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# Party Crashers

Alexandra C. Smith

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# PARTY CRASHERS

How Post-Citizens United McCain-Feingold is Killing National Political Parties

*Photo Credit: Associated Press*

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## I. INTRODUCTION

Commentary on the Supreme Court's decision in Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) is often characterized in polarizing terms, casting opponents as crusaders against special interests and proponents as guardians of free speech. These may have been the more immediate and visceral reactions, but with a post-Citizens United midterm and presidential cycle in the books, a more apt description might be one that showcases how savvy campaigners are in an ideologically agnostic way using the fruits of the decision to their political advantage.

These pragmatists have largely taken advantage of the Court's gutting of the Bipartisan Campaign Reform Act's ban on corporate and union independent expenditures and electioneering communications. Not only can these powerful entities now spend unlimited amounts on the political cause of their choosing, but they can do so anonymously by funneling money through a tax-exempt 501(c)(4) organization. These organizations have proven to be exceptionally enticing vehicles for political work for their ability to engage in a certain amount of political activity without being subject to the disclosure requirements and oversight of the Federal Election Commission ("FEC").

In 2010, just eleven months after the Court decided Citizens United, this preference was patently obvious; a joint study conducted by the Center for Public Integrity and Center for Responsive Politics found 501(c)(4) groups had spent nearly \$95 million compared to the \$65 million spent by FEC-regulated Super PACs in the 2010 election.<sup>1</sup>

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<sup>1</sup> Michael Beckel, *Nonprofits outspent super PACs in 2010, trend may continue*, The Center for Public Integrity (June 18, 2012, 3:35 PM), <http://www.publicintegrity.org/2012/06/18/9147/nonprofits-outspent-super-pacs-2010-trend-may-continue>.

In the context of American history, it seems inconceivable that in a discussion about the financing of political campaigns the role of national parties might not be as paramount. After all, national political parties have long been associated with the selection and nomination of candidates, along with the important work of voter registration and identification. This might not be so remarkable if political parties had simply outlived both their usefulness and effectiveness in cultivating candidates or grassroots organizing. Waning party identification numbers in public opinion polling might provide peripheral evidence of such a trend, but this cursory look ignores the restraints the Bipartisan Campaign Reform Act (“BCRA”) have placed on the federally-regulated political committees. Under BCRA, national party, candidate and multicandidate committees are subject to contribution limits and aggregate caps on donations.<sup>2</sup>

When Citizens United invalidated BCRA’s ban on corporate and union independent expenditures, it kept the “hard dollar” federal committees shackled to the law’s stringent contribution limits. In turn, this has created a stark imbalance, allowing outside groups to have an unprecedented influence in American elections, while leaving the federal committees starved for comparable resources. Opinions on the merits of Citizens United aside, the decision undoubtedly and perhaps unintentionally assisted the creation of a campaign finance system that favors outside spending over the regulated federal committees.

Assuming, however, that Citizens United properly corrected a constitutional infirmity in BCRA, any solution must in the spirit of equal protection allow FEC-

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<sup>2</sup> Biennial limits have been struck down by the Court’s decision in McCutcheon. McCutcheon v. Federal Election Com’n, 134 S.Ct. 1434 (2014).

regulated committees to fairly compete with their IRS-regulated “dark money” counterparts. Unlike independent groups, federal committees have the clear advantage of being able to coordinate directly with other federal campaigns; as the discussion will show, however, the two kinds of organizations are, practically speaking, engaging in similar election-related activities and even exerting comparable influence over legislators. A key difference lies in the fact that IRS-regulated groups are increasingly run and financed by a small group of individuals, whereas FEC-regulated committees typically act in a much larger representational capacity, advocating on behalf of a defined group of class of citizens. Moreover, these members of a national political party or the voters of a particular elected official have significant associational interests that are burdened in addition to the free speech rights that are impacted by all campaign finance regulations. Under the current state of the law, the smaller, usually wealthier group of individuals working through an IRS-regulated organization is not as tightly regulated as those members and party leaders expressing themselves through FEC-regulated committees. The substantial similarity in their work and impact, in turn, raises equal protection concerns. It is for this reason that any solution ought to address the disparity between these two circumstances.

This discussion is meant to elucidate the ever-evolving world of campaign finance law that has led to the massive imbalance between the spending of groups regulated by the IRS and those committees regulated by the FEC. First, this essay will explain how the explosive growth of 501(c)(4) organizations prompting the 2013 IRS scandal brought the influence of IRS-regulated organizations into the national spotlight. Next, it will provide an overview of the scope and nature of 501(c)(4) organizations, along with the

controversial Supreme Court decision – Citizens United – that made them attractive vehicles for political activity. Then, it will explore the series of Supreme Court decisions that led to the passage of the Bipartisan Campaign Reform Act (“BCRA”) and the decisions that upheld its key provisions or curbed its reach. Finally, it will discuss the state of national political parties operating in a post-Citizens United world where they must compete for dollars with 501(c)(4) organizations cloaked in anonymity and little accountability.

## II. THE 2013 IRS SCANDAL: WHEN 501(C)(4)S BECAME A HOUSEHOLD NAME

“Nobody wants to be a determination agent,” Jack Reilly told *The New York Times* in the spring of 2013. “It’s a job that just about everybody would be anxious to get out of it.”<sup>3</sup> Reilly, a lawyer who had previously overseen the classification of exempt organizations for the Internal Revenue Service (IRS), gave his comments amid the unfolding scandal that the IRS had used inappropriate criteria to target certain political groups in their application for tax-exempt status.

Applications for organizations seeking tax-exempt status are ultimately approved by the Rulings and Agreements office in Washington, D.C., but a subordinate field office in Cincinnati makes the initial determination as to whether or not the organization qualifies.<sup>4</sup> Did the agents of Group 7822—tasked with the apparently undesirable “determinations” work—in Cincinnati have a particular political vendetta or were there other forces at play?

In the summer of 2010, agents in the Determination Unit were given a “Be On the Lookout” (“BOLO”) list and were instructed to flag applications containing certain terms in the applications for groups seeking 501(c)(4) status.<sup>5</sup> These criteria included use of the word “Tea Party,” “Patriots” or “9/12 Project”; issue statements that referenced government spending, government debt or taxes; and criticism of how the country is

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<sup>3</sup> Nicholas Confessore, David Kocieniewski, and Michael Luo, *Confusion and Staff Troubles Rife at I.R.S. Office in Ohio*, *The New York Times* (May 18, 2013), [http://www.nytimes.com/2013/05/19/us/politics/at-irs-unprepared-office-seemed-unclear-about-the-rules.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/19/us/politics/at-irs-unprepared-office-seemed-unclear-about-the-rules.html?pagewanted=all&_r=0).

<sup>4</sup> *Ibid.*

<sup>5</sup> Kelly Phillips Erb, *As Debate Into Tax Exempt Scandal Continues, Here’s A Timeline Of Who Knew What And When*, *Forbes* (July 16, 2013, 12:05 AM), <http://www.forbes.com/sites/kellyphillipserb/2013/07/16/as-debate-into-tax-exempt-scandal-continues-heres-a-timeline-of-who-knew-what-and-when/>.

being run.<sup>6</sup> By early 2012, these applications were being forwarded to specialists within the agency and additional information request letters were sent to certain organizations under scrutiny.<sup>7</sup> Upon receiving complaints, Representative Darrell Issa (R-CA), Chairman of the House Oversight and Government Reform Committee, formally requested a Treasury Inspector General for Tax Administration (TIGTA) inquiry.<sup>8</sup> By the time the investigation had concluded in the spring of 2013, the then Director of Exempt Organizations Lois Lerner had publicly admitted while speaking to the American Bar Association that certain organizations had been unfairly targeted. She admonished the conduct as “absolutely incorrect, insensitive, and inappropriate,” but both the admission and the findings of the TIGTA report subsequently triggered an FBI investigation, the resignation of the acting IRS Commission and a series of congressional hearings.<sup>9</sup> In early 2014, the FBI announced that it would not be seeking criminal charges against the IRS for the scandal.<sup>10</sup>

It is worth noting that for an agency like the IRS, which is delegated broad authority by Congress and is tasked with the collection of taxpayer money, the appearance and widespread acceptance of credibility is particularly important. According to the agency’s own policy statement, IRS employees accomplish this “by being impartial

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<sup>6</sup> Treasury Inspector General for Tax Administration, *Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review*, U.S. Department of the Treasury (May 14, 2013), <http://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>.

<sup>7</sup> Kelly Phillips Erb, *As Debate Into Tax Exempt Scandal Continues, Here’s A Timeline Of Who Knew What And When*, Forbes (July 16, 2013, 12:05 AM), <http://www.forbes.com/sites/kellyphillipserb/2013/07/16/as-debate-into-tax-exempt-scandal-continues-heres-a-timeline-of-who-knew-what-and-when/>.

<sup>8</sup> Ibid.

<sup>9</sup> Treasury Inspector General for Tax Administration, *Oral Statement – Committee on Oversight and Government Reform*, U.S. Department of the Treasury (July 18, 2013), [http://www.treasury.gov/tigta/congress/congress\\_07182013.pdf](http://www.treasury.gov/tigta/congress/congress_07182013.pdf).

<sup>10</sup> Devlin Barrett, *Criminal Charges Not Expected in IRS Probe*, The Wall Street Journal (January 13, 2014, 7:25 PM), <http://online.wsj.com/news/articles/SB10001424052702303819704579318983271821584?KEYWORDS=irs+holder>.

and handling tax matters in a manner that will promote public confidence.”<sup>11</sup> The suspicion that the agency has been used to achieve political ends is, thus, a dangerous one. Indeed, charges of executive misuse of the IRS were among the Articles of Impeachment adopted by the House Judiciary Committee on July 27, 1974 against former President Richard Nixon prior to his resignation.<sup>12</sup> The desire to restore this credibility was made evident by the new acting IRS Commissioner’s remarks to the House Oversight and Government Reform Committee on June 6, 2013, in which he pledged to the inquiring lawmakers to return impartial standards.<sup>13</sup> Public confidence in the agency is critical to its ability to operate effectively.

By the summer, however, public furor had reached a fever pitch. Nearly three-quarters of respondents to one Quinnipiac poll indicated their preference for a special prosecutor to investigate the IRS.<sup>14</sup> Some looked beyond scrutinizing the apparent effects of the bureaucratic mismanagement and chose to aggressively pursue root causes. On an August episode of MSNBC’s “Hardball,” host Chris Matthews interviewed Representative Chris Van Hollen (D-MD), who had announced his intention to file a lawsuit against the IRS.<sup>15</sup> The lawsuit aimed to remove the provision from Section 501(c)(4) that permits this type of tax-exempt organization to engage in political activity

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<sup>11</sup> Internal Revenue Manual, *IRM 1.2.10.1.1, Policy Statements for Organization, Finance and Management Activities*, Internal Revenue Service (December 18, 1993), [http://www.irs.gov/irm/part1/irm\\_01-002-010.html#d0e52](http://www.irs.gov/irm/part1/irm_01-002-010.html#d0e52).

<sup>12</sup> Report of the Committee on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H. Rept. No. 93-1305, 93d Cong. 2d Sess. (Aug. 20, 1974).

<sup>13</sup> David Sherfinski, *New IRS chief sets out to win confidence*, The Washington Times (June 6, 2013), <http://www.washingtontimes.com/news/2013/jun/6/new-irs-chief-sets-out-to-win-confidence/>.

<sup>14</sup> Press Release, Quinnipiac University Polling Institute, American Voters 4-1 Want Special Prosecutor for IRS, Quinnipiac University National Poll Finds; But Fixing Economy Is More Important, Voters Say 3-1 (May 30, 2013), <http://www.quinnipiac.edu/images/polling/us/us05302013.pdf>.

