<sup>122</sup> See 11 C.F.R. §§ 104.4(b)(2), 109.10(c) (2011).

<sup>123</sup> See 11 C.F.R. §§ 104.4(c), 109.10(d) (2011).

<sup>123</sup> See Briffault, *supra* note 36.

<sup>124</sup> *Id.* at 286-90.



been suggested that even smaller donors face a risk of retaliation and reprisal when their names, addresses, and donations are publically revealed.<sup>125</sup>

The concerns about Internet-facilitated reprisals against campaign donors may be overstated. In the two recent, extensively litigated cases claiming disclosure-based harassment, very little serious misconduct was found to have occurred. The more prominent of these cases involved allegations that backers of California’s Proposition 8, which was presented to the state’s voters in 2008 by those who sought to amend the state constitution to override a state supreme court decision legalizing same-sex marriage, had been targeted for harassment and reprisal. However, the federal district court considering the claim of the pro-Proposition 8 group that it ought to be exempt from donor disclosure requirements determined that most of the hostile acts Proposition 8 backers experienced were relatively mild – the theft of yard signs, the defacing of “yes on 8” bumper stickers, and nasty e-mails and Facebook messages.<sup>126</sup> The court found such incidents unsurprising “during the heat of an election surrounding a hotly contested ballot initiative.”<sup>127</sup> While threats of physical violence and vandalism were “deplorable” and properly subject to criminal sanction, only a small number of “random acts of violence directed at a very small segment of the supporters of the initiative [we]re alleged.”<sup>129</sup> As for the claims of business boycotts and verbal challenges to Proposition 8 supporters that garnered considerable media attention, the court found these to be acceptable forms of “uninhibited, robust, and wide open” public debate.<sup>130</sup> As the court pointed out, “[j]ust as contributors to Proposition 8 are free to speak in favor of the initiative, so are opponents free to express their disagreement through

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<sup>125</sup> *Id.* at 290-94.

<sup>126</sup> *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199-1205 (E.D. Cal. 2009).

<sup>127</sup> *Id.* at 1217.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 1218 (quoting *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982)).

proper legal means,” including, specifically, organizing boycotts of the businesses or employers of those giving to causes deemed objectionable.<sup>131</sup>

The second case involved a similar ballot proposition in Washington State. As previously noted, in *Doe v. Reed*, the Supreme Court rejected a facial challenge to the application of the disclosure provisions of Washington’s Public Records Act to the signatures on a petition to subject to referendum that state’s newly-enacted law extending “everything but marriage” benefits to same-sex unions. The Court then remanded the case for consideration of petitioners’ as-applied challenge. On remand, the district court engaged in extensive fact-finding, and thoroughly reviewed the evidence presented by eighteen witnesses or deponents, including five of the John or Jane Does who brought the suit. All of those who provided testimony had taken a prominent role in the referendum campaign, going well beyond merely signing a petition. They included Protect Marriage Washington’s campaign manager and spokesman, a state senator who had her picture and statement of support printed on the back of each petition, the president of “Faith and Freedom Network,” three pastors who had publically endorsed the petition, people who gave television interviews or legislative testimony, and many individuals who gathered signatures in public locations, waved banners in public places, or put bumper stickers on their cars or signs in their yards. Yet, after two years of litigation all the evidence of harassment they could come up with were some incidents involving “an angry text message” from John Doe #2’s brother,<sup>132</sup> “two ladies that glared” at John Doe #4 while he was collecting signatures at a grocery store,<sup>133</sup> “two or three Post-It notes containing vulgar language” placed on a vehicle,<sup>134</sup>

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<sup>131</sup> *Id.* at 1217.

<sup>132</sup> *Doe # 1 v. Reed*, No. C09–5456BHS, 2011 WL 4943952, at \*11 (W.D. Wash. Oct. 17, 2011).

<sup>133</sup> *Id.* at \*12.

<sup>134</sup> *Id.*

“passing motorists [who] made offensive gestures and shouted insults,”<sup>135</sup> some callers to the state senator who used vulgar language (although it wasn’t clear if this related to the referendum campaign),<sup>136</sup> someone who, on being handed a pro-referendum brochure “crumpled it up and threw it back . . . stating it was ‘a bunch of shit,’”<sup>137</sup> sundry nasty e-mails and critical phone calls, some people who argued with the petition solicitors, and, most shocking, two incidents of petition solicitors being “moonied” by passing motorists.<sup>138</sup> It does not appear that much of what Justice Scalia has referred to as “civic courage”<sup>139</sup> should be necessary to handle these acts of retaliation – none of which actually turned on the disclosure of the names and addresses of petition signers.

