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SUPER PAC ME:
THE EFFECTS OF UNLIMITED SECRET MONEY IN THE 2012 ELECTIONS AND
THE RENEWED NEED FOR CAMPAIGN FINANCE REFORM

By Jason D. Angelo*

“Thank you, God bless you all, and God Bless Citizens United!”¹ The irony in Stephen Colbert’s voice was apparent, but his point was not lost amongst the satire: following the Supreme Court’s green-light in the controversial case *Citizens United v. FEC*², the unprecedented amount of money being expended in anticipation of the 2012 federal elections is cause for concern, and nothing less than the integrity of American democracy itself is at stake. Colbert’s late-night demonstration of the ease with which candidates can create and subsequently ‘distance’ themselves from so-called super ‘PACs’ – political action committees that exist solely for promoting a specific candidate³ – made a mockery of a system built to safeguard the electoral process but now being manipulated by those who can ‘pay to play’ at the expense of those who cannot afford to have their voices heard.⁴

Why should the amount of money in politics matter to the average American? There are billions of reasons.⁵ ‘Big money’ dominates the American political landscape and continually chips away at the integrity of our representative democracy; “wealthy contributors . . . expect – and too often receive – a return on their investment in the form of earmarks and legislative

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¹ *Late Night: Stephen Colbert Drops ‘Super PAC’ to Run For President*, L.A. TIMES, Entertainment Blog, Jan. 13, 2012, <http://latimesblogs.latimes.com/showtracker/2012/01/stephen-colbert-super-pac.html>.

² 129 S. Ct. 2893 (2010).

³ *The Campaign Jungle*, N.Y. TIMES, Nov. 12, 2011, <http://www.nytimes.com/2011/11/13/opinion/sunday/the-campaign-jungle.html>.

⁴ *Id.*

⁵ Last year over \$6 billion was spent on campaigns. Ellen L. Weintraub & Jason K. Levine, *Campaign Finance and the 2008 Elections: How Small Change(s) Can Really Add Up*, 24 ST. JOHN’S J. LEGAL COMMENT.461 (2009).

favors.”⁶ When a super PAC ‘legally’ unconnected with a politician can solicit and receive a multi-million dollar donation used to propel that politician to an election victory previously thought to be impossible, it is clear that a virus has infected the political system and a strong disinfectant is necessary.⁷ While the reasoning behind *Citizens United* –that money from independent groups cannot as a matter of law have a corrupting influence – might pass muster in a perfect world, who truly believes that “when a billionaire with a gambling interests gives [five million dollars] to a candidate-specific PAC, it does not have a corrupting influence . . .”⁸

Although it may not seem like a pertinent or pressing issue to most of the American populace, the “invidious, systemic wrong” of the corrupting influence of money in politics has been likened to a “sleeping sickness” that will eventually lead to the death of the body – in this case, the body politic.⁹ The founders of the United States provided future generations with a republic premised on representative democracy “dependent on the People alone.”¹⁰ Unfortunately, after *Citizens United*, ‘the People’ means citizens with the wealth necessary to access those with political power, and this shift has led the nation down an unintended path of corruption.¹¹

There is hope: people from all sides of the political spectrum – save some on Capitol Hill – share a common sense of urgency and feeling that something is wrong with our political

⁶ Sen. Tom Udall, *Policy Essay: Amend the Constitution to Restore Public Trust in the Political System: A Practitioner's Perspective on Campaign Finance Reform*, 29 YALE L. & POL'Y REV. 235, 246 (Fall 2010).

⁷ Nicholas Confessore and Eric Lipton, *A Big Check, and Gingrich Gets a Big Lift*, N. Y. TIMES, Jan. 8, 2012, <http://www.nytimes.com/2012/01/10/us/politics/sheldon-adelson-a-billionaire-gives-gingrich-a-big-lift.html?pagewanted=all>.

⁸ Fred Wertheimer, *Super PACs Wreak Havoc*, POLITICO, Jan. 18, 2012, <http://www.politico.com/news/stories/0112/71603.html>.

⁹ David V. Johnson, *Reclaiming the Republic: An Interview with Lawrence Lessig*, BOS. REVIEW, Nov. 11, 2011, http://www.bostonreview.net/BR36.6/lawrence_lessig_republic_lost_campaign_finance_reform_rootstrickers.php.

¹⁰ Lawrence Lessig, *More Money Can Beat Big Money*, N.Y. TIMES, Nov. 16, 2011, <http://www.nytimes.com/2011/11/17/opinion/in-campaign-financing-more-money-can-beat-big-money.html>.

¹¹ *Id.*

system.¹² Whether in the form of the Tea Party or the Occupy Wall Street movement, Americans have had enough of the status quo; the notion of corporate dominance of the political system continues to spur a populist backlash aimed at the Supreme Court, politicians, and those with the means to influence political decisions.¹³ Americans are finally warming up to the notion that corporations “have no consciences, no beliefs, no feeling, no thoughts, no desires,” and “do [not] belong to ‘We the People’ for whom the Constitution was written.”¹⁴

The 2010 federal elections were watershed moments in American history. It was in this election cycle that the true impact of the Supreme Court’s about-face on its campaign finance jurisprudence could be seen. With the help of the Court and inability of Congress to respond with meaningful legislation, issue advocacy groups and independent expenditure groups were able to spend millions of unaccounted-for dollars on Congressional elections alone.¹⁵ With the Presidency at stake, the 2012 elections is slated to be the most expensive election in American history, replete with untold amounts of anonymous spending from wealthy individuals and corporations alike.¹⁶

In a system where the candidate who raises and spends the most cash wins ninety-four percent of the time, the idea that secret, unaccountable donations can finance a candidate’s

¹² Dan Froomkin, *Candidate-Specific Super PACs offer end run for Maxed-Out donors: Study*, THE HUFFINGTON POST, Oct. 4, 2011, http://www.huffingtonpost.com/2011/10/04/candidate-specific-super-pacs-donors_n_994260.html (reporting that seventy percent of the American people believe that most members of Congress are willing to sell their votes for either cash or campaign contributions).

¹³ Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 217, 2010, available at http://yalelawandpolicy.org/sites/default/files/Levitt_29.pdf.

¹⁴ Linda P. Campbell, *Commentary: Will Colbert Nation Make its point about super PACs in S.C. primary?* FORT WORTH STAR-TELEGRAM, Jan. 19, 2012, <http://www.mcclatchydc.com/2012/01/19/136311/commentary-will-colbert-nation.html>.

¹⁵ These groups spent a reported \$750 million on campaign activities in the 2010 mid-term elections. Anne Farris Rosen, *One House Seat in Kentucky embodies how outside groups dominate politics – with money*, THE HUFFINGTON POST, Oct. 18, 2011, http://www.huffingtonpost.com/the-center-for-public-integrity/one-house-seat-in-kentuck_b_1017313.html.

¹⁶ Rich Republicans are prepared to shell out \$500 million to beat President Obama, and rich Democrats are prepared to match that; in all, we are looking at a campaign involving over \$1 billion in secret, undisclosed money. Bob Edgar, *Save the Small Donor*, THE HUFFINGTON POST, Nov. 15, 2010, http://www.huffingtonpost.com/rev-bob-edgar/save-the-small-donor_b_783542.html.

election is a troubling thought.¹⁷ Such secret contributions are indeed a “formula for influence-buying corruption,” and if history is as good a teacher as it usually is, it should come as no surprise that such corruption “has happened before, and it will happen again” without decisive action by Congress.¹⁸ A number of interests are at stake in this fight, the most important being the return of the political system to its rightful owners: the American people.¹⁹ In turn, politicians need to be held accountable to their constituents and do the work they were elected to do, rather than spend their time fundraising for the next election cycle. Congress must be “more responsive to the voters, less busy chasing dollars, and less reliant on special interests”²⁰ in order to be a true instrument of a democracy by and for the People.

The American political system is in dire need of leaders who are prepared to meet the challenges presented by the percolation of wealth into the political system and ensure that governance in Washington, D.C. is no longer auctioned off to the bidder willing to contribute the most amount of money to a particular candidate or cause.²¹ In the aftermath of recent Supreme Court decisions, special interest groups and political insiders continue to exploit loopholes in the law to circumvent the rules and disclosure requirements surrounding soft-money donations. Even more distressing is the rise of individuals known as ‘bundlers’ who are able to corral and aggregate numerous donations into one lump-sum donation and provide a cash source for campaigns well beyond the normal contribution limits currently imposed on individuals by

¹⁷ Dylan Ratigan, *Get Money Out: Making Waves*, THE HUFFINGTON POST, Oct. 3, 2011, http://www.huffingtonpost.com/dylan-ratigan/get-money-out-making-wave_b_992126.html.

¹⁸ Fred Wertheimer, *2010 Elections: Secret Financing and the Campaign Finance Reform Battles to Come*, THE HUFFINGTON POST, Nov. 3, 2010, http://www.huffingtonpost.com/fred-wertheimer/on-secret-financing-of-20_b_778346.html.

¹⁹ “Returning the voting process to all Americans is an imperative, because elections are ours and belong to us, not Big Oil or the health insurance companies or investment banks.” Pearl Korn, *Citizens United, an Assault on Our Democracy, Needs a Constitutional Amendment*, THE HUFFINGTON POST, Oct. 22, 2010, http://www.huffingtonpost.com/pearl-korn/citizens-united-an-assault_b_772482.html.

²⁰ Cheryl Chado, THE MODERN AMERICAN, *Legislative Updates*, Fall 2010.

²¹ Frank Rich, *Still the Best Congress Money Can Buy*, Op-ed Columnist, N.Y. TIMES, Nov. 27, 2010, <http://www.nytimes.com/2010/11/28/opinion/28rich.html?pagewanted=all>.

federal law. The lack of any regulation of bundlers, coupled with the dearth of rules requiring mandatory disclosure of certain donors to political advocacy groups that choose a particular tax-exempt status is an incredible threat to the openness and legitimacy of the American political system.

