2020

Outing On Outside Group Spending On Elections

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Recommended Citation
Stan. L. & Policy Rev., forthcoming

OUTING OUTSIDE GROUP SPENDING ON ELECTIONS

Have the judicial decisions of the past two decades made it impossible to rein in the unregulated and often undisclosed political spending that has inundated recent elections? This article argues that even without a constitutional amendment, judicial reversals of the holdings of *Citizens United*[1] and *SpeechNow.org*,[2] or legislative action, there is much that can be done to reform campaign finance practices by enforcing laws already on the books. It details how those laws, if enforced, would ameliorate the worst excesses of current practices, and it elaborates and counters the arguments that some have raised to implementing these laws as Congress intended. The article describes the reasons for the current inaction of the FEC and the IRS–the two agencies charged with enforcing the relevant laws. It concludes that if the two agencies commit today to enforcing the law as written, campaign finance reform will be a reality without waiting for a messianic era of dramatic changes to the courts or Congress.

The project of reforming what can be reformed now is urgent as a matter of public policy. Outside spending has increased dramatically since 2010, exceeding the rate of increase of total federal campaign spending and even accounting for more spending than made by the candidates in over 120 competitive races in the last decade. This article outlines the detrimental effects of these developments on candidates, campaigns, and institutions, e.g., an increased threat of corruption, intensified political polarization, marginalization of political parties, and increasing levels of negative advertising. Because of the rapid rate at which outside spending is increasing, the trajectory of these adverse impacts threatens the integrity of political campaigns in 2020 and

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[1] Citizens United v. FEC, 558 U.S. 310 (2010).

[2] SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

future elections.

Previous decades have witnessed repeated efforts to reform campaign finance practices. In the 1990s, soft money[3] was seen as the scourge of campaign finance because it enabled donors to evade FECA regulations. At that time, favored vehicles for raising and spending soft money were political parties and certain section 527 groups.[4] The same period saw the emergence and widespread use of so-called issue ads in the run-up to elections that escaped FECA regulation by avoiding statements expressly urging the election or defeat of specific candidates in a federal election.[5]

In response, Congress enacted legislation to restrain or eliminate soft money associated with both political parties and 527 groups as well to curtail the misuse of issue ads. Since part of the appeal of section 527 groups was their freedom from stringent disclosure requirements, Congress passed a law in 2000 requiring those groups to disclose the identities of all contributors of $200 or more in a calendar year.[6] Subsequently Congress enacted the Bipartisan Campaign

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[3] "Soft money" is not a term of art in the Federal Election Campaign Act of 1971, 86 Stat. 382, as amended in 1974 (hereinafter FECA), codified at 52 U.S. §§ 301.01 *et seq*. Rather, it is a shorthand used to describe money that is raised and spent without being restricted by FECA's source, amount, and (in many instances) disclosure rules. Campaign funds subject to these rules, in contrast, are called "hard money."

[4] For the history, *see* McConnell v. FEC, 540 U.S. 93, 122-26 (2003); Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 32 EXEMPT ORG. TAX REV. 27, 40-42 (2001); Trevor Potter and Bryson B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the "Dark Money" Election*, 27 NOTRE DAME J. L. ETHICS & PUB. POL'Y 383, 428-32 (2013). Organizations known as 527 groups because of the section of the Internal Revenue Code (IRC) under which they are organized first emerged in 1975. *See* Pub. L. No. 93-625, §10(a) (1975), codified at 26 U.S.C. §527.

[5] *See McConnell*, 540 U.S. at 126-29; Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751 (1999).

[6] *See* Pub. L. No. 106-230, 114 Stat. 477 (2000), §2, codified at 26 U.S.C. § 527(j). 527 groups were used after BCRA because political parties were no longer permitted to receive soft money. *See* Benjamin S. Feuer, *Between Political Speech and Cold, Hard Cash: Evaluating the FEC's*

Reform Act of 2002 (BCRA),[7] which prohibited political parties from raising or spending soft money[8] and restricted the availability of so-called issue ads funded by soft money on the eve of primaries and elections.[9] Although these provisions of BCRA were upheld in *McConnell v. FEC*,[10] their success was short-lived because what amounted to soft money soon flooded politically active nonprofit organizations exempt from federal income taxation.[11] Moreover, the largely unregulated money raised by nonprofits is not only legally accumulated and spent; it is also usually not subject to disclosure, inspiring the moniker "dark money." The outcome of Congress's effort to rein in uncontrolled campaign spending was thus arguably worse than the situation when soft money was raised by parties because at least those sums were subject to reporting and disclosure.

For some commentators, these developments reflect a "hydraulic effect, i.e.," reform measures will inevitably prompt campaign money to find new outlets to influence elections and to become less transparent to boot.[12] The implication, as a policy matter, is that attempting

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New Regulations for 527 Groups, 100 NW. U.L.REV. 925, 926-29 (2006). *Cf*. Edward B. Foley & Donald B. Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S. LAW WEEK 2403 (Jan. 20, 2004).

[7] *See* Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (2002), codified in different sections of FECA.

[8] *See* 52 U.S.C. §30125(e).

[9] *See* 52 U.S.C. §§30125(a)(1), (2); *infra* notes 13-14 and accompanying text.

[10] 540 U.S. at 188, 190 n.73, 194, 196.

[11] *See* IRC §§501(a), 501(c)(4)-501(c)(6). The term "nonprofit" is a state law designation applied to organizations that do not distribute profits to shareholders or similar constituencies. Nonprofits that subsequently qualify for exemption from federal income taxation are called "exempt organizations." This article uses the two terms interchangeably.

[12] *See* Frank J. Sorauf, *Political Action Committees*, in ANTHONY CORRADO, THOMAS E. MANN, DANIEL R. ORTIZ & TREVOR POTTER, CAMPAIGN FINANCE REFORM: A SOURCEBOOK 123, 128

campaign finance reform is likely to be unproductive or even counterproductive.

The story can be told another way, however. First, BCRA did contain a provision that had teeth. The "electioneering communication" provision, which prohibited spending soft money on certain kinds of advertising on the eve of primaries or elections, was successful at requiring participants to use hard (regulated) money to fund much election advertising ostensibly linked to issues rather than candidates during intense pre-election periods because the provision relied on an objective test, namely, whether a candidate's name (or identifying feature) was included in the advertisement.[13] Although the provision's reach was limited in various ways,[14] it could not be easily evaded since, to be effective in influencing voters, election-eve advertising usually identifies the candidate supported or opposed by the ad's sponsors because pure issue advocacy is less likely to motivate voters to vote for the advertiser's preferred candidate.[15]

What derailed the electioneering communication provision's effectiveness was not a hydraulic shift of money from one funding vehicle to another, but the Supreme Court's ruling in *FEC v. Wisconsin Right to Life*, which rendered the provision largely ineffective by limiting its reach to communications that are the functional equivalent of express advocacy, a type of

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(1997); Samuel Issacharoff and Pamela Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1713, 1717-18, 1729 (1999).

[13] *See* 52 U.S.C. §30118(b)(2).

[14] The provision covers communications broadcast on radio or television, not those in the print or other media. The time limitation (30 days before a primary or 60 days before a general election are covered) means that identical communications occurring outside those two windows would not be affected and, hence, could be funded by soft money. For a comprehensive overview, *see* FEC, *Making Electioneering Communications*, www.fec.gov/help-candidates-and-committees/other-filers/making-electioneering-communications. For the background of BCRA, *see* Potter & Morgan, *supra* note 4, at 433-38.

[15] *See* Briffault, *supra* note 5, at 1787; Potter & Morgan, *supra* note 4, at 442 (stating that in 2004 and 2006, more than 90% of outside group spending was disclosed).

political speech already subject to regulation.[16] As a result, an effective tool of campaign finance reform was eliminated, opening the door to intense broadcast advertising on the eve of primaries and general elections funded by soft money.

Second, three years later, another Supreme Court decision was responsible for nonprofit organizations becoming key players in the surge of unprecedented amounts of money raised in elections. In *Citizens United v. FEC*, the Court held that corporations could use their general treasury funds to make independent expenditures and electioneering communications, while previously they had been required to fund such spending using hard money raised in their political action committees (PACs).[17] The holding not only enabled commercial corporations to spend their business revenues on political activities in potentially unlimited amounts;[18] it similarly permitted nonprofit corporations to engage in such spending as well. This, in turn, motivated individuals and entities seeking anonymity to choose politically active nonprofits as vehicles for their political spending because such nonprofits are rarely required to disclose the identities of their donors.[19] As a result, a significant part of outside group spending[20] shifted to nondisclosing nonprofits (dark money groups) during the nine months before the 2010 mid-term

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[16] *See* FEC v. Wisconsin Right to Life, Inc., 551 U.S. 449, 456-57, 469-70 (2007). This part of the opinion was signed only by Chief Justice Roberts and Justice Alito. *Id.* at 455. The Court did not, however, similarly narrow the meaning of electioneering communications subject to disclosure. *See* Citizens United v. FEC, 558 U.S. 310, 368-69 (2010).

[17] *See Citizens United*, 558 U.S. at 365.

[18] The degree to which commercial corporations have in fact increased their campaign spending since *Citizens United* is a matter of dispute. *See* Miriam Galston, *Buckley 2.0: Would the* Buckley Court *Overturn* Citizens United*?*, 22 U. PA. J. CONST.L. 687, 704-05 (2020).

[19] *See* Tara Malloy, *A New Transparency: How to Ensure Disclosure from "Mixed-Purpose" Groups after* Citizens United, 46 U.S.F.L. REV. 425, 429-30 (2011).

[20] *See infra* notes 37-38 and accompanying text.

elections,[21] and these groups have continued to play an outsize role in campaigns ever since.[22]

Third, the ease with which money has been able to flood outside groups of all kinds since 2010 is due in large part to the narrow definition of corruption established by *Citizens United* and its concurrent assertion that uncoordinated spending cannot be corrupting as a matter of law.[23] That reasoning led an appellate court the same year (*SpeechNow.org v. FEC*) to extend the reasoning of *Citizens United* to permit contributions in unlimited amounts by individuals or entities to independent spending groups.[24] The *SpeechNow.org* holding, in turn, led to the emergence of independent expenditure groups known as SuperPACS, which have increased dramatically since 2010 in number and the amounts they raise and spend on elections.[25] *Citizens United* also made possible contributions of unlimited amounts to certain nonprofit organizations

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[21] *See* Malloy, *supra* note 18, at 432-33. *Citizens United* was published on January 21, 2010, and the election occurred on November 2, 2010. The magnitude of the shift cannot be quantified because the nonprofits in question do not disclose the identities of their donors.

[22] *See* Karl Evers-Hillstrom, *More money, less transparency: A decade under* Citizens United, OPENSECRETS.ORG 10 ("Outside Spending by Group (2004-2018 Cycles))," https://www.opensecrets.org/news/reports/a-decade-under-citizens-united. Campaign spending by nonprofits reported to the FEC was less in 2016 than in 2012. There are many possible explanations. First, not all their campaign spending needs to be reported to the FEC: electioneering expenditures are reportable only for the thirty days before a primary and sixty days before an election. It is thus impossible to quantify similar expenditures outside those windows. In addition, it seems that nonprofits have not been reporting contributions they make to SuperPACs that, in turn, spend this money on campaign activities. Further, some contributors may have shifted from nonprofits to SuperPACs in 2015-2016 because, until December 31, 2015, contributions to nonprofits that exceeded the annual gift tax exclusion could trigger gift tax imposed upon the donor. *See* Protecting Americans from Tax Hikes Act of 2015 (the "PATH Act"), §408, Pub. L. 114-113 (eliminating this gift tax exposure). Further, because nearly half of SuperPACs are single-candidate independent expenditure entities, donors may perceive them as virtually guaranteed to use their contributions in ways benefitting the donors' preferred candidates, while the political spending of nonprofits may be less easily controlled.

[23] *See Citizens United*, 558 U.S. at 359-61.

[24] 599 F.3d 686 (D.C. Cir. 2010).

[25] In 2016, for example, outside groups raised $1.6 and spent $1.1.

exempt from federal income taxation, such as section 501(c)(4) groups that satisfy the standard for independence enforced by the FEC, but are nonetheless closely associated with one or more candidates.[26] As noted, contributions to such organizations are additionally attractive because the groups rarely need to identify their contributors and the amounts of the money each gives.

As the consequences of these judicial decisions have come to the fore, several aspects of contemporary campaign funding are increasingly viewed as problematic. First, there is widespread concern that the amount of money now spent in certain races is undesirable because it requires candidates and office holders to spend excessive amounts of time raising funds, creates a barrier for the non-affluent who want to run for office, makes candidates and officeholders reliant upon outside spending funded by a small number of extremely wealthy individuals and entities,[27] and leads to the electoral and governing processes being viewed as corrupt by the public.[28] Importantly, because outside group spending is frequently funded by

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[26] *See* Amanda R. Schwarzenbart, *Comment: Coordination is Corruption: An Argument for the Regulation of Coordinated Issue Advocacy under Campaign Finance Law*, 66 EMORY L.J. 1493, 1524-25 (2017). *See also infra* notes 75-77.

[27] *See* Karl Evers-Hillstrom, *Super PACs outmaneuver outdated rules to leave voters in the dark*, OPENSECRETS NEWS (Mar. 18, 2020) (noting that one donor gave a SuperPAC backing Elizabeth Warren in the 20020 presidential primaries $14.6 million of its $14.8 million budget), https://www.opensecrets.org/news/2020/03/sunshine-week-2020-super-pacs-loophole; Richard Briffault, *Campaign spending isn't the problem–where the money comes from is*, THE CONVERSATION (Nov. 2, 2018), https://theconversation.com/campaign-spending-isnt-the-problem-where-the-money-comes-from-is-104093.

[28] *See*, e.g., Molly J. Walker Wilson, *Financing Elections and "Appearance of Corruption": Citizen Attitudes and Behavior*, 63 CATH. U. L.REV. 953, 980 (2014) (citing survey data); Ben Jacobs & David Smith, *'Politics Are Corrupt': Fears About Money and its Influence on Elections Loom Large*, GUARDIAN (Jul. 8, 2016), www.theguardian.com/us-news/2016/jul/08/trump-clinton-sanders-super-pacs-election-money (noting that before the 2016 presidential elections, individuals "raised [the issue of campaign finance reform] as one of their main concerns").

contributions unlimited in amount, such groups now raise and spend more money on certain races than do candidates and parties.[29] Further, there is virtual consensus about the need for greater transparency regarding the sources of funding in elections, including the identities of contributors to dark money funding vehicles.[30] Hiding the identities of contributors denies the voting public of the type of information that courts have long argued is essential to enable citizens to make informed choices about candidates to support or oppose.[31] Dark money organizations and outside groups more broadly have become symbols of these problems.

Thus, the greater part of the increased sums injected into outside groups since 2010 has come from a surge in newly legalized sources for campaign funding, i.e., very large contributions by high wealth individuals and entities to groups operating in a manner only technically independent of candidates and parties.[32] The main cause of the rapid increase in campaign contributions and spending by SuperPACs and exempt organizations in the last decade, then, was judicial decisions making unlimited outside campaign spending possible.

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[29] *See infra* notes 61-64 and accompanying text.

[30] *See* Doe v. Reed, 561 U.S.186, 228 (2010) (Scalia, J., concurring) (asserting that without transparency and public accountability, "democracy is doomed"); *Citizens United*, 558 U.S. at 369. Courts recognize the possible need for an exception if disclosure of the identities of contributors could lead to harassment or retaliation. *See also id.*, 558 U.S. at 370. However, to date the courts have found few instances of threats that justify exempting persons from disclosure. Justice Thomas often opposes disclosure, *see* Del. Strong Families v. Denn, 136 S. Ct. 2376 (2016) (Thomas, J., dissenting from denial of *certiorari*).

[31] *See infra* notes 119, 125, 205, 234 and accompanying texts.

[32] *See Super PACs: How Many Donors Give*, OPENSECRETS.ORG (showing that in 2016, the top 1% of donors gave 88.6% of the money contributed to SuperPACs), https://www.opensecrets.org/outside-spending/donor-stats?cycle=2016&type=I. In 2018, the top 1% of donors gave 96% of the money given to SuperPACs. *See* https://www.opensecrets.org/outside-spending/donor-stats?cycle=2018&type=I. Because exempt organizations are not required to disclose their donors, there are no statistics about the percentage of contributions to them made by high wealth individuals.

An additional cause of this phenomenon is the lax enforcement or non-enforcement of politically active exempt organizations by the IRS as these groups have ventured more and more prominently into election financing.[33] Finally, the FEC has been unable or unwilling to enforce provisions of campaign finance law, including its own regulations, although the reasons for its inaction differ from those that have paralyzed the IRS.[34]

What, then, can be done? As this preamble suggests, outside spending groups are a significant cause of the problems described, and they threaten to assume an ever greater role if current trends continue.[35] Therefore, this analysis focuses on problems caused by outside spending groups. Yet it is critical to acknowledge at the start that interest groups perform an important function in a democracy and constitute the foundation of a healthy civil society. The objective of campaign finance reform is not to eliminate or gag interest groups. It is rather to call attention to certain excesses of some politically active interest groups and the ways they have begun to affect electoral politics adversely.

The thesis of this analysis is that the undesirable consequences of the surge in outside group spending in the last decade can be ameliorated, although not eliminated, if existing law already on the books is enforced.[36] Specifically, the FEC should enforce FECA's rules governing the classification of nonprofits as political committees and its disclosure requirements for nonprofits not needing to be classified as political committees. Similarly, the IRS should enforce

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[33] *See infra* Part V.

[34] *See infra* Part VI.

[35] *See infra* Part I.

[36] *See infra* Parts II-IV.

existing tax law rules governing nonprofits to curb the prevalence of dark money and refocus 501(c) organizations on their core missions.

In short, even without new legislation or overturning *Citizens United*, many of the worst excesses of contemporary campaign finance could be lessened. And without discounting the potential for hydraulic effects to funnel money into new, or newly attractive, campaign vehicles, there is considerable room as a legal matter and urgent need as a policy matter to improve campaign finance regulation now to better reflect common sense notions of integrity in the electoral system.

I. THE TRAJECTORY OF OUTSIDE SPENDING

Definitions of the term"outside spending" differ, depending upon whether the term includes everything except candidate spending[37] or everything except spending by candidates and political parties.[38] Thus, statistics about outside spending or the relative proportion of outside to other spending must be examined to determine what exactly is being measured. In what follows, outside spending excludes both candidate and party spending and includes spending by PACs, SuperPACs, nonprofits, corporations, and others.[39]

A. Outside Spending Has Increased Rapidly and Dominates Many Races

In general, total spending on federal races increases with every presidential election cycle

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[37] *See Outside Spending*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending; David B. Magleby, *The 2012 Election as a Team Sport*, in DAVID B. MAGLEBY, FINANCING THE 2012 ELECTION 2 (2014).

[38] *See* Ian Vandewalker, *Election Spending 2016: Outside Groups Outspend Candidates and Parties in Key Senate Races*, BRENNAN CTR. FOR JUST. (Nov. 1, 2016), https://www.brennancenter.org/sites/default/files/publications/Election%20Spending%202016%20outside%20groups%20outspend.pdf.

[39] "Others" includes IRC 527 groups not registered with the FEC, business entities other than corporations, and individuals.

and also with off-year elections, although off-year elections typically cost less than presidential ones.[40] At the same time, the rate of increase differs depending upon the category of spender (e.g., candidates, parties, PACs, exempt organizations), the recipient category (House, Senate, President), and the particular circumstances of individual campaigns (e.g., incumbent is up for re-election, open seat, primary or general election, presidential election year or mid-term).

Despite these variations, consistent trends have begun to emerge. Most prominent is spending by SuperPACs, a campaign vehicle that did not exist before 2010. Because they are classified as independent expenditure groups, i.e., they cannot coordinate with candidates as coordination is defined in FEC regulations and Advisory Opinions,[41] SuperPACs are permitted to

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[40] *See* Nathaniel Persily, Robert F. Bauer, & Benjamin L. Ginsberg, *Campaign Finance in the United States: Assessing an Era of Fundamental Change*, BIPARTISAN POL'Y CTR. 15 (Jan. 2018) (in current dollars) (including federal election spending totals from 1990-2016 and breaking totals down by type of spender), https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf. According to this source, total federal election spending in 2008 was $5,129,249,433; in 2012, $6,112,168,473; in 2016, $6,396,456,291. *Id*. That is a rate of increase of roughly 25% between the 2008 and 2016 presidential elections.

Spending does not always increase over time: federal parties spent somewhat less in 2016 than in 2012, as did candidates for president. *Id*. Congressional candidates often spend less in election cycles with presidential races than in the previous off-year election because of greater competition for funding. *See* DANIEL P. TOKAJI & RENATA E. B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 32 (Figure 1), 34 (2014). *See also Cost of Election*, OPENSECRETS.ORG (adjusted for inflation), https://www.opensecrets.org/overview/cost.php?display=T&infl=Y. Because Michael Bloomberg spent almost $900 million in the 2020 primaries, figures for aggregate spending in that race will likely be inflated. *See* Shane Goldmacher, *Michael Bloomberg Spent More Than $900 Million on His Failed Presidential Run*, N.Y. TIMES, Mar. 20, 2020, https://www.nytimes.com/2020/03/20/us/politics/bloomberg-campaign-900-million.html. Spending in the 2015-2016 presidential contest was lower than expected because Trump benefitted from an unusual amount of free publicity. *See* Niv M. Sultan, *OpenSecrets News, Election 2016: Trump's free media helped keep cost down but fewer donors provided more of the cash*, OPENSECRETS.ORG (Apr. 13, 2017), https://www.opensecrets.org/news/2017/04/election-2016-trump-fewer-donors-provided-more-of-the-cash; Nicholas Confessore & Karen Yourish, *$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES, Mar. 15, 2016, https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html.