Similarly, in an extended critical evaluation of disclosure laws, the Institute for Justice identified precisely one incident in which a campaign finance report created a risk of retaliation, when a campaign contribution by someone who was an employee of an animal-testing laboratory – and whose name, address and employer were disclosed in a report filed by the candidate to whom she had contributed – landed her and her home address on a list maintained by what the Institute called “an animal-rights terrorist group” which referred to the lab employees on the list as “targets.”<sup>140</sup> However, nothing actually happened to the disclosed donor.<sup>141</sup>

At this point, then, despite the greater availability of disclosed information on publically accessible, searchable, and downloadable federal and state election agency websites, and the potential for politically active groups to use social media and the Internet to go after donors to campaigns or causes they oppose, it appears that relatively little in the way of illegal forms of

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<sup>135</sup> *Id.* at \*13.

<sup>136</sup> *Id.* at \*14.

<sup>137</sup> *Id.* at \*15.

<sup>138</sup> *Id.* at \*11-13.

<sup>139</sup> *Doe v. Reed*, 130 S.Ct. at 2828.

<sup>140</sup> David M. Primo, *Full Disclosure: How Campaign Finance Laws Fail to Inform Voters and Stifle Public Debate*, INST. FOR JUSTICE 7 (2011), [http://www.ij.org/images/pdf\\_folder/other\\_pubs/fulldisclosure.pdf](http://www.ij.org/images/pdf_folder/other_pubs/fulldisclosure.pdf).

<sup>141</sup> *Id.*

retaliation have occurred. To be sure, legal responses – like nasty e-mails, “uncomfortable conversations,” and even business boycotts – can burden donors, and the fear of both legal and illegal responses can make potential donors less likely to give or to hold their giving below the reporting threshold.<sup>142</sup> But the concern that the potential for increased dissemination of disclosed information concerning campaign supporters will chill political activity or lead to reprisals is, thus far, unsubstantiated by hard evidence.

Nonetheless, disclosure thresholds ought to be raised, and there is little reason to provide personal information, such as the names, addresses, or occupations, of small donors. Disclosure of large numbers of individual small donors whose names mean nothing to the public is unlikely to help voters evaluate the messages those donors are financing or the interests supporting a candidate. Indeed, extensive disclosure of small donors could very well distract attention from the big donors whose funds play a more meaningful role in understanding who is behind a candidate.

There remains the question of the voter education benefit of disclosure. There is certainly a limit on what voters can do with disclosed information. If more than one candidate is being backed by the same donor or types of donors, such as hedge fund directors or venture capitalists, or if the voter strongly prefers a candidate on certain issues even if she is troubled by the interests financing the candidate, it will be difficult for the voter to act on the disclosed information.<sup>143</sup> I suspect that much of the public and media attention to disclosure, or the lack of it, of the donors behind Super PACs and other independent committees is less because disclosure provides an effective response to the large sums of money being pumped into elections by wealthy individuals and interest groups and more because disclosure is the only form of

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<sup>142</sup> *Id.* at 6-7.

<sup>143</sup> For further development of this point, see Briffault, *supra* note 36, at 287-90.

regulation of such spending that the current Supreme Court will permit. Much as the “law of the instrument” tells us that “when all you have is a hammer, everything looks like a nail,”<sup>144</sup> so too, when the only regulatory tool available is disclosure, then disclosure is the regulatory solution people troubled by Super PACs and 501(c)’s call for.

Still, if disclosure is the only constitutionally available means of addressing the campaign activities of independent committees, then disclosure needs to be effective at doing the job it is called upon to do – informing the voters of the interests behind campaign messages and candidates in order to help them better appraise what they are hearing or seeing through the media and thus decide how to cast their ballots. That means we need much better disclosure of the donors to independent committees. With independent committees now major players, closely affiliated with the major candidates and parties, and prime vehicles for enabling wealthy individuals to commit to elections the resources they are not allowed to give directly to candidates or parties, disclosure laws need to be revised to provide full and timely information concerning the major donors financing the electioneering activities of these committees. That means (i) disclosure of the identities of all donors to groups engaged in electioneering unless their donations are clearly restricted to the groups’ non-electioneering activities; (ii) a broader definition of electioneering that recognizes that significant electioneering by independent groups occurs outside BCRA’s narrow pre-election window; (iii) requiring disclosure of the identities of the individuals and business corporations behind shell and nonprofit corporations that may be used to disguise the campaign finance activities of major donors; and (iv) instantaneous disclosure of all large contributions used to pay for independent spending.