Efforts in Congress to legislatively overturn recent Supreme Court decisions related to campaign finance laws have been futile,²² and although many politicians are making serious efforts to reform disclosure requirements, nothing has gained traction. It may take a cataclysmic event like the impending 2012 elections to spark any Congressional action on campaign finance reform, but by then, it may be too late to resurrect the system in the eyes of an increasingly cynical American electorate. This Note demonstrates the urgent need for more stringent regulation of how money and politics interact, specifically within the context of bundlers and so-called ‘super-PACs’. Part I will present an overview of campaign finance reform efforts in the United States and detail the current issues plaguing the system following the 2008 and 2010 federal election cycles. Part II will briefly analyze the Supreme Court’s campaign finance jurisprudence and detail Congressional efforts to limit the impact of the Court’s recent rulings. Finally, Part III will offer an analysis of the various options available to combat the threats posed to the political system and offer suggestions on how Congress should move forward in addressing the anonymous donations and the proliferation of money in politics.

Congress must act to insure the legitimacy of the political system. In an era of digital communications and ever-changing technology, disclosure is practicable and should be the norm with regard to any and all political donations. The flood of information that would result from closing the loopholes in the current disclosure rules would most certainly have a democratizing

²² No legislation related to campaign finance reform in the wake of the 2010 Citizens United decision has, as of this time, been passed by both houses of Congress.

effect on the current system of obfuscation that shrouds many political donors in secrecy.²³ Now more than ever, Congress must adhere to Justice Brandeis' celebrated idea of "sunlight as the best disinfectant."²⁴ In order to rid the political system of the disease of corruption, it would be wise to take a lesson from history and require the complete disclosure of political contributions, close the loopholes that incentivize the creation of super-PACS and encourage the practice of bundling, and revitalize the system of public financing of elections. Without further regulation of campaign finances, the current system will sink further into the abyss of quid-pro-quo corruption.²⁵

I. Campaign Finance Reform in the United States

a. Competing First Amendment Values

At the heart of the constitutional debate surrounding political expenditures and contributions are competing values that can be traced back to the freedom of speech provision contained in the First Amendment. The purpose most often articulated for the existence of the amendment is to "preserve an uninhibited marketplace of ideas in which the truth will ultimately prevail."²⁶ In the context of electoral politics and speech uttered during the course of a political

²³ Janine R. Wedel and Linda Keenan, *Shadow Elite: The DISCLOSE Act – Who's Blindfolding the American Electorate?*, THE HUFFINGTON POST, Sept. 23, 2010, http://www.huffingtonpost.com/janine-r-wedel/shadow-elite-disclose-act_b_736127.html.

²⁴ "Publicity is justly commended as a remedy for social and industrial diseases Sunlight is said to be the best of disinfectants . . ." Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L. J. 273, 273 (Nov. 2010) (quoting Justice Louis Brandeis).

²⁵ "A system with no restraints empowers 'capitalists to corrupt capitalism . . . [s]o long as wealth can be used to leverage political power, wealth will be used to leverage political power to protect itself' against free market competition – the very system capitalists are pledged to support." Thomas B. Edsall, *Putting Political Reform Right into the Pockets of the Nation's Voters*, N.Y. TIMES, Dec. 14, 2011.

²⁶ *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984).

campaign, the principle advocating an unregulated marketplace of knowledge – regardless of sources and motivations – “has its fullest and most urgent application.”²⁷

The Supreme Court continues to recognize only one legitimate government interest compelling enough to allow any sort of restrictions on free speech rights in the realm of elections: the avoidance of corruption or the appearance of corruption.²⁸ All other justifications have been rejected. Specifically, the post-*Buckley* Court has stated that “the protection of political equality as a basis for limiting the role of money in election campaigns” is insufficient to overcome First Amendment protections.²⁹ This rejection of an equalization theory is consistent with the Court’s historical First Amendment jurisprudence.³⁰ Absent a constitutional amendment or a significant jurisprudential retreat by the Court, leveling the playing field is not an appropriate means to achieving the end of fairness in American elections.

The Supreme Court and other lower courts currently recognize that regulating independent expenditure groups such as PACs does not fall into the anti-corruption rationale which would allow government regulation because “mere *donations* to non-profit groups cannot corrupt candidates and officeholder,”³¹ and it is “implausible that contributions to independent

²⁷ *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989).

²⁸ *See Buckley v. Valeo*, 424 U.S. 1 (1976).

²⁹ Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 954 (2005)0; *see also Davis v. FEC*, 128 S. Ct. 2759, 2773 (2008) (restating that equalization is not a “legitimate government objective”), *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990) (“The notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections” is “antithetical to the First Amendment.”); *See also Austin*, 494 U.S. at 684 (Scalia, J., dissenting) (“This illiberal free-speech principle of ‘one man, one minute’ was proposed and soundly rejected in *Buckley*.”).

³⁰ *See Frederick Schauer & Richard H. Pildes, Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1825 (1999) (“As a general matter, the American First Amendment tradition requires that the financial, political, or rhetorical imbalance between the proponents of competing arguments is insufficient to justify government intervention to correct that imbalance.”).

³¹ *Emily’s List v. FEC*, 581 F.3d 1, 11 (D.C. Cir. 2010)(emphasis in original)(“And to the extent a non-profit then *spends* its donations on activities such as advertisements, get-out-the-vote efforts, and voter registration drives, those expenditures are not considered corrupting, even though they may generate gratitude from and influence with officeholders and candidates. Rather, under *Buckley*, those expenditures are constitutionally protected.”). Additionally, the Court found that non-profit groups do not have the same relationships with candidates as political parties; since they do not “select slates of candidates . . . determine who will serve on legislative committees, elect

expenditure political committees are corrupting.”³² PACs and other independent groups are deemed untouchable because they “offer an opportunity for ordinary citizens to band together to speak on the issue or issues most important to them.”³³

What appears to be a reinvigoration and strengthening of core First Amendment values by the Roberts Court is, however, a mere charade – more of the same smoke in mirrors seen so often in Supreme Court opinions. “Like prostitutes who masquerade as masseuses or head shop owners who insist their fancy water pipes are intended for use only with legal herbs,” the groups spawned by the Supreme Court’s desire to vehemently protect the marketplace of ideas are exemplifying the notion that “[i]nvariably . . . money will come with . . . quid-pro-quo expectations and even more political corruption.”³⁴ The idea that money equals speech is not new, and it should not be questioned. In the end, the issue is not whether money is speech, but “whether we should allow money to so dominate the political system that candidates become more focused on their dependency upon money than upon the People.”³⁵

b. Historical Overview

Congress often attempts to cleanse the political system of avarice and the corrupting influence of money. With the Pendleton Act of 1883, Congress attempted to reign in the *quid pro quo* nature of political kickbacks and favors; however, when money from civil servants was cut off, corporations quickly filled in the void left behind.³⁶ By the time President Theodore

congressional leadership, or organize legislative caucuses,” they should apparently therefore be free from regulation that would contravene the First Amendment.

³² See *N.C. Right to Life v. Leake*, 525 F.3d 274, 293 (4th Cir. 2008).

³³ *Id.* at 295.

³⁴ Jacob Sullum, *Political contribution caps only funnel cash to SuperPacs*, CHI. SUN-TIMES, Jan. 18, 2012, <http://www.suntimes.com/news/otherviews/10064846-452/political-contribution-caps-only-funnel-cash-to-superpacs.html>; *Donors, Secrecy and that Loophole*, N.Y. TIMES, Jan. 5, 2012, <http://www.nytimes.com/2012/01/06/opinion/donors-secrecy-and-that-loophole.html>.

³⁵ See Johnson, *supra* note 9.

³⁶ The Pendleton Act outlawed the practice, employed since the Jackson Administration, of Federal civil servants being assessed a portion of their wages as a ‘donation’ or kickback to the political party that gave them their

Roosevelt took office, corporations held a disproportionate amount of influence within the political system. Congress attempted to remedy the situation via the 1905 Tillman Act, which banned political contributions from federally-chartered corporations, and the 1910 Publicity Act, which required post-election disclosure of contributions to both House and Senate campaigns.³⁷ Additionally, the 1947 Taft-Hartley Act banned corporations and unions from spending their treasury money on electioneering.³⁸

The Watergate Scandal provided the nation with another chance to revisit the issue of campaign financing, and the response to the disgraces of the Nixon Administration led to the passage of the Federal Elections Campaign Act of 1971 (“FECA”).³⁹ Financial contributions to candidates and parties became the target of federal regulations, as did expenditures by federal candidates and parties.⁴⁰ FECA has been thoroughly litigated, and it was partially upheld in the seminal case *Buckley v. Valeo*.⁴¹ In general, FECA imposes limits on money from certain sources and mandates disclosure of money raised and spent in federal elections.⁴² In its original form, FECA regulated the amounts of contributions individuals and political committees could make to politicians as well as the amount they could expend on behalf of candidates.⁴³ It limits the amount of expenditures that political committees can make in connection with candidates,

particular office; the assassination of President James Garfield by a dissatisfied former civil servant spurred the reforms. Philip M. Nichols, *The Perverse Effect of Campaign Contribution Limits: Reducing the Allowable Amounts Increases the Likelihood of Corruption in the Federal Legislature*, 48 AM. BUS. L. J. 1, 92 (Spring 2011).

³⁷ Unfortunately, the Publicity Act was rendered ineffective by the Supreme Court’s decision in *Newberry v. United States*, 256 U.S. 232 (1921). *Id.* at 93.

³⁸ These laws and the laws of 22 states that also banned similar corporate donations were deemed unconstitutional in the *Citizens United* ruling in 2010. *The Fair Elections Now Act: A Comprehensive Response to Citizens United: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary* (testimony of Monica Youn, Brennan Center for Justice, New York University School of Law) n.11, available at <http://www.judiciary.senate.gov/pdf/11-04-12%20Youn%20Testimony.pdf>.

³⁹ 2 U.S.C. §431 *et seq.*

⁴⁰ Ronald Dworkin, *The Decision That Threatens Democracy*, NEW YORK REVIEW OF BOOKS, May 13, 2010.