<sup>15</sup> Transcript of “Hardball with Chris Matthews” (August 21, 2013), [http://www.today.com/id/52819039/ns/msnbc-hardball\\_with\\_chris\\_matthews/t/hardball-chris-matthews-wednesday-august-st/#.UItEALwd7dQ](http://www.today.com/id/52819039/ns/msnbc-hardball_with_chris_matthews/t/hardball-chris-matthews-wednesday-august-st/#.UItEALwd7dQ).

so long as its primary purpose remains promoting the social welfare.<sup>16</sup> In musing that this so-called “murky” legal territory was responsible for the IRS controversy, Matthews remarked, “[i]t seems to me, if you have got a political agenda, pay for it, damn it. Don’t ask the government to pay for it.”<sup>17</sup>

Matthews’ comments, the lawsuit, and, of course, the overarching IRS scandal, all suggest that somewhere along the way 501(c)(4) organizations had lost their way—that these civic associations meant to promote the social welfare had morphed into savvy, well-funded political entities with a coveted tax exemption. Next, this essay will explore the law and regulations defining 501(c)(4) organizations and why its parameters left it vulnerable to exploitation after Citizens United.

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<sup>16</sup> Bernie Becker, *Van Hollen to join lawsuit against IRS*, The Hill (August 20, 2013, 9:42 PM), <http://thehill.com/blogs/on-the-money/domestic-taxes/317937-van-hollen-campaign-finance-advocates-to-sue-irs>.

<sup>17</sup> Transcript of “Hardball with Chris Matthews” (August 21, 2013), [http://www.today.com/id/52819039/ns/msnbc-hardball\\_with\\_chris\\_matthews/t/hardball-chris-matthews-wednesday-august-st/#.UItEALwd7dQ](http://www.today.com/id/52819039/ns/msnbc-hardball_with_chris_matthews/t/hardball-chris-matthews-wednesday-august-st/#.UItEALwd7dQ).

### **III. WHAT IS A 501(c)(4) ORGANIZATION?**

#### **A. Generally**

Organizations that are not-for-profit have been organized under Section 501(c) of the IRS Code since the Revenue Act of 1913. Revenue Act, ch. 16, 38 Stat. 114 (1913). Institutions such as schools, churches, chambers of commerce and labor unions are all organized under this section, with each having its own reporting requirements. Section 501(c)(4) enumerates the requirements for two different types of organizations: social welfare organizations and local associations of employees. 26 U.S.C. 501(c)(4). The IRS defines the former as “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare[.]” *Id.* While these organizations do not have to pay federal income taxes, their benefactor also cannot claim a charitable deduction on their income taxes, like other types of charitable groups organized under this section. In fact, each fundraising solicitation “by (on behalf of) an organization” must contain an express statement “in a conspicuous and easily recognizable format” putting contributors on notice that their gifts are not considered charitable tax deductions. 26 U.S.C.A. § 6113.

In 1959, the Treasury Department promulgated a regulation further emphasized the need for the organization to not be organized or operated for profit and that it must be “operated exclusively for the promotion of social welfare.” Treas. Reg. § 1.501(c)(4)-1. In People’s Educational Camp Soc. Inc., the U.S. Court of Appeals for the Second Circuit found that the word exclusively had not been interpreted narrowly “so as to foreclose every operation for nonexempt purpose no matter how insubstantial, but rather has been interpreted to mean ‘primarily.’” People’s Educational Camp Soc. Inc. v. C.I.R., 331 F.2d

923 (1964). The regulations specifically provide 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.” Treas. Reg. § 1.501(c)(4)–1.

### **1. COMMUNITY VERSUS PRIVATE BENEFIT**

An important component to all tax-exempt organizations is the requirement that the organization operate for the purpose of benefitting the community as a whole, rather than for the benefit, pleasure, or recreation of its members. Some examples in which the IRS has determined that the purpose of the 501(c)(4) was to benefit the community as a whole, as opposed to the interests of a private group of citizens include an organization seeking to promote youth interests in the community by providing virtually free admission to their sporting events<sup>18</sup>; an organization whose purpose was to encourage a noncommercial interest in the arts by sponsoring a community art show<sup>19</sup>; and an organization with membership limited to certain residents and business meant to preserve and beautify their common spaces.<sup>20</sup>

### **2. THE LOBBYING (C)(4)**

Should a 501(c)(4) engage in lobbying, their lobbying activities may be subject to special tax treatment. The Tax Code denies a deduction for lobbying and political expenditures, which might otherwise be considered an ‘ordinary and necessary trade or business expense.’ 26 U.S.C. § 162. A complimentary provision prohibits other organizations seeking to claim their dues or other sums paid to 501(c)(4)s as a deductible ordinary and necessary trade or business expense if the tax-exempt organization has notified the payer that the dues will be used for nondeductible lobbying expenditures. 26

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<sup>18</sup> Rev. Rul. 68-118, 1968-1 C.B.261.

<sup>19</sup> Rev. Rul. 78-131, 1978-1 C.B.156.

<sup>20</sup> Rev. Rul. 75-286, 1975-2 C.B.210.

U.S.C. § 162(e)(3). A separate section of the code does require the tax-exempt organization to notify its dues payers at the time they are assessed an estimate of the portion of the dues that will be used for nondeductible lobbying and political expenditures. Severe tax penalties apply for organizations that do not follow these disclosure requirements. 26 U.S.C. § 6033(e)(1). Beyond these requirements, 501(c)(4) organizations are still subject to further regulation through federal and state lobbying disclosure statutes. In particular, the Federal Lobbying Disclosure Act precludes 501(c)(4) organizations that engage in lobbying from being the recipient of federal grants or loans. 2 U.S.C.A. § 1611.

### 3. THE SCOPE OF POLITICAL ACTIVITY

Section 501(c)(4) organizations are permitted to engage in political activity to the extent that it does not become the organization's "primary" activity. A memo released by the Treasury Department indicates that this determination is one based on the 'facts and circumstances' of every case.<sup>21</sup> Certain factors may help the IRS in concluding whether or not the activity exceeds its primary purpose:

- [A]mount of funds received from and devoted to particular activities;
- other resources used in conducting such activities, such as buildings and equipment;
- the time devoted to activities (by volunteers as well as employees);
- the manner in which the organization's activities are conducted; and
- the purposes furthered by various activities.<sup>22</sup>

As the politically active 501(c)(4)'s very existence depends upon it achieving a certain balance between political and social welfare activity, it is important to understand what the IRS considers to be political activity. This activity is defined broadly as,

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<sup>21</sup> Raymond Chick and Amy Henchey, *Political Organizations and IRC 501(c)(4)*, Internal Revenue Service (1995), <http://www.irs.gov/pub/irs-tege/eotopicm95.pdf>.

<sup>22</sup> Ibid.

“influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors,” in the section of the code that sets the structure for PACs. 26 U.S.C.A. § 527.

Just as lobbying 501(c)(4)s are required to relieve the taxpayer of the burden by not deducting expenses related to lobbying (with a similar prohibition for dues paying members), 501(c)(4)s engaging in political activity are subject to a tax on those expenditures. Specifically, the organization will be responsible for the highest corporate tax rate on the lesser of its net investment income for the taxable year or the aggregate amount spent that year on political activity. 26 U.S.C.A. § 527(f). Notably, two activities that are exempted from taxation are expenditures related to influencing the appointment or confirmation of an individual for public office and nonpartisan activity, such as voter registration and get-out-the-vote (“GOTV”) campaigns. Treas. Reg. § 1.527-6. GOTV is defined by the federal code as, “encouraging or urging potential voters to vote;” “informing potential voters” about the time and location of polling places, along with information about absentee or early voting; “offering or arranging to transport, or actually transporting, potential voters to the polls,” and all other activities that assist potential voters in voting. 11 C.F.R. § 100.24.

#### **4. DISTINGUISHING LOBBYING AND POLITICAL ACTIVITY**

Whether or not the 501(c)(4) is engaging in lobbying or political activity is a critical distinction. Both have different tax implications based on their classification, but as political activity may not become the primary activity of the organization and lobbying

activities are permitted unconditionally, it is important to determine what communications constitute each type of activity.

A Revenue Ruling has indicated that this is a case-by-case ‘facts and circumstances’ determination, but the IRS also enumerated factors that would tend to suggest either political or lobbying activity. Rev. Rul. 2004-6. A communication is likely to be considered political activity if it identifies a candidate for public office; it is timed in coordination with an election; it targets voters in a certain election; it identifies a candidate’s policy position; it distinguishes the candidate’s public policy position from others; and the communication is not similar to other kinds of advocacy on the same issue. *Id.* On the other hand, the communication is likely to be considered one that is a part of the organization’s lobbying activity in the absence of any of the political factors; if it specifies specific legislation or an event that the organization hopes to influence; if the timing coincides with some legislative event that the organization hopes to influence; if it identifies a candidate as a government official whose vote the organization hopes to influence; and the communication identifies the candidate as a main sponsor of the legislation. *Id.*

## **5. SEGREGATING FUNDS**

It is important to note that the regulations above only apply to 501(c)(4) organizations that choose to conduct their political activities exclusively through the structure of the (c)(4). These organizations, however, are permitted to conduct these activities through a PAC established under § 527 of the IRS code, so long as they maintain a separate segregated fund. These contributions and expenditures are then regulated by the Federal Elections Commission (FEC), rather than the IRS.

## **6. DISCLOSURE REQUIREMENTS**

Section 501(c)(4) organizations that choose to lobby or engage in political activity are required to fill out Form 990 as a part of their tax returns to disclose these activities. The reporting requirements, however, are much more general than the requirements for PACs. While 501(c)(4)s are required to report aggregate amounts raised and spent for these activities, they do not have to reveal the source of the funds. This differs significantly from PACs, which must disclose more detailed information about their donors.

#### IV. CITIZENS UNITED AND THE RISE OF 501(c)(4) ORGANIZATIONS

After the Supreme Court's decision in Citizens United, the IRS became "flooded" with applications from organizations seeking to file under Section 501(c)(4).<sup>23</sup> In this case, the Court considered the constitutionality of provisions of the Bipartisan Campaign Reform Act of 2002 that prohibited for-profit (but not certain non-profit) corporations and unions from using general treasury funds from making independent expenditures or electioneering communications. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, 116 Stat. 81 (2002). Citizens United, a nonprofit organization that accepts contributions from individuals and from for-profit corporations, brought both a facial and as-applied challenge to the section (codified at 2 U.S.C. § 441b). The organization had sought a declaratory judgment ahead of its planned January 2008 cable release of a documentary about then-Presidential contender Hillary Clinton. Citizens United, 558 U.S. 310 at 321. The Court found that the government's ban on corporate independent expenditures, by distinguishing non-profit from for-profit corporations violated the First Amendment. Id at 365.

With criminal and civil penalties now removed for the expenditure of corporate money in elections, 501(c)(4) organizations became an obvious vehicle of choice for campaign-minded corporations. Prior to the decision in Citizens United, for-profit corporations were allowed engage politically through a separate segregated account known as a Political Action Committee (PAC). 2 U.S.C. § 441(b)(4)(B). Justice Kennedy writing for the majority, however, noted the special difficulties that are associated with these organizations, "PACs are burdensome alternatives; they are expensive to administer

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<sup>23</sup> Sean Sullivan, *What is a 501(c)(4), anyway?*, The Washington Post (May 13, 2013, 1:51 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/05/13/what-is-a-501c4-anyway/>.

and subject to extensive regulations.” Citizens United, 558 U.S. 310 at 337. PACs formed by corporations are also limited to receiving contributions “from any stockholder, executive or administrative personnel,” greatly limiting its potential donor base and fundraising potential. 2 U.S.C. § 441(b)(4)(B). The Court further noted that these “onerous” restrictions might explain why at the time of the ruling only about 2,000 of the millions of corporations in the United States had actually established PACs. Citizens United, 558 U.S. 310 at 338.

Perhaps the greatest disadvantage to corporate giving through PACs is the reporting and disclosure requirement. Contributions (in excess of \$200), operating expenses, outstanding debts and obligations must be made public and reported to the Federal Election Commission (FEC), the federal agency tasked with administering and enforcing federal campaign finance laws. 2 U.S.C.A. § 434. Though corporations may have a stake in the outcome of a particular election, the concern for maintaining a more neutral corporate brand, which would be harmed by disclosure requirements, likely weigh in favor of not engaging in the desired political speech. After Citizens United paved the way for corporate independent expenditures, however, the 501(c)(4) and its conspicuous lack of disclosure requirements provided an effective and legal solution to these conflicting interests. Despite this clear advantage, federal committees are still in the business of political activity and spending. The next section will explore what kind of speech is regulated at the federal level and the congressional motivations for doing so.

