

Campaign Finance Law and Nonprofit Electoral Campaign Activity
*After Citizens United**

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I. Introduction

Few campaign finance cases have drawn more public attention than the Supreme Court's decision on January 21, 2010 in *Citizens United v. Federal Elections Commission*.¹ In holding that corporations have a constitutionally protected right to engage in unlimited spending in support of or opposition to candidates for elected office, the Court invalidated a sixty-year-old federal law – and comparable laws in two dozen states – and overturned two prior Supreme Court decisions.² This was probably the most controversial Supreme Court campaign finance action since *Buckley v. Valeo*³ ushered in the era of modern campaign finance jurisprudence thirty-four years earlier. The significance of *Citizens United* and its consequences for campaign finance law and practice have been debated by lawyers, political scientists, politicians, and the general public ever since.

The relationship between *Citizens United* and the election campaign activities of nonprofit organizations is complex. The *Citizens United* decision grew out of an action brought by a nonprofit corporation tax-exempt under Section 501(c)(4) of the Internal Revenue Code.⁴ Indeed, virtually all of the litigation challenging and reshaping campaign

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¹ 130 S.Ct. 876 (2010).

² *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990); *McConnell v. FEC*, 540 U.S. 93 (2003) (in part).

³ 424 U.S. 1 (1976).

⁴ See *Citizens United v. FEC*, 530 F.Supp.2d 274, 275 (D.D.C. 2008). According to its website, "*Citizens United is an organization dedicated to restoring our government to citizens' control. Through a combination of education, advocacy, and grass roots organization, Citizens United seeks to reassert the traditional American values of limited government, freedom of enterprise, strong families, and national sovereignty and*

finance law has been instituted by nonprofit organizations, particularly right-to-life organizations tax-exempt under 501(c)(4), other (c)(4) advocacy organizations, and 501 (c)(6) chambers of commerce.⁵ To be sure, many nonprofit organizations had already been exempted from the federal and state bans on corporate campaign spending by a 1986 Supreme Court decision,⁶ but that decision protected only those nonprofits that took no money from business corporations and unions. *Citizens United* eliminated that limitation. Another Supreme Court decision in 2007 effectively exempted much corporate (including nonprofit) political spending from federal and state laws barring corporate electioneering, but *Citizens United* went further, clarifying and extending the opportunity for corporations and unions to participate in campaigns.⁷ Still, although recent news accounts have spotlighted the significant campaign role played by nonprofits in the current election cycle,⁸ other news stories on the rise of electioneering by nonprofits were published well before *Citizens United*.⁹

The most publicized development in the current election cycle has been the formation or rise to new prominence of a number of (c)(4) organizations – such as American Crossroads Grassroots Political Strategies (“GPS”), Americans for Job Security, American Future Fund, and Americans for Prosperity¹⁰ – as well as the Chamber of

security. Citizens United's goal is to restore the founding fathers' vision of a free nation, guided by the honesty, common sense, and good will of its citizens.” See Citizens United, <http://www.citizensunited.org/about.aspx>.

⁵ In the eight months since *Citizens United*, important federal court campaign finance decisions have been handed down in cases brought by, inter alia, SpeechNow.Org, a nonprofit association organized to promote free speech; the Center for Individual Freedom, a (c)(4) focused on judicial and legal reform; the Long Beach Area Chamber of Commerce, the Michigan Chamber of Commerce, the National Organization for Marriage, Protect Colorado Jobs, Inc, the Minnesota Chamber of Commerce, Minnesota Concerned Citizens for Life, Inc., and South Carolina Citizens for Life, Inc.

⁶ See *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

⁷ See *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

⁸ See e.g., Eliza Newlin Carney, “Brave New World of Political Spending for Nonprofits,” *National Journal*, March 15, 2010. See also Kenneth P. Vogel, “Crossroads Hauls in \$8.5 M in June,” *Politico*, June 30, 2010; Michael A. Memoli and Tom Hamburger, “Conservative Group Kicks Off \$4.1-million Election Ad Campaign,” *Latimes.com*, August 16, 2010; Ralph Z. Hallow, “Pro-GOP Nonprofits Kick in Millions,” *Washington Times*, August 19, 2010.

⁹ See, e.g., Bart Jensen, “Nonprofits Wield Some Serious Campaign Cash,” *CQ Politics*, March 8, 2009; Elizabeth Wasserman, “Nonprofits Walk Fine Line on Political Activity,” *Msnbc*, July 25, 2008, <http://www.msnbc.msn.com/id/25838144/print/1/displaymode/1098/>.