[41] *See* 11 C.F.R. §§100.16, 109.1-109.23; FEC, *Making Independent Expenditures*, https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/. For

accept contributions of any size.[42] The contrast implied is with traditional PACs, which cannot receive contributions in excess of $5,000 for each primary and each general election from any donor.[43] In 2011-2012, the first presidential election after they were established, SuperPACs spent roughly $610 million, while in 2015-2016, they spent over $1.1 billion dollars,[44] an increase of roughly 80% over 2011-2012. In 2013-2014, the first full off-year congressional election after *Citizens United*, SuperPACs spent $345 million, while in 2017-2018, the second such cycle, they spent $822 million,[45] almost 240% more than in 2013-2014. The rate of increase in SuperPAC spending, in other words, far outpaces that of total campaign spending.[46]

The situation with nonprofit groups is more complicated. Cycle-to-cycle reported

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illustrative Advisory Opinions, *see* FEC AOs 2017-10, 2016-21, 2015-09, 2015-04, 2011-12, 2010-09. On FEC Advisory Opinions generally, *see* Michael M. Franz, *The Federal Election Commission as Regulator: The Changing Evaluations of Advisory Opinions*, 3 U.C. IRVINE L. REV. 735 (2013).

[42] *See* FEC, *Registering as a Super PAC*, https://www.fec.gov/help-candidates-and- committees/filing-pac-reports/registering-super-pac/.

[43] *See* FEC, *Contribution Limits*, www.fec.gov/help-candidates-and-committees/ candidate-taking-receipts/contribution-limits/.

[44] *See* Persily, et al., *supra* note 40, at 31. According to OpenSecrets.org, in the 2016 cycle SuperPACs raised slightly less than $1.8 billion and spent $1,066,914,448. *2016 Outside Spending by Super PAC*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S. For the methodology used by OpenSecrets.org, *see* https://www.opensecrets.org/overview/ methodology.php. The claim that in 2016 SuperPACs spent 17 times more than in 2010, when they were first established, Persily, et al., *supra* note 40, at 17, is misleading because 2010 was a non-presidential year and SuperPACs operated for less than one-half the election cycle.

[45] For the 2014 numbers, *see* Persily, et al., *supra* note 40, at 31; for the 2018 numbers, *see Outside Spending*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2018.

[46] *See supra* note 40 for the rate of increase of total election spending 2008-2012; Persily, et al., *supra* note 40, at 31.

spending by nonprofit organizations peaked in 2012 and has declined since then,[47] but not all spending by these groups is reported.[48] Nonprofits may have shifted some spending from express advocacy and electioneering communications, which are reported, to issue advocacy and ads placed outside the electioneering communication window,[49] which are not. Since the latter are not disclosed,[50] there is no way to compare such spending before and after *Citizens United* and *SpeechNow.org* to see if it has increased because of an influx of unrestricted contributions and, if so, by how much. Since this period saw a surge of unlimited contributions to politically active independent-expenditure nonprofits, it is likely that considerable amounts were spent on election-related issue advocacy rather than amounts reportable to the FEC both because some believe such advocacy is more effective than outright appeals to vote for specific candidates and because nonprofits are subject to a ceiling on their campaigning under IRS regulations.[51] Moreover, when

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[47] *See Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, opensecrets.org/outsidespending/nonprof_summ.php. The reason is unknown. According to one source, the decline reflected "a lack of enthusiasm ... about the presidential race." Robert Maguire, *OpensSecrets News: $1.4 billion and counting in spending by SuperPACs, dark money groups*, OPENSECRETS.ORG, https://www.opensecrets.org/news/2016/ 11/1-4-billion-and-counting-in-spending-by-super-pacs-dark- money-groups/.

[48] *See*, e.g., David B. Magleby, *SuperPACs and 501(c) Groups in the 2016 Elections* 31 (Nov. 2017), https://www.uakron.edu/bliss/state-of-the-parties/papers/magleby.pdf (noting nine candidates for president in 2015-2016 who had affiliated 501(c)(4) groups that reported no expenditures to the FEC).

[49] *See supra* note 18.

[50] *See* Justin Levitt, *The Drunkard's Search for Money in Politics*, SUMMARY JUDGMENTS (May 27, 2014) (cautioning that we know little about "darker-than-dark" money, i.e., money spent by exempt organizations on issue advocacy intended to influence an election), http://summaryjudgments.lls.edu/2014/05/the-drunkards-search-for-money-in.html.

[51] *See*, e.g., Treas. Reg. §1.501(c)(4)-1(a)(2). *See* also Kim Barker, *How Nonprofits Spend Millions on Elections and Call It Public Welfare*, PROPUBLICA (Aug.18, 2012), https://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public -welfare (describing groups that report higher amounts of political spending in a year to the FEC than to the IRS).

nonprofit groups contribute to SuperPACs, they do not necessarily report the sums involved as political expenditures. During the 2018 mid-term election cycle, nonprofits and other nondisclosing groups gave more than $176 million to SuperPACs and hybrid PACs,[52] none of which would have been reported to the FEC. Thus, the decline of reported spending by nonprofits in 2016 may reflect their adoption of different strategies for influencing elections rather than a reduction in political spending. In any event, the aggregate of reported outside spending from all sources in presidential elections has increased dramatically since *Citizens United* and *SpeechNow.org* were decided.[53]

Consistent with these statistics, the impact of outside spending since *Citizens United* and *SpeechNow.org* is dramatic. For example, in 2012, almost 30% of the television ads run in federal elections were funded by outside sources, while four years earlier they represented roughly 8 percent.[54] By the 2015-2016 cycle, 29% of political ads in the presidential race alone were funded by outside sources.[55] Further, in that cycle, aggregate outside spending was

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[52] *See* https://www.opensecrets.org/news/2019/01/dark-money/.

[53] *See Outside Spending*, OPENSECRETS.ORG, www.opensecrets.org/outsidespending/fes_summ.php?cycle=2012 (showing outside spending during 2011-2012 was $1,038,812,960); *Outside Spending*, OPENSECRETS.ORG, www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016 (showing outside spending during 2015-2016 was $1,417,279,238). Since the total numbers on the OpenSecrets.org websites include some party spending, I have deducted those amounts to calculate outside spending during these election cycles. For the increases in off-year cycles, *see supra* note 40 and accompanying text.

[54] *See* Erika Franklin Fowler, Michael M. Franz, Travis N. Ridout, *The Blue Wave: Assessing Political Advertising Trends and Democratic Advantages in 2018*, 53 PS: POLITICAL SCIENCE & POLITICS 57, 61 (2020) (Table 8).

[55] *See* Erika Franklin Fowler, Travis N. Ridout, and Michael M. Franz, *Political Advertising in 2016: The Presidential Election as Outlier?*, 14 THE FORUM 445, 447 (2016).

estimated to be almost 25% of all (reported) federal election spending.[56] According to the Wesleyan Media Project, as of May 10, more than half of the political ads aired in 2019-2020 were funded by dark money groups alone.[57]

Aggregate numbers, moreover, obscure greater impacts in specific settings. For example, more than half of the ads in the Republican presidential primaries in 2012 and 2016 were funded by outside groups,[58] and some statistics by election cycle obscure the fact that the percentage was "even higher" in the months preceding an election.[59] In addition, because spending by federal candidates and their campaigns has decreased slightly since 2008,[60] spending by outside sources not only represents an increasingly large percentage of federal election spending. It sometimes competes with and occasionally has eclipsed candidate spending. In the 2013-2014 cycle, for example, outside spending in four of five competitive Senate races was more than candidate spending in those races, with outside groups accounting for almost half the spending in those critical races.[61] In 2015, outside groups supporting particular candidates for president raised

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[56] *See* Maguire, *supra* note 47; *Outside Spending*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/fes_summ.php?cycle=2016.

[57] *See* Anna Massoglia & Ilma Hasan, *'Dark Money' overshadows 2020 election political ad spending*, OPENSECRETS.ORG, May 19, 2020, https://www.opensecrets.org/news/2020/05/dark-money-20-political-ad-spending/.

[58] *See WMP/CPR Special Report Outside Group Activity, 2000-2016*, WESLEYAN MEDIA PROJECT/OPENSECRETS.ORG, Aug. 24, 2016.

[59] *See also* Fowler et al., *supra* note 54, at 61 (noting that figures for outside group television advertising since 2012 obscured that the percentage was "even higher" in the months preceding an election and in competitive races).

[60] *See* Zachary Albert, *Trends in Campaign Financing, 1980-2016*, Report for Campaign Finance Task Force, BIPARTISAN POL'Y CTR. 19-20 (2016), https:/bipartisanpolicy.org/ wp-content/uploads/2019/05/Trends-in-Campaign-Financing-1980-2016.-Zachary-Albert..pdf.

[61] Ian Vandewalker, *Election Spending in 2014: Outside Spending in Senate Races since* Citizens United, BRENNAN CENTER FOR JUSTICE 1, 5 (2015),

more than twice as much as did the campaigns themselves.[62] In 2016, in twenty-seven congressional races, outside money exceeded candidate spending by almost 2:1.[63] As summarized by one watchdog group, "Outside spending surpassed candidate spending in 126 races since [*Citizens United*]. That happened just 15 times in the five election cycles prior."[64]

In sum, since *Citizens United* and *SpeechNow.org*, outside spending has been fueled by contributions unlimited in size made to groups formally classified as independent according to the FEC. This has enabled outside spending to increase dramatically in absolute terms. It has also allowed outside spending to represent an increasing proportion of overall election-related spending, to compete with more traditional sources of campaign financing, and in some instances, to dwarf spending by candidates or political parties. The consequences of these changes are complex because they affect the behaviors of other sources of campaign spending and, to a degree not yet understood, alter the dynamic among those who finance federal elections. The remainder of this Part and the following Part discuss the immediate and likely long-term effects of the steep upward trajectory of outside group campaign financing.

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https://www.brennancenter.org/sites/default/files/publications. Vandewalker called races competitive if they were considered "toss-ups" based upon polls in the two months before the election. *Id*. at 4. The candidates accounted for 41% of spending, while parties accounted for 12 percent. *Id*. at 5.

[62] *See* Ian Vandewalker, *Shadow Campaigns: The Shift in Presidential Campaign Funding to Outside Groups*, BRENNAN CENTER FOR JUSTICE 1, 2-3 (2015) (noting that during that period, candidates' campaign committees raised $129 million, compared to outside groups, which raised $283 million), https://www.brennancenter.org/sites/default/files/2019-08/ Report_Shadow_Campaigns.pdf.

[63] *See* Niv M. Sultan, *Outside groups spent more than candidates in 27 races, often by huge amounts*, OPENSECRETS NEWS, Feb. 24, 2017 (noting that in those 27 races, candidates spent a total of almost $367 million, while outside spending exceeded $683 million), https://www.opensecrets.org/news/2017/02/outside-groups-spent-more-than-candidates-in-27-races- often-by-huge-amounts/.

[64] Evers-Hillstrom, *supra* note 22 (emphasis in original).

B. Consequences of Increases in Outside Spending

Many commentators believe that the increase in spending by sources other than candidates and political parties is detrimental to the political process. Of course, there has always been outside spending in elections, but as described in the preceding section, it is mainly in the election cycles since *Citizens United* and *SpeechNow.org* that outside spending has routinely exceeded party spending, has exceeded spending by candidates in specific races, and threatens to exceed candidate spending in an increasing number of races. Further, since those decisions, outside spending as a proportion of total campaign spending has increased at a greater rate than other forms of campaign spending.[65] Based upon the trajectory from 2008 to 2016, it is obvious that the unlimited campaign contributions made possible by *Citizens United* and *SpeechNow.org* have reversed the decades-old pattern of candidates spending the vast majority of the money spent during federal campaigns.

Is this change problematic? Commentators express a variety of concerns about this new phenomenon, ranging from its effects on candidate behavior–before, during, and after elections--to its impact on institutions.

To determine the effect of outside spending on candidate and officeholder behavior, Daniel Tokaji and Renata Strause interviewed current and former members of Congress, congressional staff, and people associated with outside spending groups.[66] They found that outside groups influence the agendas of candidates, both before and after their elections, in numerous ways. Members of Congress frequently feel pressured to adopt large contributors'

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[65] *See* Evers-Hillstrom, *supra* note 22; Persily, et al., *supra* note 40, at 15.

[66] *See* TOKAJI & STRAUSE, *supra* note 40.

agendas from concern that otherwise those contributors will not support them or will even support their opponents.[67] Occasionally members have received explicit threats from outside spenders,[68] although more often the threat is implicit. Those who spoke to Tokaji and Strause felt that scorecards published by outside groups significantly influence lawmakers' voting and that the threat is especially feared in connection with primary elections.[69] Clearly, outside groups have long influenced candidates and officeholders in these ways and there is nothing unusual, much less invidious, about citizens saying that they won't support, financially or otherwise, a candidate whose policies they dislike. What is different today is that the vastness of the amounts of money at stake since *Citizens United* and *SpeechNow.org* has created risks that did not exist previously when spending by outside groups was relatively small compared to spending by candidates and political parties.[70] In short, as outside group money increasingly dominates other spending, there is a risk that candidates will feel beholden to those groups to an unprecedented degree rather than to a wider range of constituents.

Relatedly, critics of the increasingly important role of outside spending characterize it as an end-run around contribution limits.[71] Because courts since *Buckley v. Valeo* have consistently

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[67] *See* TOKAJI & STRAUSE, *supra* note 40, at 76-79, 82-83. A threat to back an opponent would seem credible for a primary, but less likely in a general election.

[68] *See* TOKAJI & STRAUSE, *supra* note 40, at 81-82.

[69] *See* TOKAJI & STRAUSE, *supra* note 40, at 83-87.

[70] *See*, e.g., Briffault, *SuperPACs*, 2012 COLUM. L. REV. 1644, 1687 (stating that "[i]n New Hampshire and South Carolina the SuperPACs backing Ron Paul and Rick Santorum 'seemed to be defining the battlefield for the two candidates'").

[71] *See* Dan Froomkin, *Candidate-Specific SuperPACs Offer End Run For Maxed-Out Donors: Study*, HUFFINGTON POST (Oct. 4, 2011), http://www.huffingtonpost.com/2011/10/04/candidate-specific-super-pacs-donors_n_994260.html; Vandewalker, *Election Spending 2014*, *supra* note 61, 2 (arguing that outside spending "threatens to eviscerate two

identified contributions to candidates as the greatest potential source of corruption,[72] an end-run around contribution limits opens the door to rapidly increasing opportunities for the reality or appearance of corruption.[73] This threat of corruption is magnified now that politically active independent-expenditure nonprofits, which are rarely required to identify their donors, are permitted to received contributions of unlimited amounts, potentially involving millions or tens of millions of dollars.[74] Despite being independent as a matter of law, many independent-expenditure groups maintain strong connections to the candidates they support. For example, the groups are frequently established and operated by former staff members of the candidate in question; use common vendors, such as pollsters and consultants, with the candidate; are increasingly operated to benefit a single candidate; can feature the supported candidate as a speaker at their fundraising events; and are even permitted to allow the candidates they are funding to solicit contributions at the events the groups hold to raise money for their campaigns.[75] Firewalls that enable them to claim independence under campaign finance laws

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cornerstones of the regulation of money in politics: contribution limits and transparency").

[72] *See Buckley,* 421U.S. at 28-29.

[73] Corruption can be initiated by candidates as well as by donors. *See* Jennifer Mueller, *The Unwilling Donor*, 90 WASH. L. REV. 1783 (2015).

[74] *See Outside Spending by Disclosure, Excluding Party Committees*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/disclosure.php.

[75] *See* Galston, *supra* note 18, at 738-39, 752 n.306 and accompanying text (summarizing types of relationships between candidates and independent groups); FEC, *Definition of a Political Committee*, 66 Fed. Reg. 13681, 13683 (Mar. 7, 2001) (Notice of proposed rulemaking) (referring to the "guise of independence" of such groups). *See also* David B. Magleby & Jay Goodliffe, *Interest Groups in the 2016 Election*, FINANCING THE 2016 ELECTION 107 (ed. David B. Magleby) (2019) (arguing that many SuperPACs had such close ties to parties that it might be incorrect to view parties as weak). *See also* Michael M. Franz, Erika Franklin Fowler, and Travis N. Ridout, *Loose Cannons or Loyal Foot Soldiers? Toward a More Complex Theory of Interest Group Advertising Strategies*, 60 AMER. J. POL. SCI. 738 (2016) (finding that messaging of multi-issue interest groups tends to reflect the positions of candidates they support, although

appear flimsy to ordinary citizens not trained in the technical standards adopted by the FEC.[76] Because candidates usually know the identities of large donors,[77] even if these are not publicly disclosed, it would be surprising if candidates were indifferent to the positions urged by their largest contributors.

On the surface, the threat of corruption due to coordination may seem in tension with the threat of excessive pressure exerted by large contributors, discussed earlier. Are donors and candidates working together or not? The two threats can, however, exist simultaneously if there is a lack of true independence, arguably permitted by the lax rules for independence, and it is the large contributor rather than the candidate who wields the greater degree of power.

Among the most serious accusations made against the surge of outside spending is that it accelerates polarization. Critics who level this charge note that interest groups and wealthy individuals tend to be "intensely ideological."[78] Accordingly, as their influence grows, they exert pressure on the electoral system to produce increasingly polarized outcomes, hastening the tendency toward polarization that has characterized politics in America in recent years.[79] Recent

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that is less true of single-issue membership groups).

[76] *See* FEC Advisory Opinion 2010-09, July 22, 2010; Eliza Newlin Carney, *Firewall Between Candidates and SuperPACs Breaking Down. Rules of the Game*, ROLL CALL (Feb. 18, 2014), https://www.rollcall.com/2014/02/18/firewall-between-candidates-and-super-pacs-breaking-down-rules-of-the-game.

[77] *See* TOKAJI & STRAUSE, *supra* note 40, at 76-77. This is also common sense, since the groups and the candidates can, and do, have contact, as long as there is no coordination about ad buys, the content of election-related messages, etc. Sometimes a candidate's campaign recommends an independent expenditure entity to a donor that has maxed out on contributions to the candidate.

[78] *See* RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION xiv (2015). Frequently this is because interest groups form around a single issue.

[79] *See* LA RAJA & SCHAFFNER, *supra* note 78, at xiv.

empirical research finds that as the amounts contributed by PACs grows, political parties become increasingly fragmented.[80] According to one commentator, this contrasts with previous outside groups, such as traditional PACs and entities representing commercial interests because, since 2010, "the plurality of new groups" have been membership and ideological groups that further more extreme positions.[81]

Several commentators concerned about the level of polarization in elections and in political life more generally believe that the marginalization of political parties in the last decade,[82] a byproduct of the prominence of outside groups, has been a significant cause of the tendency toward extremes in elections. For these theorists, it is political parties that traditionally held officeholders accountable and were forces for negotiation and compromise, characteristics enabling them to counter tendencies toward extreme positions.[83] For example, according to

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[80] *See* Mike Norton & Richard H. Pildes, *How Outside Money Makes Governing More Difficult*, 20 ELECTION L. J. 1 (2020) (comparing contribution amounts at the state level and interviewing lawmakers, staff, and party officials).

[81] *See* Albert, *supra* note 60, at 13-14 (stating that prior to 2010, business groups spent the most of outside groups on elections, while ideological groups have outspent business groups since 2010). *See also* David Blankenhorn, *The Top Fourteen Causes of Polarization*, THE AMERICAN INTEREST (May 16, 2018), https://www.the-american-interest.com/2018/05/16/the-top-14-causes-of-political-polarization/ (including the rise of identity-group politics among the main causes of polarization). *Cf*. Richard Pildes, *Participation and Polarization*, 22 U. PA. J. CONST. L. 341, 345 (2020) (arguing that individual small donors are often as polarizing, and sometimes more polarizing, than other participants in elections).

[82] *See*, e.g., Fowler et al., *supra* note 54, at 61 (noting that television advertising by parties in the last decade has decreased from 20%-39% of all such advertising to 10%), https://www.cambridge.org/core/ journals/ps-political-science-and-politics/article/ blue-wave-assessing-political-advertising-trends-and-democratic-advantages-in-2018/5545DDBE5126 7FEBB492E08F24DD4B3E/share/d5c20e79fb7a891983284e83528113ef16b344bf.

[83] *See* LA RAJA & SCHAFFNER, *supra* note 78, at iv; Jonathan Rauch, *Political Realism: How Hacks, Machines, Big Money, and Back-Room Deals Can Strengthen American Democracy*, in WILLIAM F. CONNELLY, ET AL., VIRTUES AND DEFECTS OF PARTISANSHIP, POLARIZATION, GRIDLOCK 189, 190-194 (2017). *See also* NANCY ROSENBLUM, ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP (2010).