## **V. WHAT MAKES 501(c)(4) POLITICAL SPEECH DIFFERENT? A PRIMER ON CAMPAIGN FINANCE REFORM**

In the scheme of both tax and campaign finance laws, 501(c)(4) organizations' hybrid ability to both engage in political activity and yet avoid disclosure requirements is peculiar. The FEC oversees a variety of organizations whose primary purpose is that of political activism, meaning that they are subject to federal spending and contribution limits in addition to the disclosure rules. Individuals are limited both by the amount of money that they can give to a candidate's or party's committee and by biennial aggregate limits on these federal contributions.<sup>24</sup> The organizations themselves are limited to only receiving these types of "hard dollar" contributions. All receipts, disbursements and certain donor information must be disclosed regularly to the FEC.

Section 527 PACs that operate independently of a candidate ("Super PACs") are the most closely analogous to politically active Section 501(c)(4) organizations insofar as Super PACs do not have to abide by any federal limits on spending and contributions because there is no coordination with candidates or party committees. Additionally, both political activities conducted by 501(c)(4) organizations and Super PACs (as an organization) are taxed similarly under Section 527 of the Code. Despite the organizations' ability to participate in identical types of political activity, the Super PAC must regularly disclose all receipts, disbursements and certain donor information to the FEC, while the 501(c)(4) need only disclose receipts and disbursements as a part of its return to the IRS. Moreover, these disclosures to the IRS are made for the purpose of the agency verifying that non-exempt political activity has not become the 'primary' purpose

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<sup>24</sup> Biennial limits have been struck down by the Court's decision in McCutcheon. McCutcheon v. Federal Election Com'n, 134 S.Ct. 1434 (2014).

of the organization, rather than to the FEC, which evaluates disclosures to ensure broader compliance with federal election law. The hallmark of the 501(c)(4) – Super PAC relationship, however, is undoubtedly the 501(c)(4)’s ability to contribute to Super PACs. While the Super PACs will ultimately need to disclose the source of the contribution, a 501(c)(4)’s name and generic P.O. Box address will rarely reveal the true benefactor. This has opened a plethora of opportunities for enormous sums of money to flow relatively anonymously through a campaign finance system that was designed to promote transparency and limit the influence of money in politics.

It appears that while certain political activities undertaken by organizations may be nearly identical in nature, they are treated differently for the purposes federal campaign finance law. The disparate treatment might be more simply explained by the fact that political activity may not be the primary purpose of the 501(c)(4),, while Super PACs (and other organizations defined by federal election law) are exclusively devoted to these purposes. Perhaps the level of political activity is the pertinent factor in determining when the purported protections of campaign finance law are necessary. When, however, even half of the resources of increasingly well-funded 501(c)(4) organizations rival the receipts of the hard dollar national party committees and similarly regulated PACs, it is important to question why the law makes distinctions among different types of political speech.

#### **A. The Federal Election Campaign Act**

Unsurprisingly, the first attempts at comprehensive campaign finance reform occurred during the Progressive Era in the early twentieth century. These measures instituted the original ban on donations from corporations and labor unions and set the

framework for the first contribution limits and disclosure requirements.<sup>25</sup> The laws, however, were riddled with loopholes and lacked an effective enforcement mechanism. The 1970s, accompanied by public distrust from the Watergate scandal, changed the public appetite for curbing the influence of money in election and promoting transparency. The Federal Election Campaign Act (“FECA”) first passed in 1971 required full disclosure of contributions and expenditures for federal candidates, PACs and party committees. Federal Election Campaign Act, Pub. L. No. 92-225, § 302, 86 Stat. 3 (1972). The legislation once again reiterated the ban on corporate and labor union donations to federal candidates, but established the both the framework for these entities to engage in limited political activity through segregated funds and the exemptions allowing them to influence appointment or confirmation of an individual for public office and GOTV campaigns. *Id.* at § 205. What was notably absent from this first attempt at campaign finance reform was a centralized enforcement mechanism. Instead, the task was left to the Clerk of the House, the Secretary of the Senate and the Comptroller General of the United States General Accounting Office. *Id.* at § 302. Violations were then forwarded to the Justice Department for prosecution. Very few of these violations were actually litigated. *Id.* at § 307.

Following the Watergate Scandal and subsequent investigation that revealed the use of theft and illegal corporate donations, further amendments were passed to the law in 1974. In addition to setting expenditure and contribution limits on individuals, political parties and PACs, the bill established the Federal Election Commission (“FEC”) to administer FECA. *Id.* at § 310. The FEC was to be composed of six voting commissioners

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<sup>25</sup> *The Federal Election Campaign Laws: A Short History*, Federal Election Commission, <http://www.fec.gov/info/appfour.htm>.

chosen by the President, the Speaker of the House and the President pro tempore of the Senate, and the Secretary of the Senate and the Clerk of the House as ex officio nonvoting members. Federal Election Campaign Act Amendments, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

The amendments clearly transformed FECA into the most aggressive campaign finance law in the nation's history, but its strength did not go unchallenged. A constitutional challenge was swiftly brought against key provisions of the Act—questions that were ultimately considered by the Supreme Court in the landmark campaign finance case Buckley v. Valeo, 424 U.S. 1 (1976). The Court found that the contribution limits did not violate the First Amendment because the government had an interest in limiting the influence of money in elections and contribution limits achieved this with little imposition on individuals' constitutional right to free speech. Id at 58. With respect to the Act's independent expenditure ceiling, limitation on a candidate's expenditures from personal funds, and its ceilings on overall campaign expenditures, however, the Court found that these placed too onerous a burden on the constitutional rights of the parties involved. Id at 58. As the Court noted, "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." Id at 19. In the case of expenditure limits, this diminished "quantity of expression" was incongruent with meaning of the First Amendment. Id at 23. The Act's disclosure requirements were also upheld as preserving the substantial governmental interest of keeping the electorate informed and preventing corruption. Id at 55. Finally, the Court found that the FEC was conducting

activities that may only be performed by “Officers of the United States,” so the scheme by which the commissioners were chosen violated the Appointments Clause of the Constitution. Id at 141. In 1976, Congress responded to the Court’s particular concern over the appointment scheme of the commissioners, and altered it so that it followed the constitutionally required presidential appointment and senate confirmation procedure. Federal Election Campaign Act Amendments, Pub. L. No. 94-283, 90 Stat. 475 (1976) Amendments made to the law in 1979 also simplified the reporting requirements. Federal Election Campaign Act Amendments, Pub. L. No. 96-187, 93 Stat. 1339 (1980). These campaign finance laws would largely remain intact until the close of the century.

The Court’s first major foray into campaign finance legislation—Buckley v. Valeo—had inadvertently drawn a bright line by identifying the kind of speech the government sought to curtail in the interest of limiting the influence of money in elections. Namely, the statutory term “expenditure” in reference to the disclosure requirements was interpreted narrowly by the Court to mean only “funds used for communications that expressly advocate the election or defeat of a clearly identified candidate” so as to avoid an overbreadth issue. Buckley, 424 U.S. 1 at 19. In preserving the source and contribution limits, Buckley opened the door to what would become the two main ways to circumvent the limits of hard federal dollars.

#### **1. “EXPENDITURES” ONLY APPLIED TO FEDERAL CANDIDATES**

In Buckley, the Court found that the government had an interested in applying disclosure requirements for expenditures involving federal campaigns. Money that was subsequently raised according to the disclosure requirements and abided by the limitations on amount and source became known as “hard” federal dollars. National party

committees, however, like the Republican National Committee (“RNC”) and Democratic National Committee (“DNC”), do not focus their efforts exclusively on campaigns for federal office. Indeed, these committees often have a strong interest in state or local elections where federal campaign finance laws would seem not to apply. Subsequent decisions sought to isolate how these mixed activities could be funded. As the Court pointed out in McConnell v. Federal Election Com’n, which challenged the validity of the Bipartisan Campaign Reform Act of 2002, “a literal reading of FECA’s definition of ‘contribution’ would have required such activities to be funded with hard money.” McConnell v. Federal Election Com’n, 540 U.S. 93 (2002). For that reason, the FEC issued several rulings preventing the provision from applying as strictly to these so-called ‘mixed-purpose activities.’ Id at 123.

After FECA and its amendments were passed, the receipt of nonfederal money was “attributed to the individual states based on the voting age population likely to be influenced by the expenditure.” 11 C.F.R. § 106.2. In 1977, FEC promulgated a rule that carved out an important exception to this standard: the administrative costs such as those relating to the operation of the national headquarters and travel between the states. In 1978<sup>26</sup> and 1979<sup>27</sup>, the Commission expanded this exception to allow national party committees to allocate the costs of GOTV and voter registration drives between their federal and nonfederal accounts so long as the efforts were not made on behalf of a particular candidate.

For the better part of the next two decades, the standard for evaluating the allocation of administrative expenses between federal and nonfederal accounts was “on a

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<sup>26</sup> FEC Advisory Op. 1978-10

<sup>27</sup> FEC Advisory Op. 1979-17

reasonable basis.” McConnell, 540 U.S. 93, 363 n.7. In 1990, the Commission provided more of a structured explanation of this phrase by requiring that the national party committees draw 60% of the exempted expenses from their federal accounts in off-years, and 65% in presidential election years. 11 C.F.R. § 106.5(b)(2) (1991). The rule further required that state and local committees allocate these expenses by drawing from federal accounts in direct proportion to ratio of federal and nonfederal candidates on the ballot. 11 C.F.R. § 106.5(d)(1) (1991). Practically speaking, this allowed states to spend greater sums of nonfederal money on the exempted expenses, as the number of nonfederal candidates generally exceeds the number of federal candidates on the ballot in a state in any given year. National parties could then exploit this opportunity by making transfers of soft money to the state and local parties.

These exceptions created an explosion of nonfederal, or “soft,” money. Without the source and contribution limit restrictions that are required for raising hard federal dollars, soft money became an increasingly attractive tool for national parties. Former President Bill Clinton rewarded groups of donors giving roughly \$50,000 or \$100,000 with a private dinner, or small coffee hours in the Map Room of The White House.<sup>28</sup> In what would become the rallying cry for campaign finance reform advocates, some donors were given the opportunity to stay overnight in the Lincoln Bedroom.<sup>29</sup> While Republicans, who were not in control of The White House, did not have relics of American history to trade in exchange for soft money cash, they instead sold access to top party leaders. *The New York Times* reported that donors who had given over \$175,000 over four years to the RNC were invited for a stay at a luxury hotel in Palm

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<sup>28</sup> Alison Mitchell, *The Making of a Money Machine*, *The New York Times* (December 27, 1996), <http://partners.nytimes.com/library/politics/1227clinton-funds.html>.

<sup>29</sup> *Ibid.*

Beach, Florida for “the chance to rub elbows with the nation's Republican leaders, including Senator Trent Lott, the majority leader; Speaker Newt Gingrich, and Representative Robert L. Livingston, the chairman of the House Appropriations Committee.”<sup>30</sup>

In the run up to the 2000 presidential election, the RNC had raised \$211 million in soft money, which represented an 74% increase over the previous cycle, while the DNC reported \$199 million, or an 85% increase.<sup>31</sup> Indeed, by the end of the election, *The Los Angeles Times* reported, “the two major political parties spent more so-called "soft money"--about \$80 million--on television ads this election than was spent by their own presidential candidates.”<sup>32</sup> Soft money became the business of national party committees and business was booming.

## **2. “EXPENDITURES” WERE LIMITED TO EXPRESS ADVOCACY OF FEDERAL CANDIDATE**

In Buckley, the disclosure and reporting requirements were found "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Buckley, 424 U.S. 1 at 80. Express advocacy is readily identified in communications by the presence of certain words, such as ‘elect’ or ‘vote against’ in reference to a particular candidate. In tandem with the Court’s interpretation that “expenditures” referred to only federal campaigns, the express advocacy limitation made it possible for unlimited amounts of soft money to be spent on what became known as

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<sup>30</sup> Katharine Q. Seelye, *G.O.P. Reward for Its Biggest Donors: 3 Days of Rubbing Elbows With Party Leaders*, *The New York Times* (February 20, 1997), <http://www.nytimes.com/1997/02/20/us/gop-reward-for-its-biggest-donors-3-days-of-rubbing-elbows-with-party-leaders.html>.

