

**CAMPAIGN FINANCE REFORM AND DISCLOSURE: STEPPING-
UP IRS ENFORCEMENT AS A REMEDIAL MEASURE TO
PARTISAN DEADLOCK IN CONGRESS AND THE FEC**

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I. INTRODUCTION

The influence of corporate money in elections has been a contentious issue since the advent of corporate rights in the late nineteenth century, and the issue remains unresolved in spite of over one hundred years of debate.¹ The primary concern is that the concentration of wealth in the hands of a few corporations undermines the political process when this money is used to influence elections.² In 2010, the Supreme Court held in *Citizens United v. Federal Election Commission* that political speech could not be limited based on the speaker's corporate identity, and as such, any limits on corporate spending for this purpose were unconstitutional.³ The Court upheld disclosure requirements in order to balance concerns that unlimited corporate political spending creates the appearance of corruption, and thus undermines voter confidence.⁴

Under federal law, the identity of a donor to a political action committee ("PAC"), or another political committee organized under § 527 of the federal tax code, must be disclosed and made available to the public.⁵ However, in an effort to avoid disclosure requirements, corporations and wealthy benefactors have been donating large sums of money to certain nonprofit groups, called "social welfare organizations," organized under § 501(c)(4) of the federal tax code, which allows these groups to participate in some election intervention without disclosure requirements, including direct funding of PACs and Super PACs.⁶ Indeed, former Federal Election

1. See Francis Bingham, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1033-38 (2011) (detailing the influence of corporate money on elections and efforts to curtail that influence since the advent of corporate rights in the late nineteenth century). As early as 1894, prominent lawyer Elihu Root argued for an amendment to New York's constitution "to prevent . . . the great aggregations of wealth[] from using their corporate funds, *directly or indirectly*, to send members of the legislature to these halls, in order to vote for their protection and the advancement of their interests as against those of the public." *Id.* at 1035 (internal quotation marks omitted).

2. "The nation was fabulously rich but its wealth was gravitating rapidly into the hands of a small portion of the population, and the power of wealth threatened to undermine the political integrity of the Republic." *United States v. Int'l Union United Auto., Aircraft & Agr. Implement Workers of Am. (UAW-CIO)*, 352 U.S. 567, 570 (1957) (quoting 2 SAMUEL ELIOT MORISON & HENRY STEELE COMMAGER, *THE GROWTH OF THE AMERICAN REPUBLIC* 355 (4th ed. 1950)).

3. 130 S. Ct. 876, 913 (2010).

4. See *id.* at 914.

5. A political committee is defined at 2 U.S.C. § 431(4) (2006). Disclosure requirements for political committees are codified at 26 U.S.C. § 527(j)(2) (2006).

6. Social welfare organizations are codified at 26 U.S.C. § 501(c)(4) (2006). See generally Cory G. Kalanick, Note, *Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform*, 95 MINN. L. REV. 2254 (2011) (explaining how § 501(c)(4) organizations are being used to undercut campaign finance reform). See also Editorial,

Commission (“FEC”) counsel Larry Nobel concluded that a major impact of the *Citizens United* decision will be “more money . . . going to 501(c)(4) groups, trade groups and others that don’t disclose their donors,” and another article quoted a lobbyist touting that “501(c)s are the keys to the political kingdom . . . because they allow anonymity.”⁷

In light of the Supreme Court’s reliance on disclosure in *Citizens United* as a counterbalance to the appearance of impropriety stemming from seemingly unlimited political spending by corporations,⁸ steps should be taken to eliminate the § 501(c)(4) loophole. The ideal route to campaign finance reform is congressional action in modifying campaign finance laws, and regulatory reforms by the FEC.⁹ However, both Congress and the FEC (whose six commissioners are equally divided on partisan lines) are in a seemingly perpetual gridlock, and their reform efforts are thwarted by partisan bickering.¹⁰

The Secret Election, N.Y. TIMES, Sept. 19, 2010, at WK (“[T]he most disturbing story of this year’s election is embodied in an odd combination of numbers and letters: 501(c)(4). That is the legal designation for the advocacy committees that are sucking in many millions of anonymous corporate dollars, making this the most secretive election cycle since the Watergate years.”); John D. McKinnon, *Taxing Gifts to Super PACs?*, WALL ST. J. WASH. WIRE BLOG (Feb. 6, 2012, 6:17 PM), <http://blogs.wsj.com/washwire/2012/02/06/taxing-gifts-to-super-pacs> (explaining how § 501(c)(4) groups are being used as conduits of secret money to fund PACs); Rick Cohen, *Super PACs and Secret Donors from 501(c)(4)s: “Kryptonite for Our Democracy,”* NONPROFIT Q. (Feb. 13, 2012, 12:11 PM), <http://www.nonprofitquarterly.org/policysocial-context/19798-super-pacs-and-secret-donors-from-501c4s-kryptonite-for-our-democracy.html> (finding that 6.4% of Super PAC funding is untraceable to the donor and originates from various § 501(c) groups); Michael Luo & Stephanie Strom, *Donor Names Remain Secret As Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1 (reporting on the use of § 501(c)(4) groups to avoid disclosure).

7. Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United*, 10 ELECTION L.J. 363, 364 (2011) (quoting Peter Stone, *Campaign Cash: The Independent Fundraising Gold Rush Since ‘Citizens United’ Ruling*, CENTER FOR PUB. INTEGRITY (Oct. 4, 2010, 12:59 PM), <http://www.publicintegrity.org/2010/10/04/2470/campaign-cash-independent-fundraising-gold-rush-citizens-united-ruling>).

8. See *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 914 (2010).

9. See generally Kalanick, *supra* note 6 (surveying various reform possibilities and advocating congressional action in disclosure laws as the best mode of achieving reform). See also discussion *infra* Part III.A.1-2 (discussing DISCLOSE Acts of 2010 and 2012, and the FEC’s legal ability, but practical inability, to reform FECA).

10. See, e.g., Marian Wang, *FEC Deadlocks (Again) on Guidance for Big-Money Super PACs*, PROPUBLICA (Dec. 2, 2011, 1:21 PM), <http://www.propublica.org/article/deadlocks-again-on-guidance-for-big-money-super-pacs>; Jonathan D. Salant, *U.S. Federal Election Commission Deadlocks on Greater ‘12 Donor Disclosure*, BLOOMBERG (June 15, 2011, 4:13 PM), <http://www.bloomberg.com/news/2011-06-15/u-s-federal-election-panel-considers-increased-donor-disclosure-for-2012.html> (“The FEC deadlocked today in Washington along party lines, as it did when it failed to move ahead with a similar proposal in January. Some campaign finance experts who are

This Note argues that because Congress and the FEC are in such a state of deadlock, the Internal Revenue Service (“IRS”) should step in to dissuade the flow of anonymous money designed to influence elections into social welfare groups organized under § 501(c) of the tax code.¹¹ This Note will explore how the IRS can achieve this by (1) modifying regulations to include procedural mechanisms that increase enforcement of ethical rules, as applied to attorneys who counsel these groups to violate the law by falsely claiming to be a social welfare organization (when in fact they are operating as a political organization), and (2) by enforcing the gift tax on donors to social welfare organizations, in order to incentivize political donors to channel their money through the proper conduits.¹²

In Part II, I will discuss the development of the current federal tax laws as they apply to nonprofit political groups and social welfare groups,¹³ the development of modern campaign finance law along with applicable case law,¹⁴ and the problems that arise in terms of transparency and disclosure when these two areas of law intersect.¹⁵ In Part III, I will discuss various proposed methods of campaign finance reform in terms of the need for disclosure, the obstacles involved with these proposals,¹⁶ and how the IRS should act remedially in light of recent congressional and FEC stalemates.¹⁷

II. BACKGROUND: THE INTERSECTION OF THE TAX CODE WITH FEDERAL ELECTION LAW

To understand how § 501(c)(4) organizations are able to circumvent disclosure in federal election law, it is necessary to provide some background on the tax law as it applies to various

alarmed by the rise of secret donations worry that this inaction might expand the flow of unregulated money.”); Kenneth P. Doyle, *Bauerly: FEC to Vote Again on Launch Of Rulemaking to Adjust to Citizens United*, Daily Rep. Exec. (BNA) No. 11, at A-13 (June 10, 2011) (“The commissioners deadlocked 3-3 in a party-line vote on whether to move forward with a new rulemaking proposal” to implement disclosure rules in light of *Citizens United*.”). The FEC Republicans argued “that such [disclosure measures] were debated and rejected by Congress last year, when it considered but failed to pass the so-called DISCLOSE Act. . . . The legislation was approved in the House, largely along party lines, but it could not overcome a Republican filibuster in the Senate.” *Id.*; see also discussion *infra* Part III.A (discussing that DISCLOSE Acts of 2010 and 2012 were blocked by the threat of a Republican filibuster).

11. See discussion *infra* Part III.B (discussing reclassification of § 501(c)(4)s, enforcing sanctions for ethical breaches, and assessing gift taxes).

12. See discussion *infra* Part III.B.

13. See discussion *infra* Part II.A.

14. See discussion *infra* Part II.B.

15. See discussion *infra* Part II.C-D.

16. See discussion *infra* Part III.A.

17. See discussion *infra* Part III.B.

nonprofit groups,¹⁸ the development of the campaign finance laws,¹⁹ and how the decision in *Citizens United* amplifies an already perfect storm of anonymous spending in electioneering.²⁰

A. *An Overview of Applicable Federal Tax Law*

1. Section 501(c)(3): Charitable Organizations

The amount of election intervention a nonprofit organization may participate in exists on a spectrum, and at one end are § 501(c)(3) groups.²¹ These are the quintessential nonprofit organizations, such as religious and educational institutions, and charities.²² Donations to these groups are tax deductible, and the income of the organization is not taxed so long as it is related to the exempt purpose of the group.²³ These groups may not intervene in campaigns for or against the election of “a candidate for public office.”²⁴ Because these nonprofit organizations are not allowed to participate in any political activity, they are not required to report political activity on their annual tax return.²⁵

2. Section 527: Political Organizations

At the other end of the spectrum are § 527 organizations, whose primary purpose is political intervention.²⁶ A PAC or Super PAC might be organized under § 527.²⁷ Donations to these organizations are not tax deductible or subject to gift tax, and income generated for its exempt function (influencing elections) is not subject to tax.²⁸

18. See discussion *infra* Part II.A.

19. See discussion *infra* Part II.B.

20. See discussion *infra* Part II.C-D.

21. See 26 U.S.C. § 501(c)(3) (2006).

22. Donald B. Tobin, *The Rise of 501(c)(4)s In Campaign Activity: Are They As Clever As They Think?*, ELECTION L. @ MORITZ (Oct. 5, 2010), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=7667>.