Richard Pildes, the "diffusion of political power away from the political parties" and the counterpart weakening of the power of leadership within parties have reduced opportunities for "the kinds of negotiations, compromises, and pragmatic deal-making that enable government to function effectively, at least in areas of broad consensus that government must act in *some* way (budgets, debt-ceiling increases)."[84] For Pildes, this occurs because officeholders are freed from the moderating tendencies of parties by virtue of their ability to raise unlimited amounts of money from interest groups, and the potential synergy between officeholders and interests groups is especially potent when politics in general is polarized.[85]

Parties are often seen as moderating forces because they "have the strongest incentives, through elections, to aggregate the broadest range of interests"[86] and to make deals that "stick."[87] Individual officeholders, according to this view, tend to have short-term horizons, typically their own re-election, while political parties see the need for strategic, long-term planning.[88] Parties also have broad agendas because they aim at attracting voters across the nation and rely on coalitions to govern effectively.[89] In contrast, outside groups, especially exempt organizations and many SuperPACs, are often motivated by the "insular interests" favored by their donors

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[84] *See* Richard Pildes, *How to Strengthen our Polarized Politics? Strengthen political parties.*, Monkey-Cage, WASH. POST (Feb. 6, 2014).

[85] *See* Pildes, *supra* note 84.

[86] *See* Pildes, *supra* note 84.

[87] *See* Rauch, *supra* note 83, at 190, 192

[88] *See* Rauch, *supra* note 83, at 195.

[89] *See* Ian Vandewalker & Daniel I. Weiner, *Stronger Parties, Stronger Democracy: Rethinking Reform*, BRENNAN CENTER FOR JUSTICE 4, 8 (2015)

rather than positions that could appeal to a national majority.[90] As a consequence, such groups tend to support more ideologically extreme candidates and officeholders, which intensifies an existing trend for fewer moderates to be elected to office in both parties.[91]

The growing importance of outside groups is also criticized because of the tendency of outside groups to fund negative advertising. Research by the Campaign Finance Institute reveals that from 1990 until 2010, almost without exception, non-party independent expenditures in Congressional races went to support candidates rather than to defeat them; in 2010 and subsequent elections, in contrast, in all but one race, independent expenditures to defeat candidates for either house of Congress exceeded, or far exceeded, those to support them.[92] According to the Wesleyan Media Project, the number of negative ads in the 2018 off-year federal election surpassed those in 2014 by 61 percent.[93] While candidate-sponsored ads tended to be positive,[94] group-sponsored ads were between 72% and 92% negative.[95]

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[90] *See* T. Hart Benton, *Rethinking Political Party Contribution Limits: A Roadmap to Reform,* 63 LOYOLA L. REV. 257, 278-79 (2017).

[91] *See* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011) (listing sources documenting the decreasing presence of moderates in Congress in the late 1990's and early 2000's).

[92] *See* Michael J. Malbin & Brendan Glavin, *CFI's Guide to Money in Federal Elections: Essays and Tables Covering the Elections of 1974-2018*, THE CAMPAIGN FINANCE INSTITUTE 80 (Jan. 2020). The exception before 2010 was in 2006, when independent expenditures against Republicans in Congressional races were almost twice the amount spent to support Republicans in those races. *Id*. The exception in 2010 occurred when independent expenditures to support Republican candidates for the Senate exceeded those to defeat them. *Id.*

[93] *See 61% Increase in Volume of Negative Ads*, WESLEYAN MEDIA PROJECT (Oct. 30, 2018) (Figure 1) (calculating the figures as of October 25, i.e., a week before the election), https://mediaproject.wesleyan.edu/103018/. These numbers cover only broadcast television and national network and cable ads, not local cable ads. *Id.* The percentage of television attack ads was actually lower in 2018 than in 2014, but may have seemed greater due to the increase in volume. *See* Fowler et al., *supra* note 54, at 60.

[94] *See Half of Senate Ads Negative in Past Month*, WESLEYAN MEDIA PROJECT (Oct. 4, 2018) (Table 5), https:// mediaproject.wesleyan.edu/100418 (showing Democratic candidate-sponsored

In short, outside groups now routinely outspend political parties, diminishing parties' moderating influences, and they concentrate their resources on negative advertising. They also increasingly outspend candidates in competitive races. The result of this surge in the fundraising power of outside groups is most visible when such groups back or try to defeat candidates in primaries, but the effect of their power is present, although less visibly, when they affect candidates' messaging[96] or their agendas once elected.[97]

The preceding claims about the potential dangers of outside spending need to be qualified. First, equating all non-candidate, non-party spending with outside spending glosses over the close connections that some candidates and parties have with outside groups. This is especially apparent with single-candidate SuperPACs, which are formed to raise unlimited funds to engage in independent spending on behalf of specific candidates.[98] They are classified as

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ads on broadcast T.V. from September 4 to October 1, 2018, were between 14% and 18% negative and Republican candidate-sponsored T.V. ads then were between 33% and 37% negative).

[95] *See Half of Senate Ads Negative in Past Month*, *supra* note 94 (Table 6) (showing that group-sponsored broadcast T.V. ads for Senate races between Sept. 4 and Oct. 1 were equally negative whether they were pro-Republicans or pro-Democrats, whereas Republican group-sponsored T.V. ads for House races during that time frame were twenty percentage points higher than Democratic ones (72% v. 92%)).

[96] For example, Tokaji and Strause found a number of staffers believe that outside groups interfered with candidates' own messaging during the campaign by funding ads that the candidate did not endorse and, in some instances, would not have endorsed. *See* TOKAJI & STRAUSE, *supra* note 40, at 61-62, 64, 78-79. Candidates cannot work with outside groups on the groups' messages because the groups must be independent of candidates to be permitted to raise unlimited amounts of money from donors. Such instances cause candidates to lose control of their message, since the electorate typically does not distinguish between messages funded by a candidate's own campaign, as compared with those funded by outside groups supporting the candidate. *See id.* at 61.

[97] *See supra* notes 66-69 and accompanying text.

[98] In 2015-2016, roughly twice as many SuperPACs registered with the FEC as had registered during the 2012 election cycle, and they spent $475 million or almost 80% more on the specific candidates for whom they were formed than in the 2012 cycle. *See* Soo Rin Kim, *Mine, all*

outside groups because, to be able to raise unlimited sums from donors, they cannot coordinate with their candidate's campaign.[99] Yet, as noted above, SuperPACs often have close ties with the candidates they support.[100] As a consequence of the close ties between candidates and the single-candidate SuperPACs that support them, commentators caution against treating all these entities' expenditures as outside spending.[101] Researchers have also found that most outside groups (whether SuperPACs or not) are actually part of an extended party network and rarely work to elect a candidate disfavored by the establishment.[102]

Clearly, not all outside spending fosters corruption or polarization, and not all pressure applied to candidates by donors (existing or prospective) hijacks candidates' agendas or prevents lawmakers from performing their responsibilities properly. Representative government rests on the premise that responsiveness to constituencies is an important part of the function of those who hold elected office.[103] At the same time, responsiveness to one's constituencies is not the equivalent of responsiveness to the highest bidder, nor do the financial requirements for being elected to public office relieve officials of their responsibility to consider claims of the entire

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mine: Single Candidate SuperPACs, creeping down-ballot, Nov. 10, 2016, https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot. In contrast, in 2011-2012, 75 single-candidate SuperPACs spent $268 million on independent expenditures. *Id*.

[99] 52 U.S.C. §30116(a)(7)(B).

[100] *See supra* notes 74-75 and accompanying text.

[101] *See* Magleby & Goodliffe, *supra* note 75, at 90 (distinguishing three types of SuperPACs: those connected to business or labor groups, political parties, and free-standing ideological groups). *See also* Malbin & Glavin, *supra* note 91, at 23. *Cf. id*. at 6 (stating that "Super PAC spending is not as efficient as spending controlled by the candidate's campaign committee").

[102] Robin Kolodny & Diane Dwyre, *Congruence or Divergence? Do Parties and Outside Groups Spend on the Same Candidates, and Does It Matter?*, 46 AMER. POLITICS RES. 375 (2018).

[103] *See* FEDERALIST PAPERS Nos.52, 57.

range of their constituents and the public interest.[104] The problem posed by the rate of acceleration of outside group financing of elections during the past decade is that, if left unchecked, it could prevent a balanced equilibrium from forming among candidates, parties, citizens, and other actors.

If the rapid growth of outside group spending is a major cause for concern, what can and should be done? The most immediate reforms that could curtail this trend revolve around identifying groups that properly should be classified as political committees, although they currently are not. As described below, this would improve transparency because political committees are subject to reporting and disclosure rules relating to their own operations and the identity of their donors. Properly classifying certain nonprofits as political committees could also reduce the flow of outside money because contributions to such committees are capped at $5,000 per contributor. Most nonprofits that would be eligible for classification as political committees are exempt from federal income tax as IRC §501(c)(4) social welfare groups.[105] Because these nonprofits are subject to FECA as well as the IRC, and because the rules relating to campaign activity differ under FECA and the IRC, an organization can qualify as a 501(c)(4) group for IRC purposes while also being a political committee for FECA purposes. The next two Parts examine the criteria that determine which politically active groups should be regulated as political committees under FECA regardless of their classification under the IRC.

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[104] This analysis assumes no particular understanding of the public interest, which may, and often will, favor the claims of some constituents over those of others. It does, however, presuppose that the public interest is something independent of the private interests of public officials, i.e., getting elected, remaining in office, or securing employment upon leaving office.

[105] Prior to *Citizens United*, 527 organizations were popular vehicles for outside campaign financing.

II. POLITICAL COMMITTEE STATUS AND THE MAJOR PURPOSE DOCTRINE

Most nonprofits exempt under section 501 of the IRC hold the view that they do not satisfy the criteria triggering FECA political committee status, even when they are politically active. What constitutes a political committee is contested for several reasons, the most troublesome of which is what is often called the major purpose rule.

A. The Legal Status of the Major Purpose Requirement

Groups that seek to avoid FECA political committee status usually organize as exempt organizations under the IRC, either as 501(c)(4) social welfare organizations or as 501(c)(6) trade associations.[106] Classification as political committees depends upon two conditions that trigger that status. The first condition, which is statutory, is that an entity is a political committee if it receives contributions or makes expenditures for the purpose of influencing an election for federal office that total more than $1,000 in a calendar year.[107] The second condition, which was added by the Supreme Court in *Buckley*, is that a political committee is an entity "the major purpose of which is the nomination or election of a candidate" or that is "under the control of a

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[106] Not all 527 groups are required to register with the FEC as political committees. IRC §501(c)(5) labor organizations and §501(c)(6) trade associations and business leagues also engage in campaign activities, but the amounts involved are dwarfed by the amounts spent by 501(c)(4) groups. *See Political Nonprofits (Dark Money)*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_summ.php. For an analysis of political committee status and related issues as they apply to 527 groups, see Miriam Galston, *Emerging Constitutional Paradigms and Justifications for Campaign Finance Regulation: The Case of 527 Groups*, 95 GEORGETOWN L.J. 1181 (2007).

[107] The definition of political committee in section 30101(4) contains the dollar triggers. The definitions of "contribution" and "expenditure," which are part of the definition of political committee, contain the language "for the purpose of influencing any election for Federal office." *See* 52 U.S.C. §§30101(8)(A)(i), 30101(9)(A)(i). On the history of the influencing language, *see Buckley*, 424 U.S. at 77.

candidate."[108]

The statutory condition, which is triggered by specific dollar amounts, seems objective and straightforward. The second condition, in contrast, has generated much discussion among FEC commissioners, in judicial decisions, and in legal commentary. The definite article "the" before "major purpose" may be interpreted to imply that, before it can be classified a political committee, an entity must have nominating or electing a candidate as its sole major purpose i.e., that more than half of its resources are devoted to nominating or electing a candidate. Accordingly, several courts have interpreted *Buckley*'s condition as meaning "more than half." For example, in *North Carolina Right to Life v. Leake*, the Fourth Circuit adopted this interpretation based upon the definite article "the" in *Buckley* and on *Buckley*'s concern that the regulatory burdens attached to being a political committee not fall on entities engaged primarily in discussion of issues.[109] In support of its interpretation, the court also cited Supreme Court cases that use the definite article "the" before the words "major purpose" when referring to a political committee's characteristics as well as lower courts that have ruled specifically on the criteria applicable to political committees.[110] For the Fourth Circuit, *Buckley*'s condition was

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[108] *Buckley*, 424 U.S. at 79.

[109] *See* N.C Right to Life v. Leake, 525 F.3d 274, 287-89 (4th Cir. 2008), citing *Buckley*, 424 U.S. at 79-80. The Fourth Circuit distinguishes "political speech" or "speech on political issues unrelated to a particular candidate" from "campaign related" or "election-related" speech. For appellate decisions agreeing with *N.C. Right to Life* about the meaning of *Buckley*, see New Mexico Youth Organized v. Herrera, 611 F.3d 669, 675-79 (10th Cir. 2010); Minn. Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864, 875 n.10 (8th 2012); Colorado Right to Life Comm. V. Coffman, 498 F.3d 1137, 1151-55 (10th Cir. 2007). *See also* Wisc. Right to Life v. Barland, 751 F.3d 804, 839 (7th Cir. 2014).

[110] *See N.C. Right to Life*, 525 F.3d at 288. *N.C. Right to Life* mentions FEC v. Massachusetts Citizens for Life (*MCFL*), 479 U.S. 238 (1986), and McConnell v. FEC, 540 U.S. 93, 170 n.64 (2003). For a different view of the passage in *MCFL*, *see* HumanLife of Wash., Inc. v. Brumsickle, 624 F.3d 990, 1010-11 (9th Cir. 2010); Richey v. Tyson, 120 F. Supp. 2d. 1298,

meant to protect from regulation groups that have influencing elections as "a" major purpose, as long as such influencing is not their primary purpose, in order to preclude "the regulation of too much ordinary political speech."[111]

In addition to their quantitative interpretation of "the major purpose,"*North Carolina Right to Life* and similar decisions rest upon the view that *Buckley* asserted the major purpose constraint as a *constitutional* requirement circumscribing the permissible boundaries of disclosure regulation for political speech under state as well as federal law.[112] For these courts, which include the Eighth and Tenth Circuits,[113] the First Amendment of the Constitution is the source of the *Buckley* condition to subject to regulation only groups whose primary purpose is election related.

In contrast, several appellate courts have concluded that *Buckley*'s condition was an interpretation of FECA, the federal campaign finance statute at issue in the case, and not a constitutional requirement.[114] In their view, therefore, the major purpose language does not bind courts interpreting state law. All of these decisions involved the definition of a political

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1311 (S.D. Ala. 2000). District court decisions are listed in *N.C. Right to Life*, 525 F.3d at 288.

[111] *See N.C. Right to Life*, 525 F.3d at 288-89. *Cf. Buckley*, 424 U.S. at 79 (expressing concern that without restrictions, regulation "could be interpreted to reach groups engaged purely in issue discussion").

[112] *See N.C. Right to Life*, 525 F.3d at 288; *Minn. Citizens for Life*, 692 F.3d at 872; *N.M. Youth Organized*, 611 F.3d at 675-79.

[113] *See supra* note 109. The ruling of the Seventh Circuit in *Barland*, 751 F.3d 804, is consistent with these courts. In another case, however, the Seventh Circuit did not adopt the Fourth Circuit's interpretation. *See infra* notes 120-121.

[114] *See* Vt. Right to Life Comm., Inc. v. Sorrell, 758 F.3d 118, 135-36 (2nd Cir. 2014), *cert. denied* 135 S. Ct. 949 (2015); Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 487, 490 (7th Cir. 2012); Nat'l Org. For Marriage v. McKee, 649 F.3d 34, 59 (1st Cir. 2011); Montanans for Cmty. Dev. v. Mangas, 735 Fed. Appx. 280, 284, 285 (9th Cir, 2018) (unpublished op.). *See also Human Life*, 624 F.3d at 1009-10, and *infra* notes 115-116 and accompanying text.

committee under state law and all concerned the state's disclosure regulations.

In *National Organization for Marriage v. McKee* (*NOM*), for example, the First Circuit examined Maine's disclosure rules for "Non-Major-Purpose PACs," which applied to groups receiving contributions or spending more than $5,000 "for the purpose of promoting, defeating or influencing in any way" a candidate in a state election.[115] The plaintiff organization challenged the constitutionality of the state's disclosure provision based upon *Buckley*'s major purpose language. Rejecting that claim, which it said was based upon *dictum* in *Buckley*, the First Circuit asserted that *Buckley*'s major purpose language reflected the Supreme Court's "construction of a federal statute."[116] The *NOM* court also noted that, were the plaintiff to prevail in its interpretation of state law, a low-budget group spending $1,500 to elect a candidate would have to register as a political committee subject to regulation if that amount was more than half of its expenditures, but a group spending $1,500,000 to defeat the candidate would not be a political committee if $1,500,000 was less than half of its total expenditures.[117] Such an outcome, the court said, would be "perverse."[118] The outcome would be perverse because the concern of

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[115] *NOM*, 649 F.3d at 58. For registration and reporting requirements for non-major-purpose PACs, see *id*. at 42.

[116] *NOM,* 649 F.3d at 59.

[117] *See NOM,* 649 F.3d at 59; *see also Richey*, 120 F. Supp. 2d at 1310 n.10; *Ctr. for Individual Freedom*, 697 F.3d at 489, *Vt. Right to Life Comm.*, 875 F. Supp. 2d at 395; Akins, 101 F.3d 731, 743 (D.C. Cir. 1996), vacated and remanded on other grounds, 524 U.S. 11. *See also* Yamada v. Snipes, 786 F.3d 1185, 1200 (9th Cir. 2015) (noting that larges organization could spend "tens or hundreds of thousands of dollars" on election related activities, while that sum represents only one percent of their spending).

[118] *NOM,* 649 F.3d at 59, citing the district court decision in Nat'l Org. for Marriage v. McKee, 723 F. Supp. 2d 245, 264 (D. Me. 2010). It is unclear whether the court added the example to indicate that public policy considerations reinforced its constitutional analysis of the *Buckley* condition or to explain how it arrived at what *Buckley* meant.

Congress and the *Buckley* Court was to prevent the reality or appearance of corruption, and it is illogical to view $1,5000 as posing a threat of corruption, while $1,500,000 would not. Since the disclosure burden under Maine's law would be significantly less than the federal regulation at issue in *Buckley*, and the disclosure rules were substantially related to the state's important interest in providing information to enable voters to make informed choices, the court concluded that the Non-Major-Purpose PAC provision was constitutional.[119]

The Seventh Circuit also upheld a state law challenged because its disclosure rules treated groups as political committees, even though their major purpose was not electing or defeating a candidate for public office. The court observed that the disclosure provisions at issue were much less burdensome than the burdens involved in *Buckley*.[120] It also emphasized that requiring an organization to have electing a candidate as its principal purpose would facilitate circumvention of the law because an election-oriented group could simply increase its non-election activities "or better yet" merge "with a sympathetic organization that engaged in activities unrelated to campaigning."[121] The court thus concluded that preventing circumvention, a goal the Supreme Court has repeatedly endorsed,[122] constituted one of the principal reasons for rejecting the narrow reading of the *Buckley* condition advanced by the plaintiff.

B. Major Purpose and the Spectrum of Purpose

The First and Seventh Circuits are not alone in construing *Buckley*'s condition as more

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[119] *See NOM,* 649 F.3d at 56-58 (applying an exacting scrutiny analysis).

[120] *Ctr. for Individual Freedom*, 697 F. 3d at 488.

[121] *Ctr. for Individual Freedom*, 697 F. 3d at 489.

[122] *See* Nabil Ansari, *Note: Judicial Standards for the Anti-Circumvention Rationale in Campaign Finance*, 19 N.Y.U.J. LEGIS. & PUB. POL'Y 417 (2016).

flexible than do the Fourth, Eighth, and Tenth Circuits. In *HumanLife of Washington, Inc. v. Brumsickle*, the Ninth Circuit agreed that *Buckley*'s major purpose language did not establish a bright-line rule precluding treating as political committees groups whose actions to nominate or elect a candidate for public office were less than half their activities overall, although its reasoning differs from that of the other appellate courts reaching this conclusion. The case involved a state law that classified as a political committee a group having as its "primary or one of the primary purposes" to receive contributions or make expenditures in support of or opposition to a candidate or ballot proposition.[123] In contrast to the preceding courts, *HumanLife* construed *Buckley*'s condition as a constitutional statement about political committees. For this court, the passage in question in *Buckley* established two poles of constitutional analysis: groups engaged in pure issue discussion, which cannot be subjected to campaign finance disclosure regulations, and groups whose sole major purpose is supporting or defeating candidates, which can be subject to them.[124] According to *HumanLife*, the validity of regulating everything in between these poles will depend upon "whether the burdens imposed by the disclosure requirements are substantially related to the government's important informational interest."[125] For the *HumanLife* court, this result is dictated not only by the language and logic of *Buckley*; it recognizes a "'fundamental organizational reality' that most organizations 'do not have just one major purpose.'"[126]

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[123] *See HumanLife*, 624 F.3d at 997.

[124] *HumanLife*, 624 F.3d at 1009-1010.

[125] *HumanLife*, 624 F.3d at 1010.

[126] *HumanLife*, 624 F.3d at 1011, citing N.C. Right to Life, 525 F.3d at 330 (Michael, J., dissenting).