<sup>31</sup> Scott Martelle, ‘Soft Money’ Became a Runaway Train This Election, *The Los Angeles Times* (December 11, 2000), <http://articles.latimes.com/2000/dec/11/news/mn-64111>.

<sup>32</sup> *Ibid.*

issue advocacy advertisements. These advertisements are similar in style to traditional campaign communications and often make reference to federal candidates. Unlike express advocacy communications put forth by candidates and parties or through independent expenditures, however, they are not subject to the same disclosure requirements and their source could be concealed from the audience. For example, the RNC funded an advertisement with soft money during the 1996 presidential campaign, in which an announcer stated the following: “Under Clinton, the typical American family now pays over \$1,500 more in federal taxes. A big price to pay for his broken promise. Tell President Clinton: You can't afford higher taxes for more wasteful spending.”<sup>33</sup> While the advertisement avoids instructing listeners to vote against President Clinton or even to vote for Republican nominee Bob Dole, the admonition of the candidate’s policies is clearly indicated. Another example of a soft money advertisement from the 1996 presidential cycle was one put forward by the DNC, during which the voice-over said: “Protect families. For millions of working families, President Clinton cut taxes. The Dole/Gingrich budget tried to raise taxes on eight million. The Dole/Gingrich budget would’ve slashed Medicare \$270 billion, cut college scholarships. The President defended our values, protected Medicare. And now a tax cut of \$1,500 a year for the first two years of college, most community colleges free. Help adults go back to school. The President’s plan protects our values.”<sup>34</sup> Like the RNC’s advertisement, this spot made ample use of several different issues, including Medicare, scholarships and tax cuts, in

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<sup>33</sup> Deborah Beck, Paul Taylor, Jeffrey Stanger and Douglas Rivlin, *Issue Advocacy Advertising During the 1996 Campaign*, Annenberg Public Policy Center (1997), [http://www.annenbergpublicpolicycenter.org/downloads/Political\\_Communication/Advertising\\_Research\\_1997/REP16.PDF](http://www.annenbergpublicpolicycenter.org/downloads/Political_Communication/Advertising_Research_1997/REP16.PDF).

<sup>34</sup> Ibid.

order draw a contrast between President Clinton and Republican presidential nominee Bob Dole and Speaker of the House Newt Gingrich.

Issue advocacy communications fueled by soft money became a popular tool for both the national party committees and outside groups to influence federal campaigns at all levels. According to a study conducted by the Annenberg Public Policy Center shortly after the 1996 presidential election, “more than two dozen organizations engaged in issue advocacy during the 1995-96 election cycle, at an estimated total expense of \$135 million to \$150 million.”<sup>35</sup> The study also found that in a survey of registered voters nearly 58% could recall seeing an issue advocacy advertisement in the presidential election.<sup>36</sup> By the close of the century soft money-fueled issue advocacy advertisements had become a potent tool in the political process.

### **B. The Bipartisan Campaign Reform Act**

The staggering rate at which unregulated soft money and issue advocacy expenditures began to outpace their regulated hard dollar and express advocacy counterparts made these practices vulnerable to calls for reform. The situation was only compounded by allegations following the 1996 presidential campaign of illegal fundraising practices, the most notable of which was that the Democratic National Committee had raised millions of dollars illegally from foreign sources.<sup>37</sup> Congress responded by conducting an investigation through the Senate Committee on Governmental Affairs, which issued a lengthy report in 1998 detailing various abuses and

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<sup>35</sup> Deborah Beck, Paul Taylor, Jeffrey Stanger and Douglas Rivlin, *Issue Advocacy Advertising During the 1996 Campaign*, Annenberg Public Policy Center (1997), [http://www.annenbergpublicpolicycenter.org/downloads/Political\\_Communication/Advertising\\_Research\\_1997/REP16.PDF](http://www.annenbergpublicpolicycenter.org/downloads/Political_Communication/Advertising_Research_1997/REP16.PDF).

<sup>36</sup> Ibid.

<sup>37</sup> James Warren, *Probe Shows GOP, Democrats As Money-Grubbers*, The Chicago Tribune (July 27, 1997), [http://articles.chicagotribune.com/1997-07-27/news/9707270120\\_1\\_republicans-hearings-democratic-national-committee](http://articles.chicagotribune.com/1997-07-27/news/9707270120_1_republicans-hearings-democratic-national-committee).

illegal activities that had occurred.<sup>38</sup> The report was critical of both the Republican and Democratic Party's soft money fundraising efforts and called for a number of different reforms. Among the proposed changes included eliminating soft money contributions to political parties and regulating the financing and disclosure of issue advocacy advertisements.<sup>39</sup>

The Bipartisan Campaign Reform Act (2002) attempted to provide a legislative fix to the problems the report had identified. With respect to soft money, BCRA limited national parties to only raising and spending hard federal dollars; required state and local parties to finance federal election activities exclusively with federal funds; and restricted federal candidates and committees to only soliciting hard dollars on their own behalf. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 101, 116 Stat. 81 (2002). In addressing issue advocacy advertising, BCRA banned corporations and labor unions from financing "electioneering communications," and required other individuals and groups to report and disclose the source of the funding above a threshold amount. *Id.* at § 203. "Electioneering Communication," is defined by the following characteristics: reference to a clearly identified federal candidate; public distribution on radio or television for a fee; broadcast of the communication within thirty days of a primary election or sixty days of a general election; and dissemination to an audience of 50,000 or more people in the district or state where the federal candidate is running for office. *Id.* at § 201. BCRA also defined several criteria for use in determining whether or not a communication was coordinated between the person making the communication and a candidate or committee. *Id.* at § 213. The legislation directly addressed the lack of disclosure

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<sup>38</sup> H.R. Rep. No. 105-167 (1998)

<sup>39</sup> *Ibid.*

requirements on issue advocacy advertisements by requiring both advertisements authorized and not authorized by a candidate to contain a written and audio statement claiming responsibility for the advertisement. *Id.* at § 311. Finally, BCRA set new contribution limits (indexed for inflation) for individuals contributing to candidates, state and local parties, and national party committees. *Id.* at § 307. All federal contributions were then subject to a two-year aggregate cap. *Id.*

1. McCONNELL V. FEDERAL ELECTION COMMISSION (2003)

The old adage that politics creates strange bedfellows perhaps rings the truest in the legislative and judicial battles that have been fought over campaign finance reform. Not only was BCRA a product of bipartisan partnership between Senators John McCain (R-AZ) and Russ Feingold (D-WI), but its early opponents also included a diverse group from across the political spectrum. In the first challenge brought to BCRA, McConnell v. FEC, 540 U.S. 93 at 135, plaintiffs such as Senator Mitch McConnell (R-KY), California Democratic Party, National Rifle Association (NRA), American Civil Liberties Union (ACLU), American Federation of Labor and Congress of Industrial organizations (AFL-CIO) and the RNC, banded together to challenge the law's constitutionality.

In examining the challenge to BCRA's soft money ban for national political parties, the Court noted that Buckley had established its record of "subject[ing] restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions." McConnell, 540 U.S. 93 at 135. The Court explained that while limits on both contributions and expenditures impinge on First Amendment freedoms, the former may require campaigns to seek contributions from a greater number of participants, but it does not entirely block associational or free speech rights of those contributors. *Id.* at 135-

136. Limits on expenditures, by contrast, prevent organization from amplifying their members' voices. Id at 136. In concluding that the soft money ban did not violate the First Amendment, the Court held that the government had an important interest in preventing corruption and increasing public confidence in the electoral process. Id. It buttressed these findings with *stare decisis* considerations, along with comity reasons in deference to Congress' particular expertise in weighing competing constitutional interests in this area. Id at 137.

The Court recognized the same anti-corruption, pro-integrity governmental interest in rejecting the plaintiffs' challenge to the provisions of BCRA that prohibited national party committees to solicit or direct funds that are not subject to federal campaign finance limitations and reporting requirements and those that banned state and local party committees from using soft money to fund activities with respect to federal campaigns. The Court recognized that these bans were necessary to prevent national party committees from using another entity, such as a 527 organization or a state party, as a means to do with soft money what they cannot. Id at 136. The BCRA provision proscribing state and local parties to use soft money for federal election activities withstood an additional challenge that Congress had exceeded its Article I, Section 4 powers in attempting to regulate nonfederal elections. In rejecting the claim, the Court reasoned that Congress had only attempted to regulate these activities with respect to the federal campaigns taking place in a given state. Id at 186.

With respect to BCRA's restrictions on issue advocacy advertisements, the plaintiffs challenged that the new provisions violated the Buckley interpretation that the FECA rules applied only to those advertisements that expressly advocated for the election

or defeat of a candidate. The Court explained that the bright line that had been created by the Buckley decision between express and issue advocacy was the product of a statutory interpretation meant to avoid overbreadth issues, rather than from a “constitutional command...that forever fixed the permissible scope of provisions regulating campaign-related speech.” Id at 191-193. The Court found that Congress’ attempt to curb post-Buckley’s alleged abuses with respect to regulating issue advocacy advertisements fell within this scope and did not implicate First Amendment concerns. Id.

Thus, BCRA emerged from this first challenge relatively unscathed. The Court’s conclusions left intact Congress’ express intention that federal campaigns only be financed in compliance with federal campaign finance law’s reporting requirements and contribution and source limitations.

2. FEDERAL ELECTION COMMISSION V. WISCONSIN RIGHT TO LIFE, INC. (2007)

Decided only one year after BCRA had been signed into law, McConnell v. Federal Election Com’n was only able to examine a constitutional challenge to BCRA as to its facial validity. The law’s tight restrictions were constitutional in theory, but as another election cycle passed, it became clear that they might not be as workable in practice. In 2004, Wisconsin Right to Life (“WRTL”) wanted to run advertisements urging Wisconsin Senators Feingold and Kohl to oppose a filibuster of judicial nominees. The organization, a nonprofit advocacy group, started to broadcast their advertisements on July 2004 and had planned to run them through August of that year. As of August 15<sup>th</sup>, however, the advertisements would fall prey to BCRA’s electioneering communications provision that banned these types of communications within a 30-day window of a primary election. WRTL conceded that under the plain statutory terms that

the advertisements were illegal electioneering communications, but asserted that they were truly of an issue advocacy nature, rather than of the ‘sham’ issue advocacy character that Congress had sought to curtail through BCRA. The organization sought declaratory and injunctive relief in its as-applied challenge to this provision.

The Court agreed that the advertisements presented an example of true issue advocacy and were not expressly calling for the election or defeat of a federal candidate. FEC v. Wisconsin Right to Life, 551 U.S. 449 at 525 (2007). Unlike in McConnell, where the Court had refused to apply a more exacting standard to the free speech burdens presented by BCRA’s contribution limits and soft money ban, the Court in Wisconsin Right to Life, evaluated the provision prohibiting corporations from broadcasting electioneering communications within a certain timeframe before the primary or general election under strict scrutiny. The Court found that this provision implicated political speech and that in order to survive under strict scrutiny, the government had the burden of showing that BCRA’s application to WRTL’s advertisements furthered a compelling interest and that its means are narrowly tailored to achieving that interest. Id at 476. Facially, the law had survived strict scrutiny under McConnell so long as the advertisements in question were those containing express advocacy. In this case, not only were the advertisements found to not be of this nature, but the government also failed to meet its burden that a blanket ban during the 30 or 60-day period was the most narrowly tailored means to serve a compelling interest. Id at 465.

The Court rejected the government’s argument that McConnell had adopted any particular constitutional test for distinguishing an issue from an express advocacy advertisement. Wisconsin Right to Life, 551 U.S. 449 at 466. Though the majority

declined to adopt a particular test, it indicated that any such standard should contain a “safe harbor for those who wish to exercise First Amendment rights,” and “reflec[t] our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* at 467.