23. *Id.*

24. *Id.*

25. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, OMB NO. 1545-0047, SCHEDULE C FOR FORM 990 OR 990-EZ, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES FOR ORGANIZATIONS EXEMPT FROM INCOME TAX UNDER SECTION 501(C) AND SECTION 527 (2012) [hereinafter IRS, FORM 990 SCHEDULE C], available at <http://www.irs.gov/pub/irs-pdf/f990sc.pdf>; see also Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, the Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Finance Disclosure Laws*, 16 NEXUS 59, 60 (2011) (“Under current tax law, for-profit political spending through non-profits . . . is undetectable by the public.”). See generally *infra* note 41 (discussing what factors weigh for and against classifying action as “political activity”).

26. 26 U.S.C. § 527 (2006); 26 C.F.R. § 1.527-6(f) (2012); Torres-Spelliscy, *supra* note 25, at 80.

27. See Torres-Spelliscy, *supra* note 25, at 80.

28. Tobin, *supra* note 22.

These groups are required to make detailed disclosures of contributors and political expenditures on a frequent basis—in addition to disclosures required by the FEC if they are registered as a PAC or Super PAC—and this information is publically available and searchable on the IRS website.²⁹

3. Section 501(c)(4): Social Welfare Organizations

In the middle of the spectrum are § 501(c)(4) groups, or “social welfare organizations.”³⁰ Donations to these groups are not tax deductible, and the income generated for their “exempt-purpose is not taxed.”³¹ Donations to these groups may be subject to gift tax.³² The regulations governing a § 501(c)(4) group require that, to qualify, it must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community.”³³ Further, “[t]he promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office.”³⁴

However, a § 501(c)(4) group is allowed to engage in some amount of politicking so long as it maintains, as its primary purpose, the furtherance of its exempt function of promoting social welfare.³⁵ Current guidelines recommend that a § 501(c)(4) group not spend more than forty or fifty percent of their budget on political activities.³⁶ These organizations are required to list on their tax return the names, addresses, and employer identification numbers of all § 527 organizations, PACs, and Super PACs that they make payments to.³⁷ However, they are not required to disclose their

29. INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, INSTRUCTIONS FOR FORM 8872: POLITICAL ORGANIZATION REPORT OF CONTRIBUTIONS AND EXPENDITURES 1 (2007), available at <http://www.irs.gov/pub/irs-pdf/i8872.pdf>. The IRS provides a search function to find an organization's Form 8872 at <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp>.

30. 26 U.S.C. § 501(c)(4) (2006).

31. Tobin, *supra* note 22.

32. *Id.*; see discussion *infra* Part III.B.3.

33. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i) (2012).

34. *Id.* § 1.501(c)(4)-1(a)(2)(ii).

35. See Rev. Rul. 81-95, 1981-1 C.B. 332.

36. Aprill, *supra* note 7, at 382 (noting how legal advisors differ on the amount of politicking an organization may participate in without losing their § 501(c)(4) status, and stating that “[s]ome are comfortable so long as politicking is less than 50 percent of an organization's total activities. Members of the American Bar Association Tax Section have suggested a 40 percent safe harbor for nonexempt activities.”).

37. IRS, FORM 990 SCHEDULE C, *supra* note 25 (see instructions under Part I-C, line 5). Although the information is not publically disclosed, it is required to be made available to the public upon request. See 26 U.S.C. § 6104(a)(1)(A) (2006). The IRS provides a search function to find an organization's Form 990 at <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp>.

donors,³⁸ unless the donor specified that their donation be earmarked to the group's separate segregated fund to financially support a § 527, PAC, or Super PAC.³⁹ The IRS, on Form 990, does require that social welfare groups disclose their political activities in the form of a "narrative description," but little guidance is given as to what must be included.⁴⁰

To determine whether a § 501(c)(4) organization has crossed the line and failed to comply with the requirement that its primary purpose be the furtherance of social welfare, the IRS applies a multifactor "facts and circumstances" test—there is no bright line rule of determining when the organization has participated in too much politicking.⁴¹

38. Tobin, *supra* note 22.

39. IRS, FORM 990 SCHEDULE C, *supra* note 25 (see instructions under Part I-C, line 5).

40. Torres-Spelliscy, *supra* note 25, at 81 & nn.103 & 105.

41. Deborah M. Beers, *Political Activities of § 501(c)(4) Organizations: Recent Developments*, 52 Tax Mgmt. Mem (BNA) 499 (Dec. 5, 2011) (citing Rev. Rul. 2004-6, 2004-1 C.B. 328). Under this test, the factors considered in determining whether an advocacy communication is actually political activity include:

- a) The communication identifies a candidate for public office;
- b) The timing of the communication coincides with an electoral campaign;
- c) The communication targets voters in a particular election;
- d) The communication identifies that candidate's position on the public policy issue that is the subject of the communication;
- e) The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
- f) The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Rev. Rul. 2004-6, 2004-1 C.B. 330.

The factors that tend to show an advocacy communication is not political activity include, but are not limited to:

- a) The absence of any one or more of the factors listed . . . above;
- b) The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
- c) The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence, such as a legislative vote or other major legislative action (for example, a hearing before a legislative committee on the issue that is the subject of the communication);
- d) The communication identifies the candidate solely as a government official who is in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
- e) The communication identifies the candidate solely in the list of key or principal sponsors of the legislation that is the subject of the

Because this test has created some uncertainty,⁴² the IRS has attempted to clarify when an organization's "issue advocacy" crosses the line into political campaign activity, thus causing the group's funds used for the communication to be subject to tax under § 527(f)—at the highest corporate rate of thirty-five percent but with no additional disclosure requirements—unless it segregates its funds for political purposes (and thus subjects the donations to donor disclosure).⁴³ It did not, however, clarify how much political activity was acceptable.⁴⁴

Additionally, § 501(c)(4) groups, unlike § 527 groups, are not required to notify the IRS of their existence until the time they file their taxes. Thus, an investigation into whether a social welfare group has crossed the line into political intervention happens long after the election is over.⁴⁵

4. Putting Them All Together: Multi-Tiered Nonprofits

Interestingly, a § 501(c)(3) group can create its own affiliated, and somewhat politically active, § 501(c)(4) group,⁴⁶ which can in turn create its own affiliated, and very politically active § 527 group, PAC, or Super PAC; thereby creating a three-tier structure which can be arranged to "accomplish political objectives while erecting a virtually impenetrable curtain over the identity of those funding the organizations."⁴⁷ While a § 501(c)(3) group must keep a separate account from its affiliated § 501(c)(4) and § 527 group, such that it is not subsidizing its political efforts,⁴⁸ the § 501(c)(4) entity can theoretically fund its affiliated § 527 entity, PAC, or Super PAC without disclosure of the donors, so long as the § 501(c)(4) entity maintains its primary purpose of promoting social welfare.⁴⁹

communication.

Id.

42. *See, e.g., id.*; Beers, *supra* note 41.

43. *Id.* (citing Rev. Rul. 2007-41, 2007-1 C.B. 1421).

44. *See* Rev. Rul. 2004-6, 2004-1 C.B. 328.

45. *See generally* 26 U.S.C. §§ 501(c)(4), 527(i)(2)-(4) (2006).

46. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 544 (1983) (holding that this two-tier structure is permissible so long as the tax deductible funds from the § 501(c)(3) group were not subsidizing the nontax deductible causes of the § 501(c)(4) group).

47. Torres-Spelliscy, *supra* note 25, at 83 (citing Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 310 (2005)).

48. *Id.*

49. *See e.g.,* Matea Gold, *Democratic Nonprofits Send Funds to 'Super PACs'*, L.A. TIMES, Feb. 4, 2012, at A8 ("[C]ampaign finance experts said that such transfers underscore a troubling relationship between super PACs and their affiliated 501(c)4 social welfare organizations. The latter are 'weakening transparency in the political world' . . .").

B. An Overview of Campaign Finance Law and Corporate Spending

1. The Passage of the FECA

Absent pure public funding of elections, it is extremely difficult to win an election without money, regardless of the talents and charisma of the candidate.⁵⁰ Since money has great potential to corrupt the voting process, it follows that some regulation is necessary.⁵¹ In attempting to regulate campaign finance, the trick (or tricky part) is balancing free speech with fairness.⁵² Free speech and freedom of association would seem to allow a candidate to raise and spend as much money as the candidate wants, but fairness requires giving an equal voice to all potential candidates regardless of their financing.⁵³

In 1971, Congress passed the Federal Election Campaign Act (“FECA”)⁵⁴ in an effort to reform campaign finance by limiting individual, corporate, political party, and candidate activities in federal elections.⁵⁵ Initially, the limit on individual contributions was \$1000 with a maximum annual limit of \$25,000.⁵⁶ Additionally, it imposed a \$1000 per year limit on individual expenditures made in connection with a candidate.⁵⁷ In response to the Watergate scandal, Congress amended the FECA to place stricter limits on individual contributions to political campaigns and additional candidate expenditure limits.⁵⁸ The amendments also allowed for some corporate spending through PACs, which required disclosure of the donations, and created the Federal Election Commission to oversee and enforce the rules.⁵⁹ In 1976, these limits on contributions and candidate spending brought the conflicts between free speech and fairness to the point of judicial intervention when the FECA was

50. See CHARLES L. ZELDEN, *THE SUPREME COURT AND ELECTIONS: INTO THE POLITICAL THICKET* 338 (2010); see also *Money Wins Presidency and 9 of 10 Congressional Races in Priciest U.S. Election Ever*, OPENSECRETS.ORG (Nov. 5, 2008 3:19 PM), <http://www.opensecrets.org/news/2008/11/money-wins-white-house-and.html> (charting the 2008 congressional races by campaign spending amounts— that in most cases the biggest spender wins; additionally, the average price tag for a House seat is \$1.1 million and \$6.5 million for a Senate seat).