Although the *HumanLife* decision concerned state law, the constitutional reasoning implies that federal campaign finance law can classify as political committees those organizations whose campaign activity is less than half of their total activity. In fact, in 2001, when the FEC gave advance notice of a rulemaking that might add a major purpose provision to the definition of a political committee, it included an alternative consistent with this implication of *HumanLife*. Among other proposals it was considering, the FEC included interpreting the major purpose condition as referring to the goal that occupies the largest part of an organization's spending and time, even if it consumes less than half of the group's spending and time.[127] In that event, an organization could meet the major purpose condition if it spends "30% or 40% of its total disbursements on election-related activity, while its other disbursements are used for a wide range of purposes."[128] The FEC also considered the possibility of defining an organization's major purpose in terms of a fixed amount of independent expenditures or other election-related disbursements, e.g., $50,000, regardless of what percentage of an organization's total spending the fixed amount would be.[129] The goal of that alternative would be to prevent the "perverse" result, mentioned in some judicial decisions, of allowing groups with large budgets to avoid political committee status despite spending millions of dollars on express advocacy or other

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[127] *See* FEC, *Definition of Political Committee*, 66 Fed. Reg. 13681, 13685 (Mar. 7, 2001) (Advance notice of proposed rulemaking). The FEC also invited comment on other possible definitions, including equating major purpose with the goal that consumed more than half of an organization's disbursements. *Id.* *See also* FEC, *Political Committee Status*, 69 Fed. Reg. 11736, 11747 (Mar. 11, 2004) (Notice of proposed rulemaking) (inviting comment on using a 25% threshold).

[128] *Committee Status*, *supra* note 127, at 13685. The FEC also considered whether election-related activity should be limited to "independent expenditures" under FECA, i.e., public communications that expressly advocate a candidate's election or defeat. *See id*, at 13686.

[129] *See id*., at 13685.

election related communications.[130]

In 2004, the FEC elaborated on its earlier Notice by mentioning the possibility of including under the rubric of "political committee" any group that meets the statutory $1,000 contribution or expenditure test and has as "a" major purpose nominating or electing a federal candidate.[131] It clarified that, if it adopted this definition, a group could become a political committee "if the nomination or election of a candidate or candidates is one of two or more major purposes of an organization, even if it is not its primary purpose," and "even when the organization spends more funds for another purpose."[132] To justify considering this proposal, the FEC looked to the reason given in *Buckley* for introducing the major purpose condition in the first place, namely, to ensure that groups engaged "purely in issue discussion" would not be classified as political committees, even if they were involved in "incidental" contributions or expenditures.[133] The FEC reasoned that an organization with "a" major purpose of nominating or electing a candidate for office could not be said to be engaged purely in issue discussion and, thus, that there would be no inconsistency with *Buckley* if the agency adopted its "a" major purpose alternative to define a political committee in its proposed regulation.[134] The FEC also

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[130] *See supra* notes 118-119 and accompanying text.

[131] *See Political Committee Status*, *supra* note 127, at 11,744 This *NPRM* lays out various alternatives and asks for comments. When the FEC promulgated the final rule, it did not take a position on any proposals included in the *NPRM* that were not adopted. *See* FEC, *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056, 68063-68064 (Nov. 23, 2004).

[132] *Political Committee* Status, *supra* note 127, at 11744. *See id*. at 11749 (raising the same issues with specific reference to organizations described in IRC 501(c)).

[133] *Id*. at 11744.

[134] *Id*.

cited the Supreme Court's decision in *United States v. Harriss*, which held that the phrase "principal purpose" in the Federal Regulation of Lobbying Act did not limit the application of the statute to a person's most important purpose because to do so would "seriously impair the effectiveness of the Act in coping with the problem it was designed to alleviate."[135] The term "principal," the FEC observed in Notice 2004-6, more clearly signifies what is most important than "major" does, yet the Court in *Harriss* did not equate "principal" with "most important,"[136] much less with more than half. As a result, the FEC considered its suggestion a plausible interpretation of *Buckley*'s major purpose condition, even though the agency did not ultimately adopt that alternative when it finalized the rulemaking.[137]

In *Akins v. FEC*, the D.C. Circuit propounded a different interpretation of the *Buckley* major purpose condition.[138] At issue was whether a large lobbying and public affairs exempt organization had become a political committee by virtue of its involvement in political campaigns. In dismissing a complaint brought to compel the FEC to classify the organization a political committee, the agency had argued that nominating and electing candidates for federal office did not constitute the organization's major purpose.[139] The appellate court rejected the FEC's interpretation of that standard and instead adopted the view that the *Buckley* major

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[135] *See id*. (quoting United States v. Harriss, 347 U.S. 612, 622-23 (1954).

[136] *Political Committee Status*, *supra* note 127 at 11744.

[137] *See Political Committee Status*, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Final rulemaking).

[138] Akins v. FEC, 101 F.3d 731 (D.C. Cir. 1996) (en banc), *vacated and remanded on other grounds*, FEC v. Akins, 524 U.S. 11 (1998).

[139] *See Akins*, 101 F.3d at 734. The FEC determined that the organization's relevant campaign activities represented "a small portion of its overall activities" and its "campaign activities were only conducted in support of its lobbying activities." *Id*.

purpose test applied only in connection with a group's independent expenditures[140] and, thus, was not intended to apply in connection with contributions, i.e., if a group exceeded $1,000 in political contributions.[141] The rationale for this distinction was that "[i]ndependent expenditures are the most protected form of political speech" because they most resemble "pure issue discussion" and because of the difficulty in determining when a communication is independent.[142] Since the *Akins* decision was vacated and remanded on other grounds by the Supreme Court,[143] it is not precedent. Nonetheless, the appellate court's interpretation of *Buckley* is still important because it is based upon a careful reading of both the *Buckley* language and its rationale for introducing the major purpose condition, i.e., avoiding intrusive regulation of groups that engage in campaign activity confined to independent expenditures.

Organizations seeking to avoid political committee status would prefer *Buckley*'s major purpose condition to be construed narrowly, i.e., as referring to more than half of a group's election-related expenditures, since this interpretation would reduce the likelihood of a group being classified as a political committee and thus subject to FECA. As the preceding makes clear, however, neither the FEC nor all courts have adopted that reasoning. On the contrary, based upon various theories, numerous federal appellate courts and the FEC have concluded that *Buckley*'s major purpose constraint is consistent with classifying as political committees groups

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[140] *See* 52 U.S.C. 13001(17) (entailing express advocacy of election or defeat of a candidate made without cooperation or consultation with the candidate).

[141] *See Akins*, 101 F.3d at 741-42.

[142] *Akins*, 101 F.3d at 741.

[143] FEC v. Akins, 524 U.S. 11 (1998). The same reasoning was employed in State of Washington v. Grocery Mfrs. Ass'n, 195 Wn. 442, 453-54 (2020).

with considerably less than 51% of their disbursements directed toward elections.

Moreover, several courts and the FEC have considered aspects of a group's profile other than expenditures as relevant to political committee status. For example, in Notice 2001-3, the FEC considered including in the calculation of an organization's major purpose the percentage of its time, including that of paid staff and unpaid volunteers, as well as the percentage of its disbursements.[144] The FEC noted that "[v]olunteer activity may become significant in situations where, for example, an organization spends a small amount of money on election-related activity, but uses the money to recruit and train volunteers to canvass neighborhoods, run phone banks, or sponsor other volunteer activity that has a substantial impact on the campaign."[145] Similarly, the District Court of the District of Columbia recently noted that funding of campaign ads was not necessarily the "sole relevant factor" in calculating a group's major purpose, although it did not specify what additional factors could be included.[146] In the same vein, both the FEC and the courts have considered an organization's "organizational documents, solicitations, advertising, other similar documents, public pronouncements, or any other communications" as factors indicating a group's major purpose.[147]

In sum, the courts in several jurisdictions are already open to treating nonprofit organizations as political committees, even if their election activities are less than their single

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[144] *See Political Committee Status*, *supra* note 127, at 13685-13686.

[145] *See id.* at 13686. The FEC also noted that, because volunteer activity was excluded from the definition of "contribution," arguably it should not be a facto in determining a group's major purpose. *Id.*

[146] *See* CREW v. FEC, 299 F. Supp. 3d 83, 100 n.14 (D.D.C. 2018) (*CREW II*).

[147] *See* FEC, *supra* note 126, at 11745-11746. *See also* FEC v. GOPAC, 917 F. Supp. 851, 859, 862 (D.D.C. 1996).

primary purpose, as long as such activity constitutes a major purpose in light of the group's mission and totality of its activities. Earlier incarnations of the FEC were similarly receptive. The obstacle to reclassifying politically active nonprofits, therefore, is not the law, but the willingness of the FEC to enforce the law as written and interpreted by numerous courts.

It is critical to note that reclassifying politically active nonprofits would not prevent them from raising substantial amounts of money and being effective participants in elections. In 2016, for example, corporate PACs gave roughly $182 million to federal candidates and spent roughly $385 million in election-related disbursements.[148] They were able to raise sums of this magnitude even though limited by law to raising money for their PACs from their shareholders, executives, and managerial employees.[149] Overall, traditional PACs (non-SuperPACs) contributed $461 million to congressional candidates alone in the 2016 election cycle,[150] and they spent more than $1.4 billion in all in that election cycle.[151] Reclassifying politically active nonprofit organizations would not, then, interfere with their ability to raise large sums of money and be major players in elections. It would however change their situation in two respects. First, contributions to political committees are capped at $5000 per election, so they would no longer

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[148] *See* FEC, PAC CONTRIBUTIONS TO CANDIDATES: JANUARY 1, 2015 THROUGH DECEMBER 31, 2016 (2017), https://transition.fec.gov/press/summaries/2016/tables/pac/PAC2_2016_24m.pdf.

[149] 52 U.S.C. §30118 (2018).

[150] Campaign Finance Institute, *PAC Contributions to Congressional Candidates 1978-2018 (in $ millions)*, http://www.cfinst.org/pdf/federal/HistoricalTables/pdf/CFI_Federal-CF_18_Table2-10.pdf (adjusted for inflation, using 2018 mean net dollars).

[151] Committee for Economic Development, *The Landscape of Campaign Contributions: Campaign Finance after* Citizens United 3 (July 2017), https://www.ced.org/reports/the-landscape-of-campaign-contributions1.

be able to receive unlimited contributions from a single donor. Thus, they would cease to serve as intermediaries for high wealth individuals and entities seeking to influence elections with donations of hundreds of thousands or millions of dollars. Second, as noted earlier, as political committees, nonprofit organizations would be subject to FECA's reporting and disclosure rules. Thus, they would no longer serve as vehicles for secret money influencing candidates and elections.

III. WHAT POLITICAL ACTIVITY COUNTS

Regardless of the version of the major purpose test employed, in order to determine whether an organization has met the standard, it is necessary to identify which political activities need to be measured and included. Two areas have generated questions addressed in judicial decisions.

FECA defines a political committee as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.[152] With certain exceptions, a "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office."[153] Similarly, an "expenditure" includes various kinds of disbursements of value "for the purpose of influencing any election for Federal office" or an agreement make such an

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[152] 52 U.S.C. §30101(4)(A). Other groups covered are not relevant here. *See* 52 U.S.C. §30101(4)(B), (C).

[153] 52 U.S.C. §30101(8)(A)(i). *See also* 52 U.S.C. §30101(8)(A)(ii). The exceptions are in 52 U.S.C. §30101(8)(B).

expenditure.[154] Thus, through the definitions of contribution and expenditure, a political committee is defined in terms of value received or value disbursed for the purpose of influencing a federal election.

The phrase "for the purpose of influencing a federal election" was attacked as unconstitutionally vague in *Buckley*, and the Supreme Court agreed that its reach had to be narrowed in order to preclude it being applied to and, thus, chilling engagement in pure issue discussion. Noting that there was no legislative history to consult for guidance about Congress's intention in using that language, *Buckley* also acknowledged that Congress "wished to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process."[155] The Court concluded that, to avoid vagueness and protect pure issue discussion, "expenditure" in the disclosure provision at issue need only be construed to cover certain contributions and "communications that expressly advocate the election or defeat of a clearly defined candidate."[156] Those who would limit the type of political activity to express advocacy typically quote this passage in *Buckley*, which connects expenditures to express advocacy.[157] This has led to a tendency to treat the dichotomy "express advocacy-issue discussion" as exhausting the permissible constitutional categories for election-

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[154] *See* 52 U.S.C. §30101(9)(A). Exceptions are listed in 52 U.S.C. §30101(9)(B). On the history of the influencing language, *see Buckley*, 424 U.S. at 77.

[155] *Buckley*, 424 U.S. at 78.

[156] *Buckley*, 424 U.S. at 78-80. The contributions in question are amounts "earmarked for political purposes" or "authorized or requested" by candidates. *Id*. at 80.

[157] *But see* Akins v. FEC, 101 F.3d 731, 741 (D.C. Cir. 1996) calling *Buckley*'s comment about the political committee definition "dicta"); *NOM*, 649 F.3d at 59 (same). *Buckley* also limited the meaning of "for the purpose of influencing a federal election" to express advocacy for FECA's expenditure cap, which it then invalidated anyway. *See Buckley*, 424 U.S. at 43-45.

related speech.

This was never an accurate description of *Buckley*, where the Court described the relevant major purpose as "the nomination or election of a candidate," nor does it accord with *MCFL*'s characterization in terms of "political activity."[158] Moreover, as noted earlier, in 2002 Congress added an additional category of election-related communications subject to regulation, called "electioneering communications," to target expressions of support for or opposition to candidates on the eve of an election that fall short of express advocacy.[159] In *McConnell v. FEC*, the Court upheld this provision[160] and it justified expanding the scope of federal campaign finance regulation to include electioneering communications by stating that the express advocacy passage in *Buckley* was an instance of statutory construction, not constitutional interpretation.[161] It then found that the electioneering communication provision satisfied the standards of exacting scrutiny and, thus, was constitutional.[162] In *Wisconsin Right to Life*, which narrowed the definition of electioneering communications for some purposes,[163] the Court reaffirmed that express advocacy "does not dictate a constitutional test" and that the "express advocacy

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[158] *See Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262.

[159] *See supra* notes 9, 13-15 and accompanying text. This provision was upheld in *McConnell*, 540 U.S. at 190, 194, 196.

[160] 540 U.S. at 191-92. This holding was superseded by *Citizens United*, which invalidated limits on corporations', unions', and other entities' use of treasury funds for express advocacy or electioneering communications if they act independently of candidates. *Citizens United*, 558 U.S. 310 (2010).

[161] 540 U.S. at 190-192.

[162] 540 U.S. at 201.

[163] *Wisconsin Right to Life* (invalidating the ban on corporations and unions paying for most electioneering communications with treasury funds but leaving the disclosure provision for electioneering communications remains intact). *See also Citizens United*, 558 U.S. at 368-69.

restriction was an endpoint of statutory interpretation, not a first principle of constitutional law."[164] *McConnell* also upheld another group of campaign activities added by BCRA, called "federal election activities," that is subject to regulation in certain circumstances.[165] These decisions thus clarify that campaign finance regulation may, in certain circumstances, impose restrictions on election-related speech other than express advocacy. What remains to be clarified, however, is whether types of political activity other than express advocacy can be counted to assess whether groups should be classified as political committees.

"Independent expenditures," which are defined as disbursements made to fund express advocacy,[166] are presumptively counted.[167] The courts have split on what additional forms of election-related activity to include. The stakes are obvious. If the type of campaign activity considered is narrowly defined to include only express advocacy, a group can devote 100% of its activities to influencing elections but avoid political committee status by circumscribing the amount of its express advocacy. The more capacious the definition of campaign activities that count, in contrast, the greater the likelihood that a group active in elections will qualify as a political committee subject to FECA reporting, disclosure, and contribution regulations.

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[164] *Wisconsin Right to Life*, 551 U.S. at 475 n.71.

[165] "Federal election activities" includes voter registration during the 120 days before an election, voter identification, get-out-the-vote activities, and support for or opposition to a clearly identified candidate for federal office even if it does not expressly advocate for or against the candidate. *See* 52 U.S.C. §30101(20).

[166] *See* 52 U.S.C. §30101(17).

[167] *See*, e.g., the position of three FEC commissioners in CREW v. FEC, 209 F. Supp. 3d 77, 84 (D.D.C. 2016) (presuming organization's express advocacy but not its electioneering communications count to determine political committee status). *Contrast* Nat'l Ass'n for Gun Rights, Inc. v. Mangan, 933 F.3d 1102, 1112 (9th Cir. 2019). Not all states use the same terminology as FECA, e.g., some define "electioneering communications" as a kind of independent expenditure. *See Ctr. for Individual Freedom*, 697 F.3d at 497.

Whether, and how, to classify FECA electioneering communications for purposes of political committee status was one of the central issues in litigation brought by Citizens for Responsibility and Ethics in Washington (CREW) against the FEC. In 2012, CREW filed a complaint with the FEC alleging that American Action Network (AAN) had spent more than $18 million of a total budget of roughly $25 million on express advocacy and electioneering communications and, thus, it should have registered as a political committee.[168] Whether AAN should have registered depended upon how much, if any, of its electioneering communications should have counted toward political committee status because only 15 percent of its total budget was spent on express advocacy.[169] Although the FEC's Office of General Counsel recommended classifying AAN as a political committee,[170] the FEC dismissed CREW's complaint.[171] In

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[168] For the original complaint, *see* FEC MUR 6589, https://www.fec.gov/files/legal/murs/6589/14044361739.pdf. When its complaint was dismissed in 2014, CREW challenged the dismissal in court. *See* 209 F. Supp. 3d 77 (D.D.C. 2016) (*CREW I*), *appeal dismissed*, Citizens for Responsibility & Ethics v. FEC, 2017 U.S. App. LEXIS 5856 (D.C. Cir. 2017). For the subsequent litigation, *see* CREW v. AAN, 410 F. Supp. 3d 1 (D.D.C. 2019) (*CREW III*). *See also* CREW v. AAN, 415 F. Supp. 3d 143 (2019) (denying request by AAN for certification of an interlocutory appeal).

[169] *See CREW I*, 209 F. Supp. 3d at 83. Roughly $13.7 million was spent on electioneering communications during that period. *Id*. Thus, had these expenditures been counted, AAN's election-related expenditures would be roughly two-thirds of its budget during the period in question.

[170] *See CREW I*, 209 F. Supp. 3d at 83, and FEC First General Counsel Report (Jan. 17, 2013), https://www.fec.gov/files/legal/murs/6589/14044361896.pdf.

[171] At least four of the FEC's six members must agree to pursue a complaint. *See CREW I*, 209 F. Supp. 3d at 81. If they are split three-three, the complaint is dismissed. Since often three members are Democrats and three are Republicans, recently they often split along party lines, leading a complaint to be dismissed for lack of a fourth vote to proceed. Sometimes three members vote to dismiss a case even though the General Counsel says there is reason to believe a group has violated a disclosure requirement and recommends an investigation. *See infra* note 328.

declining to investigate AAN, the controlling Commissioners[172] took the position that none of AAN's electioneering communications should be counted in determining if AAN was a political committee because they were "'genuine issue advertisements' unrelated to the election of candidates."[173] When CREW challenged the FEC's decision (*CREW I*), the court rejected the FEC's determination and directed the agency to revisit its assessment of AAN's electioneering communications with the understanding that communications other than express advocacy could be counted in determining a group's major purpose.[174] After the remand, the FEC reclassified some of AAN's electioneering communications from issue advocacy to campaign ads, but continued to classify most of them as issue advocacy and again concluded that AAN was not a political committee. When CREW appealed the FEC's decision, the court not only again directed the agency to review its position; it stated in emphatic terms that, based upon the intention of Congress in enacting BCRA, ads that meet the definition of electioneering communications are presumptively election oriented and can be considered issue advocacy only in rare instances (*CREW II*).[175]

When the FEC did not comply with the *CREW II* directive,[176] CREW brought suit against

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[172] Because it takes four Commissioners to decide to investigate a complaint, the three who vote not to investigate are called the controlling Commissioners.

[173] *See CREW I*, 209 F. Supp. 3d at 84, 89.

[174] *See CREW I*, 209 F. Supp. 3d at 93.

[175] *See CREW II*, 299 F. Supp. 3d at 98-101.

[176] FEC Vice-Chair Ellen L. Weintraub prevented the FEC from dismissing CREW's claim after the second remand by preventing the FEC from having a quorum (the FEC only had four Commissioners at that point). *See* Statement of Vice-Chair Ellen L. Weintraub regarding *CREW v. FEC & American Action Network* (Apr. 19, 2018), https://www.fec.gov/resources/cms-content/documents/2018-04-19-ELW-statement.pdf.

the organization itself, asking the court to classify AAN a political committee during the time period in question and require AAN to register and satisfy the FEC's reporting requirements, including disclosing the identities of its large donors during that period (*CREW III*).[177] This decision did not, however, reach a judgment on the merits of CREW's claim about AAN's status,[178] and the litigation is ongoing. Thus, at present, based upon the AAN litigation in *CREW II*, the determination of an organization's political committee status should include electioneering communications in addition to express advocacy and, further, electioneering communications should be assumed to count as activity intended to influence the nomination or election of a candidate unless the organization justifies excluding them on a case-by-case basis.