In sum, the Court found that BCRA’s electioneering communications provisions were unconstitutional as applied to WRTL’s advertisements because they did not expressly advocate for or against a federal candidate (or do the functional equivalent through framing the issues in a particular way). Notably, the majority refused to use the case as an opportunity to examine the law’s wholesale ban on express advocacy undertaken by corporations and labor unions within the statutory timeframe. The Court had refused to declare BCRA facially invalid in *McConnell*, but the as-applied challenge brought in Wisconsin Right to Life undermined the FEC’s stance that banning all advertisements that fit the definition of an electioneering communication during the blackout period was necessary to achieving the state interest in prevent corruption. While the decision in Wisconsin Right to Life certainly did not dismantle the core of BCRA’s purpose in restricting the financing of federal elections to hard dollars, the Court’s narrow interpretation of “electioneering communication,” and, thus, what the state could lawfully regulate, would open the door for Citizens United excoriate the law’s independent expenditure and electioneering communication ban for corporations and labor unions.

### 3. DAVIS V. FEDERAL ELECTION COMMISSION (2008)

In retrospect, the so-called “Millionaire’s Amendment” to BCRA seemed to be taunting campaign finance reform foes for a fight; in raising individual contribution limit for the opponents of self-funders, or individuals capable of using personal funds for their

own political campaigns, to level the playing field, this provision had the strong potential of singling out a wealthy adversary, who could carry the challenge to the Supreme Court. This opponent took the form of Jack Davis, a House candidate in New York's 26<sup>th</sup> congressional district, who had used personal funds to (unsuccessfully) run in 2004 and 2006 at the time of the case.

Under the BCRA provision, if the self-funder intended to spend over \$350,000, he had to file a disclosure of the amount—the “opposition personal funds amount” (“OPFA”)—he expected to spend. Bipartisan Campaign Reform Act, Pub. L. No. 107-155, § 319, 116 Stat. 81 (2002). The opponent was then entitled to receive contributions at treble the normal limit, including from individuals who had met the federal cap and from coordinated party expenditures (without limit). The opponent could proceed like this until the OPFA amount had been reached and the normal contribution limits would reapply. *Id.* During this entire period, the self-funder was both held to the normal contribution limits and was subject to extensive reporting and disclosure requirements updating the FEC as to any changes in their intentions to spend more of their personal funds. *Id.*

Davis contended that this scheme violated his First Amendment right to make unlimited expenditures on his own behalf. The statutory scheme to correct the imbalance, he argued, had the effect of diminishing the impact of his own speech by enabling his opponent to raise a similar amount of money. In declaring the “Millionaire’s Amendment” to be unconstitutional, the Court first noted that it had previously held that contribution limits comported with the First Amendment if they are “‘closely drawn’ to serve a ‘sufficiently important interest,’ such as preventing corruption and the appearance

of corruption.” Davis v. Federal Election Com’n, 554 U.S. 724 at 737 (2008). The law became problematic, however, when it imposed different contribution limits for opposing candidates. This, the Court found, did not serve governmental interest in preventing corruption (its interest in instituting individual contribution limits), and attempting to artificially equalize different candidates’ spending was not a legitimate interest to justify the burden on self-funders’ First Amendment rights. Id at 741. The Court turned to its analysis in Buckley, in which it had declared caps on personal spending to be unconstitutional. The BCRA provision was similar to the cap insofar as it “impose[d] an unprecedented penalty on any candidate who robustly exercises that First Amendment right, requiring him to choose between the right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.” Id at 738-739. The Court’s application of Buckley again demonstrated its unwillingness to limit the First Amendment rights of a candidate to zealously advocate on his own behalf.

#### 4. CITIZENS UNITED V. FEDERAL ELECTION COMMISSION (2010)

As noted, the Court’s decision in Citizens United overruled its earlier decision in McConnell, which had upheld the constitutionality of the ban on corporations and labor unions from engaging in independent expenditures. Following this ruling, corporations and labor unions were permitted to spend general treasury funds to both engage in electioneering communications and in express advocacy for and against candidates. After Court’s decision was announced, Senator John McCain (R-AZ), who was one of BCRA’s original cosponsors, told moderator Bob Schieffer on “Face the Nation” that campaign finance reform was effectively “dead.”<sup>40</sup> He also predicted that public

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<sup>40</sup> Michelle Levi, *McCain: Campaign Finance Reform Is Dead*, CBS News (January 24, 2010, 11:27 AM), [http://www.cbsnews.com/8301-3460\\_162-6136386.html](http://www.cbsnews.com/8301-3460_162-6136386.html).

backlash would follow once voters observed the true impact of corporate and labor union money on elections.<sup>41</sup>

5. SPEECHNOW.ORG V. FEDERAL ELECTION COMMISSION (D.C. CIR. 2010)

This case, decided in the District Court before Citizens United and at the appellate level after the Supreme Court's decision, was uniquely positioned on the precipice of the most influential campaign finance ruling of this century. The plaintiffs in this case were individual donors who wished to make independent expenditures to expressly advocate for like-minded federal candidates through the unincorporated nonprofit 527 organization, SpeechNow. They sought an advisory opinion from the FEC, asking the Commission to declare whether or not they would need to file as a federal political action committee and whether or not their contributions would be capped under FECA's limitations (codified at § 441a(a)(1)(C) and 441a(a)(3)). The FEC found that the organization would be subject to both filing as a PAC and the contributions limits under FECA. SpeechNow was then denied a preliminary injunction by the District Court, which it appealed to the United States Court of Appeals for the District of Columbia. The District then made findings of fact with respect to the certified questions for the Court of Appeals, which sat en banc. SpeechNow's appeal and the en banc proceedings were then consolidated. In this time, the Supreme Court found in Citizens United that BCRA's ban on corporate and labor union and independent expenditures was unconstitutional.

The Court of Appeals first noted that contribution limits necessarily touch upon First Amendment interests. SpeechNow.org v. Federal Election Com'n, 599 F.3d 686 at

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<sup>41</sup> Michelle Levi, *McCain: Campaign Finance Reform Is Dead*, CBS News (January 24, 2010, 11:27 AM), [http://www.cbsnews.com/8301-3460\\_162-6136386.html](http://www.cbsnews.com/8301-3460_162-6136386.html).

692 (2010). The government must then demonstrate a “countervailing interest that outweighs the limit's burden.” SpeechNow.org, 599 F.3d 686 at 692. Using precedent, the court isolated this interest to be one of preventing actual or perceived corruption. Id. Citizens United, it found, was controlling in declaring that the “government has *no* anti-corruption interest in limiting independent expenditures.” Id. FECA’s contribution limits on independent expenditures were, thus, an unconstitutional burden on the petitioner’s First Amendment rights. Mirroring Citizens United, however, the Court of Appeals upheld the organization and disclosure requirements. With respect to these regulations, the government is not limited to an anticorruption motive and need only show a “substantial interest” to which the regulation bears a “substantial relation.” Id. at 696. The Court of Appeals found the government’s interest in campaign finance information being publicly available and, consequently, preventing further violations of other campaign finance laws (e.g. the ban on foreign contributions). Id. at 698. After Citizens United and its SpeechNow.org companion case at the appellate level, corporations, labor unions and individuals were permitted to spend unlimited sums on independent expenditures.

6. RNC v. FEDERAL ELECTION COMMISSION (D.D.C. 2010)

After Citizens United took square aim at one of the key provisions of BCRA, it was only a matter of time before the soft-money ban provisions would be challenged as well. The Republican National Committee, along with the State Republican Party of California and the Republican Party of San Diego, challenged BCRA’s restrictions on fundraising and expenditures done by the RNC for the benefit of its state and local parties. In order to navigate around the Court’s holding in McConnell, the RNC claimed that Citizens United worked to undermine the government’s interest in preventing

corruption. Republican Nat. Committee v. Federal Election Com’n, 698 F.Supp.2d 150 at 158 (2010). The Court restated the Buckley Court’s meaning of corruption, refining it to quid pro quo corruption, while declaring that “[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt.” Id. McConnell had been decided as a facial challenge, so the RNC brought its case as an as-applied challenge, declaring its intention not only to prohibit federal candidates and officeholders from soliciting soft money funds, but also to deny soft money contributors access to these individuals. Id.

The District Court noted that McConnell not only relied on quid pro quo corruption, but also the close relationship between federal officeholders and the national parties.” Id. at 159. It did, however, seem to leave the door open to an appeal when it declared that McConnell was “ambiguous on the question whether the ‘unity of interest’ between national parties and their candidates and officeholders was an independently sufficient rationale for the Court to uphold the blanket ban on soft-money contributions to national parties.” Id. at 160. The Supreme Court ultimately affirmed this holding, cementing the BCRA restrictions on national party committees.<sup>42</sup> Republican Nat. Committee v. Com’n, 698 F.Supp.2d 150 (D.D.C. 2010), *aff’d* 130 S.Ct. 3544 (2010).

### **C. Campaign Finance Reform Takeaways**

While the Court has never found a constitutional requirement for regulating the financing of elections, it has generally found campaign finance reform legislation to be consistent with Congress’ interest in preventing corruption and increasing public confidence in the electoral process. This interest is implicated when individuals and organizations attempt to influence the federal elections, and the reach can even extend to

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<sup>42</sup> 130 S.Ct. 3544

those entities whose nature is not exclusively federal (i.e. party committees), if those entities are vulnerable to exploitation by federal entities. Congress' attempt to regulate these elections by limiting their funding to certain sources, contribution limits and disclosure requirements, has been found to serve this interest. The same has not been found to be true for caps on personal and independent expenditures, attempts to even out spending among candidates in a particular race or disparate treatment between for profit and nonprofit entities in regulating their ability to influence federal elections. Additionally, disclosure requirements have consistently been upheld as serving the government interest of informing the electorate about the financing of elections. Lower courts have similarly held that in light of Citizens United limits on individual independent expenditures are unconstitutional, while reiterating the Court's previous holdings on organization and disclosure requirements, along those related to soft-money bans for national party committees. The campaign finance reforms of this century worked to prevent the influence of money in federal elections, but the lineage of cases that has followed has effectively isolated national party committees, federal PACs and candidate PACs as the only entities bound by the most exacting provisions of the law. In the next section, this essay will explore the effect this lopsided arrangement has had on the influence of these newly-emboldened 501(c)(4)s.

## VI. POST-CITIZENS UNITED CAMPAIGN FINANCE

Campaign finance law seeks to most aggressively regulate those entities that wish to influence federal campaigns. Individuals may only contribute so much to one candidate, party committee or PAC, and are further subject to an aggregate cap on these donations. In seeking to influence federal elections, candidates, party committees and PACs are in turn limited to only soliciting hard dollar funds on their own behalf. The Court has mostly upheld this double layer of protection outlined in BCRA that both ensures parties, committees, and PACs only use hard dollars to influence federal elections and prevents them from using conduits to accomplish that from which they are restricted. In allowing corporations and labor unions to both engage in electioneering communications and independent expenditures, the Court in Citizens United delivered an important blow to what had been a fairly formidable and tested piece of legislation. The decision effectively created a scheme in which national political parties and candidate committees are restricted in terms of how much money they can receive and they are required to regularly disclose these contributions in great detail. This stands in stark contrast to independent groups regulated by the IRS that, despite performing substantially similar, work are left to raise unlimited sums with few disclosure requirements. With corporations and labor unions now free to use general treasury funds to participate in the political process through independent expenditures and electioneering communications and to do so through the less transparent structure of a Section 501(c)(4) organization, it is no wonder that Senator McCain had declared campaign finance reform to have essentially died.<sup>43</sup>

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<sup>43</sup> Michelle Levi, *McCain: Campaign Finance Reform Is Dead*, CBS News (January 24, 2010, 11:27 AM), [http://www.cbsnews.com/8301-3460\\_162-6136386.html](http://www.cbsnews.com/8301-3460_162-6136386.html).

This post-mortem has been defined not only by an influx of 501(c)(4) applications to the IRS for which the agency was woefully unprepared as evidenced by the development of confusing and inappropriate criteria in the process, but also through the increase in corporate political activity. The impact of Citizens United can be demonstrated through two examples of this newfound activity.