51. See ZELDEN, *supra* note 50, at 338.

52. *Id.*

53. *Id.*

54. See Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in various sections of 2, 18, and 47 U.S.C.).

55. ZELDEN, *supra* note 50, at 338.

56. Bingham, *supra* note 1, at 1038.

57. See *id.* at 1038 (referring to § 608, 86 Stat. at 9-10).

58. ZELDEN, *supra* note 50, at 338.

59. See 2 U.S.C. §§ 434, 441d (2006); Bingham, *supra* note 1, at 1039 (internal citations omitted).

challenged as unconstitutional in *Buckley v. Valeo*.⁶⁰

2. The FECA: Case Law and Constitutionality

The starting point for the constitutional analysis of modern campaign finance reform is the Supreme Court's opinion in *Buckley v. Valeo*.⁶¹ The Court held that the FECA's limitations on contributions by individuals to political parties or PACs were constitutional because the government has a sufficient interest in preserving the integrity of the system of democracy to justify the burden on the First Amendment rights of contributors.⁶² However, the FECA's limit on political expenditures placed a substantial restriction on a person or group's right to engage in political speech, and was thus unconstitutional.⁶³ From this point forward, the Court has applied strict scrutiny to any regulation of expenditures used to express the political views of candidates based on the idea that "money is speech."⁶⁴ So, despite efforts by Congress to make the FECA as comprehensive as possible, the decision in *Buckley* transformed the FECA into a statutory framework that "no legislature ever voted to create and, one may surmise, no legislature would ever have voted to create."⁶⁵

The FECA also included language that would "regulate[] . . . spending 'in connection with' or 'for the purpose of influencing' a federal election, or 'relative to' a federal candidate."⁶⁶ The Court held that this "language could survive First Amendment scrutiny if it applied only to ads that use express words of advocacy or defeat: 'vote for,' 'vote against,' and 'defeat,'" as examples.⁶⁷ This created a divide between expenditures that expressly advocated for a candidate,

60. ZELDEN, *supra* note 50, at 338-39; *Buckley v. Valeo*, 424 U.S. 1 (1976).

61. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 334 (3d ed. 2007).

62. *Buckley*, 424 U.S. at 21 ("A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.").

63. *See id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

64. ISSACHAROFF, *supra* note 61, at 337; *see also* Eugene Volokh, *Money and Speech*, *THE VOLOKH CONSPIRACY* (Jan. 24, 2010, 4:49 PM), <http://volokh.com/2010/01/24/money-and-speech-2> (noting that the Supreme Court never actually reasoned that "money is speech" as many people characterize it). "It's that restricting the use of money to speak, like restricting the use of air travel or computers to speak, interferes with people's ability to speak." *Id.*

65. ISSACHAROFF, *supra* note 61, at 338.

66. *Id.* at 400.

67. Bingham, *supra* note 1, at 1040 (citing *Buckley*, 424 U.S. at 44 & n.52).

which may be regulated to some degree, and expenditures for issue advocacy, which cannot be regulated without violating the First Amendment.⁶⁸ After *Buckley*, it became clear that “corporations could not spend general treasury funds on express advocacy but they could spend on issue advocacy” even if “its purpose or effect was to influence . . . an election for federal office.”⁶⁹

The Court took its next look at First Amendment issues in campaign finance regulation with *First National Bank v. Bellotti* in 1978.⁷⁰ In striking down a Massachusetts law that prohibited corporate advertising relating to elections or referendums unless they materially affected its business, the Court held that a corporation should not be treated differently than private persons.⁷¹ The Court reasoned that corporations have a right to discuss government affairs, and the state’s statute that restricts corporate political speech to items “materially affecting” its business violates the First Amendment.⁷²

Eight years later, the Court addressed the issue of direct corporate expenditures in elections again in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (“MCFL”).⁷³ The Court held that the FECA’s prohibition of direct expenditures of corporate treasury funds in connection with any election violated the First Amendment as it applied to MCFL’s publication of a newsletter urging people to vote pro-life.⁷⁴ Here, MCFL was formed for the purpose of advancing political ideas—it had no shareholders, it was not established as a business entity or union, and did not accept any donations from a business entity or union. Thus an organization such as MCFL did not “create[] a threat to the political marketplace.”⁷⁵

In 1990, the Court addressed the open question of how much the government could limit corporate spending on elections for candidates in *Austin v. Michigan Chamber of Commerce*.⁷⁶ The Court upheld the Michigan Campaign Finance Act, which prohibited corporations from using treasury funds for independent expenditures to support or oppose candidates in elections for state office.⁷⁷ The Court reasoned that the Michigan Chamber of Commerce was not

68. See Bingham, *supra* note 1, at 1040.

69. *Id.* at 1041.

70. 435 U.S. 765 (1978).

71. *Id.* at 784.

72. See *id.*

73. 479 U.S. 238 (1986).

74. See *id.* at 263-65.

75. *Id.* at 264.

76. 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm’n, 558 U.S. 310 (2010); see also Bingham, *supra* note 1, at 1042 (discussing the Court’s adoption of a “new, more flexible articulation of corruption”).

77. See generally *Austin*, 494 U.S. at 661-69.

similar to a nonprofit ideological corporation, like *MCFL*, but more like a business in that over seventy-five percent of its members were business corporations, and the law was narrowly tailored to achieve the state's interest of maintaining the integrity of elections.⁷⁸ The Court found that the Michigan law was "precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views," thus surviving constitutional scrutiny.⁷⁹

C. *Loopholes: Soft Money, Sham Issue Ads and § 527*

By 1996, organizations had learned to exploit two loopholes in campaign finance reform: the soft-money loophole and the issue-advocacy loophole, which together were a "near perfect circumvention of the 1974 FECA."⁸⁰ The soft-money loophole works by allowing political parties to take donations from corporations or other wealthy sponsors and channel them through local party chapters, thus bypassing contribution limits to the national parties.⁸¹ The issue-advocacy loophole works by taking advantage of *Buckley's* "magic words" test for express advocacy to create sham issue advocacy ads.⁸² Professor Frank Askin provides a fictitious example:

[Image of Al Gore debating George Bush.] Narrator: Al Gore believes in a worker's right to organize. He supports raising the minimum wage. [Image of Al Gore shaking hands with workers.] He cares about working families. Al Gore, supports a real Patients' Bill of Rights. Al Gore's record is pro-worker and pro-labor. This election day remember America's working families!⁸³

This type of advertisement would be considered issue advocacy, and would therefore be unregulated by FECA.⁸⁴ Moreover, if the ad was funded by soft money through a § 527 conduit (later dubbed a "stealth PAC," because at that time there were no disclosure requirements for § 527 groups),⁸⁵ there were no applicable contribution limits, and corporations or other wealthy sponsors could virtually contribute large sums of money anonymously.⁸⁶

78. *See id.*

79. *Id.* at 660.

80. ISSACHAROFF, *supra* note 61, at 402.

81. Bingham, *supra* note 1, at 1043-44.

82. ISSACHAROFF, *supra* note 61, at 401 (citing *Buckley's* famous footnote, which delineates express advocacy to "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976)).

83. Frank Askin, *Of Bright Lines and Fuzzy Arguments: McCain-Feingold Tries to Rein in Sham Issue Advocacy*, 1 ELECTION L.J. 373, 378 (2002).

84. *Id.* at 378.

85. *See* Kalanick, *supra* note 6, at 2257-59, 2268 n.87.

86. *Id.* at 2257-59.

Groups organized under § 527 were initially formed to coordinate and encourage voter turnout and campaign for specific issues.⁸⁷ However, since these groups operated solely under IRS jurisdiction, and not under the FECA, political parties began to use these organizations as a means to influence election outcomes, retain tax exemption, avoid contribution limits, and completely avoid the FECA disclosure requirements.⁸⁸

1. Internal Revenue Code Amendment of 2000

In 2000, Congress first attempted to address the problem of stealth PACs by amending § 527 of the federal tax code.⁸⁹ Quoting Senator Reed, who cosponsored the bill:

Hopefully, the passage of our amendment yesterday, which mandates disclosure by Section 527 organizations, will close yet another legal loophole being exploited by clever campaign fundraisers. This amendment should make unregulated and unlimited contributions to these so-called Section 527 committees much less attractive. Although donors will be able to continue to make as many tax-deductible contributions as they want, they will no longer be able to do so in absolute secrecy.⁹⁰

Although it was an amendment to the federal tax code, and not the FECA, it was referred to as “campaign finance reform,” and its purpose was to close the § 527 loophole.⁹¹

Congress adopted a two-pronged approach in the amendment.⁹² First, it required that new § 527 organizations notify the IRS of their existence with twenty-four hours of formation.⁹³ Second, § 527 organizations were now required to make regular periodic reports of their contributions and expenditures to the IRS.⁹⁴ These reports must include “[t]he amount, date, and purpose of each expenditure made,” and “[t]he name and address . . . of all contributors”⁹⁵ Although the amendment was a far cry from a full-fledged campaign finance reform effort, it seemed to be a step in the right direction.⁹⁶

87. *Id.*

88. *Id.*

89. Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, 114 Stat. 477, 479 (2000) (codified at 26 U.S.C. § 527(i)-(j) (2006)).