¹⁰ See, e.g., Jim Rutenberg, Don Van Natta, Jr., and Mike McIntire, “Offering Donors Secrecy, and Going on Attack,” *N.Y. Times*, October 11, 2010; Matt Viser, “Donor names stay secret as nonprofits politick,”

Commerce.¹¹ These organizations take donations from business corporations and individuals and use those funds to pay for campaign ads. Given the anecdotal evidence that many business corporations interested in electoral activity are reluctant to do so directly or publicly and prefer to channel their money through intermediary organizations, a key role of nonprofit (c)(4)'s and (c)(6) chambers of commerce in the post-*Citizens United* regime may be to provide the vehicles for collecting and pooling business corporation funds to pay for independent expenditures supporting or opposing candidates.

The principal focus of both legislation and litigation since *Citizens United* has been disclosure, that is, the publicizing of the names and affiliations of the individuals and firms financing campaign activity. The main Congressional response to *Citizens United* has been the DISCLOSE Act which, as the name suggests, is concerned mostly, albeit not exclusively, with disclosure. The DISCLOSE Act passed the House of Representatives in June 2010 but, for this Congress at least, died in the Senate. At least eight states have passed new campaign finance disclosure laws, and many others have debated disclosure law changes.¹² With corporate spending now constitutionally protected, disclosure is, for reformers, the only game in town. Indeed, it is the one regulatory technique a Supreme Court otherwise decidedly hostile to campaign finance regulation has blessed. *Citizens United* upheld the application of federal disclosure laws to corporate spending, finding disclosure entirely consistent with, indeed, supportive of, First Amendment values.

Much of the current public controversy over the electoral role of nonprofits has focused on the lack of disclosure of the identity of the donors to these nonprofits.¹³

Boston.com, October 7, 2010; Washington Post, "Americans for Prosperity's Big-bucks Attack Ads," September 28, 2010; Felicia Sonmez, "Who is Americans for Prosperity?" Washington Post, August 26, 2010; T.W. Farnam and Dan Eggen, "Interest-group Spending for Midterm Up Fivefold from 2006; Many Sources Secret," Washington Post, October 4, 2010.

¹¹ See, e.g., Dan Eggen and Scott Wilson, "Obama Continues Attack on Chamber of Commerce," Washington Post, October 11, 2010.

¹² National Conference of State Legislatures, "Life After *Citizens United*," August 10, 2010, <http://www.ncsl.org/default.aspx?tabid=19607>.

¹³ See, e.g., "Clean and Open Elections," N.Y. Times, October 6, 2010; Mike McIntire, "The Secret Sponsors," N.Y. Times, October 2, 2010; Michael Luo and Stephanie Strom, "Donor Names Remain Secret as Rules Shift," N.Y. Times, September 20, 2010; T.W. Farnam, "Despite Supreme Court Support, Disclosure of Funding for 'Issue Ads' has Decreased," Washington Post, September 15, 2010

Current reform efforts have aimed at (i) requiring the disclosure of donors to organizations – such as (c)(4)s and (c)(6)s -- whose primary activity is not electoral but that do pay for independent expenditures and (ii) requiring that the names of the principal funders of significant independent expenditure ads appear in the body of the ads themselves. These will surely draw constitutional challenges. Although the Supreme Court has endorsed disclosure, disclosure does raise questions concerning the First Amendment rights of those subject to disclosure obligations and of those whose names would be disclosed. The opponents of regulation, having succeeded in knocking down or paring back other laws, are now aiming their fire at disclosure requirements. By one recent count, reform opponents have brought legal challenges to the disclosure laws of nine states.¹⁴ Although these have generally not succeeded, more expansive disclosure will raise new questions.

This paper examines the implications of *Citizens United* for the campaign activities of nonprofits under federal and state campaign finance laws. Although federal tax law is a crucial part of the regulatory environment for nonprofit electoral activities, this paper will not address tax, but will leave that to others.

Part II provides the legal and factual background for *Citizens United* and summarizes its holding and consequences for the three major forms of campaign finance regulation – expenditure limits, contribution limits, and disclosure requirements. Part III discusses other significant campaign finance law developments concerning the pooling of corporate and individual funds in nonprofit intermediaries for the purpose of supporting electoral advocacy and the disclosure of the donors who may be financing the campaign spending of nonprofits. Part IV then focuses on current federal and state efforts to require nonprofits engaged in election spending to provide greater information concerning their donors. Part V concludes.

¹⁴ Tara Malloy, “Lawsuits from Maine to Hawaii Seek to Block Public’s Right to Know,” Campaign Legal Center Blog, October 5, 2010.