**A. The 501(c)(4) Giant: Organizing for Action (“OFA”)**

In 2007, it seemed inconceivable that a junior Senator from Illinois would be able to take out the long-favored Democratic frontrunner Hillary Clinton in the 2008 primary election, but then-Senator Barack Obama was able to do just that. While the President certainly electrified the campaign trail with a compelling personal story and a consistent and clear message, the heart of his operation was undoubtedly the grassroots campaign he had built early in the nominating process. In John Heilemann and Mark Halperin’s chronicle of the 2008 elections, they noted this important investment:

Since the start of Obama’s bid for the nomination, [David] Plouffe had been chanting a mantra in his ear: “You need to own Iowa.” Owning Iowa meant establishing a deep and intimate connection to the state. It meant visiting any county and remembering what had happened the last time he was there—whom he’d met, why they mattered. It meant doing more than appreciating the grassroots machine that [his team] were building. It meant being invested in it, living and breathing it, becoming one with it.<sup>44</sup>

Candidate Obama turned out breathtaking crowds and ultimately defied the conventional wisdom in winning the Iowa caucuses in January 2008 largely as a result of this grassroots structure. This coordinated structure, defined by a deft use of both technology and volunteers, was quickly replicated the other states throughout the primary process. It was also useful for fundraising; by January 2008, the Obama campaign had raised nearly

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<sup>44</sup> John Heilemann and Mark Halperin, *Game Change* 159 (2010).

\$32 million with a substantial portion of that coming from online donations.<sup>45</sup> After he had clinched the Democratic nomination, then-Senator Obama sent shockwaves through the political system when he rejected nearly \$85 million in public financing for his campaign. He bet big on the 1.5 million individual donors who had given to him in the primary and it paid off: between the primary and general election the Obama campaign raised almost \$800 million dollars, which was nearly double what his challenger and campaign finance crusader Senator John McCain had been able to raise.<sup>46</sup> At the end of the 2008 elections, Obama for America would be remembered for being one of the most well-run and successful campaigns in American history.

For the President's grassroots team, however, their efforts did not end when the last ballot had been cast and they sought to keep the organization alive. Organizing for America, a 501(c)(4) project of the Democratic National Committee, was thus born. The organization operated out of the DNC in Washington, D.C. and harnessed the President's vast network of emails and volunteers to promote the his first-term agenda, including advocacy for changes in healthcare, environmental and fiscal policy.<sup>47</sup> A report from *The New York Times* succinctly described the organization's goal as "transforming the YouTubing-Facebooking-texting-Twittering grass-roots organization that put Mr. Obama in the White House into an instrument of government."<sup>48</sup>

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<sup>45</sup> Leslie Wayne and Jeff Zeleny, *Enlisting New Donors, Obama Reaped \$32 Million in January*, The New York Times (February 1, 2008), <http://www.nytimes.com/2008/02/01/us/politics/01donate.html>.

<sup>46</sup> Shailagh Murray and Perry Bacon Jr., *Obama to Reject Public Funds for Election*, The Washington Post (June 20, 2008), [http://articles.washingtonpost.com/2008-06-20/politics/36814638\\_1\\_obama-and-mccain-general-election-straight-talk-express](http://articles.washingtonpost.com/2008-06-20/politics/36814638_1_obama-and-mccain-general-election-straight-talk-express).

<sup>47</sup> Chris Cillizza, *Obama Announces "Organizing for America,"* The Washington Post (January 17, 2009, 11:33 AM), <http://voices.washingtonpost.com/thefix/white-house/obama-announces-organizing-for.html>.

<sup>48</sup> Jim Rutenberg and Adam Nagourney, *Melding Obama's Web to a YouTube Presidency*, The New York Times (January 25, 2009), <http://www.nytimes.com/2009/01/26/us/politics/26grassroots.html>.

Organizing for America was particularly active in pushing the President's healthcare reform agenda. In October 2009, for example, the organization held a "Time to Deliver on Health Reform" event in which the goal was to engage supporters to make over 100,000 phone calls to Members of Congress—a goal that organizers quickly beat by nearly triple the amount.<sup>49</sup> The President's grassroots base was alive and well.

As the 2012 elections approached, the President's team once again revived its state-based grassroots structure. According to campaign manager Jim Messina, keeping Organizing for America alive between the first campaign and the reelect was the key to the President's success:

It kept our super volunteers active in the organizations and gave them a reason to talk to their neighbors for two years and continue to grow their ability and talent, and then second, it put a whole bunch of young kids who were kind of the second-and-third-level people in the '08 race in analytics and gave them a home in the DNC...and a patron at the White House.<sup>50</sup>

The campaign worked through its state organizations to accomplish these goals. Like the relationship between the DNC and Organizing for America, the state versions operated as projects of the state parties. Indeed, Organizing for America employees were on the state party payroll in most cases, financed through transfers from the national party committee.<sup>51</sup> In Ohio alone, Organizing for America had 130 offices employing seven hundred staffers as of Election Day 2012.<sup>52</sup> The President's grassroots structure undoubtedly helped him win a second term in the short term, but its long-term value was

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<sup>49</sup> Dawn Teo, *Congress "Getting Completely Crushed" With Over 100,000 Calls For Obama's Healthcare Reform*, The Huffington Post (October 20, 2009, 2:24 PM), [http://www.huffingtonpost.com/dawn-teo/ofa-healthcare-phonebank\\_b\\_327418.html](http://www.huffingtonpost.com/dawn-teo/ofa-healthcare-phonebank_b_327418.html).

<sup>50</sup> Dan Balz, *Collision 2012: Obama vs. Romney and the Future of Elections in America* 80 (2013).

<sup>51</sup> Paul Blumenthal, *Obama Ground Game: State Parties Flush With Cash In Swing States*, The Huffington Post (October 24, 2012, 5:33 PM) [http://www.huffingtonpost.com/2012/10/24/obama-ground-game-swing-states\\_n\\_2009600.html](http://www.huffingtonpost.com/2012/10/24/obama-ground-game-swing-states_n_2009600.html).

<sup>52</sup> Dan Balz, *Collision 2012: Obama vs. Romney and the Future of Elections in America* 325 (2013).

undoubtedly the treasure trove of data it was able to collect. The Obama campaign collected millions of key data points about voters that were used to raise money, target messaging and eventually model turnout.<sup>53</sup>

Shortly after the President's second Inauguration, it was announced that Organizing for America would be reincorporated as a 501(c)(4) organization operating separately from the DNC whose primary purpose would be to promote the President's agenda. Progressive activists critical of the Court's decision in Citizens United immediately showed opposition to the idea that the grassroots organization would use the very nonprofit vehicle that the Court's decision had, in their opinion, wrongfully empowered.<sup>54</sup> This prompted OFA to issue a statement two months later that it will disclose the donation amount, name, city and state of donors who gave \$250 or more every quarter. Messina, who serves as the OFA's national chairman, also confirmed that the organization would not accept contributions from corporations, federal lobbyists or foreigners (notably, this list did not include labor unions).<sup>55</sup> While this was done to quell criticism that the organization was attempting fundraising behind the shroud of 501(c)(4) secrecy, some public watchdog groups noted that the voluntary disclosure lacked the employer, occupation and address information required of political committees.<sup>56</sup>

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<sup>53</sup> Michael Scherer, *Inside the Secret World of the Data Crunchers Who Helped Obama Win*, TIME (November 7, 2012), <http://swampland.time.com/2012/11/07/inside-the-secret-world-of-quants-and-data-crunchers-who-helped-obama-win/>.

<sup>54</sup> Andy Kroll, *Post-Election, The Obama Machine Goes to the Dark (Money) Side*, Mother Jones (January 18, 2013, 9:37 AM), <http://www.motherjones.com/mojo/2013/01/post-election-obama-machine-goes-dark-money-side>.

<sup>55</sup> Jim Messina, *Why we're raising money to support Obama agenda*, CNN Opinion (March 7, 2013, 10:04 AM), <http://www.cnn.com/2013/03/07/opinion/messina-organizing-for-action/index.html?iref=allsearch>.

<sup>56</sup> Dave Levinthal, *Obama nonprofit not disclosing all donor data*, The Center for Public Integrity (March 21, 2013, 12:08 PM), <http://www.publicintegrity.org/2013/03/21/12345/obama-nonprofit-not-disclosing-all-donor-data>.

Another area of concern appeared to be focused on OFA's control of presidential resources. After the 2012 elections, OFA took control over official Barack Obama Twitter account and Facebook Fan Page, each having millions of followers. Melanie Sloan, head of Citizens for Responsibility and Ethics in Washington, stated her belief that "the White House might well be violating the Presidential Records Act, which requires preservation of presidential records."<sup>57</sup> Additionally, the President's rumored presence at quarterly meetings with donors who had given \$500,000 or more, raised concerns that this marked the return of paying for access to the White House from the 1990s.<sup>58</sup>

Of paramount interest is what will happen to the valuable voter data file that was amassed by the Obama camp during the 2012 campaign. As of February 2012, a spokeswoman for OFA confirmed that while the file was owned by the Obama 2012 reelection campaign that it had been leased to OFA.<sup>59</sup> An outstanding question remains as to whether or not this rich and complex file will be shared with Democratic candidates in future cycles. As of July 2013, the Obama 2012 campaign had raised several hundred thousand dollars to retire its campaign debt simply by renting its mailing list.<sup>60</sup>

During the government shutdown of 2013, Organizing for Action released a thirty-second advertisement entitled "Irresponsible" that criticized Congressional Republicans for not passing a continuing resolution that would have kept the government funded during an interim period. The advertisement, which was broadcast nationally on

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<sup>57</sup> Aaron Blake, *Obama sharing Twitter account with controversial campaign spin-off*, The Washington Post (March 22, 2013, 12:18 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/03/22/obama-sharing-twitter-account-with-controversial-campaign-spin-off/>.

<sup>58</sup> Tom Hamburger, *Obama's new political group to lure unlimited donations*, The Washington Post (February 23, 2013), [http://www.washingtonpost.com/politics/obamas-electoral-engine-harnessed-by-group-collecting-corporate-donations/2013/02/23/7a0c9820-7d19-11e2-9a75-dab0201670da\\_story\\_2.html](http://www.washingtonpost.com/politics/obamas-electoral-engine-harnessed-by-group-collecting-corporate-donations/2013/02/23/7a0c9820-7d19-11e2-9a75-dab0201670da_story_2.html).

<sup>59</sup> Ibid.

<sup>60</sup> Jonathan Salant, *Obama Campaign Rents Mailing List to Obama Nonprofit*, Bloomberg (July 17, 2013, 11:23 AM), <http://go.bloomberg.com/political-capital/2013-07-17/obama-rents-list-to-allied-nonprofit-lends-it-to-inaugural-committee/>.

cable news, directed viewers to the Organizing for America website with the following message set to a picture of House Speaker John Boehner (R-OH) and House Majority Leader Eric Cantor (R-VA): “Tell them to stand up to the Tea Party.”<sup>61</sup> The advertisement then flashes its required disclosure, “Paid for by Organizing for America.” This is precisely the type of issue advocacy that OFA in which the organization had announced its intention to engage from its establishment. The advertisement is patently not an example of express advocacy, as it is not clearly identifying a federal candidate for election or defeat in an election; it does, however, present a sharply critical picture of Republican Members of Congress. Since it does not touch upon a federal election, this is not the type of speech that the federal government has an interest in regulating through campaign finance laws, but the advertisement undoubtedly made a foray into the political process at a key legislative moment. Voluntary disclosures on OFA’s behalf make it possible for the electorate to see the donors that may have financed the advertisement, but the organization is under no legal obligation to do this or continue this practice. The speech featured in the advertisement is precisely the kind that foes of *Citizens United* would begin to dominate the political discourse: impactful political speech funded by sources that can remain anonymous.

Organizing for America and its Obama for America predecessor were two of the most successful campaign efforts in history. Together, they oversaw the proliferation of an intricate grassroots structure based on personal relationships and the resulting data. Imagining their inherent value alone in comparison to the value of the type of civic associations, like civic leagues or local volunteer fire departments that were originally

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<sup>61</sup> Advertisement, “Irresponsible,” Organizing for America (October 7, 2013), <https://www.youtube.com/watch?v=tgqMEslkoHw>.

contemplated by the IRS Code, is nearly incomprehensible. As campaigns employ greater resources to build better and more technologically-savvy structures, the example set by OFA in reincorporating as a 501(c)(4) with the intent to influence the political process has the potential dramatically change the way political committees function in their post-election state.