90. 146 CONG. REC. 10,182 (2000) (statement of Sen. Reed).

91. *See* 146 CONG. REC. 13,291 (2000) (statement of Rep. Castle); 146 CONG. REC. 12,848-49 (2000) (statement of Sen. Feingold).

92. *See* Beers, *supra* note 41.

93. *Id.* (citing Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, 114 Stat. 477, 479 (2000) (codified at 26 U.S.C. § 527(i))).

94. *See* Beers, *supra* note 41 (citing Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, 114 Stat. 477, 479 (2000) (codified at 26 U.S.C. § 527(i))).

95. 26 U.S.C. § 527(j)(3)(A)-(B).

96. *See* 146 CONG. REC. 12,848 (2000) (statement of Sen. Feingold) (“The bill we are going to pass is by no means a solution to all the problems of our campaign finance

2. Bipartisan Campaign Reform Act of 2002

Two years later, in further response to the § 527 “twin loopholes,”⁹⁷ Congress enacted the Bipartisan Campaign Reform Act of 2002 (“BCRA”).⁹⁸ Title I of the Act limited the use of soft money, and Title II of the Act attempted to regulate sham issue advocacy.⁹⁹ The BCRA addressed the soft-money problem by prohibiting “national party committees from soliciting . . . funds not subject to FECA’s limitations.”¹⁰⁰ It also redefined express advocacy that would be subject to FECA’s prohibition on corporate or union funded advertisements and disclosure requirements as “electioneering communications.”¹⁰¹ Electioneering communications were now defined as:

[A]ny broadcast, cable, or satellite communication which –

(I) refers to a clearly identified candidate for Federal office;

(II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate.¹⁰²

In essence, “all ‘electioneering communications’ funded by the general treasuries of a union or corporation were [now] prohibited.”¹⁰³ As one would assume, this led to litigation regarding the constitutionality of the BCRA.¹⁰⁴

3. *McConnell*, *Wisconsin Right to Life*, and the BCRA

In 2003, the Court first addressed the constitutionality of the BCRA in the *McConnell* decision.¹⁰⁵ The Court upheld the BCRA’s soft-money ban and its regulations of the source, content, or timing of

system, but it is a start—and an important start—because it will close the loophole that was opened at the intersection of the tax laws and election laws that allows unlimited amounts of completely secret contributions to flow into our campaign finance system and influence our elections.”).

97. See Bingham, *supra* note 1, at 1044.

98. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C. (2006)).

99. ISSACHAROFF, *supra* note 61, at 403; Bingham, *supra* note 1, at 1044-45.

100. Bingham, *supra* note 1, at 1044.

101. *Id.*

102. 2 U.S.C. § 434(f)(3)(A)(i) (2006).

103. Bingham, *supra* note 1, at 1045.

104. See *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003), *overruled in part* by *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

105. *Id.*

political advertising.¹⁰⁶ The Court reasoned that the burden on free speech was minimal because the regulations mostly dealt with contributions used to register voters, not with campaign expenditures, which are more akin to political speech, and thus deserve greater protection.¹⁰⁷ The Court further reasoned that the government has a legitimate interest in preventing “both the actual corruption threatened by large financial contributions and . . . the appearance of corruption”; thus validating *Austin*’s rationale in favor of government regulations of corporate spending in elections, due to the distorting effects of corporate aggregations of wealth.¹⁰⁸

Four years later, the Court backtracked on its antidistortion justification in *Federal Election Commission v. Wisconsin Right to Life, Inc.*¹⁰⁹ The Court held that the BCRA’s ban on the use of corporate treasury funds for political advertisements in the sixty days before an election was unconstitutional,¹¹⁰ where the advertisements do not explicitly endorse or oppose a candidate. The Court reasoned that a test equating an effect of express advocacy rather than actual advocacy would “unquestionably chill a substantial amount of political speech.”¹¹¹ The Court further held that an advertisement is only subject to regulation as a functional equivalent to express advocacy if it is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹¹² Thus, any issue ads that did not fall into this category were eligible for an as-applied challenge to the BCRA’s ban on corporate funded ads shortly before an election.¹¹³

In light of this decision, Citizens United, a § 501(c)(4) corporation, sought to enjoin the FEC from enforcing the BCRA ban on their ads promoting the film *Hillary: The Movie*, which was critical of then possible presidential candidate, Hillary Rodham Clinton.¹¹⁴ Citizens United asserted that their ads were “issue speech,” and thus outside the scope of the BCRA as applied under *Wisconsin Right to Life*.¹¹⁵ It intended to air the ads within thirty days of the democratic primary, and within sixty days of the

106. *See id.* at 142-58.

107. *Id.* at 166-68.

108. *Id.* 136-37 (2003) (quoting Fed. Election Comm’n v. Nat’l Right to Work Comm., 459 U.S. 197, 208 (1982)); *see also* discussion *supra* Part II.B.2 (discussing prior court decisions recognizing corruption interest).

109. 551 U.S. 449 (2007).

110. *Id.* at 481-82.

111. *Id.* at 469.

112. *Id.* at 470.

113. *See id.*

114. *See* Citizens United v. Fed. Election Comm’n, 530 F. Supp. 2d 274, 275-79 (D.D.C. 2008).

115. *Id.* at 277-79.

presidential election.¹¹⁶ The lower court found in favor of the FEC and denied the injunction. Citizens United appealed, and the Supreme Court granted certiorari.¹¹⁷ For Citizens United to prevail, the Court would either have to find that the BCRA, as applied to the ads, was unconstitutional as a restriction of “issue speech,” or overrule the *McConnell* decision, which upheld the BCRA limits on electioneering communications.¹¹⁸

D. Loopholes: Citizens United, Speechnow, Super Pacs, and § 501(c)(4)

The Supreme Court’s 2010 decision in *Citizens United* fundamentally changed campaign finance law by overruling *Austin* and part of *McConnell*,¹¹⁹ invalidating several key provisions of the BCRA, and thereby ending restrictions on the use of corporate and union treasury funds to finance independent expenditures and electioneering communications.¹²⁰ To be sure, the Court went as far as to say that “[n]o sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.”¹²¹ When addressing the appearance of corruption allegedly created by large donations, the Court stated that “influence over or access to elected officials does not mean that those officials are corrupt,” essentially limiting regulation to actual quid pro quo vote buying.¹²² The opinion justifies the Court’s loosening of corporate spending restrictions by highlighting disclosure as a “less restrictive alternative” to fulfilling the substantial governmental interest of providing voters with sufficient information and deterring an appearance of corruption.¹²³

Notably, the Court found the BRCA’s disclosure requirements could be applied to § 501(c)(4) groups, are facially constitutional subject to only “exacting scrutiny,” and open to as-applied challenges if the group could show a reasonable probability that disclosure of contributor information would subject donors to “threats, harassment, or reprisals from either government officials or private parties.”¹²⁴ Additionally, the Court rejected the premise set forth in

116. *Id.* at 276.

117. *See Citizens United v. Fed. Election Comm’n*, No. 07-2240 (ARR, RCL, RWR), 2008 WL 2788753 (D.D.C. July 18, 2008), *aff’d in part, rev’d in part and remanded by* 130 S. Ct. 876 (2010).

118. *Citizens United*, 530 F. Supp. 2d at 278-80.

119. *See Citizens United*, 130 S. Ct. 876.

120. Torres-Spelliscy, *supra* note 25, at 61.

121. *Citizens United*, 130 S. Ct. at 913.

122. *Id.* at 911.

123. *Id.* at 915 (citing *Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986)).

124. *Id.* at 914 (citing and quoting *Buckley v. Valeo*, 424 U.S. 1, 64, 66, 74 (1976) and *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 198, 231-32 (2003)).

*Wisconsin Right to Life*¹²⁵ that disclosure is only required for communications that are the “functional equivalent” of express advocacy.¹²⁶ However, the Court did not provide any bright-line guidance of when disclosure must be required for these groups.¹²⁷

In March of 2010, the D.C. Circuit had the opportunity to apply *Citizens United* to its decision in *SpeechNow.org v. Federal Election Commission*.¹²⁸ The Court determined that PACs, who intended only to make independent (noncoordinated) expenditures, were constitutionally exempt (as-applied) from the FECA individual contribution limits of \$5000.¹²⁹ This decision allows a PAC, who wishes to forego making any direct contributions to a candidate, to receive unlimited contributions from individual or corporate donors, thus becoming what has been dubbed a “Super PAC.”¹³⁰ The D.C. Circuit reasoned that because *Citizens United* grants such broad protections to independent expenditures, and absent a quid pro quo arrangement, the government has no sufficient interest in limiting independent expenditures.¹³¹ Thus, there can be no sufficient anticorruption interest in limiting contributions to these groups.¹³² The D.C. Circuit did, however, uphold the disclosure and reporting requirements that apply to these organizations.¹³³

Taken together, a corporation (or a wealthy individual donor) can spend virtually unlimited amounts of money on campaign intervention completely anonymously. Here is how: *Citizens United* allows corporations to spend unlimited amounts of money from their general treasuries on independent political expenditures.¹³⁴ A nonprofit’s § 501(c)(4) status allows it to spend forty to fifty percent of its budget on election intervention without disclosure requirements under IRS regulation.¹³⁵ These § 501(c)(4) groups can, in turn, fund Super PACs,¹³⁶ which under *SpeechNow.org* may also receive

125. Fed. Election Comm’n v. Wis. Right to Life, Inc., 551 U.S. 449, 469-76 (2007).

126. *Citizens United*, 130 S. Ct. at 915.

127. *See id.* at 916-17.

128. *See SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 553 (2010).

129. *Id.* at 694-96.

130. *Id.*; *see also Super PACs*, OPENSECRETS.ORG, <http://www.opensecrets.org/pacs/superpacs.php> (last visited Jan. 17, 2013) (defining qualities of Super PACs, listing names of Super PACs, and indicating amount of money raised and spent by each).