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<sup>144</sup> See *Law of the Instrument*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Law\\_of\\_the\\_instrument](http://en.wikipedia.org/wiki/Law_of_the_instrument) (last visited Feb. 26, 2012).

Rightsizing disclosure by raising the monetary thresholds for disclosure to focus more precisely on those who give significant amounts to campaign while expanding the ambit of disclosure to more effectively reach the independent committees that, particularly since *Citizens United*, now loom so large in our election campaigns will make disclosure a more effective instrument for “increas[ing] the fund of information concerning those who support candidates” and “help[ing] voters to define more of the candidates’ constituencies.”<sup>145</sup> Nominally independent committees are increasingly the functional equivalent of the candidates’ campaign committees, while also outraising and spending candidates’ campaign committees. The best-funded Super PACs are dedicated to advancing the fortunes of specific candidates. They are managed by former members’ of the candidates political or office staffs, and use the same consultants as the candidates they are backing. Their principal donors typically consist of individuals who previously “maxed out” on donations to the campaign of the candidate of the candidate they are backing.<sup>146</sup> Candidates and their advisers raise funds for and appear at strategy sessions of Super PACs,<sup>147</sup> much as some of the top Super PAC donors travel with the candidates.<sup>148</sup> Moreover, the major donors to the independent committees have a lot at stake in the outcome of the election. Their businesses are often in industries subject to considerable government regulation and they would benefit considerably from government tax or regulatory decisions that could be affected by the election of the committee they are backing through a

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<sup>145</sup> *Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

<sup>146</sup> See, e.g., OpenSecretsblog, *Double-Duty Donors, part II: Large Numbers of Wealthy Donors Hit Legal Limit on Giving to Candidates, Turn to Presidential Super PACs in Continuing Trend*, Feb. 21, 2012.

<sup>147</sup> See, e.g., Michael Luo and Nicholas Confessore, Top Obama Adviser to Appear at ‘Super PAC’ Meeting, N.Y. Times, March 2, 2012, <http://thecaucus.blogs.nytimes.com/2012/03/02/top-obama-adviser-to-appear-at-super-pac-meeting/http://www.opensecrets.org/MT/mt-search.cgi?search=double+duty+donors&IncludeBlogs=8>.

<sup>148</sup> See, e.g., Eliza Newlin Carney, The Super PAC Paradox, Roll Call, March 12, 2012, *supra* note 19.

Super PAC or 501(c) nonprofit.<sup>149</sup> As a result, the justifications for requiring the disclosure of the identities of those who donate directly to candidates apply equally to the donors backing candidates through nominally independent committees.

Our laws are reasonably effective at obtaining and publicizing the identities of those who contribute directly to candidates; it is now critical that the laws be updated to make them effective at disclosing the donors to independent committees. Even if campaign finance disclosure has a limited direct effect on voters' decisions, it can still play an important salutary role in informing the public generally about the powerful economic forces that shape our elections, our politics, and ultimately, our public policy. Better disclosure concerning the donors to independent committees can provide the public with a valuable education concerning the influence of money on government and policymaking, and a window onto the interplay of campaign finance, lobbying, legislating, and political action. Disclosure can lead to new, responsive forms of political organization, closer monitoring of the linkages between major donors and elected officials in the legislative process, and new proposals for campaign finance or other political reforms. Such political action may also be a "proper way"<sup>150</sup> for informed citizens to react to the disclosure of the size and sources of the contributions at work in our election campaigns.

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<sup>149</sup> See, e.g., Jonathan D. Salant, Payday Lender Political Donors Hidden in Corporate Names, Bloomberg, Mar. 21, 2012, <http://www.bloomberg.com/news/2012-03-22/payday-lender-political-donors-hidden-in-corporate-names.html>; Dan Froomkin, Mitt Romney Super PAC's Big Donors Could Reap Many Dividends, Huffington Post, March 1, 2012, [http://www.huffingtonpost.com/2012/03/01/mitt-romney-super-pac-big-donors\\_n\\_1306868.html](http://www.huffingtonpost.com/2012/03/01/mitt-romney-super-pac-big-donors_n_1306868.html).

<sup>150</sup> Citizens United v. FEC, 130 S. Ct. 876, 916 (2010).