### **B. The Tyranny of the Minority: The Empowerment of Outside Groups**

After the House of Representatives failed to pass budget or an appropriations continuing resolution, the federal government entered into a shutdown period in October 2013 during which time thousands of government workers were furloughed and nonessential services were cut. After an arduous two weeks, the shutdown ended on October 16, 2013. That afternoon, Club for Growth, a 501(c)(4) organization that advocates for fiscally conservative policies, sent out a press release entitled: “Club News: Key Vote Alert – “No” on Reid-McConnell Deal[.]”<sup>62</sup> The press release was sent amid reports that Senate Majority Leader Harry Reid (D-NV) and Minority Leader Mitch McConnell (R-KY) had come to a compromise to end the two-week long government shutdown. In indicating that it had planned to “key vote” the compromise plan, the group fired a warning shot to the dozens of Members of Congress whose campaigns it supports with endorsements and financial backing that voting for the bill could cost them come election time. Heritage Action for America, the 501(c)(4) arm of the conservative think tank The Heritage Foundation, along with FreedomWorks for America, another 501(c)(4) organization, had created similar litmus test.<sup>63</sup>

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<sup>62</sup>, Club for Growth, Key Vote Alert – “No” on Reid-McConnell Deal (October 16, 2013), <http://www.clubforgrowth.org/perm/?postID=16217>.

<sup>63</sup> Heritage Action for America: Scorecard, <http://www.heritageactionscorecard.com/about> (last visited May 3, 2014).

The goal of these groups and others is a simple one: attractive conservative candidates with the promise of money and endorsements, use “key vote” scorecards to keep them honest and expend resources in forcing out less conservative lawmakers in primaries. In the 2012 cycle, for example, the FreedomWorks Super PAC spent nearly \$10 million dollars in independent expenditures advocating against Republican candidates compared to only \$4 million spent against Democrats.<sup>64</sup> When one hundred Republican Members failed to sign a letter penned by freshman Representative Mark Meadows (R-NC) urging them to engage in the fight to defund the Affordable Care Act, Heritage Action ran critical online advertisements in their districts.<sup>65</sup> David Wasserman, from the nonpartisan Cook Political Report, mused to *The New York Times*, ““When else in our history has a freshman member of Congress from North Carolina been able to round up a gang of 80 that’s essentially ground the government to a halt?””<sup>66</sup> With corporations and labor unions now able to spend freely in elections in a post-Citizens United world, it has simply become easier for these groups to raise larger sums of money to achieve their ends.

Without evaluating the merits of BCRA, the legislation had the effect of artificially creating an even playing field: national committees, candidate committees and federal PACs were limited by the amount of donations they could receive from individual donors and corporations and labor unions were proscribed from engaging in electioneering communications. Citizens United removed that prohibition, but left the

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<sup>64</sup> Club for Growth, Outside Spending Summary 2012, The Center for Responsive Politics (last visited May 3, 2014), <http://www.opensecrets.org/outsidespending/detail.php?cycle=2012&cmte=Club+for+Growth>.

<sup>65</sup> Sheryl Gay Stolberg and Mike McIntire, *A Federal Budget Crisis Months in the Planning*, The New York Times (October 5, 2013), [http://www.nytimes.com/2013/10/06/us/a-federal-budget-crisis-months-in-the-planning.html?pagewanted=1&hp&\\_r=0](http://www.nytimes.com/2013/10/06/us/a-federal-budget-crisis-months-in-the-planning.html?pagewanted=1&hp&_r=0).

<sup>66</sup> Ibid.

existing controls on FEC-regulated committees in tact. Given this current state, it is not difficult to see why a wealthier donor would prefer to give unlimited and undisclosed sums to a 501(c)(4), rather than both be limited in his or her influence and be revealed as a source of campaign funds through a traditional committee. Next, this essay will explore how these committees are fairing in the competitive age of big spending by independent groups post-Citizens United.

## VII. IS THE PARTY OVER?

After the Court's decision in Citizens United, 501(c)(4)s have become potent political entities in defining issues and influencing elections. This can be seen in the example of Organizing for Action through which an outside organization was able to take over an existing party structure and is now independently exercising its traditional functions. Their influence is also demonstrated by the newfound power of outside groups, who act as the functional equivalent of parties, grading and culling elected officials in both electoral and legislative battles.

Where does the national party committee fit into this scheme? In the case of the departure of OFA from the DNC, it has left the Party nearly on the edge of bankruptcy and without key members of the Obama team such as Jim Messina and Stephanie Cutter, both of whom are involved with OFA. As of September 2013, the DNC owed various creditors in excess of \$17 million.<sup>67</sup> OFA, which leases the Obama 2012 email list and controls his influential social media pages, has emerged as its own vibrant entity forcing the DNC to compete for its own top donors. According to a CNN report, “[a]ll of the top-tier OFA donors this year have been prolific supporters of the DNC in past years. But of the 13 who cut six-figure checks to OFA in the first half of this year, only three gave to the DNC over the same period[.]”<sup>68</sup> The report further notes that in an off-year, OFA undoubtedly has a more appealing pitch in “offer[ing] the glamour of helping the President wage the battles unfolding day by day on the front pages,” rather than the more

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<sup>67</sup> Kent Cooper, *Both RNC and DNC Raise \$7 Million in September, but DNC Still in Debt*, Roll Call (October 20, 2013, 6:17 PM), <http://blogs.rollcall.com/moneyline/both-rnc-and-dnc-raise-7-million-in-september-but-dnc-still-in-debt/>.

<sup>68</sup> Tory Newmyer, *The DNC is nearly broke*, CNN Money (September 30, 2013, 10:20 AM), <http://finance.fortune.cnn.com/2013/09/30/dnc-debt-crisis/>.

mundane party-building work in which the DNC will engage during this time.<sup>69</sup> While it is likely that the DNC's fundraising prospects will increase as the 2014 midterm elections approach, both in terms of money and staff, OFA's departure has undoubtedly left the Party in a precarious situation ahead of an important election cycle in which it hopes to maintain a Senate majority and make gains in the House.

Democrats are not the only ones facing friendly fire these days. After Citizens United, outside conservatives groups have operated at their zenith in attempting to redefine the party in both electoral and legislative contests. A review of the independent spending in the 2012 Republican primaries by groups such as the Club for Growth, FreedomWorks, the Senate Conservatives Fund, Senate Conservatives Action and the Tea Party Express, shows that they accounted for 54%, or a majority, of all spending in Republican primaries.<sup>70</sup> Following the enactment of BCRA, the RNC, National Republican Congressional Committee ("NRCC"), and the National Republican Senatorial Committee ("NRSC") all experienced a precipitous decline in fundraising. The RNC, for example, raised nearly \$500 million in 2000—the high water mark of soft money contributions—and fell almost \$100 million short of that in 2012.<sup>71</sup> This is the opposite of the impact Citizens United had on the fundraising and spending of outside groups, after which these groups saw historic gains. In 1998, outside efforts spent \$9.9 million

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<sup>69</sup> Tory Newmyer, *The DNC is nearly broke*, CNN Money (September 30, 2013, 10:20 AM), <http://finance.fortune.cnn.com/2013/09/30/dnc-debt-crisis/>.

<sup>70</sup> Paul Blumenthal, *Citizens United, McCain-Feingold Fueled Congress' Shutdown Politics*, The Huffington Post (October 16, 2013, 2:01 PM), [http://www.huffingtonpost.com/2013/10/16/citizens-united-shutdown\\_n\\_4108252.html](http://www.huffingtonpost.com/2013/10/16/citizens-united-shutdown_n_4108252.html).

<sup>71</sup> *Ibid.*

on independent expenditures, while in 2012, “non-party independent expenditures totaled just over \$457 million[.]”<sup>72</sup>

The practical application of these trends paints a dangerous picture for incumbents. Shortly after the Senator McConnell came to a compromise with Senate Democrats to end the government shutdown in October 2013, he was welcomed by the news that the Senate Conservatives Fund had endorsed his primary opponent Matt Bevin in his 2014 election bid. In a statement, the organization’s Director Matt Hoskins opined that the primary wouldn’t be “easy” because McConnell had “the support of the entire Washington establishment.”<sup>73</sup> Ten days later, the group announced a \$330,000 buy to air an advertisement critical of McConnell’s government shutdown deal.<sup>74</sup> This buy was in addition to a nearly identical buy that the organization had funded earlier in the Fall, condemning McConnell “for not doing enough in the push to defund President Barack Obama’s health care reforms.”<sup>75</sup> In the 2012 cycle, the Senate Conservatives Fund raised nearly \$16 million dollars. That figure is roughly what Senator McConnell had reported raising as of September 2013 for the 2014 cycle. The NRSC, which is backing McConnell’s reelection bid, raised about \$25 million with \$3 million cash on hand remaining.

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<sup>72</sup> Reid Wilson, *A Decade After McCain-Feingold, Election Spending Spikes*, The National Journal (July 11, 2013), <http://www.nationaljournal.com/columns/on-the-trail/a-decade-after-mccain-feingold-election-spending-spikes-20130711>.

<sup>73</sup> Luke Johnson, *Mitch McConnell’s Tea Party Opponent Endorsed By Senate Conservatives Fund*, The Huffington Post (October 18, 2013, 11:28 AM), [http://www.huffingtonpost.com/2013/10/18/mitch-mcconnell-matt-bevin\\_n\\_4122484.html](http://www.huffingtonpost.com/2013/10/18/mitch-mcconnell-matt-bevin_n_4122484.html).

<sup>74</sup> Luke Johnson, *Senate Conservatives Action Goes On The Air Against Mitch McConnell*, The Huffington Post (October 29, 2013), [http://www.huffingtonpost.com/2013/10/29/senate-conservatives-mitch-mcconnell\\_n\\_4173519.html?ref=topbar](http://www.huffingtonpost.com/2013/10/29/senate-conservatives-mitch-mcconnell_n_4173519.html?ref=topbar).

<sup>75</sup> Roger Alford, *Conservative group endorses Matt Bevin in Ky.*, Yahoo! News (October 18, 2013, 2:07 PM), <http://news.yahoo.com/conservative-group-endorses-matt-bevin-ky-170747505--election.html>.

Incumbency certainly has its advantages and it is true that other independent expenditure outfits will come to the Senator's aid. These numbers might make the case for Hoskins' claim that the "Washington establishment" would present challenges to Bevin in the primary, but they do not tell the entire story. First, the Senate Conservatives Fund is likely to not be the only outside group to back Bevin's candidacy, opening the door to more spending. As *The Boston Globe* noted, "McConnell's job as the most powerful Republican in the Senate has made him a top target of... archconservatives from around the country...portraying him as a symbol of all that is wrong with Washington."<sup>76</sup> Second, the NRSC has to consider the thirty-two other Senate seats up in 2014 in allocating its resources. Finally, the Democratic nominee Alison Lundergan Gimes has already outpaced McConnell in the first fundraising quarter, making it necessary for McConnell's campaign to conserve resources for use beyond the primary. Despite characterizing itself as antiestablishment, the Virginia-based Senate Conservatives Fund walked away from the government shutdown as perhaps one of few winners on the right, having raked in \$1.5 million alone during August using a 'defund Obamacare' strategy.<sup>77</sup>

Under BCRA's limited state party transfer provisions and the proliferation of outside spending, state parties are also bearing the brunt of this uneven campaign finance system. *Politico* recently reported that state parties are struggling to raise money as

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<sup>76</sup> Noah Bierman, *2 sides target Mitch McConnell in Ky. Senate race*, *The Boston Globe* (February 24, 2014), <http://www.bostonglobe.com/news/nation/2014/02/24/mitch-mcconnell-squeezed-from-right-and-left-fight-win-reelection-and-take-over-senate/rkQOrqba9IYUdqWf92DWI/story.html>.