131. *See SpeechNow.org*, 599 F.3d at 694-95.

132. *Id.* at 694 (“In light of the Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of *quid pro quo* corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption.”).

133. *Id.* at 697-98.

134. *See Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 913 (2010).

135. *See discussion supra* Part II.A.3-4.

136. *See discussion supra* Part II.A.3-4.

unlimited donations so long as their expenditures are independent and noncoordinated.¹³⁷ Because a Super PAC need only disclose the donating § 501(c)(4) group's identity, not the identity of the donors to the § 501(c)(4) group, there exists an anonymous conduit for large sums of electioneering funds.¹³⁸ Social welfare organizations organized under § 501(c)(4) that willfully manipulate this conduit and facilitate large anonymous donations for election intervention pose a threat to the underlying policies of campaign finance reform¹³⁹ and the underlying justifications of the *Citizens United* decision.¹⁴⁰

III. AN ANALYSIS OF VARIOUS REFORM EFFORTS

Perhaps the most direct and effective ways to address campaign finance reform are through congressional action in modifying the campaign and tax laws, or by having the FEC promulgate more effective and clear regulations and guidelines.¹⁴¹ However, the latest

137. *SpeechNow.org*, 599 F.3d at 694.

138. See discussion *supra* Part II.A.3-4.

139. See, e.g., Rick Cohen, *Super PACs and Secret Donors from 501(c)(4)s: "Kryptonite for Our Democracy,"* NONPROFIT Q. (Feb. 13, 2012, 12:11 PM), <http://www.nonprofitquarterly.org/policysocial-context/19798-super-pacs-and-secret-donors-from-501c4s-kryptonite-for-our-democracy.html>; *The Secret Election*, *supra* note 6; Gold, *supra* note 49; Tobin, *supra* note 22; see also Letter from J. Gerald Hebert, Exec. Dir., Campaign Legal Center, & Fred Wertheimer, Pres., Democracy 21, to Douglas H. Shulman, Comm'r, Internal Revenue Serv., & Lois Lerner, Dir. of the Exempt Orgs. Div., Internal Revenue Serv. (Dec. 14, 2011), available at http://www.campaignlegalcenter.org/attachments/IRS_LETTER_12_14_2011.pdf (requesting an IRS investigation into whether the groups "Crossroads GPS, the American Action Network, Americans Elect and Priorities USA—are operating in violation of their claimed tax-exempt status under section 501(c)(4) of the Internal Revenue Code because each organization is engaging in far more political activity than the Code allows for 'social welfare' organizations"). Congress has also focused some attention on the issue of possible misuse of § 501(c)(4) status. See Letter from Max Baucus, Senate Fin. Comm. Chairman, to Douglas H. Shulman, Comm'r, Internal Revenue Serv. (Sept. 28, 2010), available at <http://finance.senate.gov/newsroom/chairman/release/?id=9bc04792-1ead-4668-a512-89443f342312> (requesting the IRS to "survey major 501(c)(4), (c)(5) and (c)(6) organizations involved in political campaign activity to examine whether they are operated for the organization's intended tax exempt purpose and to ensure that political campaign activity is not the organization's primary activity," and to determine whether the tax code is "being used to eliminate transparency in the funding of our elections." The results of the report will be used to determine whether the Finance Committee should "open its own investigation and/or to take appropriate legislative action.").

140. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 914 (2010) (upholding the BCRA's disclosure requirements stating "[d]isclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities'" (quoting *Buckley v. Valeo*, 424 U.S. 1, 64 (1976))).

141. See generally Bingham, *supra* note 1, at 1061-62 (advocating FEC and congressional action, and using Internet technology to increase transparency); Kalanick, *supra* note 6, at 2270-78 (advocating for congressional action in passing more robust disclosure legislation); Aprill, *supra* note 7, at 401-05 (advocating for congressional modifications of the tax code).

congressional efforts have been thwarted by partisan politics,¹⁴² and the FEC, whose commissioners, by reason of law, will generally be equally divided on partisan lines,¹⁴³ has similarly been unable to agree on the proper mode of reform.¹⁴⁴ In this section, I will discuss the latest reform efforts by Congress,¹⁴⁵ possible reform actions the FEC could take,¹⁴⁶ and a few alternative modes of reform that would also require action by either Congress or the FEC.¹⁴⁷ Finally, I will discuss the actions that the IRS can take, and should take, in the meantime,¹⁴⁸ until Congress and the FEC can find common ground to address the issue of secret money in elections post-*Citizens United*.

A. *Possible Modes of Reform Requiring Congressional or FEC Action*

1. Disclose Acts of 2010 and 2012

In 2010, Democratic Representative Chris Van Hollen introduced the Democracy is Strengthened by Casting Light on Spending in Elections Act (the “DISCLOSE Act”) to amend the FECA to address the lack of transparency in current campaign finance laws.¹⁴⁹ One feature of the Act would require that the head of a corporation, union, § 527, or § 501(c) group making a political ad appear on camera, be identified by name and company, and make an individual disclosure with the familiar words “I approve this message,” and in some cases “I helped to pay for this message,” similar to what candidates are required to do.¹⁵⁰ Another feature of the DISCLOSE Act would require that the top five donors be listed in the advertisements so that donors cannot disguise their support by hiding behind the name of the entity creating the ads.¹⁵¹ The legislation passed the House along party lines, but was defeated in the Senate as a result of a threatened filibuster by Republicans.¹⁵²

On February 9, 2012, Representative Van Hollen announced that

142. See discussion *infra* Part III.A.1.

143. 2 U.S.C. § 437c(a)(1) (2006) (“The Commission is composed of . . . 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.”).

144. See discussion *infra* Part III.A.2.

145. See discussion *infra* Part III.A.1.

146. See discussion *infra* Part III.A.2.

147. See discussion *infra* Parts III.A.3-4.

148. See discussion *infra* Part III.B.

149. See Democracy is Strengthened by Casting Light on Spending in Elections Act (DISCLOSE Act), H.R. 5175, 111th Cong. (2010).

150. *Id.* at § 214(e)(2), e(4)(A).

151. *Id.* at § 214(e)(5).

152. Doyle, *supra* note 10.

a new DISCLOSE bill would be introduced.¹⁵³ The Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012 (“DISCLOSE 2012”) is similar to the prior Act in that it requires both a “stand by your ad” statement for corporations and other outside groups, and a disclosure of the top donors in radio and television ads.¹⁵⁴ Additionally, it would require § 501(c)(4) groups, unions, corporations, and PACs that spend over \$10,000 on a “campaign-related disbursement” to report and disclose their donors to the FEC within twenty-four hours of making the expenditure.¹⁵⁵ As was the case with the 2010 DISCLOSE Act, supporters seeking to open debate on the bill in the Senate were blocked by the threat of a Republican filibuster.¹⁵⁶ Although the bill appears to be dead, supporters have vowed not to give up until the issue of secret money is resolved.¹⁵⁷

2. FEC Regulatory Reform

Under the FECA, political committees must disclose their donors.¹⁵⁸ A political committee is defined as an organization “which receives contributions aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year”¹⁵⁹ Under the Supreme Court holding in *Buckley v. Valeo*, they are organizations which “are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.”¹⁶⁰ What exactly constitutes “major purpose” is not entirely clear.¹⁶¹

153. Press Release, Chris Van Hollen, Congressman, Van Hollen, House Democrats Introduce DISCLOSE 2012 Act (Feb. 9, 2012), <http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=279166>; see also Sam Stein, *Disclose Act: Super PAC Transparency Legislation to Be Introduced by House Democrats*, HUFFINGTON POST (Jan. 25, 2012, 5:06 PM), http://www.huffingtonpost.com/2012/01/25/disclose-act-super-pac-chris-van-hollen_n_1232008.html; Editorial, *Return of the DISCLOSE Act*, L.A. TIMES, Feb. 15, 2012, at A12.

154. Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012 (DISCLOSURE 2012 Act), H.R. 4010, 112th Cong. § 3 (2012).

155. See, e.g., *id.* § 324; *Return of the DISCLOSE Act*, *supra* note 153, at A12.

156. See Paul Blumenthal, *Sheldon Whitehouse, Disclose Act Sponsor: 'We Can't Give Up'*, HUFFINGTON POST (July 31, 2012, 3:20 PM), http://www.huffingtonpost.com/2012/07/31/sheldon-whitehouse-disclose-act_n_1724573.html.

157. See *id.*

158. 2 U.S.C. § 434(b) (2006).

159. 11 C.F.R. § 100.5(a) (2012).

160. 424 U.S. 1, 79 (1976) (emphasis added).

161. *Compare* Human Life of Wash. Inc. v. Brumsickle, 624 F.3d 990, 997 (9th Cir. 2010) (quoting State *ex rel.* Evergreen Freedom Found. v. Wash. Educ. Ass'n, 49 P.3d 894, 903 (Wash. Ct. App. 2002) (internal quotation marks omitted) (upholding as constitutional a state law defining an organization as a political committee where “its ‘primary or one of the primary purposes’ is ‘to affect, directly or indirectly,

Currently, under FEC regulatory policy, § 501(c) and § 527 groups are required to register as political committees with the FEC (and thus required to disclose donors to the FEC) when *the* “major purpose” of the group is the nomination or election of a candidate; this is based on the FEC’s interpretation of *Buckley*.¹⁶² Considering that a § 527 group, by definition of the tax code, is a “political organization” that is “operated *primarily for the purpose of . . .* influencing or attempting to influence the selection, nomination, election [of a candidate],”¹⁶³ it would seem relatively easy to determine that they should register as a political committee with the FEC, but this cannot be said about § 501(c)(4) social welfare groups, many of whom may not engage in politicking at all.¹⁶⁴ However, some recent federal decisions have upheld state laws taking a broader reading of *Buckley* in their definitions of a political committee—namely, where a political committee is defined as one whose major purpose, or *one of its major purposes*, is to influence an election.¹⁶⁵ In effect, the “safe harbor” of allowable political activity that a § 501(c)(4) group can engage in while not falling under FEC regulation could theoretically be reduced from fifty percent¹⁶⁶ to something significantly lower by clarifying this definition in a similar way on a federal level.¹⁶⁷

In 2004, the FEC initiated the rulemaking process to clarify when an organization must register as a political committee.¹⁶⁸ One

governmental decision making by supporting or opposing candidates or ballot propositions”), *with* N.C. Right to Life, Inc. v. Leake, 525 F.3d 274, 289 (4th Cir. 2008) (holding unconstitutional a state law defining a political committee as one that has “a major purpose” of influencing elections under a reading of *Buckley* that it must be “their primary purpose”). *See also* Aprill, *supra* note 7, at 382 (noting how legal advisors differ on the amount of politicking an organization may participate in without losing their 501(c)(4) status, adding that “[s]ome are comfortable so long as politicking is less than 50 percent of an organization’s total activities. Members of the American Bar Association Tax Section have suggested a 40 percent safe harbor for nonexempt activities.”).