⁴¹ 424 U.S. 1 (1976).

⁴² See http://www.thecapitol.net/Publications/CRS_Reports/RL33888.pdf.

⁴³ See 2 U.S.C. §431 *et seq.*

prohibits donations by, among others, foreign nationals, restricts the use of ‘soft money’, and prohibits certain uses of the money donated to federal candidates.⁴⁴

The next prominent piece of campaign finance legislation came in 2002, when the Bipartisan Campaign Finance Reform Act (hereinafter “McCain-Feingold”) was passed as an amendment to FECA.⁴⁵ At the heart of the Act is the banning of political contributions known as ‘soft money’ – a phenomenon used to circumvent disclosure requirements and contribution limits that had become quite a nuisance in the period following the passage and various amendments to FECA.⁴⁶ Soft money, as it is dealt with in McCain-Feingold, is a contribution to a political party or national campaign that is not designated for a specific candidate – and therefore was not subject to FECA regulations.⁴⁷ Individuals, unions, and corporations were free to –and often did – make cash donations to support the ‘general activities’ of the national parties, which, in turn, went to advertisement campaigns aimed at increasing voter turnout and candidate recognition.⁴⁸ As a result of McCain-Feingold, political parties, candidates, and office holders cannot solicit, receive, or direct anyone to donate soft money or anything of value that is not subject to FECA’s regulations.⁴⁹

While laudable, McCain-Feingold did little to “turn off the faucet” of money that had been flowing into federal elections; indeed, it merely “changed the address of soft money” from the national parties and their committees to newly-formed PACs, groups formed in coordination

⁴⁴ *Id.*

⁴⁵ “Non-federal funds may not be used for the purpose of influencing any election for federal office.” Pub.L. 107-155, 116 Stat. 81.

⁴⁶ Kevin J. Madden, *Turning The Faucet Back On: The Future of McCain-Feingold's Soft-Money Ban After Davis v. Federal Election Commission* 59 AM. U. L. REV. 2, 385, 388 (Dec. 2009).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 2 U.S.C. § 441i(d); *McConnell*, 540 U.S. at 99.

with entities commonly referred to by their tax-exempt status such as 501(C) and 527 groups.⁵⁰ Unfortunately, McCain-Feingold has the exact opposite effect its sponsors intended: it drives money into the hands of unregulated third-party groups, many of whom are under no duty to disclose the sources of their funding.⁵¹ McCain-Feingold did not go far enough, and indeed, it inadvertently adds to the appearance of corruption and corruption which it had originally sought to deter.

b. 2008 and 2010: Learning from History's Lessons

Many Americans, perhaps most exemplified by the recent Occupy Wall Street protestors, believe – however cynically – that “big money dominates our political system regardless of who’s in power . . . [and that] it has inexorably institutionalized a caste system” where only the voices of the adequately-funded are truly heard.⁵² Indeed, the previous two elections cycles saw incredible influxes of money; 2008 heralded the largest amount of money ever raised and the greatest amount of individuals to donate to a candidate.⁵³ The spending by 501(c) groups or 527s exacerbated the money chase and forced presidential candidates to opt out of the public financing system in order to keep up with flood of money being spent by these independent groups.⁵⁴

501(c)(4) groups are now the vehicle of choice for those who wish to advocate for a certain cause without letting anyone know, and they are cause for particular concern. These groups include charities, unions, civic leagues, and social welfare organizations whose primary

⁵⁰ Indeed, by 2008, most soft money was being channeled through PACs, most of which are commonly managed or receive their financial backing from 501(c) and 527 groups. Press Release, CAMPAIGN FINANCE INSTITUTE, *Soft Money Political Spending by 501(c) Nonprofits Tripled in 2008 Election*, Feb. 25, 2009, available at <http://www.cfinst.org/press/preleases/09-02>

25/*Soft_Money_Political_Spending_by_Nonprofits_Triples_in_2008.aspx*; Madden, *supra* note 46, at 414.

⁵¹ Madden, *supra* note 46, at 414.

⁵² Rich, *supra* note 21.

⁵³ Weintraub & Levine, *supra* note 5, at 461.

⁵⁴ *Id.* at 467.

purpose must be promoting social welfare – not advancing a certain political message.⁵⁵ These groups can collect unlimited amounts of donations and do not have to publicly disclose the source of their donations. This shield of anonymity presents the distinct possibility that corporations and others give to groups backing controversial causes while unconnected to the cause and making the cause seem entirely grassroots in the eyes of the public.⁵⁶

As long as their primary purpose is not political advocacy, 501(c)(4)s may make express advocacy appeals to the public.⁵⁷ While they cannot donate directly to individual candidates, they can promote them and attack their opponents provided they do not coordinate their efforts with any candidates or political party.⁵⁸ There are three main types of advocacy that these groups can undertake. Express advocacy appeals may be made to the public if it is merely a subsidiary purpose of the group.⁵⁹ Electioneering communications that name specific candidates are allowed within 60 days of a general election and 30 days of a primary election as long as they are not the “functional equivalent of express advocacy.”⁶⁰ Additionally, these groups can make even broader communications outside of the aforementioned time-frames and distribute other non-express advocacy messages concerning certain candidates and their positions on issues.⁶¹

1. 501(c)(4)s and 527s: A Dangerous Combination

To further exploit the disclosure and contribution limit loopholes, 501(c)(4) groups have embarked on a pattern of forming coordinate 527 groups, and following a recent decision in the

⁵⁵ See Press Release, *supra* note 50. These groups can “lobby without contribution limits as long as the topic of the lobbying directly relates to the organization’s tax-exempt purpose” and “advocacy does not constitute the primary purpose” of the group. Lauren Daniel, Note, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J. L. & SOC. POL’Y 176 (Spring 2010).

⁵⁶ “It’s Christmas for consultants . . . it’s completely unlimited. And it’s going to change everything.” Nicholas Confessore, *Lines Blur Between Candidates and PACs With Unlimited Cash*, N.Y. TIMES, Aug. 27, 2011.

⁵⁷ See Press Release, *supra* note 50.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

U.S. Court of Appeals for the District of Columbia, the former contribution limit of \$5,000 per individual to such groups no longer applies.⁶² Created in harmony, these two groups together allow anonymous donations to be legitimately funneled into 501(c)(4) groups and in turn into 527 groups – now deemed, in the post-2010 election world, as ‘super-PACs’. 527 groups – named for their classification under Internal Revenue Code – that call themselves issue advocacy groups are not subject to fundraising and contribution limits and thus have been the vehicle for wealthy individuals to donate unlimited sums of money in order to promote certain causes and candidates.⁶³ Because they were not included within BCRA’s soft-money ban, 527’s have been allowed to “do the ‘dirty work’” of candidates who seek to distance themselves from negative ad campaigns.⁶⁴ Attempts by the FEC to regulate 527s, even on a case-by-case basis, have been struck down.⁶⁵

The line between these PACs and individual candidates has become increasingly blurred; they often are founded by the former aides of political candidates,⁶⁶ are financed by the top donors to particular candidates, and may even be blessed by the candidates themselves.⁶⁷ They essentially function as ‘shadow parties,’ sharing office space, personnel, and strategies with national party committees and candidates, and they can take in unlimited amount of money –

⁶² The limit does not apply as long as the 527 group does not coordinate with a political candidate or party. *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. App 2011); Adam Liptak, *Courts Take on Campaign Finance Decisions*, N. Y. TIMES, Mar. 26, 2010, <http://www.nytimes.com/2010/03/27/us/politics/27campaign.html?pagewanted=1>.

⁶³ Daniel, *supra* note 55, at 150. §527 of the IRC covers groups that engaged in “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office. I.R.C. § 527 (e)(2).

⁶⁴ Daniel, *supra* note 55, at 157.

⁶⁵ See *Emily’s List*, 581 F.3d 1.

⁶⁶ “What we’ve essentially said is, if you’ve maxed out to the Senate Committee, the Congressional Committee, or the R.N.C. and you’d like to do more, under the *Citizens United* decision, you can give money to American Crossroads [a coordinate 527 group].” Jeffrey Toobin, *Money Talks*, THE NEW YORKER, Apr. 11, 2011, http://www.newyorker.com/talk/comment/2011/04/11/110411taco_talk_toobin.

⁶⁷ See Press Release, *supra* note 50.

including money from corporate treasuries.⁶⁸ The ‘revolving door’ of staff between campaigns and these candidate-centered PACs make their close relationship clear and borders on the limits of legality; the million dollar donations made to the PACs are now just as dangerous and corruption-inducing as if they were made to a candidate themselves.⁶⁹ They are, in essence, being utilized as an end-run around the contribution limits imposed by FECA.⁷⁰

After receiving the green light by the courts, these groups exploded onto the scene in the 2010 Congressional mid-term elections.⁷¹ Independent electioneering expenditures reached \$280.2 million in 2010 – double the 2008 figures and five times the 2006 figures.⁷² Thirty-five percent of that spending was done furtively by uncapped and unregulated entities.⁷³ Ahead of the 2012 election, the picture is even more disturbing, and the ‘double-dipping’ practice of donating to both candidates and technically unrelated PACs and 501(c)(4)s is reaching a new height.⁷⁴ The new norm in campaign donations is to donate the maximum amount allowed by law to a particular campaign and almost immediately give a substantially larger amount to a related PAC.⁷⁵

⁶⁸ Of the 27 501(c)(4) groups that spent over \$1 million in 2010, 12 had coordinate PACs that had commonly-managed components. Youn, *supra* note 38, at 8.

⁶⁹ See Froomkin, *supra* note 12.

⁷⁰ They are essentially arms of campaigns sprouted in order to garner unlimited contributions from big-time donors and evade the traditional contribution limits. *Id.*

⁷¹ Nearly \$300 million was poured by these groups into ad campaigns. The U.S. Chamber of Commerce alone amassed an \$86 million contribution from the health insurance industry to lobby against ObamaCare, and it spent over \$32 million on federal electioneering in the 2010 election cycle. Youn, *supra* note 38, at 5.