II. *Citizens United*

A. The Legal Backdrop

The movement to limit corporate participation in electoral politics began in the 1890s, in tandem with the rise of corporate spending in elections. Congress banned corporate contributions to federal candidates in 1907; by 1928, twenty-seven states had banned all corporate contributions and an additional nine barred contributions from certain categories of corporations, such as banks, public utilities, and insurance companies.¹⁵ The federal contribution ban was extended to independent corporate spending -- accompanied by an analogous restriction on contributions and expenditures by labor unions -- by the Taft-Hartley Act of 1947. So, too, before *Citizens United*, twenty-four states prohibited corporate spending in support of or opposition to election candidates.¹⁶ Although some of these laws targeted specific categories of corporations -- again, typically, banks, insurance companies or utilities -- most referred to “corporations” generally and did not specifically exempt nonprofit corporations.

The limits on corporate election spending contain several exceptions.¹⁷ Federal campaign law, for example, frees corporations to spend without limit on so-called “internal communications” -- that is, campaign messages from the corporation to its shareholders and executive and administrative personnel and their families, and on nonpartisan voter registration and get-out-the-vote drives. A corporation could also use corporate resources -- usually referred to as “treasury funds” -- to establish and pay the administrative expenses of a “separate segregated fund to be utilized for political purposes”¹⁸ -- better known as a political action committee or PAC. The corporation could pay the costs of soliciting donations -- from shareholders, executive and administrative personnel and their families, or under certain circumstances from all corporate employees

¹⁵Earl R. Sikes, *State and Federal Corrupt-Practices Legislation 127-28* (Duke Univ. Press 1928).

¹⁶See *State Laws Affected by Citizens United*, National Conference of State Legislatures, <http://www.ncsl.org/default.asp?tabid=19607>.

¹⁷Similar exceptions are also applicable to the limits on labor unions.

¹⁸2 U.S.C. § 441b(b)(2)(C).

and their families – to the PAC. The PAC could then use those donations to make contributions or undertake independent spending supporting or opposing candidates. PAC independent spending is not subject to a dollar limit, but an individual’s contribution to a PAC is capped at \$5000 per year. A PAC is entirely controlled by the corporation or union that creates it, which can determine which candidates the PAC supports and how much money it can spend with respect to each of those candidates.¹⁹The PAC is the corporation’s legally authorized campaign spending alter ego.

The ban on the use of corporate treasury funds in election campaigns is based on the idea that corporations pose a special problem for democracy. The aggregation of wealth symbolized by the corporate war chest, the fear that huge economic resources would be translated into political power, and the concern that shareholders’ funds would be diverted to the political goals of unaccountable corporate managers were all driving forces behind the early twentieth century focus of campaign finance regulation on corporations. Since the Supreme Court’s 1976 decision in *Buckley v. Valeo*, however, our campaign finance jurisprudence has been framed around the First Amendment’s protection of speech and association, and has dismissed the idea that unequal campaign spending and enormous differences in the wealth available for election activity are problems that can be addressed by limits on spending.

The statutory exceptions from the corporate spending ban recognize the free speech value of some corporate campaign activity. The internal communication exception – probably constitutionally required long before *Buckley*²⁰ -- and the authorization for PACs reflect the view that these entities are not just economic power organs but are also associations of individuals with certain shared political interests. But with *Buckley* recognizing a constitutional right to engage in campaign spending, it was unclear whether these exceptions would be enough to save the longstanding special restrictions on corporations.

¹⁹ Cf. *Pipefitters Union Local No. 562 v. United States*, 407 U.S. 385, 414-17 (1972).

²⁰ See *United States v. CIO*, 335 U.S. 106, 121 (1948).

Buckley addressed multiple constitutional challenges to the comprehensive Federal Election Campaign Act (FECA) of 1971 and the FECA Amendments of 1974. It did not address any of the older restrictions on corporations and unions. But *Buckley* created the framework against which those older laws would ultimately be judged.

Buckley held that campaign finance activity is protected by the First Amendment; that campaign expenditures – that is, spending aimed at communicating views on electoral issues to the voters -- are the highest form of campaign spending; that restrictions on campaign expenditures are subject to strict judicial scrutiny; and that campaign spending can not be limited in order to equalize either the spending of or in support of candidates or the efforts of individuals, interest groups or organizations to influence the electorate.

But *Buckley* also held that contributions, although constitutionally protected, are a lower order of speech than expenditures since contributions do not literally communicate the views of the donor but are more a “symbolic expression of support.”²¹ Moreover, the Court found that contributions present the danger of corruption and the appearance of corruption. As a result, limits on contributions could be constitutional, and the Court upheld FECA’s limits on individual donations to federal candidates and political committees, on donations by political committees to federal candidates, and on an individual’s total donations for federal electoral purposes.