162. *See* Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 481-85 (2008).

163. 26 U.S.C. § 527(e)(1)-(2) (2006) (emphasis added).

164. However, this does not necessarily mean that § 527 groups obey the law and actually register with the FEC. *See generally* Ryan, *supra* note 162 (arguing that groups organized under §527 of the tax code should be presumed political committees by the FEC, unless they can show otherwise, because many of these groups fail to register when they should).

165. *See Human Life of Wash. Inc.*, 624 F.3d at 1008-09 (holding the Washington definition of political committee is constitutional under *Buckley v. Valeo*, 424 U.S. 1 (1976)); *see also* Nat’l Org. for Marriage v. McKee, 649 F.3d 34, 59 (1st Cir. 2011) (mentioning how the non-major-purpose PAC definition did not, on its face, violate the First Amendment).

166. *See* discussion *infra* Part II.A.3.

167. *See Human Life of Wash. Inc.*, 624 F.3d at 1008-09.

168. Political Committee Status, 69 Fed. Reg. 11,736, 11,744 (proposed Mar. 11,

of the discussed solutions was to modify “major purpose” with the indefinite article “a”; thus requiring an organization to register as 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.”¹⁶⁹ However, the FEC chose not to promulgate a rule clarifying political committee status,¹⁷⁰ despite admonitions from Senators and House members accusing the FEC of “[sitting] on its hands once again.”¹⁷¹

The problem with relying on FEC action to strengthen and enforce disclosure requirements is the fact that the FEC is made up of six members, generally evenly split between Republicans and Democrats;¹⁷² this creates a likely stalemate that makes regulation through this channel nearly as insurmountable as through congressional action.¹⁷³ The FEC took up *Citizens United* rulemaking to decide whether to strengthen disclosure rules in January 2011.¹⁷⁴ However, the Commission has remained at an impasse, deadlocking 3-3 along party lines on how to proceed.¹⁷⁵

On April 21, 2011, Representative Chris Van Hollen sued the FEC and challenged the regulation that allows nonprofit groups to hide the identity of donors while airing issue ads that do not expressly urge votes for or against a particular candidate.¹⁷⁶ The District Court of D.C. agreed with Van Hollen and found that the Commission regulation¹⁷⁷ was invalid in limiting disclosure only if the donations were “made for the purpose of furthering electioneering communications.”¹⁷⁸ The case was eventually reversed on appeal.¹⁷⁹ While the appeal was pending, the FEC released a statement¹⁸⁰ indicating that until the case was resolved, or until the

2004).

169. *Id.*

170. *See* Ryan, *supra* note 162, at 488-90.

171. *Id.* at 90.

172. 2 U.S.C. § 437c(a)(1) (2006).

173. *See* Marion Wang, *FEC Gridlock On Campaign Finance Issues Essentially Gives 'De Facto Green Light'*, BUSINESS INSIDER (Nov. 8, 2011), http://articles.businessinsider.com/2011-11-08/politics/30372438_1_campaign-finance-fec-rulings (describing how the divided FEC panel inhibits finance reform progress).

174. Doyle, *supra* note 10.

175. *Id.*

176. *See* Complaint, Van Hollen v. FEC, 851 F. Supp. 2d 69 (D.D.C. 2012) (No. 11-0766 (ABJ)) (“[A]s a result of the regulation, the public record reflects little or no disclosure of the numerous contributors to non-profit corporations that [make] substantial electioneering contributions . . .”).

177. 11 C.F.R. 104.20(c) (2007).

178. *See id.*; Van Hollen v. FEC, 851 F. Supp. 2d 69, 84-88 (D.D.C. 2012).

179. *Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 112 (D.C. Cir. 2012).

180. Press Release, Fed. Election Comm., FEC Statement on *Van Hollen v. FEC*, (July 27, 2012), http://www.fec.gov/press/press2012/20120727_VanHollen_v_FEC.sht

Commission adopted a new regulation, all donors making gifts over \$1000 for electioneering communications must be disclosed.¹⁸¹ However, some of the affected groups simply created ads that expressly called for the election or defeat of a candidate and took their chances that they would still remain in the forty to fifty percent nonpolitical safe harbor¹⁸² and not have to register as political committees.¹⁸³ They were still able to air issue ads funded by anonymous donors until the “electioneering communication” window opened, at which point they could end run the District Court ruling by airing anonymous “express advocacy” independent expenditure ads.¹⁸⁴ On August 23, 2012, the FEC deadlocked along party lines again on an advisory opinion regarding these “express advocacy” messages and determining when a nonprofit becomes subject to FEC regulation.¹⁸⁵

3. Public Financing Schemes

Several countries such as Japan, Germany, France, Spain, Belgium, and Canada have handled reform efforts with various forms of public financing of campaigns.¹⁸⁶ Pure public financing, however, is a restriction on expenditures and would likely be unconstitutional under *Buckley*.¹⁸⁷ So, public financing in the United States would have to be a choice conditioned on the agreement by a candidate to expenditure limitations.¹⁸⁸

ml.

181. *Id.*

182. *See supra* Part II.A.3.

183. *See, e.g.*, Andy Kroll, *Karl Rove's Catch-22*, MOTHER JONES (July 27, 2012, 3:00 AM), <http://www.motherjones.com/politics/2012/07/karl-rove-crossroads-gps-dark-money-disclosure>; Elahe Izadi, *FEC Releases Disclosure Rules*, NAT'L J. (July 27, 2012, 4:11 PM), <http://influencealley.nationaljournal.com/2012/07/fec-requiring-disclosure.php> (“Groups can end run the new rules by simply changing their ads to advocate for or against a candidate -- a practice many instituted after the court's ruling.”).

184. The “electioneering communication” window is thirty days before a primary (or before the first day of a national nominating convention) and sixty days before the general election. 2 U.S.C. § 434(f)(3)(A)(i)(II) (2006). The social welfare group Americans for Prosperity has already begun to run anonymously funded “express advocacy” ads; the group, however, denies that it is doing so in response to the FEC announcement. *See* Alex Seitz-Wald, *Koch Group's \$25 Million Buy*, SALON (Aug. 8, 2012, 4:00 PM), http://www.salon.com/2012/08/08/koch_groups_25_million_buy.

185. Kenneth P. Doyle, *FEC Deadlocked on Major Questions Regarding Application of Disclosure Rules*, BNA MONEY & POL. REPORT (Aug. 24, 2012).

186. ISSACHAROFF, *supra* note 61, at 443.

187. *Id.*

188. *Id.* at 444 (“Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.” (quoting *Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976))).

Some states have enacted these “clean money” acts to implement this idea with some success.¹⁸⁹ For example, Maine instituted the Maine Clean Election Act of 1996, which was found to be constitutional.¹⁹⁰ This Act enabled candidates to opt-in to the program by raising a threshold amount of five-dollar contributions from constituents, referred to as “seed money.”¹⁹¹ This money must be turned over to the Clean Elections Fund, and subsequently, the candidate is barred from raising any more private funds.¹⁹² In exchange, the candidate is granted public financing for the campaign.¹⁹³ The amount of financing is based on the average amount that was spent by candidates for that office in the previous two elections.¹⁹⁴ Arizona has a similar law in place.¹⁹⁵

The U.S. Senate introduced a bill entitled the Fair Elections Now Act in 2007, which similarly proposed requiring a candidate to achieve a threshold amount of public support and seed money to be eligible for public funds.¹⁹⁶ In 2011, the bill was reintroduced in the House and Senate.¹⁹⁷ It provides for a maximum donation of \$100. House candidates opting for Fair Election financing will have to raise \$50,000 in seed money from people in their states, and Senate candidates will have to collect qualifying donations “equal to 2,000 plus 500 times the number of congressional districts in their state.”¹⁹⁸ Candidates then would receive funding for their primary race, and additional funding for the general election if they win, with a maximum of \$900,000 total for House candidates and “\$1.25 million plus another \$250,000 per congressional district in their state” for Senate candidates.¹⁹⁹ For example, New York currently has twenty-nine congressional districts, so this would total \$8.5 million in public financing.²⁰⁰ Considering that in 2008 the average amount of money spent by a House candidate was \$1.1 million, and \$6.5

189. *See, e.g.*, *Daggett v. Comm’n on Governmental Ethics and Election Practices*, 205 F.3d 445, 450 (1st Cir. 2000) (holding that Maine’s public funding act is constitutional).

190. *Id.*

191. ISSACHAROFF, *supra* note 61, at 445.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 450.

196. Fair Elections Now Act, S. 1285, 110th Cong. § 503 (2007).

197. Fair Elections Now Act, S. 750, 112th Cong. (2011); Fair Elections Now Act, H.R. 1404, 112th Cong. (2011)

198. *A Summary of the Fair Elections Now Act*, FAIR ELECTIONS NOW (May 20, 2009), <http://fairelectionsnow.org/sites/default/files/Fair%20Elections%20Now%20Act%20Summary.pdf>.