⁷² *Id.*

⁷³ For example, over \$85 million was spent on U.S. Senate races by these groups, \$65.4 million of which was spent on the top ten races and thirty percent of which was funded by anonymous donors. *Id.*

⁷⁴ Within the Obama-supporting PAC, Priorities USA, 9 of 24 donors were responsible for eighty-two percent of the money raised thus far. Froomkin, *supra* note 12.

⁷⁵ In the case of the Romney-supporting PAC Restore Our Future, 55 of 75 people who had given to the PAC in the second quarter of 2011 had already given to the Romney campaign itself; most had donated the maximum of \$2500 and then given as much as \$1 million to the PAC. ‘Double-dippers’ represent nearly seventy-five percent of the PAC’s individual donors. Froomkin, *supra* note 12.

2. Advent of the 'Bundler' Phenomenon

The 2000s also saw the meteoric rise of the use of individuals known as bundlers to raise large aggregate amounts of fast-cash for campaigns. First employed by the Bush campaign in 2000 – not coincidentally, also the first presidential campaign to opt-out of the public financing system since its inception in 1976⁷⁶ - bundling is now an essential element of any presidential campaign. The Bush campaign gave these individuals special titles, such as pioneers or rangers, and also gave them privileged access to the soon-to-be President depending on how many checks they could deliver to the campaign coffers.⁷⁷

Bundlers are intermediaries who receive contributions, often the maximum legal amount a person can donate, and 'bundle' them together into one lump-sum donation to a political campaign; in turn, bundlers are credited with and are often rewarded for soliciting the contributions with access to and influence over a candidate.⁷⁸ They are often independently wealthy and well-connected to other affluent individuals. Often, their focus is to get the absolute maximum combined contribution allowable by law from a large group of friends and associates, which is about \$38,500 for donations to both the party committee and the candidate.

The 2012 election cycle, already in full-swing, has seen the rise of the super-bundler – someone tasked with raising an exorbitant amount of money for a candidate by aggregating

⁷⁶ Weintraub & Levine, *supra* note 5, at 465.

⁷⁷ Paul Blumenthal, *Obama Bundlers Raise \$55.5 Million For President's Re-Election*, Oct. 15, 2011, http://www.huffingtonpost.com/2011/10/15/barack-obama-bundlers-55-million-dollars-re-election_n_1011877.html.

⁷⁸ Scott M. Noveck, *Campaign Finance Disclosures and the Legislative Process*, 47 HARVARD J. ON LEGIS. 75, 101, 2010 (detailing the bundling phenomenon and the loophole that currently exists); Many of President Obama's bundlers from the 2008 election received perquisites such as jobs in his Administration following his election. Michael Beckel, *Two Dozen Bankrollers-Turned-Ambassadors Bundled at Least \$10 Million for Barack Obama*, OpenSecrets Blog, Nov. 18, 2009, <http://www.opensecrets.org/news/2009/11/two-dozen-bankrollersturnedamb.html>. (reporting that at least 24 high-profile bundlers were given ambassadorships in the Obama Administration, as was done in the Clinton and Bush Administrations).

individual contributions.⁷⁹ But there is something different about the 2012 elections: the unspoken rules have changed. No longer are candidates voluntarily releasing the names of their bundlers; in fact, President Obama is the only candidate thus far to release a list.⁸⁰ While the rules regarding disclosure of bundlers are sparse, all candidates since former President Bush in 2000 have voluntarily released a list of their bundlers to the public.⁸¹ As of now, it appears the only way to avoid even more secrecy involving political fundraising is for Congress to promulgate a new set of rules aimed at increasing the transparency of the relatively unregulated practice of bundling.

c. Reasons for Reform

Nothing less than the integrity of the American electoral process – a vital ingredient for a healthy democracy – is at stake in the midst of the aforementioned developments in the campaign finance arena.⁸² Reducing money’s – specifically secret money’s – chokehold on the electoral system and thus combating corruption and the appearance of corruption are the main reasons that reform is needed.⁸³ With 2012 expected to be another “expensive slugfest,” and with special interests pledging to destroy the records set in the 2010 elections, reform is needed now more than ever.⁸⁴ By removing the layers of obfuscation created by loopholes and court

⁷⁹ The early and aggressive bundling campaigns prove that the 2012 election is going to dwarf the 2010 cycle in terms of money spent. Already, 352 bundlers have collected at least \$55.5 million for the President’s reelection from the period of April to September 2011, and five new bundlers have raised over \$500,000. Blumenthal, *supra* note 77.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Youn, *supra* note 38, at 5.

⁸³ Campaign finance reform is about “systemic efforts to ensure republican government that is responsive to the people.” Marc C. Alexander, *Citizens United and Forgotten Equality* (forthcoming)

⁸⁴ Youn, *supra* note 38, at 5 (referencing Eliza Newlin Carney, *Democrats Join the Battle*, NAT’L JOURNAL, Feb. 27, 2011, <http://www.nationaljournal.com/columns/rules-of-the-game/democrats-join-the-battle-20110227>; Tom Hamburger & Matea Gold, *Some Democrats Favor a Shift to More Outside Campaign Spending*, L. A. TIMES, Nov. 4, 2010, <http://www.articles.latimes.com/2010/nov/04/nation/la-na-money-politics-20101104>; Andy Kroll, *Will Secret Spending Divide Democrats?*, MOTHER JONES, Nov. 15, 2010, <http://motherjones.com/politics/2010/11/obama-outside-spendgin-2012-election>; Peter H. Stone, *Democrats Desperately Seek Their Own Rove*, CENTER FOR PUBLIC INTEGRITY, Mar. 14, 2011,

decisions, Congress can act not only to promote the judicially-sanctioned goal of fighting corruption, but also to promote egalitarianism and political accountability in an era severely lacking both.

Allowing wealthy interests greater access to public officials and, thereby, greater influence over legislative decisions and policy outcomes is a central concern underlying any attempt at campaign finance reform and regulation.⁸⁵ The close relationship between money and politics, coupled with the realities of economic inequalities within the United States, translates into a system that is antithetical to the democratic underpinnings of the American constitutional regime.⁸⁶ Undoubtedly, wealthy citizens have an incentive to support policies that entrench their personal interests, even at the expense of the less fortunate.⁸⁷ As a result, unregulated ‘speech’ in the form of money contravenes one of the primary purposes of the First Amendment: to ensure that all citizens, regardless of their economic status, are equal partners within the political process and have equal access to both politicians and the marketplace of ideas.⁸⁸ Thus, one motivation for reform revolves around the idea that Americans are committed to a view of the legislative process that is more akin to a one person, one vote election than a process that is able to be sold to those willing to pay the most.

Both lawmaker and corporate political accountability is a central concern underlying the need for reform. Currently, incumbents and those candidates supported by PACs and other independent expenditure groups are at an incredible advantage in terms of money and exposure to their constituents; indeed, the massive amounts of fundraising stifle any competitiveness in the

<http://www.publicintegrity.org/articles/entry/3019>). See also Rosen, *supra* note 15 (chronicling one U.S. House race and how the influx of unregulated independent expenditures has effected how political campaigns are conducted).

⁸⁵ Noveck, *supra* note 78, at 5.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See generally Alexander, *supra* note 83; see also Dworkin, *supra* note 40.

political arena on the federal level. Lawmakers often benefit from campaign contributions from the very interests and industries that they are charged with regulating, creating at the very least the appearance of impropriety and giving credence to the cynicism and contempt with which many Americans view Congress.⁸⁹

Perhaps the most disturbing consequence of the influx of money in recent elections has been the amount of time that lawmakers have been forced to devote to fundraising. The time and energy of politicians is no longer devoted to constituent issues or to reading and making decisions on the merits of legislation; rather, the majority of their free time is now spent raising more money to keep up with the money flowing from independent expenditure groups.⁹⁰ With less time to fulfill their legislative obligations or meet with constituents, it follows that only those able to contribute significant sums to a candidate will garner their attention, thus depriving average citizens from being heard and from fostering appropriate debates on important issues.⁹¹ It is easy to see a point in the future where lawmakers, no matter how much time they spend fundraising, will no longer be able to keep up with the efforts of independent groups, and this cycle has already – and will continue to – deterred many qualified people from seeking political office.⁹²

If there is any doubt to whether politician's time and efforts are being consumed by money, one need only ask the politicians themselves. Many politicians are tired of making the

⁸⁹ Yoon, *supra* note 38, at 11. It also speaks volumes that currently, Congress has a laughable nine percent approval rating among American adults according to a recent New York Times/CBS News poll. Felicia Sonmez, *Congressional Approval Drops to Single Digits*, WASH. POST, Oct. 26, 2011, http://www.washingtonpost.com/blogs/2chambers/post/congressional-approval-drops-to-single-digits/2011/10/26/gIQAufAAJM_blog.html.

⁹⁰ Professor Alexander argues that politicians are currently locked in an ever-escalating cycle of fundraising that grows with each election, and that 'time-protection' – saving politicians from this cycle – should be a compelling interest sufficient to justify upholding tougher campaign finance regulations. Alexander, *supra* note 83, at 17.

⁹¹ Levitt, *supra* note 13, at 233.