Buckley, however, held that corruption concerns could not justify limits on *spending* by individuals, organizations or interest groups in support of or opposition to a candidate if the spending were undertaken independently of the candidate benefited. The Court found that the “absence of prearrangement and coordination of an expenditure with the candidate or his agent” would both “undermine[] the value of the expenditure to the candidate” and “alleviate[] the danger that expenditure will be given as a quid pro quo for improper commitments from the candidate.”²² With the anticorruption justification

²¹ 424 U.S. at 21.

²² *Id.* at 47.

unavailable and equality flatly rejected as a basis for limiting campaign spending, *Buckley* struck down FECA's limits on independent spending.²³

Buckley's outright rejection of independent spending limits and its holding that even contribution limits trigger constitutional concern did not bode well for the future of the older restrictions on corporate campaign activity. Indeed, the Supreme Court's first post-*Buckley* case suggested they would soon be on their way out. In *First National Bank of Boston v. Bellotti*,²⁴ decided just two years after *Buckley*, the Court struck down a Massachusetts law banning corporate spending in support of or opposition to ballot propositions. Electioneering, said the *Bellotti* Court "is the type of speech indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation than from an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of the source, whether corporation, association, union, or individual."²⁵

Bellotti might well have sounded the death knell for the federal and state bans on corporate campaign spending but for two factors. First, the Massachusetts law dealt only with ballot proposition elections, not candidate elections. The Court left open the possibility that candidate elections might present different concerns, noting "[r]eferenda are held on issues, not candidates for public office" so that the "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue."²⁶ Second, the Massachusetts law did not authorize PACs. Arguably, by enabling corporate campaign spending a PAC takes the sting out of the ban on the use of treasury funds. Still, *Buckley* and *Bellotti* together suggested serious constitutional doubts about the special regulation of corporations.

²³ The Court also invalidated limits on a candidate's use of personal wealth for his or her own campaign and limits on a candidate's total campaign spending. Neither could be justified by the anti-corruption concern. See *id.* at 51-57.

²⁴ 435 U.S. 765 (1978).

²⁵ *Id.* at 777.

²⁶ 435 U.S. at 790. See also *id.* at 788, n. 26.

Those doubts would not become doctrine until more than three decades later, however. Shortly after *Bellotti* the Court shifted gear and gave much greater weight to the longstanding congressional and state concerns about corporations – even in cases involving nonprofit corporations – than *Bellotti* would have suggested was likely. In *Federal Election Commission v. National Right to Work Committee* (“NRWC”),²⁷ the Court upheld a federal law that tightly restricted the ability of a nonprofit ideological corporation to solicit donations to its PAC. Under FECA, “a corporation without capital stock” may solicit only its “members,” but NRWC also sought to solicit nonmembers for financial support. The Court found that the government’s interest in “ensur[ing] that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political ‘war chests’” justified the restrictions on corporate campaign contributions, the requirement that corporations act through PACs, and the accompanying restrictions on PAC solicitations.²⁸ The Court linked corporate war chests to *Buckley*’s concern about the corrupting effects of large financial contributions, and accepted Congress’s “judgment that the special characteristics of the corporate structure require particularly careful regulation.”²⁹

The Court said nothing about the fact that NRWC was a nonprofit. It acknowledged that federal law “restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated.” But it concluded that it would not “second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared . . . and there is no reason why” the governmental interest in preventing both actual corruption and the appearance of corruption “may not be accomplished by treating unions, corporations, and similar organizations differently from individuals.”³⁰ The corporate form mattered, even when

²⁷ 459 U.S. 197 (1982).

²⁸ *Id.* at 207.

²⁹ *Id.* at 209-10.

³⁰ *Id.* at 210-11.

the corporation in question was not a business corporation but a nonprofit. The Court distinguished *Bellotti* as a referendum case.³¹

Four years later, in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* (“*MCFL*”),³² the Court expanded on *NRWC*’s finding that the corporate form provides a special justification for regulation – that “concern over the corrosive influence of concentrated corporate wealth reflects the conviction that it is important to protect the integrity of the marketplace of political ideas.”³³ But in *MCFL* the nonprofit nature of the corporation mattered. *MCFL* “was formed for the express purpose of promoting political ideas, and cannot engage in business activities.” It had “no shareholders or other persons affiliated so as to have a claim on its earnings,” and it did not accept contributions from business corporations or labor unions so that it would not be a “conduit[] for the type of direct spending that creates a threat to the political marketplace.” Thus, “the concerns underlying the regulation of corporate political activity are simply absent with regard to *MCFL*.”³⁴ Moreover, *MCFL* was an independent spending case, not a contributions case. The Court distinguished *NRWC*, noting “[w]e have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.”³⁵

Four years later in *Austin v. Michigan Chamber of Commerce*³⁶ the Court upheld a state law prohibiting corporate independent spending in support of or opposition to candidates. Like *NRWC* and *MCFL*, *Austin* emphasized the special nature of the corporate form – “the unique state-conferred corporate structure that facilitates the amassing of large treasuries.” As the resources available to a corporation reflect the economically motivated decisions of investors and customers, corporate spending raises the prospect of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated

³¹ *Id.* at 210 n.7.