199. *Id.*

200. New York Congressional District Map, GOVTRACK.US, <http://www.govtrack.us/congress/members/NY> (last visited Jan. 17, 2013).

million for a Senate candidate, this funding scheme seems reasonable.²⁰¹ However, both the Senate and the House bills are almost entirely cosponsored by Democrats, and there is little bipartisan support.²⁰² Given the current conditions in Congress, it seems unlikely that these bills will gain traction anytime soon.²⁰³

4. Blind Contributions

Professors Ian Ayres and Bruce Ackerman have suggested making an about-face. They suggest keeping the identity of donors secret from the public and the candidates.²⁰⁴ They argue that donor disclosure does not thwart corruption because “the public rarely polices the contributions and does not have access to other important information (for example, why the contribution was made or the amount of access that any given donor has to the candidate) that is held only by the candidate and the donor.”²⁰⁵ Essentially, the FEC would operate a blind trust that would act as a firewall between donors and candidates, and thus eliminate any quid pro quo because the candidates would not know who gave them the money.²⁰⁶ This proposal, although sound and academically interesting, would require sweeping changes in campaign finance policy.²⁰⁷ Given that policy change in the United States happens incrementally (and slowly), this proposal seems unlikely to provide any near term solutions.²⁰⁸

B. IRS Enforcement as a Remedial Measure

Given that Congress and the FEC seem to be in a deadlock with

201. See sources cited *supra* note 50.

202. See, e.g., *Bill Summary & Status 112th Congress (2011-2012): S.750 Cosponsors*, THOMAS, <http://thomas.loc.gov/home/thomas.php> (search “S. 750” and select bill number; then click on the “Cosponsors” hyperlink) (last visited Jan. 18, 2012); *Bill Summary & Status 112th Congress (2011-2012): H.R. 1404 Cosponsors*, THOMAS, <http://thomas.loc.gov/home/thomas.php> (search “H.R. 1404” and select bill number; then click on the “Cosponsors” hyperlink) (last visited Jan. 18, 2013).

203. Currently the 112th Congress has 192 Democrats and 240 Republicans in the House, and 51 Democrats and 47 Republicans in the Senate (9 Democrats short of the 60 required to defeat a filibuster by the Republicans). See *The United States Congress Quick Facts*, THISNATION.COM, <http://thisnation.com/congress-facts.html> (last visited Jan. 18, 2013); see also *supra* Part III.A.1 (discussing how DISCLOSE Act failed to pass).

204. ISSACHAROFF, *supra* note 61, at 451 (referring to Bruce Ackerman & Ian Ayres, *The Secret Refund Booth*, 73 U. CHI. L. REV. 1107 (2006)).

205. ISSACHAROFF, *supra* note 61, at 451-52.

206. Ackerman & Ayres, *supra* note 204, at 1111.

207. See Stephen K. Medvic, *Voting With Dollars: A New Paradigm for Campaign Finance*, 14 L. & POL. BOOK REV. 704-07 (2004) (reviewing BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* (2002)).

208. See *id.*

respect to campaign finance reform,²⁰⁹ there are steps that the IRS can take, and should take, in the interim, to address secret money in elections post-*Citizens United*.²¹⁰ Donald Tobin, law professor at The Ohio State University Moritz College of Law, has noted that in most cases where a § 501(c)(4) organization is exploiting its tax status to finance political advocacy and influence elections, it is breaking the law, and the IRS can take action.²¹¹ Namely, there are procedural mechanisms the IRS can put in place to better assist the IRS in regulating § 501(c)(4)s²¹²; the IRS could reclassify a rogue social welfare group as a § 527, thus requiring disclosure of donors;²¹³ the IRS and the Treasury can levy ethics sanctions against attorneys who advise social welfare organizations to break the law;²¹⁴ additionally, the IRS could begin to enforce the gift tax on § 501(c)(4) organizations, thereby making social welfare groups less attractive to donors who intend for their donations to influence elections.²¹⁵

Although § 501(c)(4) groups are allowed to participate in a limited amount of intervention in a political campaign,²¹⁶ the purpose of these groups is to promote “the common good and general welfare of the people of the community.”²¹⁷ This does not include “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office,”²¹⁸ whose purpose is reserved for § 527 groups.²¹⁹ In fact, when drafting § 527(f), Congress addressed this very issue as evidenced in a Senate Committee Report:

The committee expects that, generally, a section 501(c) organization that is permitted to engage in political activities would establish a separate organization that would operate primarily as a political organization, and directly receive and disburse all funds related to nomination, etc., activities. In this way, *the campaign-type activities would be taken entirely out of the section 501(c) organization*, to the benefit both of the organization

209. See discussion *supra* Part III.A.1-4 (analyzing various campaign finance reform reports).

210. Tobin, *supra* note 22.

211. *Id.*

212. *Id.*; see also Aprill, *supra* note 7, at 401-02 (advocating for a “notice of application for exemption” within a specified time period, which would likely require modification of the tax code).

213. Tobin, *supra* note 22.

214. *Id.*

215. *Id.*

216. See Rev. Rul. 81-95, 1981-1 C.B. 332.

217. 26 C.F.R. § 1.501(e)(4)-1(a)(2)(i) (2012).

218. 26 C.F.R. § 1.501(e)(4)-1(a)(2)(ii) (2012).

219. See generally 26 U.S.C. § 527 (2006); see also S. REP. NO. 93-1357, at 29-30 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7505-06 (noting that organizations other than § 501(c)s should be created to address campaign-related activities).

and the administration of the tax laws.²²⁰

Social welfare organizations under § 501(c)(4) are simply not designed for political intervention in elections, but § 527 groups are specifically created for this.²²¹

1. Procedural Mechanisms and Reclassifying a § 501(c)(4) Group as a § 527 Group

Part of the IRS enforcement problem²²² is that the IRS does not know that a § 501(c)(4) group exists until it files its application, and there are no procedural mechanisms in place to make the IRS aware of its existence.²²³ When a § 527 group is formed, it is required to notify the IRS of its existence within twenty-four hours of its establishment, as specified by Congress in the tax code,²²⁴ which allows the IRS to monitor and regulate these groups.²²⁵ Although the IRS and the Treasury Department cannot change the tax code, they do have the power to promulgate regulations to require notice for § 501(c)(4) groups, so that they may be more closely monitored for abuse.²²⁶

If such monitoring or investigation leads the IRS to determine that the § 501(c)(4) organization is in fact abusing its status, the IRS can reclassify the group as a § 527, thus subjecting it to the disclosure requirements proscribed in that section.²²⁷ As Professor Tobin states, “An organization is not a 501(c)(4) organization simply because it says so. Section 527 specifically defines organizations that are 527 organizations. There is no opt-out provision.”²²⁸ If the IRS determines that an organization is mischaracterizing itself as a § 501(c)(4) group and reclassifies it as a § 527 group, the organization must either disclose who its donors are, or the nondisclosed donations will be subject to tax at the highest corporate tax rate of thirty-five percent.²²⁹ Although this proposal would not close the loophole in such a way that nondisclosure would be impossible, the thirty-five percent tax certainly would be a substantial incentive to

220. S. REP. NO. 93-1357, at 30 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7506 (emphasis added).

221. Tobin, *supra* note 22.

222. See discussion *supra* Part II.A.3.

223. Tobin, *supra* note 22.

224. 26 U.S.C. § 527(i)(2).

225. See 146 CONG. REC. 10,182 (2000) (statement of Sen. Reed) (“The amendment . . . force[s] Section 527 organizations to emerge from the shadows.”).

226. Tobin, *supra* note 22.

227. *Id.*

228. *Id.*

229. See, e.g., 26 U.S.C. § 527(j)(1); Torres-Spelliscy, *supra* note 25, at 85-86 (quoting *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360 (11th Cir. 2003)).

disclose who the donors are.

2. Enforcing Sanctions for Ethical Breaches

Another issue that has garnered attention is the ability of § 501(c)(4) groups to organize shortly before an election, finance election activity without donor disclosure, and then dissolve shortly thereafter, all under the radar of the IRS because the IRS does not know of their existence until after they file their taxes, which is long after the election is over.²³⁰ Professor Tobin points out that in these instances, “lawyers who are setting up these organizations have an ethical responsibility under our IRS Professional Responsibility rules not to assist others in engaging in illegal activities.”²³¹ Setting up a social welfare organization under § 501(c)(4) for the purpose of intervening in an election is illegal, and as such, a lawyer cannot counsel such an organization to break the law.²³²

Over the last few years, the IRS, in order to address tax shelter abuse, has imposed strict new regulations on the ethical responsibilities of attorneys giving tax advice—these are stricter than many state bar rules of professional conduct.²³³ Practitioners who willfully, recklessly, or through gross incompetence violate the regulations published in Circular 230 are subject to severe penalties.²³⁴ In addition to implementing these regulations, the IRS has doubled the staff at the Office of Professional Responsibility in order to investigate misconduct and strengthen professional standards.²³⁵ Advising a campaign advocacy organization to masquerade itself as a social welfare organization is likely a violation of Circular 230 regulations,²³⁶ and if the IRS sanctioned attorneys and law firms who counsel organizations to do this, it could be a strong deterrent.

3. Assessing Gift Tax on § 501(c)(4) Groups

Another possible deterrent to the misuse of § 501(c)(4) status is the application of the gift tax on donors to social welfare

230. Michael Luo & Stephanie Strom, *Donor Names Remain Secret As Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1.

231. Tobin, *supra* note 22.

232. Tobin, *supra* note 22.

233. *New IRS Circular 230 Regulations for Written Tax Advice*, GIBBONS, <http://www.gibbonslaw.com/circular230> (last visited Jan. 17, 2013); *see also* Tobin, *supra* note 22.

234. *See New IRS Circular 230 Regulations for Written Tax Advice*, *supra* note 233 (referring to 31 C.F.R. §§ 10.34, 10.36 (2011)).