⁹² *Id.*; Udall, *supra* note 6, at 246 ("Congress is stuck in the mud of strident partisanship, excessive ideology, never-ending campaigns, and – at the heart of it all – a corrosive system of private campaign funding and the constant fundraising it demands.").

efforts to lure funds from wealthy donors and interests, many of whom are not located in the politician's home state.⁹³ Many are also disturbed by the corrosive effects of the cycle of fundraising on the legislative process.⁹⁴ When lawmakers are reporting spending up to twenty hours per day attempting to coax donations from wealthy individuals and that they devote fifty percent of their free time to fundraising, it is clear that action must be taken to break this cycle.⁹⁵

The ability of corporations to make potentially anonymous and unlimited contributions to groups favoring certain causes is also a reason for concern. Unlike candidates, corporations are not politically accountable. Despite being equated on the same level as an individual in the eyes of the law, they enjoy numerous advantages that people generally are not fortunate enough to possess, including limited liability, perpetual life, and favorable tax treatment of assets.⁹⁶ Indeed, the aim of corporation is to increase profits regardless of conflicting political priorities or social concerns.⁹⁷ Moreover, the financial clout of corporations cannot be underestimated; it would be easy for funds from a corporate treasury to dominate an election, as their immense profits dwarf any aggregate amounts spent in an election cycle.⁹⁸ Large corporations often have specific agendas, many of which contravene conventional public wisdom and opinion.⁹⁹ Left unchecked,

⁹³ "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a \$100,000 donation does not alter the way one thinks about -- and quite possibly votes on -- an issue?" See Wertheimer, *supra* note 18. See also Udall, *supra* note 6, at 237 ("With each election the cost of campaigns ratchets up, creating an endless campaign cycle in which elected officials spend far too much time engaged in fundraising rather than doing the work the American people elect them to do. As the Pressure to raise money increases, incumbents dedicate more and more of their time in office to fundraising and the incentive to accept large contributions intensifies.").

⁹⁴ "[L]arger donations effectively purchase greater benefits for donors . . . Large soft money contributions in fact distort the legislative process. They affect what gets done and how it gets done. They affect who Senators and House member are, whom they spend their time with, what input they get, and make no mistake about it, this money affects outcomes as well." See Wertheimer, *supra* note 18 (quoting former Republican Sen. Warren Rudman).

⁹⁵ Youn, *supra* note 38, at 14.

⁹⁶ Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO L. REV. 2365, 2382 (June 2010).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 2389.

the war chest of a corporate treasury can have an incredible impact on an election and the messages that are put out to the public in support of particular candidates and policies.

The main concern is that with such vast resources, corporate interests will now be able to effectively drown out those who oppose their policy stances within the free marketplace of ideas that is so crucial to a vibrant democracy. Corporate speech, if left unchecked, does have the potential to create a distortion and lead some citizens to make a policy judgment that they might not otherwise have made.¹⁰⁰ While allowing corporations to spend money advocating certain issues will undoubtedly create more ‘speech’ within the marketplace of ideas, this is not necessarily a good thing if other viewpoints are drowned out by the amount of speech being placed within the market.¹⁰¹ Additionally, voters may equate the amount and quality of advertising that they see with the breadth of support behind a certain candidate or idea, and a particular viewpoint may gain more force in the eyes of some voters simply because they are constantly being inundated with ads in its support.¹⁰² Most significantly, advertisements may appear to speak on behalf of a campaign or candidate and in support of the general welfare when they are actually advancing a specific corporate interest. This effectively allows corporations to hide behind the shadow of the 501(c)(4) and 527 groups that put out such advertisements.¹⁰³

The beginnings of the 2012 election cycle illustrate that Super PACs and other powerful individuals can now exert an incredible amount of influence and power as a direct result of

¹⁰⁰ Levitt, *supra* note 13, at 225.

¹⁰¹ “Monopolies and near-monopolies are just as destructive to the marketplace of ideas as they are to any other market.” Dworkin, *supra* note 40. *Cf.* Levitt, *supra* note 13, at 225 (asking whether it is really a bad thing if a voter makes a decision based on an accurate idea after assessing it on the merits, regardless of whether the message is funded in whole or in part by corporate interests).

¹⁰² Levitt, *supra* note 13, at 215-16.

¹⁰³ “Individuals speak for themselves, together or in association with other individuals, while corporations speak for their commercial interests and spend other people’s money, not their own.” Dworkin, *supra* note 40 (noting that corporations are legally required to spend corporate funds only to promote their own financial interests).

recent Supreme Court decisions and Congressional inaction.¹⁰⁴ Even one candidate, former Speaker of the House Newt Gingrich, openly admits that there is no other choice, given the current state of the law, than for a campaign to have at least one Super PAC that “spend[s] an absurd amount of money” mostly on negative ads.¹⁰⁵ Super PACs, such as American Crossroads and Americans for Prosperity, are hoping to spend upwards of two-hundred million dollars during the 2012 election cycle on advertisements, thus freeing up the national party committees from such obligations and allowing them to focus on voter turnout issues.¹⁰⁶

Between bundlers, PACs, and super PACs, the public has little idea about from where the money being pumped into the current election cycle is coming. Mitt Romney refuses to release his list of bundlers, and investigations reveal that they include top officers of private equity and venture capital firms.¹⁰⁷ Meanwhile, Newt Gingrich’s entire campaign received a last-minute injection of life support in the form of a multi-million dollar check from a personal friend to the Gingrich-supporting super-PAC – an amount one-thousand times the amount one could legally give directly to the Gingrich campaign during one year.¹⁰⁸

II. The Court and Congress: At Odds from the Beginning

a. From *Buckley* to *Citizens United* and *Speechnow.org*

The seminal case in campaign finance reform jurisprudence is *Buckley v. Valeo*, decided in 1976 after a challenge to FECA. The Court upheld limits on political contributions but found

¹⁰⁴ “The Super PACs are outspending the candidate committees two to one . . . just like in the world of business and advertising, politics goes the same way. Those that spend the most have the biggest impact.” Jessica Hopper, Unlimited contributions give ‘Super PACs’ power to change presidential race, Rock Center, Jan. 16, 2012, http://rockcenter.msnbc.msn.com/_news/2012/01/16/10167332-unlimited-contributions-give-super-pacs-power-to-change-presidential-race.

¹⁰⁵ *Id.*

¹⁰⁶ Nicholas Confessore, *Outside Groups Eclipsing G.O.P. as Hub of Campaigns*, N.Y. Times, Oct. 29, 2011.

¹⁰⁷ Michael Isikoff, *Guess Who’s Raising Money For Romney: Bigwigs From Private Equity Firms*, MSNBC Jan. 12, 2012, http://firstread.msnbc.msn.com/_news/2012/01/12/10142991-guess-whos-raising-money-for-romney-bigwigs-from-private-equity-firms.

¹⁰⁸ Nicholas Confessore, *A Big Check, and Gingrich Gets a Big Lift*, N.Y. TIMES, Jan. 9, 2012. Gingrich noted that he had “no objection to [the donor] counterbalancing Romney’s millionaires.”

that limits on expenditures were an unjustified burden on First Amendment free speech rights of candidates.¹⁰⁹ *Buckley* equated money with speech, and political expenditures by candidates, parties, committees, or other groups or individuals are given the greatest constitutional protection.¹¹⁰ Contributions – payments made to a candidate, party, committee, or other political actor to fund communication to voters – are treated as a lower form of speech, and while still subject to strict scrutiny, limits on contributions may be justified by an anti-corruption purpose.¹¹¹

The only compelling interests recognized by the Court as justification for contribution limits are the prevention or the appearance of corruption. Concerned with *quid pro quo* issued and the overall integrity of the system in the eyes of the American populace, the Court struck a balance that allowed those with wealth to use it to support candidates and political parties as long as those expenditures are not coordinated with an actual campaign.¹¹² Egalitarian concerns used to justify limits on expenditures and contributions were – and continue to be – summarily rejected as compelling interests by the Court.¹¹³

In 2010, the Supreme Court stepped in to resolve the issue of whether independent expenditures, specifically expenditures from corporate treasuries, could be limited. *Citizens United* is recognized by many as a major doctrinal shift in jurisprudence with enormous practical consequences that will reshape the way elections are conducted. No other decision of the Court in recent history has “generated such open hostilities among the three branches of

¹⁰⁹ See *Buckley*, 424 U.S. 1; Levitt, *supra* note 13, at 218.

¹¹⁰ Limits on expenditures are subject to strict scrutiny, and combating corruption or the appearance of corruption is not considered a compelling government interest necessary to sustain expenditure limits. Richard Briffault, *Symposium: An Intersection of Laws: Citizens United v. FEC: On Dejudicializing American Campaign Finance Law*, 27 GA. ST. U. L. REV. 887, 896, Summer 2011.

¹¹¹ *Id.*

¹¹² *Id.* at 897-900.

¹¹³ The Court found that such interests were “wholly foreign to the First Amendment,” and could not be used to limit a candidate’s use of his own wealth, the total amount a campaign spends, or expenditures by independent people or groups promoting or opposing specific candidates. *Id.* at 898.

government.”¹¹⁴ Overruling a prior line of jurisprudence, as well as a portion of McCain-Feingold, the Court held that the government cannot restrict independent corporate-funded electoral advocacy.¹¹⁵ The court also refused to consider empirical evidence of the effects of corporate spending on the politicians who benefit from corporate donations.¹¹⁶ In a slightly cynical yet prescient observation, Justice Stevens, in dissent, noted that “the only relevant thing that has changed [since the Court’s prior campaign finance decisions] . . . is the composition of this Court.”¹¹⁷

Putting First Amendment concerns once again at the forefront of its analysis, the Court unapologetically privileged speech despite the recognized negative effects of corporate money on the political system.¹¹⁸ In reaffirming the premise that money is speech when spent on political advocacy, the Court also reiterated that the only viable compelling government interests for limiting campaign contributions are to reduce actual corruption or the appearance thereof.¹¹⁹ In the typical fashion of the Roberts Court, Justice Kennedy went to great lengths to base the ruling on need for an informed electorate and the idea that freedom of political speech for all is an essential prerequisite of an effective democracy. The Court extolled the virtues of uninhibited speech for all, and it rationalized its decision with the premise that a large amount of speech, regardless of its source, ensures that voters have access to as wide and diverse a range of information and political opinions as possible.¹²⁰ Assuming, perhaps naively, that all voters are and seek to be fully informed and deliberate difference viewpoints based on their merits and

¹¹⁴ Dworkin, *supra* note 40.

¹¹⁵ Corporations are now able to advocate expressly for or against any candidate. Levitt, *supra* note 13, at 220.

¹¹⁶ Briffault, *supra* note 110, at 902-03.