<sup>77</sup> A Washington Post-ABC News survey showed that Republicans' favorability had sunk to an all-time low of 32% after the October 2013 government shutdown. Paul Steinhauser, *Shutdown Poll: No winners by GOP bigger loser than Dems*, CNN (October 14, 2013, 5:19 PM), <http://politicalticker.blogs.cnn.com/2013/10/14/shutdown-poll-no-winners-but-gop-bigger-loser-than-dems/>.

outside groups supplant their efforts.<sup>78</sup> This results in a political landscape where “candidates can be more beholden to national organizations or single-issue groups rather than state party leaders.”<sup>79</sup> This has resulted in a fierce competition between the state parties and outside organizations for donors, a contest the former is undoubtedly losing. In 2000, state parties raised an average of \$5.4 million for nonfederal races—a figure that dropped to \$2.8 million by 2012.<sup>80</sup>

While the full impact of Citizens United has yet to be seen after just two election cycles, it is evident that political parties and candidate committees are beginning to feel the brunt of its influence on outside spending. If 2012 was marked by Super PAC’s enhanced ability to “prop up rivals who otherwise were woefully short on money” in the Republican primary, the 2014 cycle is likely to see parallel activity on House and Senate challengers.<sup>81</sup>

Article I, Section 4 of the Constitution empowers Congress to regulate federal elections and while efforts to control the financing of elections necessarily touch upon First Amendment rights, the courts in the spirit of comity have largely left Congress to weigh these competing interests. The importance of preventing corruption and maintaining confidence in the electoral system has consistently been found to be a legitimate government interest when money intersects directly or indirectly with federal elections (though, notably, the government rarely presents evidence of actual corruption, choosing to rely on the “appearance” of corruption instead). The Court has never found, however, that there exists some constitutional requirement for Congress to enact some

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<sup>78</sup> Byron Tau, *Last call for state parties?*, POLITICO (February 16, 2014, 6:57 AM), <http://www.politico.com/story/2014/02/last-call-for-state-parties-103559.html>.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Dan Balz, *Collision 2012: Obama vs. Romney and the Future of Elections in America* 351 (2013).

exacting level of regulations; rather, there exists a permissible scope of in which congressional regulations will be considered valid. In permitting corporations and labor unions to engage in independent expenditures and electioneering communications, the Court undoubtedly delivered a blow to the intricate framework set up by BCRA, but there is a strong argument that Congress went too far in making distinctions between for-profit and non-profit corporations in the original legislation. Corporations have traditionally enjoyed personhood recognition under the law, so the Court could not justify the disparate treatment on First Amendment grounds that corporations are not natural persons.

What appears to be most troubling to campaign reform advocates is the lack of disclosure requirements that allow 501(c)(4)s to fund their political activities with little scrutiny. Indeed, many critics of the campaign finance reforms outlined in BCRA do not take issue with disclosure requirements. A well-informed citizenry requires transparency in the political discourse, but simply imposing disclosure requirements on 501(c)(4)s similar to those of other political committees would have minimal impact. Corporations and labor unions have entered the political sphere and they have a strong interest in staying involved. Spending and fundraising levels for the outside groups that benefit from these sources have soared, while fundraising for national party committees has been artificially strangled by BCRA's limitations.

The extreme asymmetry that has been created by the BCRA-Citizens United would seem to have the effect of unconstitutionally limiting the party members' First Amendment free speech and associational rights by diminishing the quality of the speech. Individual and aggregate contribution caps in comparison to the unlimited fundraising

and spending abilities of outside groups creates an imbalance that was not contemplated in the Court's facial evaluation of BCRA's constitutionality. The plaintiffs in McConnell (including, ironically, Senator McConnell whose candidacy now suffers from this structure) made the argument that the soft money ban on party committees violates equal protection implicated in the Fifth Amendment's Due Process Clause because it "discriminates against political parties in favor of special interest groups." McConnell, 540 U.S. 93 at 187.

The Court first pointed out that the contribution limits to political parties exceeded those of nonparty political committees. McConnell, 540 U.S. 93 at 188. The unlimited spending now permitted by vast corporations and labor unions would seem to render this argument moot. More importantly, the McConnell Court clearly did not have the benefit of seeing the effects of Citizens United when it argued that "Congress is fully entitled to consider the real-world differences between political parties and interest groups" in writing campaign finance laws:

Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Id.

In 2013, a DNC that is now fighting its campaign-turned-501(c)(4) counterpart for donors, or Congressional Republicans whose seats were threatened by pro-shutdown groups for dissident votes, would likely take strong exception that power of political parties dominates that of special interest groups.

While the most stringent campaign finance regulations remain in tact for candidate PACs and multicandidate PACs, along with national party committees, the latter is uniquely situated within the political world. In the case of candidate-based organizations, having a specific individual or office for which to solicit donors is arguably easier than in trying to build a donor class around a faceless collective set of ideas and tactics. Candidates, for example, can refine their pitch to national or local issues that their offices will specifically influence. While the national party committees work to aid these candidates in their elections, there is less of a direct connection between dollars raised and electoral outcomes than there is for candidate committees. National political parties also perform many of the important, but less attractive tasks like voter registration, voter identification and state and local party building. The work of national political committees is even more undervalued when juxtaposed with the projects of outside groups because these groups tend to focus on niche causes that are attractive to larger donors, who tend to be more single-issue focused. For many donors this is not a difficult decision; either contribute to a national party committee bound by contribution limits, performing important, but mundane administrative tasks and supporting a diversity of candidates, or the virtually limitless, anonymous single-issue organization of your choosing, and in some cases, your creation.<sup>82</sup>

If the national party system were a relic of the American political past, these arguments may not carry as much force; the fact remains, however, that their efforts and abilities have been artificially dampened by a broken campaign finance system. Where outside organizations often coalesce around a timely issue, national party committees

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<sup>82</sup> Phillip Bump, *The Age of the Single-Issue, Mega-Donor Political Party Has Arrived*, Yahoo! News (February 18, 2014, 9:32 AM), <http://news.yahoo.com/age-single-issue-mega-donor-political-party-arrived-143200645.html>.

provide a unifying consistency for its members through the different election cycles; where outside organizations are run and funded by a small number of wealthy individuals, national party committees are made up of the elected leadership from each state and are held accountable to those members in regular elections; and where outside organizations typically seek to reach its targets for one vote in a single election, national party committees seek to build a lifelong relationship with its registrants, encouraging them not only to vote, but to also perform vital volunteer efforts that help sustain the party. Most importantly, membership in national parties is the single most visible form of political expression for most Americans, and denying national party committees the opportunity to vigorously advocate on behalf of its members interests is a harmful dilution of those members' associational freedoms.

Groups organized as a 501(c)(4) have a clear advantage: they are not subject to the contribution limits and disclosure requirements like their FEC-regulated counterparts. The provision of the tax code, intended to benefit organizations like civic leagues and volunteer fire associations, was evidently unprepared for use by corporations emboldened with newfound political power post-Citizens United. With the Court having decided the issue and Congress too hopelessly gridlocked to offer a legislative fix, the Executive Branch has, perhaps, the only short-term potential to find a solution.

## VIII. THE EXECUTIVE ANTIDOTE TO CITIZENS UNITED

In November 2013, the Obama Administration announced proposed IRS regulations aiming to limit the scope of permissible political activities performed by 501(c)(4)s organizations.<sup>83</sup> Under the current rules, political activity is considered “social welfare” so long as it meets the facts and circumstances test and does not constitute more than half of the organization’s activities. The new guidelines single out “candidate-related political activity” as not benefitting the social welfare.<sup>84</sup> “Candidate-related political activity” includes communications, grants and contributions, and activities closely related to elections or candidates.<sup>85</sup>

This would effectively gut the way politically-active 501(c)(4)s conduct their activities in campaigns, which has not gone unnoticed by liberals and conservatives alike. *The Washington Post* reported that the majority of the 23,000 comments that have been filed in the notice and comment period have been “sharply critical,” with conservatives claiming it is “a scheme to silence President Obama’s critics” and liberals frowning upon the First Amendment implications.<sup>86</sup> Lawmakers have also been divided on the proposed regulations. While Representative Chris Van Hollen has withdrawn his suit to compel

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<sup>83</sup> Press Release, Internal Revenue Service, Treasury, IRS Will Issue Proposed Guidance for Tax-Exempt Social Welfare Organizations (November 26, 2013), <http://www.irs.gov/uac/Newsroom/Treasury,-IRS-Will-Issue-Proposed-Guidance-for-Tax-Exempt-Social-Welfare-Organizations>.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Matea Gold, *IRS plan to curb politically active groups is threatened by opposition from both sides*, *The Washington Post* (February 12, 2014), [http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da\\_story.html](http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da_story.html).

the IRS to address the issue<sup>87</sup>, Republicans on the House Ways and Means Committee have attempted to block any rules from taking effect for a year.<sup>88</sup>

The proposed regulations would have the potent effect of curbing the current level of activity performed by 501(c)(4) organizations, but this does nothing to correct the fundamental unfairness that exists for federally-regulated committees, and in particular, national party committees. Even if 501(c)(4)s are neutered as effective political organizations by these regulations because donors can no longer remain anonymous, Citizens United and SpeechNow.org still permit corporations, labor unions and individuals to spend unlimited amounts on independent expenditures and electioneering communications. The regulations do little but remove one (albeit, important) hurdle in the otherwise unobstructed path of wealthy donors, while making it difficult for federal committees to compete.

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<sup>87</sup> Eliza Newlin Carney, *Van Hollen and Allies Drop IRS Suit*, Roll Call (December 6, 2013, 12:51 PM), <http://blogs.rollcall.com/beltway-insiders/van-hollen-and-allies-drop-irs-suit/>.

<sup>88</sup> Matea Gold, *IRS plan to curb politically active groups is threatened by opposition from both sides*, The Washington Post (February 12, 2014), [http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da\\_story.html](http://www.washingtonpost.com/politics/irs-plan-to-curb-politically-active-groups-threatened-by-opposition-from-both-sides/2014/02/12/99dcfd2a-932a-11e3-b46a-5a3d0d2130da_story.html).

## IX. CONCLUSION

Congress is empowered to even the playing field by removing the artificial and largely arbitrary controls on political parties. Every major piece of campaign finance reform has been followed by runaway abuses of loopholes and an influx of money into the political process. Efforts to curb the influence of money in politics have only served to lead the wealthiest and most influential entities in the political process into the secretive confines of 501(c)(4)s – this only after the strict regulations on hard dollar committees had left these actors feeling as though their speech had been suppressed elsewhere. In an analysis of campaign finance reform done by the libertarian think-tank The Cato Institute, the author Bradley A. Smith notes that American elections have taken place for most of our nation’s history without the arbitrary and exacting campaign finance regulations that exist today.<sup>89</sup> Further, Smith points out that “since passage of the Federal Elections Campaign Act and similar state laws, the influence of special interests has grown, voter turnout has fallen, and incumbents have become tougher to dislodge.”<sup>90</sup> What makes Smith’s argument particularly compelling is that it was written prior to the passage of BCRA, and, yet, the post-FECA environment he describes has only worsened with more “reform.” Since Citizens United, top U.S. corporations have poured over \$173 million into 501(c)(4) organizations<sup>91</sup>; voter turnout from the 2008 presidential election to the 2012 election dropped from 61.6% to 58.2%<sup>92</sup>; and, finally, both U.S. House and

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<sup>89</sup> Bradley A. Smith, *Why Campaign Finance Reform Never Works*, The Cato Institute, <http://www.cato.org/publications/commentary/why-campaign-finance-reform-never-works>.

<sup>90</sup> *Ibid.*

<sup>91</sup> Michael Beckel, *Top U.S. corporations funneled \$173 million to political nonprofits*, The Center for Public Integrity (January 16, 2014, 12:01 AM), <http://www.publicintegrity.org/2014/01/16/14107/top-us-corporations-funneled-185-million-political-nonprofits>.

<sup>92</sup> Michael P. McDonald, *Turnout in the 2012 Presidential Election*, The Huffington Post (February 11, 2013, 1:09 PM), [http://www.huffingtonpost.com/michael-p-mcdonald/turnout-in-the-2012-presi\\_b\\_2663122.html](http://www.huffingtonpost.com/michael-p-mcdonald/turnout-in-the-2012-presi_b_2663122.html).

Senate reelection rates stand at about 90%.<sup>93</sup> With the rest of BCRA's provisions effectively declared "dead" by the Court's decision in *Citizens United*, Congress can right the current imbalance by removing hard dollar limits for political committees, and instead focus efforts on disclosure and transparency.

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<sup>93</sup> Reelection Rates Over the Years, The Center for Responsive Politics, <https://www.opensecrets.org/bigpicture/reelect.php> (last visited May 3, 2014).