235. Press Release, Internal Revenue Serv., IRS and the Treasury Department Amend Circular 230 to Promote Ethical Practice by Tax Professionals (Dec. 17, 2004), <http://www.irs.gov/uac/IRS-and-the-Treasury-Department-Amend-Circular-230-to-Promote-Ethical-Practice-by-Tax-Professionals>.

236. Tobin, *supra* note 22.

organizations.²³⁷ Contributions to § 501(c)(3) charitable organizations and § 527 political organizations are exempted from the gift tax by statute,²³⁸ but no such express exemption exists for § 501(c)(4) organizations.²³⁹ The gift tax applies only to individual donors, not corporations,²⁴⁰ but it could dissuade wealthy individuals from contributing large sums of anonymous money for election intervention.²⁴¹ The gift tax has not traditionally been applied to social welfare groups.²⁴² However, the IRS has consistently asserted that it can be applied,²⁴³ and it would likely be constitutional.²⁴⁴ If the tax were assessed—which is currently thirty-five percent,²⁴⁵ but has historically been as high as fifty-five percent,²⁴⁶—donors would have to take the costs into account, which could significantly reduce their contributions, all of which could be avoided if they simply donated to a § 527 organization and disclosed their identity.²⁴⁷ This likely would not affect small donors who wish to support a social welfare organization that is operating within its legal definition, because there is a \$5 million lifetime exemption before out-of-pocket taxes must be paid on a gift.²⁴⁸ Larger donors, however, will not likely want to use up their lifetime exemptions, especially because the lifetime exemption tends to fluctuate and is rather unpredictable over time.²⁴⁹

237. *Id.*; Ellen P. Aprill, *Once and Future Gift Taxation of Transfers to Section 501(c)(4) Organizations: Current Law, Constitutional Issues, and Policy Considerations*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 289, 291 (2012); Donald B. Tobin, *The Application of the Gift Tax Provisions in the Internal Revenue Code to § 501(c)(4) Organizations*, ELECTION LAW @ MORITZ (May 13, 2011), <http://moritzlaw.osu.edu/electionlaw/comments/index.php?ID=8335>.

238. 26 U.S.C. § 2501(a)(4) (2006) (exempting § 527 organizations from gift tax); 26 U.S.C. § 2522(a)(2) (2006) (providing a credit against gift tax for charitable contributions to § 501(c)(3) organizations).

239. Tobin, *supra* note 22.

240. Torres-Spelliscy, *supra* note 25, at 84.

241. Aprill, *supra* note 237, at 291.

242. *See* Tobin, *supra* note 237.

243. *See id.*

244. *See generally* Aprill, *supra* note 237, at 293 (concluding that “despite precedents that might be interpreted to the contrary, the better view is that such gifts are taxable under current law” and that, despite Supreme Court campaign finance reform precedents, “such taxation is constitutional under the Supreme Court tax law jurisprudence”). Aprill proceeds with an in-depth discussion of the constitutionality of applying the gift tax to social welfare organizations. *See id.* at 311-21.

245. Aprill, *supra* note 237, at 294 & n.33 (internal citations omitted).

246. *Id.* at 294 & n.32 (internal citations omitted).

247. *See id.* at 290-91; *see also* Tobin, *supra* note 22 (stating that a gift tax on large donors would make 501(c)(4)s less attractive campaign vehicles).

248. *See* Aprill, *supra* note 237, at 295.

249. *See* Tobin, *supra* note 237 (“Since the amount of the gift tax and estate tax exemption are in flux, it is unlikely that most donors will want to use their gift tax exemption.”); *see also* Aprill, *supra* note 237, at 294-95 (noting that the lifetime

The gift tax was enacted in 1924 as a way “to prevent taxpayers from evading the estate tax by making *inter vivos* gifts.”²⁵⁰ The IRS has unambiguously held that this tax applies to donations given to noncharitable organizations, such as § 501(c)(4) organizations, unless specifically exempted by statute.²⁵¹ For instance, in 1959, and again in 1972, the IRS stated in Revenue Rulings that the gift tax applied to contributions to political parties and candidates.²⁵² In 1974, Congress amended the tax code to specifically exempt § 527 organizations from the gift tax, reasoning that the tax code should not be used to restrict political speech.²⁵³ Subsequently, the IRS stopped assessing the gift tax on donations to § 527 political organizations, and in explaining its nonenforcement, the IRS stated “that gratuitous transfers to persons other than organizations described in section 527(e) of the Code *are subject to the gift tax absent any specific statute to the contrary*, even though the transfers may be motivated by a desire to advance the donor’s *own social, political or charitable goals*.”²⁵⁴ Thus, it seems quite clear that the IRS maintains that it can enforce this tax on § 501(c)(4) organizations.²⁵⁵ The IRS has not further addressed the applicability of the gift tax to § 501(c)(4) nonprofits in any subsequent Revenue Rulings.²⁵⁶

However, in May 2011, the IRS sent audit letters to five prominent § 501(c)(4) political donors in connection with possible gift tax liabilities, and informed them that an investigation had been opened.²⁵⁷ Subsequently, six Senate Finance Committee Republicans wrote a letter to the IRS Commissioner demanding to know why the audits were initiated and whether any outside political forces were involved in the decision.²⁵⁸ Additionally, Representative Dave Camp, the Chairman of the House Ways and Means Committee, questioned the audits and released a letter that stated “[e]very aspect of this tax

exemption has been as low as \$1 million and as high as \$5 million and there is reason to believe it may be “clawed back” depending on how the tax structure is determined after 2012).

250. Aprill, *supra* note 237, at 293-94.

251. Tobin, *supra* note 237.

252. *Id.* (citing Rev. Rul. 59-57, 1959-1 C.B. 626 and Rev. Rul. 72-583, 1972-2 C.B. 534).

253. Aprill, *supra* note 237, at 297-98.

254. Tobin, *supra* note 237 (citing Rev. Rul. 82-216, 1982-2 C.B. 220) (emphasis added).

255. Tobin, *supra* note 237.

256. *Id.*

257. Stephanie Strom, *I.R.S. Sets Sights On Donors' Gifts That Push Policy*, N.Y. TIMES, May 12, 2011, at A1; Ben Smith, *IRS Gift Tax Move Could Hit New Anonymous Groups*, POLITICO (May 10, 2011, 8:39 PM), http://www.politico.com/blogs/bensmith/0511/IRS_gift_tax_move_could_hit_new_anonymous_groups.html.

258. Aprill, *supra* note 237, at 291-92.

investigation, from the timing to the sudden reversal of nearly thirty years of IRS practice, strongly suggests that the IRS is targeting constitutionally-protected political speech.”²⁵⁹ In response, the IRS discontinued the audits and the investigations.²⁶⁰ On July 7, 2011, the IRS released a memo indicating it would cease the investigations until further notice, and it would attempt to determine if further guidance is needed in terms of applying the gift tax to § 501(c)(4) donors.²⁶¹ The memo also stated that it would withhold further investigations until after this determination was made; future audits “would be prospective only after notice to the public.”²⁶² In the meantime, we will have to wait for further guidance on whether the IRS intends to go forward on assessing this tax.

Seemingly in response to the IRS dropping the audits and investigations,²⁶³ it was reported on Feb. 6, 2012, that Senate Democrat Maria Cantwell “was expected to file an amendment to a transportation tax measure” that would address the gift tax on donations to § 501(c)(4) organizations.²⁶⁴ As written, the amendment states that “under present law, gift tax applies to transfers to . . . 501(c)(4) organizations,” and would require § 501(c)(4) groups “receiving large contributions to notify donors of their potential gift tax liability.”²⁶⁵ The amendment would also subject organizations that fail to notify donors to a penalty of fifty percent of each qualified transfer.²⁶⁶ If congressional deadlock on the DISCLOSE Act,²⁶⁷ coupled with the response of congressional Republicans to the recent audits,²⁶⁸ is any indication of the likelihood of this amendment passing, it does not fare well. However, legislative clarification of the gift tax would provide public notice and pave the way for easier IRS enforcement of the gift tax on social welfare groups.

IV. CONCLUSION

In *Citizens United*, the Supreme Court relied on disclosure as a counterbalance to the appearance of corruption when corporations are allowed to spend unlimited funds for the purpose of influencing campaigns.²⁶⁹ When groups use § 501(c)(4) of the tax code to circumvent disclosure requirements in election spending, they

259. *Id.* at 292.

260. *Id.*

261. *Id.*

262. *Id.* at 292-93.

263. *See* McKinnon, *supra* note 6.

264. *Id.*

265. *Id.* (internal quotation marks omitted).

266. *Id.*

267. *See* discussion *supra* Part III.A.1.

268. *See* Aprill, *supra* note 237, at 291-92.

269. *See* discussion *supra* Part II.D.

undermine the fundamental policy goals of having an informed electorate and transparency in elections, both of which are necessary for the successful functioning of democracy.²⁷⁰ In light of these facts, steps should be taken to eliminate this loophole.²⁷¹ Ideally, Congress should pass comprehensive disclosure laws,²⁷² and the FEC should implement regulations that address the issues arising from the *Citizens United* decision.²⁷³ However, Congress and the FEC appear to be unable to reach a consensus, and this is not likely to change in the near future.²⁷⁴ In the meantime, there are steps the IRS can take to dissuade the flow of anonymous money through social welfare organizations that exploit the tax code.²⁷⁵ The IRS should implement procedural regulations to better police these groups,²⁷⁶ enforce ethical rules on those who advise these groups to break the law,²⁷⁷ and enforce the gift tax to encourage potential donors to channel political money through legally proper conduits.²⁷⁸

270. See discussion *supra* Part II.D.

271. See discussion *supra* Part III.A.

272. See discussion *supra* Part III.A.1.

273. See discussion *supra* Part III.A.2.

274. See discussion *supra* Part III.A.

275. See discussion *supra* Part III.B.

276. See discussion *supra* Part III.B.1.

277. See discussion *supra* Part III.B.2.

278. See discussion *supra* Part III.B.3.