¹¹⁷ Youn, *supra* note 38, at 4 (quoting *Citizens United*, 130 S.Ct. at 942 (Stevens, J. dissenting)).

¹¹⁸ Wilson, *supra* note 96, at 2367.

¹¹⁹ *Id.*

¹²⁰ Dworkin, *supra* note 40; Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1764 (2001) (arguing that elections are about giving the electorate a variety of choices, but if one politician is well-funded, the public is likely to hear more from that candidate than his opponents).

sources, the Court gave complete credence to the notion that forbidding limits of corporate expenditures will add to the ‘free’ marketplace of ideas and give power to the informed and settled opinions of the largest number of people.¹²¹

Following the Court’s decision in *Citizens United*, two decisions by the D.C Circuit Court of Appeals further protected independent expenditure committees from reach of government regulation and illustrate what some call a movement towards a completely deregulated campaign finance system.¹²² The Court’s decision in *Emily’s List v. FEC* stands for the premise that, unless they act in direct coordination with a candidate or a party, a 527 may receive and spend unlimited amounts of money, and thus, 527s have been given the go-ahead to expressly advocate for certain candidates.¹²³ In *Speechnow.org v. FEC*, the Court cited *Citizens United* for the principle that by definition, independent expenditure groups do not corrupt despite influence over or access to politicians to toss out a variety of FEC regulations applied to independent expenditure groups; “ingratiation and access [by and to politicians],” according to the Court, “are not corruption.”¹²⁴ While invalidating any limits on contributions to such committees in light of *Citizens United*, the D.C. Court of Appeals upheld the various reporting and disclosure requirements implemented by the FEC, stating that the “public has an interest in knowing who is speaking about a candidate and who is funding that speech” because such disclosure “deters and helps expose violations of other campaign finance restrictions . . .”¹²⁵

b. Congressional Response

¹²¹ *Id.*; Noveck, *supra* note 78, at 102.

¹²² David D. Kirkpatrick, *Court Rejects Rules on Spending by Nonprofits*, N.Y. TIMES, Sept. 18, 2009, <http://www.nytimes.com/2009/09/19/us/politics/19donate.html>.

¹²³ *Emily’s List*, 581 F.3d 1 (D.C. Cir. 2009); Daniel, *supra* note 55, at 151.

¹²⁴ *Citizens United*, 130 S. Ct. at 910.

¹²⁵ *Speechnow.org v. FEC*, 599 F.3d at 686, 697 (D.C. Cir. 2010).

While they expanded the amount of unaccounted-for money floating around in federal elections, *Citizens United* and *Speechnow.org* did not sound a death knell to Congress's ability or need to pass further campaign finance reform bills. Various Congressmen have proposed closing the loopholes allowing 501(c)(4) groups to avoid disclosure or donate anonymous funds to their corresponding 527 PACs; however, no proposal has been passed in both chambers of Congress. Two of the most important and necessary pieces of legislation introduced before Congress are detailed below.

i. The Fair Elections Now Act (FENA)¹²⁶

Perhaps the most sweeping attempt at campaign finance reform since the post-Watergate era, FENA was reintroduced in 2011 by Senator Richard Durbin as S. 750 and Representative John Larson as H.R. 1404 and would amend FECA by creating a Fair Elections Fund and Fair Elections Oversight Board.¹²⁷ By creating – for the first time – a public financing system for U.S. Senator and House elections, the bill seeks to free candidates from constant fundraising and allow them to better focus on the needs of their constituents and the demands of their job.¹²⁸ By providing such a system, FENA would make small donors the key players in financing elections rather than those able to make massive contributions.¹²⁹

Under the proposed set of rules, matching funds would be available to qualified congressional candidates who agree not take large donations from PACs or other individuals; the system is completely voluntary. Candidates for the House must first solicit 1500 donors from their home state and raise at least \$50,000; this would discourage those with limited support and

¹²⁶ Americans for Campaign Reform, <http://www.acrreform.org/legislation/fair-elections-now-act/>.

¹²⁷ Cheryl Chado, THE MODERN AMERICAN, *Legislative Updates*, Fall 2010.

¹²⁸ *Id.*; Sam Waterston, *Historic Movement on Fair Elections*, THE HUFFINGTON POST, Sept. 23, 2010, http://www.huffingtonpost.com/sam-waterston/historic-movement-on-fair_b_737084.html.

¹²⁹ Wertheimer, *supra* note 18.

money from running and taking advantage of the public financing system.¹³⁰ House candidates would receive up to \$900,000 in FENA funds – forty percent for the primary election and sixty percent for the general election.¹³¹ They would also receive a media voucher of \$100,000, with an added option of trading in that voucher to their national party committee for cash.¹³² Taking into account their smaller numbers, Senate candidates must receive donations from 2,000 constituents plus 500 for each congressional district within their state.¹³³ Candidates would receive up to \$1.25 million plus \$250,000 per congressional district within their state and \$100,000 in tradable media vouchers.¹³⁴

Candidates opting into the system would be eligible to receive funding for both the primary and general elections. They would also be rewarded for continuing to solicit small-time donations by receiving \$4 for every \$100 they raise over the initial threshold and would get an additional twenty percent reduction in the lowest broadcast rates on all television and radio advertising.¹³⁵ The cost of the system, estimated at between \$700-850 million per year depending on how many candidates participate, would be covered by adding a fee to large government contractors – those companies receiving contracts of over \$50,000 – for Senate elections and by using ten percent of the revenues raised by an auction of an additional broadcasting spectrum for House races.¹³⁶

¹³⁰ See generally <http://www.fairelectionsnow.org/about-bill>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ <http://www.fairelectionsnow.org/about-bill>.

ii. Democracy is Strengthened by Casting Light on Spending in Elections (DISCLOSE) Act

The DISCLOSE Act takes a different approach at combating corruption in the political arena and rebuking *Citizens United* by requiring disclosure and compelling companies to inform shareholders about political spending, as well as requiring corporate CEO's to appear in any political ads funded by their companies.¹³⁷ Passed in the House in 2010, the legislation stalled in the Senate due to repeated Republican filibusters.¹³⁸ If passed by the Senate, the bill would function as another amendment to FECA. Full disclosure of any donors of political ads run by corporations, unions, 527 groups, and trade associations would be mandatory.¹³⁹ The Act would encourage small donors to continue giving while requiring groups to disclose the names of all donors who have given \$1,000 or more to the group for independent expenditures or electioneering communication or those who make donations of more than \$10,000 for unrestricted purposes.¹⁴⁰

Corporations would also be held accountable for political expenditures and released for the American public to digest. Heads of corporations would have to appear in ads they sponsor, expressing approval of the ad.¹⁴¹ The CEO or highest ranking official must say they approve the message on camera within the ad itself; if the ad is sponsored by a PAC, the top funder of the ad

¹³⁷ Wilson, *supra* note 96, at 2391.

¹³⁸ Michael Beckel, *Senate Republicans Again Block DISCLOSE Act, Designed to Reveal Special Interest Spending*, Open Secrets Blog, <http://www.opensecrets.org/news/2010/09/senate-republicans-again-block.html>; Paul Loeb, *An Antidote to Unaccountable Corporate Lies: How to Pass the DISCLOSE Act*, THE HUFFINGTON POST, Aug. 2, 2010, http://www.huffingtonpost.com/paul-loeb/an-antidote-to-corporate_b_667574.html (reporting that every Republican Senator, representing only eleven percent of the Country's population, backed a filibuster and effectively killed the bill).

¹³⁹ Evan Mackinder, *Disclose, Disclaim, Report: Democrats Reveal New Campaign Finance Legislation*, Apr. 29, 2010, Open Secrets Blog, <http://www.opensecrets.org/news/2010-04/disclose-disclaim-report.html>.

¹⁴⁰ The groups would also be required to form a separate campaign expenditure account. POLITICO, *Dem Bill would blunt campaign finance ruling*, Apr. 29, 2010, <http://dyn.politico.com/printstory.cfm?uuid=48CAEA3B-18FE-70B>.

¹⁴¹ Mackinder, *supra* note 139.

must appear.¹⁴² Additionally, the top five donors of non-restricted funds to a group that purchases television-related ads will be listed on the screen at the end of the ad. In turn, corporate officials must report any political expenditure to their corporate boards and shareholders.¹⁴³

Two other aspects of the bill touch on some of the chief concerns of those outraged by *Citizens United*: the possibility of foreign money influencing U.S. elections and the ability of companies who are recipients of government contracts to make donations and simulate the appearance of corruption. The DISCLOSE Act would ban companies with more than twenty percent foreign ownership or whose boards are made up of a majority of foreign nationals from participating in US elections in any way.¹⁴⁴ Additionally, if one or more foreign nationals have the power to direct, dictate, or control the decision-making of a corporation or its U.S. subsidiary, that corporation may not contribute financially to any purpose relating to U.S. elections. The bill would also ban the practice of 'Pay to Play' by forbidding government contractors and recipients of TARP funding from participating in elections in any way.¹⁴⁵

iii. Constitutional Amendments

An alternative approach to mere legislation is a constitutional amendment that overrules and neutralizes *Citizens United*.¹⁴⁶ The only long-term solution may be to give Congress plenary authority to enact comprehensive campaign finance reform, thus removing the ever-present possibility of future judicial interference.¹⁴⁷ Amending the Constitution, however, may be

¹⁴² All corporations must disclose campaign related spending on their website with a clear link on its homepage within 24 hours of reporting the expenditure to the FEC. The contributions must also be disclosed to shareholders and members of the organization in any financial reports provided on an annual basis. *Id.*

¹⁴³ *Id.*

¹⁴⁴ POLITICO, *supra* note 140.

¹⁴⁵ Once a corporation has repaid the TARP funds, the ban is lifted; additionally, companies that have a contract with the government valued at less than \$50,000 are not subject to the ban. *Id.*

¹⁴⁶ See Korn, *supra* note 19.