In addition to the decision in *CREW II*, two appellate courts interpreting state statutes have unequivocally ruled in favor of classifying organizations as political committees by taking into account more than express advocacy. In *Vermont Right to Life*, the Second Circuit upheld Maine's definition of an expenditure as including disbursements for communications that "support" or "oppose" a candidate for elected office and also validated the use of that definition for determining if an organization qualified as a political committee.[179] The court largely relied

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[177] *See CREW III*, 410 F. Supp. 3d at 35-36. The first two lawsuits, brought by CREW against the FEC, were authorized by FECA §39109(a)(8)(A). After the FEC failed to respond to the court's directive in *CREW II*, FECA §30109(a)(8)(C) enabled CREW to bring a citizen suit directly against the organization it claimed had violated the law. AAN is challenging the constitutionality of §30109(a)(8)(C). *See Notice of Constitutional Challenge*, July 13, 2020, https://mail.google.com/mail/u/0/?zx=7q56tgq30q56#search/gleahy%40law.gwu.edu/WhctKJVzXHXRjrfJmwmBPDCgkcVHXNdXgGgNQtsdxGKBpXBhpxWNqvlnGVMhxDkSDPffZBQ?projector=1&messagePartId=0.1.

[178] AAN moved to dismiss the lawsuit, saying the court lacked subject matter jurisdiction, CREW did not have standing, the FEC's decision was not reviewable because it resulted from an exercise of the agency's prosecutorial discretion, and related claims. *See CREW III,* 410 F. Supp. 3d at 1 (D.D.C. 2019).

[179] *See* Vt. Right to Life Comm., Inc. v. Sorrell*,* 758 F.3d 118 (2d Cir. 2014).

upon *McConnell v. FEC* to conclude that the support or oppose language in the statute was not unconstitutionally vague either for the definition of an expenditure or for including in the metric for determining political committee status.[180] Similarly, in *Center for Individual Freedom*, the Seventh Circuit upheld Illinois' definition of a political committee that depended upon a group accepting contributions or making expenditures "'on behalf of or in opposition to' a candidate or ballot initiative."[181] Also relying on *McConnell*, the court argued that the terms of the statute ensure that the transactions triggering political committee status will be "within the core area of genuinely campaign-related transactions."[182]

The First Circuit decision in *NOM* was more nuanced. In *NOM* the plaintiff organization argued that strict scrutiny was required when analyzing political committee status for "non-major purpose PACs" under Maine law because of the "extensive regulations" that accompany political committee status.[183] The First Circuit disagreed, stating that the regulatory burdens imposed by Maine on such PACs were light, and it cautioned that the precedents the plaintiff organization relied upon involved situations where the regulatory burdens on PACs were significantly greater than those imposed by Maine law.[184] Thus, it concluded that exacting scrutiny was appropriate for analyzing the Maine statutory scheme, and it found the Maine definition of such PACs constitutional. At the same time, the court noted that Supreme Court precedents consider

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[180] *See Vt. Right to Life*, 758 F.3d at 128-29, 134-135.

[181] *Ctr. for Individual Freedom*, 697 F.3d at 488, 491-98.

[182] *Ctr. for Individual Freedom*, 697 F.3d at 488.

[183] *NOM*, 649 F.3d at 55-56.

[184] *NOM*, 649 F.3d at 56.

limitations on contributions more restrictive burdens than disclosure rules,[185] which may suggest that the court might have reached a different result if the classification of organizations as political committees subjected them to contribution restrictions as well as disclosure obligations.

In *Wisconsin Right to Life v. Barland*,[186] the Seventh Circuit examined the relationship between the type of political advocacy permitted to define an expenditure for purposes of the electioneering communication disclosure rules and the counterpart question for the definition of a political committee, and it rejected the conclusion reached by *CREW II* and other appellate courts. The court argued that when *Citizens United* stated that disclosure was a less burdensome form of regulation than "more comprehensive regulations," it was referring only to "one time, event-driven" regulation, i.e., requiring reporting expenditures of a certain kind when they are made. In contrast, the Seventh Circuit asserted that when the scope of political activity triggers political committee status, i.e., when the definition of a political committee itself depends upon the definition of an expenditure, *Citizens United*'s relaxation of the express advocacy standard no longer applies. Otherwise, the court argued, a broad interpretation of political advocacy could chill debate on public issues and cause small groups of activists circulating their positions on public policies inadvertently to be labeled political committees subject to comprehensive regulation.[187]

In sum, the CREW-AAN litigation, which is exactly on point, upheld a broad definition

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[185] *NOM*, 649 F.3d at 55 (citing *Buckley*, *Citizens United*, and Doe v. Reed, 561 U.S. 186, 196 (2010)).

[186] Wisc. Right to Life v. Barland, 751 F.3d 804 (7th Cir. 2014). For the relevant provision in the statute, see *id*. at 812-13.

[187] *Barland*, 751 F.3d at 836-837.

of election-related activities for purposes of determining political committee status, as did three appellate courts applying federal campaign finance law to state campaign finance statutes. *Barland*, which reached the opposite conclusion, has been called an outlier to the extent that it limits either the definition of "expenditure" or "political committee" to express advocacy exclusively.[188]

Although the precedents thus incline toward a broad definition, the strongest argument for construing broadly the type of political activity that counts for determining political committee status is the logic of campaign finance jurisprudence, namely, what as a constitutional matter needs protection. The considerations set forth in *Buckley* should guide today's discourse: pure issue advocacy should not be subject to regulation, whereas different forms of political expression can be regulated to varying degrees in accordance with levels of scrutiny appropriate to the type of speech in question. *Buckley* and subsequent judicial decisions have all upheld disclosure and reporting rules and have portrayed the public interests in knowing who is funding which candidates as paramount.[189] In light of these constitutional doctrines and the extraordinary amounts of money flooding recent elections without the disclosure anticipated by *Buckley* and its progeny, it is clear that politically active nonprofits should not be able to evade their disclosure responsibilities by avoiding political committee status.

Political committee status should, then, rest upon a concept of political activity that

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[188] *CREW I*, 209 F. Supp. 3d at 90-91. *See also Vt. Right to Life*, 758 F.3d at 332. Zachary R. Clark, *Constitutional Limits on State Campaign Finance Disclosure Laws: What's the Purpose of the Major Purpose Test?*, 2015 U. CHI. LEGAL F. 527, 541 (stating that *Barland* seems to "back off" *Ctr. for Individual Freedom*). The difference between the two Seventh Circuit holdings may be due to differences in the Illinois and Wisconsin statutes).

[189] *See Buckley*, 424 U.S. at 66, 76; *McConnell*, 540 U.S. at 196; *Citizens United*, 558 U.S. at 367.

reflects what the concept means in ordinary discourse unless there is a compelling reason to ignore common sense meanings.[190] Supporters of a narrow definition of political activity assert that the First Amendment is such a compelling reason and that it justifies–indeed requires–keeping the area of unregulated political activity as expansive as possible in order to secure a realm of expression explicitly protected by the Constitution. This claim is disingenuous in this context, however, because Congress agreed completely with the First Amendment argument and, as a result, enacted IRC §527 to afford a privileged position to politically active exempt organizations. In 1974, concerned about ambiguities in the case law and IRS rulings, Congress created section 527, which assures tax exemption for politically active groups and guarantees that contributions to such groups will be exempt from gift tax even though they exceed the annual gift tax exclusion.[191] According to the legislative history, Congress discussed the relationship between 501(c) organizations and 527 groups, and it expressed the view that the newly created 527 organization would take "the campaign-type activities ... entirely out of the section 501(c) organization," which transformation would be "to the benefit both of the organization and the administration of the tax laws."[192] In other words, it is unnecessary to construe narrowly the nature of the political activity that counts in determining if a 501(c) organization is a political committee based upon First Amendment concerns because Congress

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[190] The emphatic *Buckley* doctrine that pure issue advocacy should not be subject to campaign finance regulation, however many people would see it as political when communicated on the eve of an election, might be considered such a compelling reason.

[191] *See* IRC §527(a), (b)(2), (c)(1), (e)(2) (exempting such groups from tax on income raised and spent for purposes of influencing elections, although not on investment income); §2501(a)(4) (exempting the contributions from the gift tax). Prior to that time, contributions in amounts greater than the annual exclusion were arguably exposed to gift tax liability.

[192] S. REP. NO. 93-1357, at 30 (1974).

itself intended to shift political activity out of 501(c) organizations and into a safe tax code home, i.e. section 527.

The First Amendment does not guarantee that every nonprofit organization will be able to exercise its full right to political expression under the aegis of every section of the IRC. For example, the Supreme Court upheld the IRC's denial of business expense treatment for the costs of lobbying or political activity, even though those costs otherwise would qualify as ordinary and necessary business expenses.[193] It also upheld the IRC's limitations on 501(c)(3) organizations that prevent them from engaging in more than an insubstantial amount of lobbying.[194] Organizations can both obtain exempt status and engage in unlimited political activity by organizing as 527 groups. The main, perhaps the only, reason that 501(c) groups resist locating their political activities in a 527 entity[195] is that 527 groups are subject to disclosure rules that 501 groups can avoid, namely, reporting the identities of their contributors and the amounts of their contributions. Thus, the desire to avoid disclosure, and not First Amendment concerns, is the impetus for arguing that political committee status depends upon express advocacy rather than a broader concept of political activity adopted by most courts.

IV. DONOR DISCLOSURE

Parts II-III presented the legal grounds for classifying many politically active 501(c) groups as political committees, in contrast to their current status. This classification is important because one of the most damaging aspects of current campaign finance practices is the unlimited

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[193] *See* Cammarano v. U.S., 358 U.S. 498 (1959).

[194] *See* Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).

[195] Section 501(c) groups can do this by setting up a separate segregated account via bookkeeping entries. *See* https://www.fec.gov/help-candidates-and-committees/registering-ssf/.

amounts of money that can be contributed to certain independent-expenditure groups coupled with the ability of those groups to avoid disclosing the sources of their funds. For example, a watchdog group found that from 2008-2015, 41 donors each gave between $1 million and $165 million to politically active 501(c) groups.[196] SuperPACs, in contrast, are required to disclose their contributors, although the names of entities, which account for roughly one-third of the $1.5 billion contributed to SuperPACs in 2015-2016 alone, can be unrevealing or misleading.[197] Individual donors to entities with unrevealing or misleading names are also undisclosed, unless revealed by enterprising journalists or watchdog groups.[198]

If politically active groups that resemble political committees, but are not currently classified as such, were reclassified as political committees, they would be required to report the identities of donors who contribute more than $200 during a calendar year.[199] This Part considers

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[196] *See Political Nonprofits: Top Donors*, OPENSECRETS.ORG, https://www.opensecrets.org/outsidespending/nonprof_donors.php. Since these nonprofits are not required to disclose their donors, the watchdog's list, based upon cross-referencing tax returns, is likely incomplete.

[197] *See McConnell*, 540 U.S. at 128 (giving examples like "Citizens for Better Medicare," an association of drug manufacturers); *41 annoyingly ridiculous super PAC names*, THE WEEK (Apr. 20, 2012) (listing three groups that include "Americans for A Better Tomorrow" in their title), https://theweek.com/articles/476236/41-annoyingly-ridiculous-super-pac-names; Fredreka Schouten, *Behind Fuzzy Names*, USA TODAY (Feb. 11, 2014) (stating that Americans for Progressive Action never backed a liberal Democratic candidate), https://www.usatoday.com/story/news/politics/2014/02/11/super-pac-names/5375699. *See also* CAMPAIGN LEGAL CTR., DODGING DISCLOSURE: HOW SUPERPACS USED REPORTING LOOPHOLES AND DIGITAL DISCLAIMER GAPS TO KEEP VOTERS IN THE DARK IN THE 2018 MIDTERMS (2018), https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf; Evers-Hillstrom, *supra* note 30.

[198] *See* Michael Beckel, *Will Limited Liability Companies Be the Next Frontier of "Dark Money?,"* CTR. PUB. INTEGRITY (Apr. 14, 2016) (describing use of limited liability companies to shield names of individual donors to SuperPACs), https://publicintegrity.org/politics/rapper-backed-group-illustratesblind-spot-in-political-transparency.

[199] *See* 52 U.S.C. §30104(b)(3)(A).

disclosure regulations that apply to disbursements even when the FEC fails to classify such groups as political committees and that also apply to tax-exempt groups not required to be classified as political committees because they engage in lesser amounts of political activity.[200]

The donor disclosure rules for independent expenditures are different from those for electioneering communications. For groups making independent expenditures, there are three relevant FECA sections. Section 30104(c)(1) provides that

> Every person (other than a political committee) who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under subsection (b)(3)(A) for all contributions received by such person.[201]

Section 30104(b)(3)(A), in turn, requires identification of each contributor of more than $200 in aggregate in a calendar year to a reporting entity as well as the date and amount of the contributions.[202] Taken together, these two sections appear to require disclosure of every donor of more than $200 in a calendar year to a nonprofit group, such as a 501(c)(4), that spends more than $250 on independent expenditures during that period, regardless of whether the donor intended to fund the political activity of the group. For 501(c)(4) groups, which are required by the IRC to be engaged primarily in social welfare, this interpretation of the two provisions would appear to require disclosing every donor of $251 or more, even if the donor contributed to fund

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[200] *See* FEC, *Political Committee Status*, *supra* note 126, at 11749, 11750, 11755; CREW v. FEC, 316 F.3d 349, 360, 396, 398, 400 (D.D.C. 2018), *stay denied sub nom* Crossroads Grassroots Policy Strategies v. CREW, 139 S. Ct. 50 (2018).

[201] 52 U.S.C. §30104(c)(1). An independent expenditure is a disbursement that is not coordinated with a candidate and that advocates the election or defeat of a clearly identified candidate, either using words like elect and vote for "Smith" or using words that can only be reasonably interpreted as advocating the election or defeat of "Smith." *See* 52 U.S.C. §§30101(17), 11 C.F.R. §100.16. *See also* 11 C.F.R. §100.22.

[202] 52 U.S.C. §30104(b)(3)(A).

the group's efforts to strengthen its social welfare mission rather than its political activity.

However, the definition of "contribution" narrows the reach of these sections because it states that a contribution is a transfer of value (by money, loan, or anything else) "for the purpose of influencing any election for Federal office."[203] The influencing language is not defined in FECA, but in *Buckley v. Valeo*, the Supreme Court construed this language in the definition of a contribution to include "funds provided to a candidate or political party or campaign committee either directly or indirectly through an intermediary" as well as "dollars given to another person or organization that are earmarked for political purposes."[204] FECA also does not define "for political purposes." Quoting from the legislative history, the *Buckley* Court noted that Congress had intended

> to achieve "total disclosure" by reaching "every kind of political activity" in order to insure that the voters are fully informed and to achieve through publicity the maximum deterrence to corruption and undue influence possible.[205]

Based upon *Buckley*, then, a contribution only includes amounts given to a candidate, political party, or campaign (directly or through an intermediary) or amounts earmarked for "every kind of political activity."

Neither FECA nor the regulations specify how earmarking is to be determined when

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[203] 52 U.S.C. §30101(8)(A)(i). The term also covers "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." 52 U.S.C. §30101(8)(A)(ii). Exceptions are made, for example, for services provided by volunteers or commercial loans from financial institutions. *See* 52 U.S.C. §30101(8)(B).

[204] *Buckley*, 424 U.S. at 23 n.24. *See id*. at 78.

[205] *Buckley*, 424 U.S. at 76 (footnote omitted). *See Citizens United* 558 U.S. at 369 (affirming the public's interest "in knowing who is speaking about a candidate shortly before an election," and concluding that "the informational interest alone" was sufficient to support campaign finance disclosure requirements).

donors give to entities making independent expenditures. They do, however, address earmarking when contributions are made to an entity that will then make contributions to a candidate. According to FECA, a contribution that is

> made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as a contribution from such person to such candidate.[206]

The related regulations explain that, in this context,

> *earmarked* means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.[207]

The consequence of such earmarking is that the immediate recipient is considered an "intermediary or conduit"' that must report to the FEC both the identity of the source and the beneficiary candidate to whom the contribution is forwarded.[208] Thus, although there are no statutory or regulatory explanations of earmarking in the context of contributions to independent-expenditure organizations, the provisions quoted make clear that the idea of earmarking extends far beyond an express request by a donor to an organization to use all or part of a contribution for independent expenditures. Based upon the above regulation section, an implicit understanding between parties would constitute earmarking, as would an indirect expression of intent that the

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[206] 52 U.S.C. §30116(a)(8); 11 C.F.R. §110.6(a).

[207] 11 C.F.R. §110.6(b)(1) (emphasis in original).

[208] 52 U.S.C. §30116(a)(8); 11 C.F.R. §110.6(b)(2), (c). Certain exceptions apply. *See* §110.6(b)(2)(i)-(iii). The intermediary's report must include the name and address of each contributor and, if the amount is greater than $200, the contributor's occupation and employer. §110.6(c)(1)(iv). If the intermediary organization "exercises any direction or control" over the ultimate beneficiary of the contribution, both the initial donor and the intermediary organization will be deemed to have made the earmarked contribution. 11 C.F.R. §110.6(d)(2).

contributor's money be used by the recipient organization for such purposes. Some commentators have argued that earmarking occurs "[w]here donors 'know,' directly or indirectly, that their dollars will be spent on political activity."[209] This would occur, for example, if a 501(c) organization that is not a political committee solicits contributions with the understanding that the money will be used for independent expenditures. In such situations, both donor and recipient organization would also violate the law prohibiting "straw donors," i.e., one party making "contributions in the name of another person."[210]

The third statutory provision related to donor disclosure in connection with independent expenditures is section 30104(c)(2), which provides for the identification of those who contribute more than $200 to groups making independent expenditures if the contribution was made "for the purpose of furthering the independent expenditure."[211] This provision is more limited than (c)(1) in that it requires that a subset of the donors disclosed under (c)(1) be further identified if they intended to fund the independent expenditure, rather than simply earmarking their contribution for a political purpose.[212]

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[209] *See Contributions to Politically Active Outside Groups: Risk Areas and Advice for Donors*, COVINGTON ELECTION AND POLITICAL LAW 2 (Oct. 9, 2018) (asserting that in such cases, the recipient organization exposes itself to enforcement actions, especially under state laws).

[210] 52 U.S.C. §30122; 11 C.F.R. §110.4 (stating that giving anything of value "all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source" to the recipient when the contribution is made). Thus, "a donor that gives to a nonprofit, non-political entity with the expectation that it will be contributed to a SuperPAC, may violate [section 30122]." *See Contributions to Politically Active Outside Groups*, supra note 209, at 4.

[211] 52 U.S.C. §30104(c)(2)(C).

[212] The relationship between 30104(c)(1) and 30104(c)(1), as stated in the text, has been litigated. *See infra* notes 216-219 and accompanying text; Potter and Morgan, *supra* note 4, at 420-28.

To implement these three statutory provisions concerning donor disclosure to entities making independent expenditures, the FEC promulgated section 109.10(e)(1)(vi). That regulation provides that the non-political committee reporting its own independent expenditures must disclose the identity of each donor whose "contribution was made for the purpose of furthering *the reported* independent expenditure" (emphasis added). This is the sole FEC regulation implementing all three statutory sections just described. That the reach of the regulation appears to be less than the reach of (c)(2) and is markedly narrower than (c)(1) was noted by the FEC's Office of General Counsel.[213] Because of the discrepancy, which enables organizations making independent expenditures to argue they lack the obligation to disclose most or all of their donors, a watchdog group challenged the legality of the regulation, first at the FEC and subsequently in court.

In *Citizens for the Responsibility and Ethics in Washington v. FEC (CREW-CGPS)*, the court held that section 109.10(e)(1)(vi) was invalid.[214] The court found that, by not promulgating a regulation reflecting subsection 30104(c)(1)'s requirement of disclosure of "all" contributions received by a group making independent expenditures, the FEC had "read[...] subsection (c)(1) out of the statute."[215] The FEC then issued guidance that, to comply with section 30104(c)(1),

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[213] *See* CREW v. FEC, 316 F. Supp. 3d 349, 361-63 (D.D.C.2018) (*CREW-CGPS*). Perhaps the FEC's failure to implement (c)(1) went unnoticed because in 1980, corporations were not allowed to make independent expenditures and few people filed such reports in any case. *See* Potter & Morgan, *supra* note 4, at 427.

[214] *See CREW-CGPS*, *supra* note 213. CREW's complaint identified Crossroads Grassroots Policy Strategies (CGPS) as the organization that should have been classified as a political committee. *Id.*

[215] CGPS sought unsuccessfully to stay enforcement of the district court's vacatur until its appeal on the merits was decided. *See* CREW v. FEC, 904 F.3d 1014 (D.C. Cir. 2018), CGPS v. CREW, 139 S. Ct. 50 (2018). In August of 2020, the lower court decision was affirmed. CREW v. FEC, ___ F.3d ___ (D.C. Cir. 2020).

requires entities making an independent expenditure greater than $250 to report the identities of all persons making contributions to it greater than $200 "earmarked for a political purpose" "intended to influence elections."[216] To comply with §30104(c)(2), the FEC guidance also requires such entities to further identify those who made contributions greater than $200 for any independent expenditure.[217]

Commentators have criticized the FEC's guidance for lacking clarity[218] or for enabling organizations making substantial amounts of independent expenditures to claim that none of their contributors intended their contributions to support those expenditures.[219] And, in fact, even nonprofits making large amounts of independent expenditures have usually disclosed few if any contributors, either asserting in their filings that they have received no contributions made for political purposes, listing no names and offering no explanation, or listing the names of other

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[216] FEC, Press Release, Oct. 4, 2018, https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/. *See* GAO, CAMPAIGN FINANCE 12 n.30 (Feb. 2020).

[217] *See* FEC, Press Release, *supra* note 216.

[218] *See Contributions to Politically Active Outside Groups*, *supra* note 209, at 5; Zachary G. Parks & Kevin Glandon, *FEC Issues New Guidance on Donor Disclosure for Entities Making Independent Expenditures*, COVINGTON & BURLING LLP, INSIDE POLITICAL LAW (Oct. 4, 2018).