³² 479 U.S. 238 (1986).

³³ *Id.* at 257.

³⁴ *Id.* at 263-64.

³⁵ *Id.* at 259-60.

³⁶ 494 U.S. 652 (1990).

with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." As a result, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions."³⁷

Even though it was a nonprofit, the Michigan Chamber of Commerce could not take advantage of the *MCFL* exception as most of its funding came from business corporations, so there was a danger that it could serve as a conduit for business corporation political spending.³⁸ Moreover, *Austin* reiterated that when a legislature acts to address the problems posed by corporate wealth it need not limit itself to wealthy corporations but could address all entities that "receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process."³⁹

In a pair of cases decided in 2003, the Court continued to find that Congress could treat corporations – including nonprofit corporations – as posing special problems requiring more stringent regulation. In *FEC v. Beaumont*,⁴⁰ a case brought by North Carolina Right to Life, Inc., a 501(c)(4) nonprofit advocacy corporation, the Court held that nonprofits were not entitled to an *MCFL*-type exemption from the federal prohibition of corporate campaign contributions. The Court reiterated the language from its prior cases concerning the dangers of war chests accumulated due to the special advantages that go with the corporate form. *Beaumont* also added the concern that corporate donations could be used to evade the limits on individual donations to candidates and parties. *Beaumont* acknowledged that "advocacy corporations are generally different from traditional business corporations" but held that they present many of the same concerns posed by business corporations, including the use of significant state-created advantages to

³⁷ Id. at 660.

³⁸ Id. at 661-65.

³⁹ Id. at 661.

⁴⁰ 539 U.S. 146 (2003).

amass considerable resources and the possibility they could be conduits for individual contributions above the limits on individual contributions.⁴¹

Finally, *McConnell v. FEC*,⁴² upheld the extension of the federal ban on corporate and union independent spending to a new category of campaign activity known as “electioneering communication.” This provision turned less on the nature of the corporation (or union) and more on another key campaign finance law issue – how to determine when political activity is sufficiently election-related that it can be subject to campaign finance regulation.

In addressing FECA’s provisions dealing with limits on and disclosure of expenditures, *Buckley* considered statutory language that define expenditure as made “for the purpose of . . . influencing” the nomination or election of federal candidates. The Court found that when applied to spending by entities other than candidates, political parties, or organizations with the major purpose of electing candidates FECA’s language was vague and overly broad, with the potential to regulate non-electoral political speech. To avoid the constitutional vagueness and overbreadth objections, *Buckley* interpreted FECA to apply only to “express advocacy” – that is, “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate”⁴³ The Court gave as examples of express advocacy language “such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”⁴⁴ These became known as the “magic words” of express advocacy. All other activity came to be known as “issue advocacy,” even though it need not involve the discussion of issues. *MCFL* subsequently applied the express advocacy standard to the prohibition on corporate expenditures.⁴⁵

⁴¹ *Id.* at 159-60.

⁴² 540 U.S. 93 (2003).

⁴³ 424 U.S. at 80.

⁴⁴ *Id.* at 44 n. 52.

⁴⁵ 479 U.S. at 248-50.

The express advocacy/magic words standard exempted many campaign messages from coverage. An advertisement could warmly praise or sharply criticize a candidate for office, but so long as it avoided literally calling on voters to elect or defeat that candidate it would be treated as issue advocacy, not express advocacy. Even discussion of a candidate's character, personality, or private life was issue advocacy so long as there was no call to vote for or against that candidate. To guarantee that an ad would be treated as issue advocacy not express advocacy, a political committee could include a tag line urging the viewer or listener to call the sponsor for more information, or to call the candidate depicted in the ad and tell him or her what the caller thinks of the candidate's actions or positions. As such advocacy was not electoral, the ad would not be considered express advocacy. As a result, the express advocacy standard proved extremely easy to evade. With most campaign professionals recognizing that many of the most successful election ads by candidates relied on more subtle pitches than literally calling on voters to vote a certain way, the express advocacy standard assured that the vast majority of election ads placed by campaign participants other than candidates would be exempt from campaign finance regulation.