¹⁴⁷ See Udall, *supra* note 6, at 237.

unrealistic, controversial, and too time consuming to be a practical solution.¹⁴⁸ Without an amendment or reversal of Supreme Court precedent, many believe that special interest funds will continue to influence and corrupt the electoral and legislative process and that therefore, Congress must be given the authority and flexibility to break the cycle of unlimited special interest money.¹⁴⁹

III. Recommendations and Analysis

“There’s one word to describe what’s going on in the campaign-finance area: the word is obscene. And it’s going to result in scandal and corruption and, eventually, opportunities for reform.”¹⁵⁰ Perhaps that is the best hope for what currently seems like a lost cause; it may take the 2012 elections for Congress to be motivated, whether through the results of the election or the amount of contempt the American electorate exhibits against elected officials. *Citizens United* provides for the potential that independent corporate speech will overwhelm the American political system.¹⁵¹ If anything, this atrocity will only provide greater impetus for the reforms needed to return American elections back to the people. Short of a complete reversal on recent First Amendment jurisprudence by the Supreme Court, legislative action by Congress is the only way to attack the issue of money in politics.

There are three major ways that Congress could respond to this growing crisis of integrity: (1) requiring full disclosure of all political contributions; (2) revamping and enhancing

¹⁴⁸ R. Sam Garrett, *Campaign Finance Policy After Citizens United v. Federal Elections Commission: Issues and Options for Congress*, CONGRESSIONAL RESEARCH SERVICE 7-5700, 4, Feb. 1, 2010, available at <http://fpc.state.gov/documents/organization/137016.pdf>.

¹⁴⁹ Udall, *supra* note 6, at 242-43 (positing that whenever new regulations are imposed, money will find a way through another loophole and that because the potential for corruption remains large whether via direct donations, soft money, issue ads, or independent expenditures, Congress must be given the ability to flexibly update regulations without worrying about their constitutional standing).

¹⁵⁰ Kim Barker, *A guide to the new world of campaign finance: what you need to know about Super-PACs and ‘dark money’*, TUSCON SENTINEL, July 11, 2011, available at http://www.tucsonsentinel.com/nationworld/report/071111_super_pacs/a-guide-new-world-campaign-finance/.

¹⁵¹ Levitt, *supra* note 13, at 75 n. 26 (suggesting that the wealthiest citizens use their resources to entrench their own interests and “use their inequitable distributions to maintain the status quo against the majority desires,” thereby undermining the democratic process).

the public financing of federal elections; or (3) requiring complete anonymity of all political donors. While far from perfect – and far from being able to act as a total stopgap to plug the cascade of corporate donations – a combination of requiring full disclosure and giving more opportunities for candidates to participate in a viable public financing system would be the best way to currently move forward. At the very least, such a move would restore some semblance of integrity in the system and those who are elected to run it and would be a starting point for more substantial reforms later on down the road. In the short term, requiring full disclosure will at least aid in combatting the appearance of corruption and allow the public to see who is behind the financing of American elections. However, in the long run, only a fully-supported, practical public financing system will be able to fully cure the political system from the ills from which it currently suffers.

a. Full disclosure

The dominant and preferred model of reform is to require complete and full disclosure of all information relating to political contributions of any sort and their sources.¹⁵² Touted as a free market approach, it is premised on the assumption that people will actually care and pay attention to such information when making informed decisions during elections. The model fits well into a society where businesses are used to giving more information to the public, who in turn can better protect their own interests rather than rely on government command and control of that information. This gives people the power to make their own judgment calls, and it supplants the notion that transparency is a prerequisite for government accountability.¹⁵³

¹⁵² Noveck, *supra* note 78, at 100.

¹⁵³ Briffault, *supra* note 24, at 273.

Disclosure ultimately aids voters in predicting candidate's behavior once in office, provides data about the candidate's issue positions – including ones that may not be public.¹⁵⁴

Disclosure is likely the most successful element of the U.S. campaign finance system and Congress needs to keep building on those past successes.¹⁵⁵ Full disclosure requires a delicate balancing act of anti-corruption, public education and political privacy/participation concerns.¹⁵⁶ It is a two-step process where electoral actors make reports to a government agency, generally the FEC, and that information is subsequently disseminated to the public at large.¹⁵⁷

Since *Buckley*, disclosure has been recognized as “the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist.”¹⁵⁸ With the continued blessing of the Supreme Court, disclosure has historically had three main justifications.¹⁵⁹ Most importantly, disclosing who is funding political actors and messages serves to informing the voters. In doing so, it effectively deters corruption and the appearance of corruption by exposing large contributions and expenditures to the public eye.¹⁶⁰ Additionally, it allows the FEC and other agencies to enforce current campaign finance laws, as record-keeping, reporting, and disclosure requirements are essential means of gather data needed to detect violations of FECA's contribution limits.¹⁶¹

¹⁵⁴ 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*, 26 CHAPMAN J. L. & POL'Y 59, 93 (2011) (quoting *Recent Legislation, Campaign Finance Reform-Issue Advocacy Organizations-Congress Mandates Contribution and Expenditure Requirements for Section 527 Organizations*, 114 HARV. L. REV. 2209, 2213-15 (2001)).

¹⁵⁵ Briffault, *supra* note 24, at 273.

¹⁵⁶ *Id.* at 299.

¹⁵⁷ *Id.* at 276.

¹⁵⁸ Torres-Spelliscy, *supra* note 154, at 66.

¹⁵⁹ Briffault, *supra* note 24, at 280; *Buckley*, 424 U.S. 1, 66 (1976). Eight justices expressly reaffirmed the constitutionality of requiring disclosure; absent evidence of “a reasonable probability of threats, harassment, or reprisals.” Levitt, *supra* note 13, at 221; *Citizens United*, 130 S.Ct. at 914-16 (citing *McConnell*, 540 U.S. at 198).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

The vast majority of Americans already see the merits of a full disclosure model.¹⁶² But disclosure among groups making electioneering communications dropped from nearly ninety-seven percent in 2006 to thirty-four percent in 2010 and disclosure of donors to groups making independent expenditures went from nearly ninety-seven percent in 2006 to seventy percent in 2010.¹⁶³ Ten percent of groups favoring Republican revealed their donors and fifty percent of groups favoring Democrats revealed their donors.¹⁶⁴ The “sensible thing” for Congress to do is to devise rules that require disclosure of campaign activity no matter what tax status is adopted by the spender; there is a compelling government interest in providing transparency to the political process and the sources of money regardless of what the tax consequences are of the manner in which a group is organized.¹⁶⁵

While disclosure should be the norm across the spectrum, there is a particular need for legislation to close the loopholes permitting the non-disclosure of bundlers. Bundling can be a far greater source of political influence than individual donations.¹⁶⁶ Disclosure will help the public better understand the forces behind a candidate and who has access to him as well of the practice of bundling in general – still a mystery to most Americans; as of now, the practice is still only lightly regulated.¹⁶⁷

¹⁶² “An extraordinary ninety-two percent of Americans want full disclosure of campaign contributors.” Rich, *supra* note 21; even Republican House Speaker John Boehner believes in full disclosure: “We ought to have full disclosure of all money that we raise and how it is spent.” Paul Loeb, *Stop the Anonymous Hit Men: Make Shadowy Campaign Money the Issue*, THE HUFFINGTON POST, Oct. 11, 2010, http://www.huffingtonpost.com/paul-loeb/stop-the-anonymous-hit-me_b_758627.html.

¹⁶³ Youn, *supra* note 38, at 6.

¹⁶⁴ Prior to Citizens United, the rate of disclosure of such groups was one hundred percent. Korn, *supra* note 19.

¹⁶⁵ Torres-Spelliscy, *supra* note 154, at 66.

¹⁶⁶ Briffault, *supra* note 24, at 302.

¹⁶⁷ *Id.*, “The bundling of political donations once was an innocuous play in the game book of Washington political operatives. Now, the fund-raising practice has grown so widespread, and some of its practitioners so brazen, that bundling has become the chief source of abuse in the American campaign-finance system.” Brody Mullins, *Donor Bundling Emerges As Major Ill in '08 Race*, WALL ST. J., Oct. 18, 2007, <http://online.wsj.com/article/SB119267248520862997.html>

The public value of financial and personal information related to the practice of bundling would be immense, as the sums aggregated by bundlers are far greater than any amount an individual is able to give.¹⁶⁸ Currently, neither state nor federal law caps the amount anyone can bundle in an election.¹⁶⁹ Only funds bundled by registered lobbyists are ever required to be disclosed.¹⁷⁰ However, many are able to skirt the registration requirements and essentially function as lobbyists – and thus garner the attention of powerful politicians – while remaining mostly anonymous.¹⁷¹ Thus, under the current system, most bundlers are not considered lobbyists and therefore are not affected.¹⁷²

A number of drawbacks suggest that merely passing legislation mandating disclosure will not solve all of the issues exacerbated by *Citizens United*; the disinfectant qualities of sunlight may unfortunately not be enough to combat the diseases afflicting the financing of campaigns and political advertisements. Imposing such a heavy burden may deter potential donors and this could be skewed against certain constituencies; this could in turn run afoul of the First Amendment by imposing an unneeded burden on particular groups.¹⁷³ Enhanced disclosure would likely chill some large donors who view contributions as a ‘cost of doing business’ or a line item in their annual budget.¹⁷⁴ It does not appear, however, that more disclosure would

¹⁶⁸ Briffault, *supra* note 24, at 303.

¹⁶⁹ *Id.* at 302.

¹⁷⁰ *Id.* (“...the Honest Leadership and Open Government Act (HLOGA) requir[es] federal campaign political committees and political party committees to disclose the bundled contributions of \$15,000 or more that they receive from federally registered lobbyists in a six-month period.”). Prior to HLOGA, committees were only required to disclose the names of bundlers who physically delivered checks to the campaign. *Id.*

¹⁷¹ See Eric Lichtblau, *Obama Backers Tied to Lobbies Raise Millions*, N.Y. TIMES, Oct. 27, 2011, <http://www.nytimes.com/2011/10/28/us/politics/obama-bundlers-have-ties-to-lobbying.html>.