[219] *See* Brendan Fischer & Maggie Christ, *How the FEC is Still Allowing Dark Money Groups to Remain Dark*, CAMPAIGN LEGAL CTR. (Oct. 17, 2018) (detailing CLC's findings about groups making independent expenditures, but not listing any contributors that gave money for political purposes, even when the organization in question expressly solicited contributions to support candidates), https://campaignlegal.org/update/how-fec-still-allowing-dark-money-groups-remain-dark; Maggie Severns, *Dark-money groups were ordered to reveal their donors. They didn't.*, POLITICO (Oct. 16, 2018) (explaining how FEC guidance aided "efforts to keep donors out of sight"), https://www.politico.com/story/2018/10/16/donors-to-dark-money-groups-still-mostly-hidden-despite-court-ruling-905894.

organizations as donors so that the ultimate individual donors are not identified.[220] Although it is impossible to quantify the donors shielded in this way, it is estimated that fully- or partially nondisclosing groups have spent close to a billion dollars on political advertising since 2010.[221]

The situation is different for organizations such as nonprofits that spend money on electioneering communications.[222] The disclosure provision for electioneering communications, introduced by BCRA in 2002, mandates disclosure by entities that make expenditures in excess of $10,000 for electioneering communications and disclosure of the identities of their donors; the provision does not, however, require a showing that the expenditures were intended to influence the election of a candidate for federal elective office.[223] The initial FEC regulation tracked the statute,[224] so that disclosure of donors was required whenever an organization funded communications meeting the definition of "electioneering communications." In 2007, however, after the Supreme Court decided *Wisconsin Right to Life*,[225] and even though the Court left intact

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[220] *See* Karl Evers-Hilstrom, *Trump FEC pick offers mixed messages on donor disclosure*, OPENSECRETS NEWS (Mar. 10, 2020); Fischer & Christ, *supra* note 218.

[221] *See* Kenneth P. Doyle, *Secret Donor Challenge Brings Court Scrutiny of Karl Rove Group*, BLOOMBERG GOVERNMENT (Sept. 12, 2019) (estimating all not-fully disclosing group spending, not just independent expenditures), https://about.bgov.com/news/secret-donor-challenge-brings-court-scrutiny-of-karl-rove-group/; Anna Massoglia, *Millions in masked money funneled into 2018 elections*, OPENSECRETS.ORG (Nov. 7, 2018) (same), https://www.opensecrets.org/news/2018/11/millions-in-masked-money-funneled-into-2018-elections/.

[222] *See supra* notes 9-11.

[223] *See* 52 U.S.C. §30104(f)(1)-(2). For background, see Potter and Morgan, *supra* note 4, at 433-37; *id.* at 440 (noting that BCRA and the FEC initially showed a desire to "move away from an intent-based disclosure rule," referring to "donations" rather than "contributions," to avoid the implication that the funds transferred necessarily were intended to influence elections); *id.* at 450 (citing evidence that Congress wanted to prevent evasion of the reporting and disclosure rules).

[224] *See* 11 C.F.R. §104.20(c)(7), (8).

[225] *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007).

the definition in FECA for disclosure purposes, the FEC requested comment on possible revisions to the regulation that would add an *intent* element to the conditions for identifying donors.[226] It then promulgated a regulation requiring corporations and unions making independent expenditures to identify their donors only if the amounts donated aggregate $1000 or more and are "made for the purpose of furthering electioneering communications."[227]

Then-Congressman Chris Van Hollen challenged the revised regulation's purpose requirement as inconsistent with the text of the underlying statute.[228] Although the district court agreed with him and invalidated the rule,[229] on appeal the D.C. Circuit reversed that decision and upheld the regulation.[230] The appellate court found that the regulation represented a permissible

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[226] *See* FEC, *Electioneering Communications*, 72 Fed. Reg. 50,261 (Aug. 31, 2007). According to an appellate court, the FEC believed this reconsideration was necessitated by *Wisconsin Right to Life*, which made commercial corporations and unions subject to disclosure–something that Congress had not contemplated when enacting BCRA. *See* Van Hollen v. FEC, 811 F.3d 486, 490-91 (D.C. Cir. 2016). For background, *see* Potter and Morgan, *supra* note 4, at 446-55 (detailing events leading the FEC to change its rule and arguing that Congress "did in fact anticipate that the electioneering disclosure requirements could be applied" to such corporations and unions). *See id*. at 451.

[227] *See* 11 C.F.R. §104.20(c)(9) (stating that this rule applies if the reporting entity is a corporation or a union). If the reporting entity is not a corporation or a union, the earlier rule applies, which required identifying all donors of $1000 or more in the relevant time frame regardless of intent. *See* 11 C.F.R. §104.20(c)(8). Different disclosure rules apply if the donations are made to a separate bank account established by the reporting entity to fund electioneering communications. *See* 11 C.F.R. §104.20(c)(7).

[228] *See* Van Hollen v. FEC, 851 F. Supp. 2d 69 (D.D.C. 2012).

[229] The FEC did not appeal the *Van Hollen* decision, probably because it lacked four votes to appeal. Instead, the intervener appealed and the D.C. Circuit reversed, sending the case back to the FEC to explain or revise its regulation. *See* Ctr. for Individual Freedom v. Van Hollen, 694 F.3d 108 (D.C.Cir. 2012). When the FEC did not act, the court again invalidated the regulation. *See* Van Hollen v. FEC, 74 F. Supp. 3d 407 (D.D.C. 2014).

[230] *See* Van Hollen v FEC, 811 F.3d 486, 489-90 (D.C. Cir 2016), *reversing* 74 F. Supp. 3d 407 (D.D.C. 2014).

exercise of agency discretion under *Chevron*.[231] Although a rehearing en banc was requested, and denied,[232] the appellate decision was not appealed.

No other court has yet ruled on the validity of this FEC regulation. Six months before the D.C. Circuit's *Van Hollen* decision, in *Delaware Strong Families*, the Third Circuit examined a state law that largely tracked FECA's electioneering communication disclosure provision.[233] Employing exacting scrutiny, the court concluded that there was a substantial relationship between the state's interest in an informed electorate and the type of disclosure required by the law.[234] The court expressly rejected the plaintiff organization's claim that the reasoning of *Citizens United* requires donors to be disclosed only if they earmarked their contributions for electioneering communications.[235] The Supreme Court denied *certiorari*,[236] leaving the Third Circuit's holding intact. Although *Van Hollen* had been handed down six months earlier, Justice Thomas' dissent, which was the only opinion in the denial of *certiorari*, does not mention that

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[231] *See Van Hollen*, 811 F.3d 486.

[232] *See* Van Hollen v. FEC, 811 F.3d 486, *reh'g en banc denied*, 2016 U.S. App. LEXIS 17528 (D.C. Cir. Sept. 26, 2016). For criticism of the composition of the panel, *see* Rick Hasen, *Appeals Court Panel Overturns Van Hollen v. FEC, Reopening Massive Disclosure Loophole for 2016 Cycle*, ELECTION LAW BLOG (Jan. 21, 2016), cited in Stephen R. Klein, *"The Centre Cannot Hold": Campaign Finance Disclosure Beyond 2016*, 56 WASHBURN L.J. 93, 104 (2017).

[233] *See* Del. Strong Families v. Att'y Gen. of Delaware, 793 F.3d 304 (3rd Cir. 2015), *cert. denied sub nom*. Del. Strong Families v. Denn, 136 S. Ct. 2376 (2016). The Delaware provision covered a wider range of media, e.g., radio, newspapers and other periodicals, signs, the internet, mail, and the telephone. *Id.* at 311.

[234] *See Del. Strong Families*, 793 F.3d at 312, *see id*. at 309-310.

[235] *See Del. Strong Families*, 793 F.3d at 311-12. When this decision was rendered, the *Van Hollen* decision invalidating the FEC's regulation had not yet been reversed. However, the Third Circuit appears to have relied on its exacting scrutiny reasoning, not on the earlier *Van Hollen* case. *See id*. at 311-12.

[236] *See Del. Strong Families*, *supra* note 233 (of the eight Justices deciding the case, Justice Alito would have granted *certiorari* and Justice Thomas wrote a dissent).

decision, arguing instead that transparency should sometimes yield to First Amendment values and that the requirements of the Delaware disclosure provisions were unnecessarily broad and burdensome.[237]

Based upon the preceding, prospects for disclosure by entities that are not political committees are uncertain. In the case of independent expenditures, although courts invalidated the FEC's regulation that practically assured donors would not be disclosed, the FEC's subsequent guidance enabled groups to avoid disclosing donors. In the case of electioneering communications, the decision by the D.C. Circuit upheld the FEC's interpretation of FECA requiring intent by donors to fund political activity before disclosure is required. This is the definitive interpretation of FECA's electioneering communication disclosure provision unless and until a different Circuit Court reaches a contrary conclusion, yet there is some uncertainty here as well because the Supreme Court denied *certiorari* in a case invalidating an interpretation similar to the D.C. Circuit's for a state law mirroring the FECA provision.[238] The denial of *certiorari* is not precedential, although it did leave the state law in effect. The fragmentary evidence detailed in this Part thus suggests that, for now, if there is to be action supporting disclosure for politically active groups not classified as political committees, it likely will come from state rather than federal law.

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[237] *See Del. Strong Families*, 136 S. Ct. at 2376.

[238] *See supra* notes 232-235 and accompanying text.

V. FEC ENFORCEMENT

The Federal Election Commission (FEC) is entrusted with enforcing federal campaign finance law.[239] It has six Commissioners, and by law, no political party can be represented by more than three Commissioners.[240] The rationale for this limitation is to ensure that any agency action will reflect some degree of bipartisan support.[241] Although legislating an equal number of Commissioners from each party,[242] and also requiring four votes for official actions, might seem like a recipe for deadlock, in point of fact, until roughly fifteen years ago, there was an extremely low rate of deadlock in important substantive matters.[243]

In the last decade, however, there has been an increase in instances of Commission deadlock. Deadlock has occurred at every level of their decisionmaking. For example, after a complaint is filed about an individual or group that may have violated federal election laws,[244] at least four Commissioners have to vote to *begin* an investigation into whether the facts are as

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[239] *See* Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, §310, 52 U.S.C. §§30106 et seq.

[240] *See* 52 U.S.C. §30106(a)(1).

[241] *See Deadlocked Votes Among Members of the Federal Election Commission (FEC): Overview and Potential Considerations for Congress* (Summary), CONGRESSIONAL RESEARCH SERVICE R40779 (Oct. 6, 2009); Scott E. Thomas and Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 590 (2000).

[242] The statutory requirement prevents more than three Commissioners from one party. Occasionally Commissioners are Independents, e.g., Steven T. Walther, currently on the Commission.

[243] *See* Office of Commissioner Ann M. Ravel, FEC, *Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp* 7-12 (Feb. 2017). Early in its history, the FEC was sometimes attacked for being too active in enforcing campaign finance laws. *See* Lauren Eber, *Note: Waiting for Watergate: The Long Road to FEC Reform*, 79 S. CAL. L. REV. 1155, 1167-68 (2006).

[244] Complaints are frequently filed by nonpartisan watchdog groups and partisan members of the public opposed to the activities of the organization that is the subject of the complaint.

alleged.[245] This is the same number of Commissioners as are needed to approve a formal rulemaking, issue an advisory opinion, enter into a conciliation agreement, or conclude whether a violation of FECA actually occurred.[246] As a result, many complaints are dismissed prior to fact finding because only three votes exist to pursue an investigation. In such cases, the Commission "will not even ask questions and may not get to the bottom of some very serious allegations."[247] Deadlocks about starting an investigation occur even when the Office of General Counsel informs the Commissioners that there is reason to believe an investigation should be undertaken.[248]

In a scathing report, then-Commissioner Ann Ravel stated that in 2016 the FEC deadlocked in 30% of their substantive votes, as compared with 4.2% in counterpart situations in 2006.[249] She argues that an "anti-enforcement bloc" "has shut down the Commission's ability to

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[245] *See* 52 U.S.C. §30109(a)(2).

[246] *See FEC Enforcement Process and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE 9 (Dec. 22, 2015).

[247] Thomas & Bowman, *supra* note 241, at 592.

[248] *See*, e.g., FEC, *Summary*, MUR 7286 (Indivisible Kentucky, Inc.) (2018), https://www.fec.gov/data/legal/matter-under-review/7286/; FEC, *Summary*, MUR 6589 (Am. Action Network) (2016), https://www.fec.gov/data/legal/matter-under-review/6589/; FEC, *Summary*, MUR 6487 (F8, LLC, *et al*.) (2016), https://www.fec.gov/data/legal/matter-under-review/6487/; FEC, *Summary*, MUR 6002 (Freedom's Watch, Inc.) (2010), https://www.fec.gov/data/legal/matter-under-review/6002/; FEC, *Summary*, MUR 5993 (I'm for Ohio) (May 2009), https://www.fec.gov/data/legal/matter-under-review/5993/; FEC, *Summary*, MUR 5694 (Americans for Job Security, Inc.) (2009), https://www.fec.gov/data/legal/matter-under-review/5694/.

[249] *See Dysfunction and Deadlock*, *supra* note 243, at 1, 3, 7-8. The Report also describes similar findings by the Congressional Research Service and Public Citizen. *Id*. at 8. For the meaning of a "substantive vote," *see Deadlocked Votes*, *supra* note 240.

investigate even serious allegations in sworn complaints."[250] Experts disagree about the origin of the current dysfunction.[251] Certainly, by 2009, several highly publicized and "acrimonious" disagreements led Commissioners to level charges of bad faith or worse against fellow Commissioners in their "Statements of Reasons" for recommending that an enforcement action be pursued or dismissed.[252] Legislation has repeatedly been introduced, often on a bipartisan basis, to restructure the FEC in the hopes of creating a more effective agency to regulate and enforce federal campaign finance laws.[253] In the face of a dysfunctional agency, numerous commentators have also made proposals to reform the FEC.[254]

The FEC may also have been hampered by inadequate resources. Between 2017 and 2020, the FEC experienced a net loss of 38 full-time employees, a roughly 10% reduction.[255]

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[250] *See Dysfunction and Deadlock*, *supra* note 243, at 7 (arguing the bloc applied a more stringent standard of proof than is required, even to the initial decision to begin an investigation). *See also* FEC, *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12545 (Mar. 16, 2007).

[251] *See Dysfunction and Deadlock*, *supra* note 243, at 8; Richard L. Hasen, *The FEC Is As Good As Dead; The new Republican commissioners are gutting campaign finance law*, SLATE (Jan. 25, 2011) (dating it to the two-year fight over confirming Hans von Spakovsky as a commissioner and the eventual appointment of Donald McGahn, an outspoken critic of campaign finance laws).

[252] *See Deadlocked Votes*, *supra* note 240, at 3.

[253] *See* Federal Election Administration Act of 2009, S.1648 (Aug. 7, 2009); Restoring Integrity to America's Elections Act, H.R.2931, 114th Cong. (2015). Restoring Integrity to America's Elections Act, H.R.2034, 115th Cong. (2017); Restoring Integrity to America's Elections Act, H.R. 1272, 116th Cong. (2019). *See also* We the People Act of 2017, H.R.3537, 115th Cong. (2017) (proposing to abolish the FEC and create a new agency instead).

[254] *See Note: Eliminating the FEC: The Best Hope for Campaign Finance Regulation?*, 131 HARV. L. REV. 1421 (2018) (recommending elimination of the FEC and arguing that other entities could prevent "chaos and disorder" from ensuing); Daniel I. Weiner, *Fixing the FEC: An Agenda for Reform*, BRENNAN CENTER FOR JUSTICE (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Fixing_FEC.pdf.

[255] *See* FEC, *Fiscal Year 2020 Congressional Budget Justification* 13 (Mar. 18, 2019) (stating that FY 2020 would see a "total decrease of 38 FTEs").

More importantly, between 2010 and 2021, the FEC lost 30% of the staff in its enforcement division.[256] This loss coincided with a growing enforcement case load.[257] As a result, the FEC has dismissed well-documented complaints for reasons of "prosecutorial discretion," asserting it was prudent not to pursue those cases because of its limited resources and other priorities.[258] In general, the agency's exercise of prosecutorial discretion regarding enforcement is unreviewable by a court, although if based upon an interpretation of law, rather than practical considerations, the decision is reviewable.[259]

Whatever the source of the current tendency to deadlock on important substantive issues, the ramifications for campaign finance enforcement have been profound. A former FEC Commissioner observed, "[t]he deadlock in recent years not only means that those who have already violated the law are not penalized, but sends a signal that others can push the legal envelope with little fear of recourse."[260] In addition, as noted earlier, even when a court rebukes the FEC for an interpretation or action being "contrary to law" and directs it to withdraw a regulation, the FEC may continue to thwart the purposes of the statute (and the court) by

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[256] *See* Courtney Bublé, *Election Agency Commissioner: 'The Biggest Story at the FEC Is What's Not Happening*, GOVEXECDAILY (Feb. 20, 2021) (citing testimony by Commissioner Ellen Weintraub to Committee on House Administration, May 2019).

[6] *See* Bublé, *supra* note 255.

[258] *See* CREW v. FEC (*CREW-CHGO*), 892 F.3d 434, 439 n.7 (D.C. Cir. 2018); *id* at 438 (prosecutorial discretion can be exercised by administrative agencies).

[259] *CREW-CHGO*, 892 F.3d at 438; CREW v. AAN, 415 F. Supp. 3d 143, 146-47 (2019).

[260] Trevor Potter, *Money, Politics, and the Crippling of the FEC: A Symposium on the Federal Election Commission's Arguable Inability to Effectively Regulate Money in American Elections*, 69 ADMIN. L. REV. 447, 450 (2017).

continuing to issue guidance that permits evasion of disclosure.[261]

For nine months in 2019-20, the FEC's enforcement function was further undermined by the lack of a quorum.[262] There is now a quorum, but no nominees for the two remaining seats have yet been identified.[263] It remains to be seen whether the current Commissioners–two Republicans, one Democrat, and one Independent–can cooperate regarding the agency's work in the present polarized political climate.

What is needed is for the FEC to commit to enforcing FEC v+-A and the regulations as written. This article has reviewed two major areas where existing statutory and regulatory provisions support far more extensive enforcement than has occurred in the past decade. Parts II-III demonstrated the legal grounds for classifying as political committees tax-exempt organizations engaged in extensive campaign activity, such as electioneering communications, activities that support or oppose candidates for public office, and contributions to groups that engage in electoral activities. There is also precedent for counting what groups tell their donors when soliciting funds to determine if electoral activity is in fact their major purpose.[264] Additionally, the FEC should scrutinize politically active groups that accomplish their social welfare purpose largely by lobbying since, when it is to their advantage, they have asked the IRS to classify their lobbying and issue advocacy as political activity because these are undertaken to

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[261] *See supra* notes 216-219 and accompanying text.

[262] *See Federal Election Commission: Membership and Policymaking Quorum, In Brief*, CONGRESSIONAL RESEARCH SERVICE 1 (June 24, 2020). There were four Commissioners between 2017 and August 2019.

[263] *Membership and Policymaking Quorum*, *supra* note 262, at 2.

[264] *Supra* note 166 and accompanying text.

further the groups' electoral agenda.[265] In short, current law permits the FEC to take a holistic approach in classifying groups as political committees.

Second, as detailed in Part IV, existing law supports requiring greater disclosure of donors than the FEC currently requires. Judicial decisions have directed the FEC to implement the literal terms of FECA 30104(c)(1), which could greatly enlarge the groups required to identify their donors.[266] However, politically active nonprofits have mixed purposes because by law, their campaign activity cannot be their primary purpose. This has enabled them to deny that any of their donors have political purposes. To avoid needing to determine the motives of donors, the FEC could institute a rebuttable presumption that the same percentage of each contribution has an electoral purpose as the percentage of the nonprofit's spending on independent expenditures has to its total spending.[267] Further, under existing law the FEC should enforce FECA's "straw donor" provision that requires organizations to disclose the identities of the ultimate donors, when the immediate donors are entities with names that mask the names of their supporters.[268]

In brief, even without new legislation or judicial decisions, the FEC has at its disposal numerous avenues for reducing some of the excesses of outside group campaign financing. Its current inaction not only reflects, it also reinforces the dysfunction of the electoral system it is sworn to protect.

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[265] *See* PLRs 199925051, 9808037, 9725036.

[266] *See supra* notes 213-214.

[267] For a somewhat similar strategy used to quantify the lobbying or campaigning component of dues paid to certain nonprofits that lobby or campaign, see IRC §§ 162(e), 6033(e)(1)(A).

[268] *See supra* note 210.

VI. IRS ENFORCEMENT

A. What Is a Social Welfare Organization?

In the last two decades, certain nonprofit groups that qualify as IRC exempt organizations have become increasingly active politically. The most prominent of these are social welfare organizations[269] exempt from federal income tax under section 501(c)(4).[270] Although the statute requires that they be "operated exclusively for social welfare," the implementing Treasury regulation states that "an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[271] The term "social welfare" is not further defined in the statute or regulations, but the regulations state that social welfare does not include participation in a political campaign for or against a candidate for public office, social or recreational activities, or carrying on a business in a manner similar to a for-profit organization.[272]

The affirmative requirement for a social welfare organization is thus very general, i.e.,

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[269] The exemption is for "civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare," or certain associations of employees not relevant here. 26 U.S.C. §501(c)(4).