In the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Congress responded by defining a new category of campaign speech -- "electioneering communications" -- for purposes of the ban on corporate and union campaign expenditures as well for determining the scope of disclosure. "Electioneering communications" consist of (i) broadcast, cable or satellite communications (ii) that refer to a clearly identified candidate, (iii) are targeted on that candidate's constituency, and (iv) are aired within thirty days before a primary or sixty days before a general election in which that candidate is running.

McConnell upheld the electioneering communications regulations. It found that "*Buckley*'s magic-words requirement is functionally meaningless" and that as a result "*Buckley*'s express advocacy line . . . has not aided the legislative effort to combat real or apparent corruption."⁴⁶ The Court agreed that the new standard avoided vagueness and

⁴⁶ 540 U.S. at 193-94.

was properly tailored to regulate campaign messages. The Court rejected facial challenges to the extension of both disclosure requirements and the ban on corporate and union expenditures to electioneering communications. The Court noted that “Congress’s power to prohibit corporations and unions from using funds in their treasuries to finance advertisements expressly advocating the election or defeat of candidates in federal elections has been firmly embedded in our law.”⁴⁷ Picking up on a theme previously articulated in *Austin*, the Court noted that since a corporation could spend through its PAC, the prohibition on the use of treasury funds was not an absolute ban on corporate election spending; the PAC provides a corporation with “constitutionally sufficient opportunities to engage in express advocacy.”⁴⁸

The twenty-year period from *NRWC* to *McConnell* of Supreme Court affirmation of special restrictions on corporations (and unions) began to change sharply with the 2007 decision in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL*”),⁴⁹ which effectively undid much of *McConnell*’s affirmation of BCRA’s extension of the ban on the use of corporate and union treasury funds to electioneering communication. *WRTL* agreed with *McConnell* that Congress could regulate spending beyond the magic words of express advocacy, but held that Congress could not apply the corporate spending ban beyond communications which were the “functional equivalent of express advocacy,” which would occur “only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁵⁰ *WRTL* did not quite go back to the “magic words” but it indicated that Congress could not go much beyond them. The Court also broke with the idea that the availability of the PAC gives corporations a constitutionality sufficient outlet to speak: “PACs imposed well-documented and onerous burdens, particularly on small nonprofits.”⁵¹

⁴⁷ *Id.* at 202.

⁴⁸ *Id.*

⁴⁹ 551 U.S. 449 (2007).

⁵⁰ 127 S.Ct. at 2667.

⁵¹ *Id.* at 2671 n.9.

WRTL indicated that with the departure of Justice O'Connor – who had been a coauthor of *McConnell* – and her replacement by Justice Alito, the majority of the Court was far more skeptical of campaign finance restrictions and far more willing to find campaign finance laws violative of the First Amendment. *McConnell* had upheld BCRA's restrictions on corporate electioneering communications by a narrow 5-4 vote. By WRTL, the Court's views on campaign finance had switched to 5-4 in the opposite direction.

B. The Facts

Citizens United grew out of an action brought by a conservative advocacy nonprofit organization, tax-exempt under section 501(c)(4), to obtain an exemption from the ban on corporate electioneering communications for a film it had made, *Hillary: The Movie*, when Senator Clinton was running for the Democratic nomination for president. The film was not itself an electioneering communication, as it was released in theaters and on DVD but not broadcast or distributed by cable or satellite, which is a statutory prerequisite for "electioneering communication" status. However, Citizens United also wanted to distribute the film through video-on-demand (VOD) available to digital cable subscribers. Distributing the film on cable, and television broadcasts of ads promoting the film, which mentioned Senator Clinton by name, is electioneering communication within the statute if aired in any state within thirty days before a primary election in which Senator Clinton was a candidate.

The district court denied Citizens United's motion for preliminary relief and ultimately granted the FEC's motion to dismiss the case.⁵² The Supreme Court took the case, heard oral argument on Citizens United's request for an as-applied exemption from BCRA; then asked the parties to file supplemental briefs addressing whether *Austin* and the relevant portion of *McConnell* should be overruled. The Court heard reargument on that question in September 2009.

⁵² 530 F.Supp.2d 274 (D.D.C. 2008), 530 F.Supp.2d 274 (D.D.C. 2008).