¹⁷² Briffault, *supra* note 24, at 303 (citing <http://www.whitehouseforsale.org>, which found reported that only 17 of Obama’s 605 top bundlers and 77 of McCain’s 851 top bundlers in the 2008 elections were registered lobbyists).

¹⁷³ However, Buckley concluded that the potential chilling effects of forced disclosure, at least in the case of large parties/candidates, was worth the risk. *Id.* at 290.

¹⁷⁴ *Id.* at 291. Additionally, foreign direct investment in the US was down fifty-two percent in 2009 already, and some argue that discouraging corporate expenditures may “create a climate that the world will see as a disadvantage of investing in our country.” Nancy McLernon, *Unfortunate “Us” vs. “Them” Rhetoric Drives DISCLOSE Act*, July 1, 2010, THE HUFFINGTON POST, <http://www.huffingtonpost.com/nancy-mclernon/unfortunate-us-vs-them->

inhibit wealthy individuals from making or parties and candidates from accepting very large donations;¹⁷⁵ it may simply donations to 501(c)(4) groups who claim to exist for advocacy purposes yet blur the line between political and non-political entities.¹⁷⁶

Moreover, disclosure alone does little to actually regulate how money affects politics and where it goes. Disclosure does not necessarily serve egalitarian interests, however, because it does not limit who may contribute, how much they can give, or how the money can be used. Any possible effects on voters' attitudes are highly speculative at best.¹⁷⁷ The vote may be "too blunt an instrument to be an effective means for the voter to make her views about the candidate's campaign finance practices known."¹⁷⁸ The notion that the voter can hold a candidate accountable in an election fails to acknowledge that each voter only has one vote and must make up her mind based on a number of complex issues.¹⁷⁹ Additionally, even if a voter was concerned solely with which corporations advocated for which candidates, it would be difficult to decipher the information, as many interest groups give to more than one candidate in the same race and even to both parties.¹⁸⁰

Relying on disclosure alone would capitulate other goals of campaign finance reform such as voter equality, creating electoral competition, decreasing the amount of time spent fundraising, and reducing the amount of private money in politics.¹⁸¹ Even in a digital age where

rh_b_632143.html (stating that the U.S. must promote a competitive non-discriminatory environment instead of the 'Us vs. Them' mentality that has been directed at mostly innocent foreign corporations).

¹⁷⁵ In fact, some groups would likely glory in forced disclosure because it would show their political power. Briffault, *supra* note 24, at 287.

¹⁷⁶ *Id.* Another concern is that disclosure would make it easier for politicians to trace their supporters and thereby reward them with their votes in exchange for continued support. Noveck, *supra* note 78, at 75.

¹⁷⁷ Noveck, *supra* note 78, at 103 n.176 (relying on an empirical study concluding that disclosure alone fails to produce more competition in elections or reduce the impact of large contributions) (David Schultz, *Disclosure is Not Enough: Empirical Lessons from State Experiences*, 3 ELECTION L. J. 349, 350 (2005)).

¹⁷⁸ Briffault, *supra* note 24, at 289.

¹⁷⁹ It is also doubtful that campaign contributions are at the top of many lists of things voters consider in making voting decisions. *Id.* at 288.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 276.

information is available at the click of a button, the amount of information released by mandatory disclosure could cause an informational overload. This could potentially obfuscate the important data in a sea of numbers, thus not allowing the average voter to make the necessary connections and see the true money trail.¹⁸² Additionally, mandating disclosure would likely require stringent enforcement by a new, large, and expensive regulatory agency – something that many are not willing to currently see created.¹⁸³

As such, the real benefit of requiring disclosure may ultimately be that the public is educated about the electoral process and can therefore be more attuned to the patterns of interest group giving and their impact on the government when an important issue is being debated.¹⁸⁴ Targeting large donors for disclosure – rather than the majority who give small amounts – would sharpen the public’s focus on those who are most likely to effect the actions of elected officials rather than have a chilling effect on participation of small-time donors; thus, a monetary threshold on any disclosure requirement is necessary.¹⁸⁵

b. Public Financing System

For the last decade, the public financing system for Presidential elections has been in decline; one need only look at the rise of bundlers and independent expenditure groups to realize that it no longer feasible for most candidates to participate in such a system and risk being severely out-spent.¹⁸⁶ Unless the current system is amended – and a system to fund Congressional campaigns is created – only long-shot candidates, if any, will take advantage of

¹⁸² Noveck, *supra* note 78, at 103.

¹⁸³ *Id.*

¹⁸⁴ Briffault, *supra* note 24, at 299.

¹⁸⁵ *Id.*

¹⁸⁶ Weintraub & Levine, *supra* note 5, at 465-66.

the system.¹⁸⁷ Indeed, no major party candidates in the previous two presidential elections relied on public funding, instead opting to raise funds privately.¹⁸⁸ The strings that come attached to public funding – including restrictions on how money can be spent and a time-consuming documentation and FEC auditing process – also deter those candidates who would otherwise qualify for public funding from using it.¹⁸⁹ Campaigns have been confident of both their ability and their opponent’s ability to outraise the current spending limits for some time.

A revamped system would level the field and provide equal opportunities for candidates to spread their messages in a way that would effectively minimize corruption.¹⁹⁰ Despite the potential costs associated with establishing an effective system of public financing, the opportunity to potentially rid the system of some special interest funds and allow lawmakers more time to focus on their jobs as legislators outweighs any associated costs.¹⁹¹ Passing FENA is a necessary prerequisite to the development of a system of financing for Congress, and more would need to be done to revamp the Presidential system. FENA would ‘broaden and deepen the donor pool and allow new voters to have a stake in the electoral process.’¹⁹² Small contributions are a healthy part of a participatory democracy.¹⁹³

FENA, however, would be completely voluntary and would not impose spending limits on participants as long as they agreed to limit private individual contributions to no more than

¹⁸⁷ Serious candidates will not return to the system unless it can provide sufficient funding that will allow them to compete with the amount of money being raised and spent by non-participating candidates and outside groups. *Id.* at 475.

¹⁸⁸ *Id.* at 465.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 475.

¹⁹¹ “We already pay for congressional campaigns, we just label it the national debt. Interests that donate to campaigns often get what they want from legislation, and we all pay for that, by comparison, public financing seems like a bargain.” *The Fair Elections Now Act*, AMERICANS FOR CAMPAIGN REFORM, <http://www.accreform.org/legislation/fair-elections-now-act/>.

¹⁹² Youn, *supra* note 38, at 15.

¹⁹³ *Id.*

\$100.¹⁹⁴ This framework alone is not workable because those who opt-out would be grossly outspent by their wealthy opponents who do not participate.¹⁹⁵ The bill also does not address problem of unlimited spending by corporations or interest groups left open by *Citizens United*, leaving publicly financed candidates at a disadvantage if they are subject to attacks by independent groups.¹⁹⁶ Thus, while FENA would take care of part of the problem, it would only be effective if passed in conjunction with a bill similar to the DISCLOSE Act so that those who do not choose to participate in such a system will still be forced to disclose who is funding their campaigns.

c. Information Suppression Model

Another alternative that has been debated among scholars is to not allow candidates to know the identity of donors. This would eliminate ability of donations to have a *quid pro quo* corrupt effect. Under this model, anonymous donations to candidates, parties, and committees would be made through a blind trust operated by the FEC.¹⁹⁷ At most, the FEC could only reveal that a donor donated '\$200 +' to a particular person/group.¹⁹⁸ Politicians would hypothetically not know who to reward with their votes once in office, but this would depend wholly on the integrity of the staff of the trust, as corruption could lead to data leaks.¹⁹⁹ Although the model calls for complete disclosure of contributions after 10 years, it is hard to imagine that a public used to transparency and having information at their fingertips would be willing to place trust in government to get it right and run such a system with integrity.²⁰⁰

¹⁹⁴ Udall, *supra* note 6, at 248.

¹⁹⁵ *Id.* at 246.

¹⁹⁶ *Id.*

¹⁹⁷ Briffault, *supra* note 24, at 295. See generally BRUCE ACKERM & IAN AYRES, *Voting with Dollars: A New Paradigm For Campaign Finance*, YALE UNIVERSITY PRESS, 2002.

¹⁹⁸ Briffault, *supra* note 24, at 295.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 296.

IV. Conclusion

The future of our political system depends on the ability of Congress to pass and implement the regulations necessary to shed light on the enormous amounts of money being channeled into political advertisements and campaigns. In the absence of a constitutional amendment, it is unlikely that Congress could pass legislation overturning *Citizens United* that could withstand judicial scrutiny; however, some action must be taken to restore the public trust. Shedding light on anonymous donors and the true sources behind political advertisements will only serve to further educate and enlighten the public and thereby supplant the First Amendment values held so dear by the American people and Supreme Court justices alike. Congress would be wise to allow some sunlight in to serve as a disinfectant to the corrosive special interests funds that tighten their grip on lawmakers each day. Not only would they free themselves from the constant cycle of fundraising now endured by most elected officials, politicians and candidates would be able to spend more time understanding the issues of the day and connecting with those constituents who are not wealthy enough to ‘buy’ their time.

In the end, the passage of FENA and a bill similar to the DISCLOSE Act will be a good first step towards restoring integrity in the system. However, Congress should not stop there, and if practical, should pursue a Constitutional Amendment that would grant it the power and flexibility to combat the uninhibited flow of corporate funds into American elections. Accountability is key – both for politicians and for those who choose to donate money for political causes, whether individuals or corporations. The 2008 and 2010 elections showed – and the 2012 elections are on pace to show – that there is too much anonymous money floating around the political system purporting to speak on behalf of the public, a certain party, or a candidate.

Ninety-two percent of the American people cannot be wrong, and eventually, their voices will be heard.²⁰¹ The time to act is now, and it may be too late to restore the trust of the people in their government if Congress waits until after the 2012 elections to mandate full disclosure and revitalize the public financing of federal elections. At stake is nothing less than our democracy itself.

²⁰¹ Rich, *supra* n. 21.