[270] Most 501(c)(4) groups are not politically active. The relatively small number spending large amounts of money on political campaigns are responsible for the sector's reputation. *See* Jeremy Koulish, *From Camps to Campaign Funds: History, Anatomy, and Activities of 501(c)(4) Organizations,* URBAN INST. 26-27 (2016). In 2019, there were roughly 80,000 501(c)(4) groups filing with the IRS. *See* IRS, *Statistics of Income Tax Stats: Tax-Exempt Organizations and Non-Exempt Charitable Trusts* (Table 14), https://www.irs.gov/statistics/soi-tax-stats-tax-exempt-organizations-and-nonexempt-charitable-trusts-irs-data-book-table-14. These numbers do not reflect smaller 501(c)(4) groups not required to file annual returns because their gross receipts are less than $50,000.

[271] 26 C.F.R. §1.501(c)(4)-1(a)(2)(i).

[272] *See* 26 C.F.R. §1.501(c)(4)-1(a)(2)(ii).

promoting some kind of community benefit or public good.[273] The activities and goals of social welfare organizations sometimes resemble those of 501(c)(3) charities,[274] but if an organization desires to lobby more than the insubstantial amount permitted to a charity,[275] it often organizes as a 501(c)(4) group or establishes a 501(c)(4) affiliate for its lobbying.[276] An IRS ruling states that a social welfare group can have lobbying to achieve its social welfare goal as its principal or sole purpose.[277] Thus, because 501(c)(4)s can engage in some political campaign activity,[278] they can be social welfare groups in good standing while devoting most of their activity to lobbying (for their social welfare mission) and some to campaign activity. For example, an environmental group would likely qualify as pursuing a 501(c)(4) community benefit if it spends 80% of its

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[273] In the words of an IRS instruction manual, "'social welfare' is inherently an abstruse concept that continues to defy precise definition." IRS, *Social Wefare: What Does It Mean? How Much Private Benefit Is Permissible? What Is A Community?*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 1981 (*1981 IRS CPE TEXT*) 39 (1981). *See* Flat Top Lake Ass'n v. U.S., 868 F.2d 108 (4th Cir. 1989) (stating that the regulation merely substitutes one amorphous term (i.e., "community") for another ("social welfare")"); Daniel Halperin, *The Tax Exemption under I.R.C. §501(c)(4)*, 21 NYU J. LEGIS. & PUB. POL'Y 519, 525-28 (2014). For examples of a community benefit, *see* John Francis Reilly, Carter C. Hull, & Barbara A. Braig Allen, *IRC 501(c)(4) Organizations,* EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION (CPE) TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2003 (*2003 IRS CPE TEXT*), I-4 to I-11 (2003), https://www.irs.gov/pub/irs-tege/eotopici03.pdf.

[274] *See Note: IRS Denials of Charitable Status: A Social Welfare Organization Problem*, 82 MICH. L. REV. 508, 512-14 (1983).

[275] *See* 26 U.S.C. §501(c)(3) (stipulating that no substantial part of a 501(c)(3)'s activities can be attempting to influence legislation). *See also* 26 U.S.C. §501(h) (permitting public charities to elect an alternative to the "no substantial part" rule).

[276] This structure was blessed by the Court in Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983).

[277] Lobbying in pursuit of a group's social welfare purpose is part of the group's social welfare activities. Rev. Rul. 71-530, 1971-2 Cum.Bull. 237.

[278] *See* Rev. Rul. 81-95, 1981-1 Cum.Bull. 332 (stating that 501(c)(4)s can engage in campaign activity as long as they are primarily engaged in social welfare).

activities on lobbying legislators on environmental issues, 10% on campaigning for candidates committed to a green agenda, and 10% percent on administration. The group would qualify as a social welfare organization, although to the public, it might appear to be a political organization.

B. The "Primarily" Standard

A frequently contested aspect of the criteria for 501(c)(4) status is the statement in the regulations that a group can qualify "as operating exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."[279] Since the underlying statute says "exclusively" rather than "primarily," and the IRS has not published formal guidance that quantifies or elaborates the primarily standard introduced in the regulations, commentators have advanced a wide variety of interpretations. These interpretations include requiring a 501(c)(4) group's social welfare activities to be 100% of its overall activities, 60% of its activities, 51% of its activities, or all but an "insubstantial" portion of its activities.[280] Some practitioners adopt the most lenient interpretation, i.e, that as long as 51% of a group's activities promote social welfare, it satisfies the primarily requirement of the 501(c)(4) regulations.[281]

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[279] 26 C.F.R. §1.501(c)(4)-1(a)(2)(i).

[280] *See* ABA Section of Taxation, *Comments on Proposed Regulations regarding Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities* 10-12 (May 7, 2014) (*2014 ABA Comments*). The Section of Taxation did not reach a consensus about the proper standard. *Id*. at 11. An earlier task force of the Exempt Organizations Committee of the Section of Taxation recommended at least 60% of a 501(c)(4)'s activities be for social welfare. *See* ABA Section of Taxation, *Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics*, 45 EXEMPT ORG. TAX REV. 136 (2004). However, the views of some of the principal authors of this Task Force have, in the wake of *Citizens United*, changed. *See 2014 ABA Comments*, at 11 n.15.

[281] *See 2014 ABA Comments*, *supra* note 280, at 11. This interpretation would afford clients maximal leeway for campaign activity.

Although the IRS has appeared at times to acquiesce in the equation of primarily with 51%,[282] such statements have been in non-precedential materials.[283] At the same time, the agency has consistently taken the position in litigation that 501(c)(4) groups cannot have a non-social welfare purpose that is more than "insubstantial," and numerous courts, including appellate courts in five federal Circuits, have agreed.[284] The statement by the Tax Court in *Ocean Pines Association v. Commissioner* is illustrative. In upholding the IRS's denial of a 501(c)(4) exemption, the court stated that an organization "will not be denied exemption if it partakes in activities not in furtherance of an exempt purpose so long as such nonconforming activities are

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[282] *See* Jennifer Mueller, *Defending Nuance in an Era of Tea Party Politics: Any Argument for the Continued Use of Standards to Evaluate the Campaign Activities of 501(c)(4) Organizations*, 22 GEO. MASON L. REV. 103, 111 (2014); *Judy Kindell on §501(c)(4)-(6) Organizations and § 527*, 11 Paul Streckfus' EO Tax J. 42, 44 (May/June 2006) (stating the opinion of a tax law specialist in the Exempt Organization Division of the IRS). Until 1959, the regulations mirrored the language of the underlying statute by requiring a social welfare group to be engaged exclusively in social welfare activities. *See* Miriam Galston, Vision Services Plan v. U.S.: *Implications for Campaign Activities of 501(c)(4)s*, 53 EXEMPT ORG. TAX. REV. 165, 166 (2006). For the discussions within the IRS about the regulation's inconsistency with the statute, *see id.* at 168-69.

[283] On non-precedential materials, *see* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Colllide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 62-63 (2004). The IRS has also stated in internal documents that 501(c)(4) organizations can have a greater amount of non-exempt activity than can 501(c)(3) groups. *See* Galston, *supra* note 282, 167-68.

[284] *See* Ocean Pines Ass'n v. Comm'r, 135 T.C. 276, 281 (2010), aff'd 672 F.3d 284 (4th Cir. 2012); Vision Services Plan v. U.S., 2006-1 U.S. Tax Cas. (CCH) ¶ 50,173, at 11 (E.D. Cal. 2005), aff'd 2008-1 U.S. Tax Cas. (CCH) 50,160,101 (9th Cir. 2008), *cert. denied*, 555 U.S. 1097 (2009); Am. Ass'n of Christian Schools Voluntary Employees Beneficiary Ass'n Welfare Plan Trust v. United States, 850 F.2d 1510, 1515-16 (11th Cir. 1988); Police Benevolent Ass'n of Richmond, Va.. v. United States, 661 F. Supp. 765, 773 (E.D. Va.1987), aff'd without opinion, 836 F.2d 547 (4th Cir. 1987) (*per curiam*) (unpublished opinion); Mutual Aid Association of the Church of the Brethren v. United States, 759 F.2d 792, 796 (10th Cir. 1985); Contracting Plumbers Cooperative Restoration Corp. v. U.S., 488 F.2d 684, 686 (2d Cir. 1973), *cert. denied*, 419 U.S. 827 (1974); American Women Buyers Club, Inc. v. United States, 338 F.2d 526, 528 (2d Cir. 1964); People's Educational Camp Soc'y, Inc. v. Comm'r, 331 F.2d 923, 931 (2d Cir.), *cert. denied*, 379 U.S. 839 (1964).

insubstantial in comparison to activities which further exempt purpose(s)."[285]

Clearly, if a 501(c)(4)'s non-social welfare purpose is limited to being insubstantial, an organization's non-exempt activities cannot be 40%, much less 49%, of its overall activities.[286] Further, even if the relevant factors measured were limited to an organization's expenditures, it is not obvious whether substantial/insubstantial should refer to a percentage or an absolute dollar amount. Recall that several cases examining the FECA primary purpose standard criticized a percentage test because it could cause a low-budget group spending $1,500 on candidate advertisements to be a political committee, while a high-budget group might not be a political committee even if it spent $1.5 million on such advertisements.[287] If the relevant factors measured extend beyond expenditures–e.g., including time spent, volunteer hours, or representations in solicitations or other communications with potential donors or the public–the primarily test would be even more elusive. Whatever test the IRS eventually adopts, it should elaborate the standard in considerable detail, as it has in the case of lobbying,[288] to enable affected groups to plan their political involvement so as not to threaten their exempt status. Moreover, a group's political activities will be combined with all its other non-exempt activities to determine if the group is operating primarily to promote social welfare.

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[285] *Ocean Pines Ass'n*, 135 T.C. at 281.

[286] Although the statute and regulations don't speak of a social welfare or exempt *purpose*, the regulations imply this by saying that an "organization embraced within this section is one which is operated primarily for the purpose of bringing about civic betterments and social improvements." Treas. reg. §1.501(c)(4)-1(a)(2)(i).

[287] *See supra* notes 112-119 and accompanying text.

[288] *See* 26 C.F.R. §§53.4911-2, 53.4945-2.

In an earlier article, I elaborated what the primarily standard should be.[289] To summarize, since the statute requires 501(c)(4) groups to be exclusively engaged in promoting social welfare, the interpretation of primarily should be heavily influenced by the statutory mandate. There are administrative reasons to permit 501(c)(4) groups to engage to some degree in campaign activities, since the ambiguity surrounding what constitutes political campaign activity makes a zero tolerance standard impractical. Not only does the statutory language suggest that "primarily" permits only a modest amount of non-exempt activity. The underlying rationale for having a 501(c)(4) exemption in the first place suggests that only an insubstantial amount of non-exempt activity should be permitted. A fundamental principle of the IRC is that all income is subject to tax unless otherwise excepted.[290] In section 501(a) Congress excepted from income taxation numerous categories of entity because of specific types of public good they provide. The public good provided by social welfare organizations is elaborated as "the common good and general welfare of the people of the community" and "bringing about civic betterments and social improvements."[291] While these phrases are maddeningly indeterminate, they do exclude certain types of enterprises. As noted earlier, the regulations state that social welfare does not include participation in political campaigns for or against a candidate for public office, social or recreational activities, and commercial activities.[292] Further, the terms of the regulation exclude

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[289] *See* Galston, *supra* note 282.

[290] *See* 26 U.S.C. §61 (defining gross income as "all income from whatever source derived").

[291] 11 C.F.R. §1.501(c)(4)-1(a)(2)(i).

[292] 11 C.F.R. §1.501(c)(4)-1(a)(2)(ii).

private benefit or private goods.[293] In *American Campaign Academy v. Commissioner*,[294] the Tax Court expressly stated that conferring a benefit on a political party constitutes a private benefit. In short, both because the regulations exclude political campaign activity from the purview of social welfare and because political participation represents a private benefit, the campaign activity of 501(c)(4) organizations should not be substantial. That this interpretation accords with congressional intent can also be seen from Congress's assertion, in enacting section 527, that this new form of tax exempt entity would take "the campaign-type activities ... entirely out of the section 501(c) organization ... to the benefit both of the organization and the administration of the tax laws."[295]

C. The Meaning of "Political" for 501(c)(4) Purposes

Although the 501(c)(4) regulations specify that social welfare does not include participation in a political campaign for or against a candidate for elected office, the regulations do not explain what political activity[296] is covered by this statement. Over the years, the IRS has issued precedential and non-precedential forms of guidance that clarify the meaning of political activity for organizations described in 501(c), and there are a few judicial decisions on the same topic. Only one precedential ruling identifies political activity specifically in the context of 501(c)(4); most rulings elaborate the term in connection with 501(c)(3) organizations. The

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[293] *See* Rev. Rul. 73-306, 1973-2 Cum.Bull. 179; 80-206, 1980-2 Cum.Bull. 185.

[294] *See* 92 T.C.1053 (1989).

[295] S. REP. NO. 93-1357, at 30 (1974).

[296] The 501(c)(4) regulations say "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office." 26 C.F.R. §1.501(c)(4)-1(a)(2)(ii). The title of that subsection is "Political or social activities." *Id*. This article uses "political activity," "political campaign activity," and "participation in political campaigns" interchangeably.

501(c)(4) ruling involved a group that rated candidates for public office as its main activity. The ratings were made on a nonpartisan basis and were explained in terms of the candidates' qualifications, e.g., education and experience. Although the group "was formed for the purpose of promoting an enlightened electorate," the ruling held that it was not entitled to 501(c)(4) exemption because its primary activity, even if nonpartisan, constituted "participation or intervention on behalf of those candidates favorably rated and in opposition to those less favorably rated."[297] The Second Circuit upheld the identical position for a 501(c)(3) entity that rated candidates for elected judicial positions, even though the entity frequently gave multiple candidates a "highly qualified" rating.[298]

There are, however, additional IRS rulings and other materials that can be consulted. The IRS has indicated that rulings elaborating the meaning of political activity for purposes of 501(c)(3) groups also apply to 501(c)(4) organizations.[299] In addition, IRS materials that elaborate the meaning of political activity for section 527 organizations are also useful for elaborating its meaning for social welfare and other tax-exempt 501(c) groups.[300]

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[297] Rev. Rul. 67-368, 1967-2 Cum.Bull. 194. *See* Priv. Letter Rul. 202022009, 2020 PLR Lexis 153 (Feb. 20, 2020).

[298] *See* Ass'n of the Bar of City of New York v. Comm'r, 858 F.2d 876, 881 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989).

[299] *See* Rev. Rul. 81-95, 1981-1 Cum.Bull. 332.

[300] This is because 501(c) organizations are potentially subject to tax on the amounts they spend on political activities, IRC §527(f), and the definition of political activity for the purpose of this tax is almost the same as for section 527 groups. *See* IRC §527(e)(2). A few activities that are political activities for a 527 group would not be for 501(c)s. *See 2003 EO CPE TEXT*, *supra* note 271, at L-9 to L-10. However, under section 527(f)(1), a 501(c) organization engaging in such activities is only taxable on the lesser of its political expenditures or its net investment income in the taxable year. Thus, a social welfare organization could spend millions of dollars on political activity (assuming this is not its primary activity) and still be liable for no or minimal tax if it has little or no net investment income. *See* Rev. Rul. 2004-6, 2004-1 Cum.Bull. 328.

The scope of the concept of political activity for federal election law purposes is not the same as its scope for federal income tax purposes, and in most respects, the concept is much broader under the IRC.[301] A major difference is that the election law standard encompasses only activities associated with campaigns for federal office, while the tax code standard can reach political activity at the local, state, or federal level. As a consequence, all independent expenditures for FECA purposes will be political campaign activity for purposes of section 501(c)(4) as well, but so will express advocacy at any other level of government. Electioneering activities for FECA purposes include only certain communications made on the eve of a federal primary or election,[302] while the tax code concept could reach comparable communications made at any point in an election cycle and at any level of government.[303] The two regimes also differ in that ads classified as electioneering communications under federal campaign finance law might be considered a form of issue advocacy by the IRS, depending upon the context and, thus, could count as social welfare rather than as political.[304]

The main respects in which the tax code and election law standards differ concern

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[301] *See* Miriam Galston, *When Statutory Regimes Collide: Will* Citizens United *and* Wisconsin Right to Life *Make Federal Tax Regulation of Campaign Activity Unconstitutional?*, 13 U. PA. J OF CONST. L. 867, 877-79 (2011) (comparing the type of activity treated as political in the election law and tax regimes). *See also* Judith E. Kindell & John Francis Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002 (*2002 IRS CPE TEXT*) 343-344 (explaining the IRS cannot adopt the FEC standard because of the different objectives of the two regimes), https://www.irs.gov/pub/irs-tege/eotopici02.pdf.

[302] *See supra* note 13. Although "electioneering communication" was narrowed to the functional equivalent of express advocacy for some purposes, the original definition still applies for disclosure. *See Citizens United*, 558 U.S. at 368-69.

[303] Although communications made outside the 30/60 day framework of FECA can be political activity for exempt organizations, the more distant an election involving the candidate named is, the less likely the communication will be viewed as political activity by the IRS.

[304] *See* Rev. Rul. 2004-6, 2004-1 Cum.Bull. 331; Rev. Rul. 2007-41, 2007-1 Cum.Bull. 1421.

activities that support or oppose a candidate for elected office, but are not express advocacy or electioneering communications. There are only a few instances in which the support/oppose standard applies in the election law context,[305] whereas this standard underlies many of the activities deemed campaign activities for IRC purposes. In a series of revenue rulings spanning more than 40 years, the IRS has attempted, largely through illustrative examples, to identify the categories of activities that will be counted as participation in a political campaign.[306] Most of these examples portray a series of factors that do or do not suggest the intent to affect a political campaign, and the IRS reaches its ultimate assessment by applying a balancing process called the "facts and circumstances test."

Most of the examples included in IRS guidance involve attempts to influence the outcome of an individual candidate's campaign for public office.[307] These can involve obviously political campaign activities, such as distributing partisan voter guides, raising money for a candidate, disseminating a candidate's campaign literature, or providing a forum for only one of two competing candidates for a public office.[308] The examples also include less blatant forms of

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[305] *See* 52 U.S.C. §30101(20)(A)(iii).

[306] The most comprehensive collection of examples is in Rev. Rul. 2007-41, *supra* note 304, which discusses situations that could be political activity that is completely prohibited for 501(c)(3) organizations. Rev. Rul. 2004-6, *supra* note 304, lists factors the IRS considers to determine if an activity is a non-taxable exempt function for a section 527 political organization, which would make it a potentially taxable activity if done by a 501(c)(4) group.

[307] *See 2002 IRS CPE TEXT*, *supra* note 301, at 339-341 (discussing the meaning of "candidate" and "public office" for IRC and FECA purposes); Rev. Rul. 67-71, 1967-1 Cum. Bull. 125 (stating that an elective school board position is a public office).

[308] *See* Rev. Rul. 78-248, 1978-1 Cum.Bull. 154; Rev. Rul. 80-282, 1980-2 Cum.Bull. 178; 2002 IRS CPE TEXT, *supra* note 298, at 419; Rev. Rul. 74-574, 1974-2 C.B. 160. *See also* Erika Lunder, *IRS Guidelines for Political Advocacy by Exempt 501(c) Organizations: Revenue Ruling 2004-6*, CRS REPORT (Jan. 10, 2005).

political campaign activity. For example, inviting all candidates for a particular office to speak during the month preceding an election, but scheduling the preferred candidate at the time likely to attract the largest audience, will constitute campaign activity by the organization,[309] as will express advocacy by an organization's leader in a context where her statement can be attributed to the organization.[310] A statement advocating a position on a public issue may be classified as political campaign activity if it occurs in proximity to an election, names or otherwise identifies a candidate in the election, connects the candidate to the organization's approved (or disapproved) position, or otherwise indicates an intent to influence the candidate's success in the election.[311]

In short, what constitutes political activity for a social welfare group is clear in some instances and ambiguous in others. The 2004 and 2007 revenue rulings described in the preceding clarified the situation somewhat, but the IRS's subsequent attempt to further clarify the meaning of political activity for 501(c)(4) and other exempt organizations was unsuccessful.[312] In response to this situation, a group of nonprofit and tax attorneys founded *The Bright Lines Project*, an effort to develop a series of precise and detailed definitions and rules to eliminate much of the ambiguity surrounding the meaning of political activity for exempt organizations

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[309] *See* Rev. Rul. 2007-41, *supra* note 304, at 1423 (introduction to situations 7-9).

[310] *See* Rev. Rul. 2007-41, *supra* note 304, at 1423 (situation 6).

[311] *See* Rev. Rul. 2007-41, *supra* note 304, at 1424-1425. Another factor listed by the IRS is "[w]hether the timing of the communication and identification of the candidate are related to a non-electoral event like a scheduled vote on specific legislation by an officeholder who also is a candidate for public office." *Id*. at 1424. Also important is whether the subject matter is a wedge issue between the opponents in the election. *Id*. *See 2002 IRS CPE Text, supra* note 301, at 344-346.

[312] *See infra* notes 316-320 and accompanying text.

described in sections 501(c)(4), (5), and (6).[313] The proposals elicited both praise and criticism,[314] but for reasons explained in what follows, neither these proposals nor any other clarifications of the political activity standard for tax-exempt organizations have been adopted by the IRS to date.