There were a number of arguments that might have won Citizens United an exemption without invalidating the ban on corporate electioneering. The movie could have been treated as not the functional equivalent of express advocacy – but both the district court and the Supreme Court found that the film’s consistent and pervasive criticism of Senator Clinton’s fitness for president eliminated that option. Citizens United could have been granted an *MCFL*-type nonprofit exemption. Although, unlike *MCFL*, Citizens United accepted “a small portion of its funds from for-profit corporations,”⁵³ the *MCFL* exception could have been expanded. Indeed, a number of courts had held that the exception was available for nonprofits that receive a modest share of their total funding from for-profit corporations.⁵⁴ Citizens United’s expenses for *Hillary: the Movie* could have been treated as falling within the press or media exclusion from the definition of “electioneering communication” as Citizens United was in the regular business of making ideological films. Indeed, six months after the Supreme Court’s decision the FEC issued an advisory opinion finding that Citizens United’s production, distribution, and marketing costs for its films fit within the media exemption.⁵⁵ Alternatively, an exemption for VOD spending could have been created as VOD involves viewer requests to receive a communication rather than a sponsor’s bombardment of the viewer with an unsought message, so that VOD “has a lower risk of distorting the political process than do television ads.”⁵⁶

The five-justice majority on the Supreme Court determined not to be sidetracked by these Citizens-United-specific issues and instead addressed the fundamental constitutional question underlying the corporate spending prohibition.

⁵³ 130 S.Ct. at 887.

⁵⁴ See, e.g., *Center for Individual Freedom, Inc. v. Ireland*, 613 F.Supp.2d 777, 778 (S.D.W. Va. 2009) (4.4% of revenues from business corporations); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999) (up to 8%); *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129, 130 (8th Cir. 1997) (exemption available even if nonprofit “engages in minor business activities or accepts insignificant contributions from business corporations”).

⁵⁵ FEC Advisory Opinion 2010-08 (June 11, 2010).

⁵⁶ 130 S.Ct. at 890-91.

C. The Decision

(1) Expenditure Prohibition: In an opinion by Justice Kennedy, the Court, by a vote of five to four, determined that both the prohibition on the use of corporate or union treasury funds to pay for electioneering communications and the older prohibition on the use of corporate and union treasury funds to pay independent expenditures for express advocacy violate the First Amendment. In so doing, the Court overturned both *Austin* and the relevant portion of *McConnell*. The Court's reasoning was fairly straight-forward.

The Court emphasized that "First Amendment protection extends to corporations" including the political speech of corporations. Citing *Bellotti*, it noted that the argument that the First Amendment is not available because corporations are not "natural persons" had long been rejected.⁵⁷ The Court also rejected the argument it had accepted in *McConnell* that due to the availability of the PAC option the prohibition on the use of corporate and union treasury funds was not really a ban on corporate speech but only a channeling device: "The law before us is an outright ban." Requiring that political spending be directed through a PAC imposed "burdensome" administrative costs so that the possibility of creating and using a PAC was not a constitutionally sufficient means for enabling corporate or union independent spending.⁵⁸

The Court then considered and rejected possible justifications for barring corporate election spending. First, it dismissed *Austin*'s anti-distortion rationale – the idea that corporate wealth amassed in the marketplace and unrelated to support for the corporation's political ideas distorts the electoral process: "It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or not correlation to the public's support for the corporation's political ideas.' . . . All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech."⁵⁹ The Court treated the

⁵⁷ Id. at 899-900.

⁵⁸ Id. at 897.

⁵⁹ Id. at 905.

anti-distortion argument as little more than a variant on the egalitarian argument for limiting individuals' independent spending that it had rejected in *Buckley*.⁶⁰

Second, the Court denied that corruption concerns could support a prohibition on corporate independent spending. The Court underscored the distinction, central to campaign finance jurisprudence since *Buckley*, between contributions and expenditures. *NRWC*'s reference to "the influence of political war chests funneled through the corporate form" could be dismissed because *NRWC* "involved contribution limits" and not expenditures. An independent expenditure – that is, one that has not been prearranged or coordinated with a candidate – simply and categorically does not present a corruption danger. Even if an independent expenditure wins the spender "influence over or access to elected officials," that is not corruption so that the anti-corruption concern cannot justify a spending ban.⁶¹

The Court also summarily dismissed an argument it had accepted in *Austin* that the corporate spending ban protects the interests of dissenting shareholders. Shareholder protection was rejected as both overinclusive – there is no exemption for nonprofits or for single-shareholder corporations – and underinclusive, given the temporal and media limits on the definition of "electioneering communication."⁶²

(2) Disclaimer and Disclosure: Citizens United had also challenged the application to *Hillary: the Movie* of BCRA's disclaimer and disclosure provisions. The disclaimer measure requires that any electioneering communication funded by anyone other than a candidate include a statement that the ad is not authorized by a candidate and that spender is responsible for its content. The ad must also display the funder's name and address or Web site address. The disclosure provision requires that anyone who spends more than \$10,000 on electioneering communications in a calendar year must file with the FEC a statement identifying the person making the communication, the amount spent, the election at which it was directed, and the names and addresses of certain contributors.

⁶⁰ Id. at 904.