The IRS has occasionally attempted to deny or revoke 501(c)(4) exemption to partisan organizations because they provide too much private benefit to qualify as social welfare organizations. Employing a private benefit test enables the agency to avoid determinations based upon the participation or intervention in campaign activity standard. To date, however, it seems to have been successful in utilizing the private benefit theory with 501(c)(3) groups, but not 501(c)(4) organizations.[315]

D. IRS Enforcement

1. *IRS attempts at clarifying "Political Campaign Activity" and "Primarily*"

The IRS has made attempts intermittently over the years to enforce limits on politically active social welfare organizations. The most important of these efforts was its decision in 2013 to initiate a rulemaking that would clarify the meaning of political campaign activity for

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[313] Public Citizen, *The Bright Lines Project* (summarizing the history and rationale of the project and containing the conclusions of the group, which were sent to the IRS in November of 2014), https://brightlinesproject.org/about-us/.

[314] *See* Ellen P. Aprill, *A Case Study of Legislation vs. Regulation: Defining Political Campaign Intervention under Federal Tax Law*, 63 DUKE L.J. 1635, 1639-47 (2014) and sources cited.

[315] *See American Campaign Academy*, *supra* note 263 (describing partisan 501(c)(3) private benefit case); Ohio DLC, Inc. v. IRS, T.C. No. 9743-00 (2001) (entering a stipulated decision that revoking the 501(c)(4) DLC's exemption due to private benefit was erroneous). *See also* Democratic Leadership Council v. U.S., 542 F. Supp. 2d 63 (D.D.C. 2008) (rejecting IRS revocation of 501(c)(4) exemption because was retroactive).

501(c)(4) purposes and the contours of the primarily standard.[316]

The IRS's Notice of Proposed Rulemaking (*NPRM*) elicited more than 150,000 comments and was criticized by both the political right and the political left.[317] As the IRS noted, the proposed "more definitive" rules would sometimes capture more and sometimes less than existing interpretations.[318] Although its proposed regulations would thus be less lenient than existing law in certain areas, it would be more lenient in others--a necessary byproduct of creating relatively precise and objective rules to replace the amorphous, repeatedly criticized "facts and circumstances" standard.[319] Even though greater certainty about the parameters of political activity would assist nonprofits and their tax counselors as well as the IRS in navigating an otherwise ambiguous and contested area of law, the criticism of its proposed regulations was intense and wide-ranging.[320] The Service failed to move forward on these regulations,[321] and

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[316] *See* IRS, *Guidance for Tax-Exempt Social Welfare Organizations on Candidate-Related Political Activities*, 78 Fed. Reg. 71535 (Nov. 29, 2013) (*NPRM*).

[317] *See* IRS News Release, *Prepared Remarks of Commissioner of Internal Revenue Service John Koskinen before the National Press Club* (Apr. 2, 2014), https://www.irs.gov/newsroom/prepared-remarks-of-commissioner-of-internal-revenue-service-john-koskinen-before-the-national-press-club-2014. *See also* Matt Nese & Kelsey Drapkin, *Overwhelmingly Opposed: An Analysis of Public and 955 Organization, Expert, and Public Official Comments on the IRS's 501(c)(4) Rulemaking*, INSTITUTE FOR FREE SPEECH (July 21, 2014) (finding, based upon a sample of 955 comments, that 87% were opposed to the *NPRM*), https://www.ifs.org/research/overwhelmingly-opposed-an-analysis-of-public-and-955-organization-expert-and-public-official-comments-on-the-irss-501c4-rulemaking/.

[318] *See NPRM*, 78 Fed. Reg. at 71536-71537.

[319] *See* Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L. J. 1313, 1350, 1357 (2007); Kay Guinane, *Wanted: A Bright-Line Test Defining Prohibited Intervention in Elections by 501(c)(3) Organizations*, 6 FIRST AMEND. L. REV. 142 (2007) (describing history and application of facts-and-circumstances test and arguing for a bright-line rule); Amelia Elaqua, *Eyes Wide Shut: The Ambiguous "Political Activity" Prohibition and Its Effects on 501(c)(3) Organizations,* 8 HOUS. BUS. & TAX L.J. 113, 131-32 (2007).

[320] *See* Rick Cohen, *143,764 Comments Submitted to IRS on Proposed 501(c)(4) Regulations*, NONPROFIT Q. (Mar. 11, 2014) (noting that "[f]rom the left, right, center, and those of no politics

since 2015, Congress has repeatedly passed legislation prohibiting the IRS from using any funds

> to issue, revise, or finalize any regulation, revenue ruling, or other guidance not limited to a particular taxpayer relating to the standard which is used to determine whether an organization is operated exclusively for the promotion of social welfare for purposes of section 501(c)(4) of the Internal Revenue Code of 1986, (including the proposed regulations published at 78 Fed. Reg. 71535 (November 29, 2013)).[322]

In short, the IRS is now actually prohibited by law from clarifying the standards governing politically active social welfare organizations. The result is to preserve the ambiguity about how much and what kind of political activity social welfare organizations can engage in while retaining their exempt status. The ensuing uncertainty, in turn, has enabled a subset of such groups to serve as repositories for unlimited amounts of dark money to flood political campaigns without any public accountability. Among other things, this uncertainty has enabled some groups to claim they primarily promote social welfare even when 49% of their activities involve participating in political campaigns.

2. *Other IRS enforcement*

The IRS had little success in another enforcement effort potentially impacting politically active 501(c)(4) groups. In 2011, the IRS attempted to enforce the gift tax against certain donors,

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at all, the proposed regulations were thoroughly bludgeoned in most of the comments").

[321] *See* IRS *Update on the Proposed New Regulations on 501(c)(4) Organizations* (May 22, 2014) (delaying a public hearing on the proposed regulations to enable the agency to review the comments and revise the proposed regulations based upon them), https://www.irs.gov/newsroom/irs-update-on-the-proposed-new-regulation-on-501c4-organizations. *See also* Press Release, *Hatch Calls for IRS to Throw Out Proposed Rule Regulating Political Activity*,*Agency Seeking to Broaden Rule Governing Tax-Exempt Organizations (*Apr. 13, 2015).

[322] *See Consolidated Appropriations Act, 2016*, Pub. Law 114-113, 129 Stat. 2433 (Dec. 18, 2015)*; Consolidated Appropriations Act, 2017*, Pub. Law 115-31, 131 Stat. 336 (May 5, 2017); *Consolidated Appropriations Act, 2018*, Pub. Law 115-141, 132 Stat. 535 (Mar. 23, 2018), §125; *Consolidated Appropriations Act of 2019,* Pub. Law 116-6 (Feb 15, 2019), §124.

including five contributors to 501(c)(4) groups.[323] The gift tax provision is imposed on individuals who give to a single beneficiary an amount that exceeds the annual gift tax exclusion, currently $15,000.[324] Enforcement of the tax would have affected only those contributing more than the annual gift tax exclusion to a 501(c)(4) in a given year. The pressure brought to bear on Congress to reverse the IRS's enforcement initiative was strong enough that members of the Senate Finance Committee wrote a letter to the Commissioner questioning the IRS's motives and requesting the identities of those who made the decision to enforce the gift tax.[325] Although the Commissioner responded that enforcement against the five donors to 501(c)(4) groups was part of "ongoing work that focuses broadly on gift tax non-compliance" and, thus, did not target donors to social welfare organizations,[326] the IRS ended the five audits and stated that any possible actions of a similar kind would only be undertaken prospectively.[327]

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[323] *See* John R. Luckey & Erika K. Lunder, *501(c)(4)s and the Gift Tax: Legal Analysis*, CONGRESSIONAL RESEARCH SERVICE (Aug. 10, 2012), https://www.everycrsreport.com/files/20120810_R42655_50a6a6d02ebe83076ce441fbfb2b49c953950697.pdf; Caplin & Drysdale, *The Gift Tax and Contributions to Section 501(c)(4) Organizations: Less than Meets the Eye?* (June 14, 2011), http://www.capdale.com/alert-the-gift-tax-and-contributions-to-section-501c4-organizations-less-than-meets-the-eye#Link1; Matthew Melone, *Gift Taxes on Donations to Social Welfare Organizations: De-Politicizing Social Welfare Organizations Or Politicizing the IRS?*, 12 DEPAUL BUS. & COMM. L.J. 51 (2013).

[324] *See* 26 U.S.C. §§2501-2503. There is a lifetime gift tax exclusion, which was more than $11,000,000 in 2019. *See* 26 U.S.C. §2503. Since amount of gifts above the annual exclusion can be credited against the lifetime exclusion, it is possible that no gift tax will be paid in the year the annual exclusion is exceeded, although IRS Form 709 must be filed specifying the amount of the gift. *See* https://www.irs.gov/forms-pubs/about-form-709.

[325] *See* Amanda Becker, *Senate Finance Republicans Question IRS Enforcement*, ROLL CALL (May 18, 2011), https://www.rollcall.com/2011/05/18/senate-finance-republicans-question-irs-enforcement.

[326] *See* Letter from IRS Commissioner Douglas H. Shulman to Senator John Thune (May 31, 2011), http://www.capdale.com/files/Shulman%20Letter%20May%2021,%202011.pdf. In September of 2010, the Senate Finance Chair had written to the Commissioner asking him to begin investigating politically active exempt organizations. *Id*.

[327] *See* Luckey & Lunder, *supra* note 323, at 1.

In 2015, Congress passed legislation that expressly abolished the gift tax for contributions to 501(c)(4) organizations and other tax-exempt groups.[328] Thus, this potential avenue for making politically active 501(c)(4) organizations less attractive for outsize contributions was eliminated. In short, as was the case with the proposed regulations to clarify the meaning of the primarily standard and the type of political activity to be measured, the issue of a gift tax exemption for large gifts to 501(c)(4) groups is no longer in the control of the IRS.[329]

The IRS nonetheless has the ability to audit politically active exempt organizations to determine whether they engage in sufficient campaign activity to warrant reclassifying them as political organizations under section 527 or to deny them exempt status under 501(c)(4). The IRS infrequently avails itself of this power. In one famous instance, when several hundred groups applied to become social welfare organizations in the wake of *Citizens United*, the IRS was accused of targeting conservative groups when it scrutinized applications for exemption based upon "words such as "Tea Party" and "Patriot" (and words such as "Occupy" and

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[328] *See* Consolidated Appropriations Act, 2016, Pub. Law No. 114-113, 129 Stat. 2242 (Dec. 18, 2015), §408 (ending gift tax for 501(c)(4)-(6) groups).

[329] In 2018, the IRS stopped requiring 501(c)(4) and other tax-exempt organizations to identify donors contributing $5,000 or more on their Form 990, although the information could be required to be disclosed to the IRS upon request. *See* I.R.S. Revenue Procedure 2018-38, 2018-31 I.R.B. 280. Donors names, amounts donated, and donation date had been required, although none of this information was available to the public. *See*, e.g., Schedule of Contributors 2015, https://www.irs.gov/pub/irs-prior/f990ezb--2015.pdf. In May 2020, the agency released final regulations eliminating the need for such information on Form 990, saying that the information was unnecessary "for the efficient administration of the internal revenue laws" and burdened the IRS with the responsibility to redact this information when making Form 990 available for public scrutiny. *See* IRS, *Final regulation*, 85 Fed. Reg. 31959 (May 28, 2020). *See also* IRS, *Notice of Proposed Rulemaking, Guidance under Section 6033 Regarding the Reporting Requirements of Exempt Organizations*, 84 Fed. Reg. 47447 (Sept. 10, 2019); IRS, *Proposed rule; notice of hearing*, 84 Fed. Reg. 70089 (Dec. 20, 2019).

"Progressive") to identify groups that were likely to be politically active."[330] Although the IRS was ultimately cleared of the charges leveled against it,[331] the controversy has lingered and motivated legislative measures to circumscribe the IRS's discretion in various ways.[332]

It is impossible to know how often the IRS denies 501(c)(4) exemption to politically active groups or revokes an exemption already granted because of political activity. A few IRS enforcement successes have become public. Freedom Path is an organization that held itself out as a 501(c)(4) group since 2011.[333] In 2013, the IRS officially rejected Freedom Path's application for exemption on the grounds that its activities were not primarily for social welfare, and the group sued the IRS, challenging the constitutionality of the standard used to determine which activities promote social welfare.[334] In 2017, the district court granted summary judgment to the IRS, upholding the constitutionality of the standard in question, but the Fifth Circuit

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[330] Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL LAW REVIEW ONLINE 41, 49 (2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2305851&download=yes.

[331] For a concise history, *see* Staff of S. Permanent Subcomm. on Investigations, Comm. on Homeland Sec. & Gov't Affairs, 113th Cong., *IRS and TIGTA Management Failures Related to 501(c)(4) Applicants Engaged in Campaign Activity* 1-7 (Comm. Print 2014) (*TIGTA Report*).

[332] *See* Taxpayer Knowledge of IRS Investigations Act, H.R. 1026 (Feb. 24, 2015); Penina Lieber, *The IRS in Freefall: The Scandal over Delayed Approvals of Certain Social Welfare and Charitable Institutions,* 89 PA BAR ASSN. Q. 1 (2018); Michael Wyland, *Whatever Happened to the IRS Tax Exemption Scandal?*, NONPROFIT Q. (Aug. 22, 2017), https://nonprofitquarterly.org/whatever-happened-irs-tax-exemption-scandal/.

[333] *See Freedom Path and Free Speech: New 501(c)(4) Challenge to Constitutionality of IRS's Speech-Related Regulations* (May 9, 2014), https://wagenmakerlaw.com/blog/freedom-path-and-free-speech-new-501c4-challenge-constitutionality-irs%E2%80%99s-speech-related.

[334] Freedom Path, Inc. v. IRS, 2017 U.S. Dist. LEXIS 104970 (ND Tex. 2017), *vacated and remanded on other grounds*, 913 F.3d 503 (5th Cir. 2019) (concluding the plaintiff does not have standing to challenge the constitutionality of Rev. Rul. 2004-6 because a facial challenge "considers only the text of the statute itself, and not its application to the particular circumstances of the individual.").

vacated the decision because the plaintiff lacked standing to bring a facial challenge.[335] As a result, the denial by the IRS of the organization's 501(c)(4) status is controlling.

In another high profile case, Arkansans for Common Sense claimed it spent more than half of its 2010 $1.29 million budget on its "general purpose of educating the public" about public issues while somewhat less than half was spent on political activities to re-elect a senator, i.e., independent expenditures and contributions to other campaign vehicles.[336] In rejecting the group's application for 501(c)(4) status, the IRS found that roughly 85 percent of the group's spending was in fact political because it occurred on the eve of the primary and general elections.[337] Accordingly, the agency concluded that the group was not primarily engaged in promoting social welfare during 2010.

However, to judge by the number of high profile 501(c)(4) groups apparently in good standing that are prominent in funding political advertising during campaigns,[338] it appears that either the IRS has not recently been attempting to enforce tax law rules against politically active

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[335] *See supra* note 334. *See also Freedom Path Revisited: Crashing on the Shoals of Standing*, https://wagenmakerlaw.com/blog/freedom-path-revisited.

[336] *See Dark Money Stories, Arkansans for Common Sense*, PROPUBLICA, https://projects.propublica.org/dark-money/organizations/arkansans-for-common-sense.html; Michael Beckel, *IRS Says Liberal Group Too Political for 'Social Welfare" Status*, THE CTR. FOR PUBLIC INTEGRITY (June 19, 2014; Dec. 19, 2015), https://publicintegrity.org/politics/irs-says-liberal-group-too-political-for-social-welfare-status. *See also* FEC Form 5, https://docquery.fec.gov/cgi-bin/forms/C90011222/479120/; *Dark Money Illuminated*, ISSUEONE.ORG 11 (Sept. 2018), https://www.issueone.org/wp-content/uploads/2018/09/Dark-Money-Illuminated-Report.pdf.

[337] *See* Beckel, *supra* note 336.

[338] *See Top Election Spenders*, OPENSECRETS.ORG, https://www.opensecrets.org/dark-money/top-election-spenders.

501(c)(4) organizations[339] or that it has been unsuccessful in efforts to do so.[340]

If it is failing to scrutinize groups that appear to be more politically active than tax law warrants, part of the reason could be lack of resources.[341] As a result of funding cuts of more than $2 billion since 2010,[342] the IRS had roughly 14,000 fewer enforcement staff as of 2018, even though it was attempting to enforce a new tax law.[343] That translated into a 30% reduction in staff to carry out the agency's enforcement function.[344] In addition to resource issues, however, the IRS has failed to adopt practices to utilize publicly available data about exempt organizations' political activity such as are maintained by the FEC and easily accessible.[345] Finally, the IRS's seeming inaction may be explained in part by the fact that the individuals who

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[339] *See Dark Money Illuminated*, *supra* note 336, at 11-13 (describing group that admitted spending 52% of its budget on political activity and other groups that reported larger amounts of political spending to the FEC than to the IRS).

[340] *See*, e.g., *Democratic Leadership Council*, *supra* note 315; Bill Alison, *Politically connected nonprofits have long bested the IRS*, SUNLIGHT FOUNDATION (Jul 31, 2013), https://sunlightfoundation.com/2013/07/31/irs-cfours/.

[341] U.S. GOV'T ACCOUNTABILITY OFFICE, INTERNAL REVENUE SERVICE: OBSERVATIONS ON IRS'S OPERATIONS, PLANNING, AND RESOURCES 4-7 (Feb. 2015) (describing reductions in IRS resources since 2010).

[342] *See* Chuck Marr, Emily Horton, & Roderick Taylor, *IRS Budget Needs to Be Restored and Supplemented to Implement and Enforce the New Tax Law*, CTR. ON BUDGET & POL'Y PRIORITIES 1-3 (Jan. 25, 2018), https://www.cbpp.org/sites/default/files/atoms/files/1-25-18irs.pdf.

[343] *See* Emily Horton, *2018 Funding Bill Falls Short for the IRS*, CTR. ON BUDGET & POL'Y PRIORITIES (Mar. 23, 2018), https://www.cbpp.org/blog/2018-funding-bill-falls-short-for-the-irs#:~:text=The%202018%20funding%20bill%2C%20however,2010%20level%2C%20adjusted%20for%20inflation.

[344] *See* Steve Wamhoff, *Congressional Budget Office Confirms That IRS Budget Cuts Lose Money and Benefit the Rich*, INSTITUTE ON TAXES AND ECONOMIC POLICY (July 9, 2020) (citing figures from the Congressional Budget Office), https://itep.org/congressional-budget-office-confirms-that-irs-budget-cuts-lose-money-and-benefit-the-rich/.

[345] *See TIGTA Report*, *supra* note 331, at 26-27, *id*. at 9 (recommending IRS use FEC data to "help identify 501(c)(4) groups warranting heightened review for campaign activity").

would be directly affected by reining in exempt organizations' political activity are members of Congress, who are responsible for appropriating funds for the operation of the agency, and the President, who has the ability to interfere with the groups' operations indirectly. In the words of one former IRS director of legislative affairs, "[i]n Congress, the liberals will jump up and down if IRS officials don't go after right-wing groups, and the right will come after them if they think they're picking on their friends."[346] Given Congress's recent record, e.g., reducing the IRS's operating budget and passing a law forbidding the IRS from clarifying the rules governing political activity of exempt organizations, it would not be unreasonable if IRS personnel avoid activities that could inspire retaliation by members of Congress.

In sum, a combination of inaction by IRS personnel and Congressional obstruction has led to a situation where portions of the IRC intended to create tax incentives to further social welfare and other public goods are now routinely abused to create campaign funding vehicles that attract vast sums of money from unidentified sources. Despite the obstacles created by Congress, the IRS still retains the authority to enforce the laws on the books against 501(c)(4) groups and other entities abusing the tax code for their private, partisan purposes. Its task will be easier if Congress stops tying its hands by reducing its budget and interfering with its ability to publish guidance to clarify the boundaries of acceptable campaign activity by exempt organizations. Nonetheless, until that time, the IRS has tools at its disposal to enforce the current limits on campaigning by exempt organizations.

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[346] *See* Dave Levinthal, *Non-Political Nonprofit's Spending Spikes in Election Years: Trade group spent millions bashing Obama in 2012*, CTR. FOR PUBLIC INTEGRITY (Feb. 7, 2013; May 19, 2014), https://publicintegrity.org/politics/non-political-nonprofits-spending-spikes-in-election-years/.

VII. CONCLUSION

Campaign spending by outside groups has skyrocketed in the last decade. In an increasing number of races, outside groups spend more money than the candidates themselves. Rules permitting unlimited contributions to certain outside groups have enabled a small number of high-wealth individuals and corporations to have a disproportionate impact on elections. Social scientists have documented connections between these developments and the growth of polarization, the increase in negative advertising, and the decline of the moderating influences of parties. No single reform can reverse all the adverse consequences of outside money. Nonetheless numerous steps can be taken immediately based upon existing law that would curb some of the worst excesses of current campaign finance practices.

First and foremost, many exempt organizations should be classified as political committees and, thus, regulated by the FEC under FECA. If they were properly classified, they would be subject to contribution limits and disclosure requirements. They would thus cease to serve as funnels for unlimited and unaccountable sums of money flooding elections.

Second, the IRS contributes to unlimited and unaccountable spending by not policing its own rules, namely, that (c)(4)s and trade associations primarily serve a public interest, not a partisan one. The tools it needs are already at its disposal. What the IRS lacks is the will, not the way, to pursue its proper mission and counteract the threat posed by the trajectory of outside spending to the integrity of elections in America.