⁶¹ Id. at 908-11.

⁶² Id. at 911.

The Court upheld the application of the disclaimer and disclosure provisions to the movie and to the television ads promoting the movie. In so doing, the Court emphasized the value of disclosure. Not only is disclosure “a less restrictive alternative to more comprehensive regulations of speech,”⁶³ disclosure provides voters with information relevant to their voting decisions, and so is entirely consistent with, indeed, supportive of, the First Amendment:

“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶⁴

The Court determined the voter informational purposes of the disclaimer and disclosure laws would be served by applying them not just to the movie but to the ads, even though the ads were arguably commercial – aimed at selling a product – and not political. “At the very least, the disclaimers avoid confusion by making clear that the ads were not funded by a candidate or political party.”⁶⁵

The Court also addressed an issue implicitly raised by *WRTL*’s limiting definition of “electioneering communication.” *WRTL* had dealt with the use of “electioneering communication” to extend the ban on the use of corporate and union treasury funds on campaign expenditures – now invalidated by *Citizens United*. But BCRA also extended federal disclosure requirements concerning election spending from express advocacy to electioneering communications. Did *WRTL*’s gloss limiting electioneering communication to “the functional equivalent of express advocacy” apply to disclosure, too? If so, then at least the *Hillary* ads might have been exempted from the disclosure requirement. But the Court expressly “reject[ed] *Citizens United*’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” Disclosure doesn’t burden political speech in the same way that spending limits do, and it also serves to inform the voters. “Even if the ads only pertain to a commercial transaction,

⁶³ Id. at 915.

⁶⁴ Id. at 916.

⁶⁵ Id. at 915.

the public has an interest in knowing who is speaking about a candidate shortly before an election.”⁶⁶ As a result, electioneering communications as broadly defined in the statute may be subject to disclosure.

D. Consequences

(1) Expenditure Restrictions: *Citizens United* invalidated the federal ban on the use of corporate and union treasury funds to pay for independent expenditures and also thereby doomed the two dozen similar state laws. By treating corporate and union spending as no different, from a constitutional perspective, from individual spending, the case also presumably precludes dollar limits, not just complete bans, on spending by corporations.

(2) Corporate Contributions to Candidates and Political Parties: *Citizens United* does not address laws banning corporate campaign contributions. The Court distinguished *NRWC* as a contributions case; made much of the contribution/expenditure distinction in its discussion of the anti-corruption rationale for regulation; and did not mention *Beaumont* – which had upheld the application of the ban on corporate contributions to nonprofit corporations -- at all. As a result, the federal and many state laws banning corporate campaign contributions – including campaign contributions by nonprofits -- remain valid. Similarly valid is the application of corporate contribution bans to coordinated expenditures -- that is, expenditures undertaken in cooperation with a candidate or party – as the Court has held that they may be treated as contributions.

To be sure, the Court’s rejection of the idea that the use of corporate war chests for electoral purposes is particularly pernicious or more dangerous than spending by individuals does raise questions about the constitutionality of a complete ban on corporate and union contributions, as opposed to the dollar limits on contributions applicable to individuals and non-corporate and non-union associations. Still, the complete ban might be sustained under the secondary rationale put forward in *Beaumont* -- that it is necessary

⁶⁶ *Id.* at 915.

to prevent circumvention of the limits on individual contributions that might result if an individual who has given the maximum permitted amount uses a corporation as a conduit for giving additional money.⁶⁷ As *Beaumont* noted, “nonprofit advocacy corporations are . . . no less susceptible than traditional business companies to misuse as conduits for circumventing the contribution limits imposed on individuals.”⁶⁸

The question has come up in a handful of post-*Citizens United* cases. The federal district court in *Thalheimer v. City of San Diego*⁶⁹ noted that *Beaumont* relied in part on the antidistortion and corporate war chest reasoning of *Austin* and determined that after *Citizens United* “that reasoning is no longer persuasive.” However, the court also noted that *Beaumont*’s anticircumvention interest “was not affected by *Citizens United*” and so upheld the City’s prohibition on corporate contributions. A federal district court rejected the claim brought by both a nonprofit and a for-profit corporation that *Citizens United* requires the invalidation of Minnesota’s ban on corporate contributions, finding that *Beaumont* “remains good law.”⁷⁰ As a result, for now at least, a nonprofit corporation that wants to make a campaign contribution must establish a PAC to do so.

(3) Disclosure: The First Amendment permits the application of current federal disclaimer and disclosure requirements to corporate independent spending, including both express advocacy and electioneering communications. But these provisions are focused primarily on the speaker – the organization that is paying for the ads. The disclaimer requires the entity paying for the ads to disclaim that it is affiliated with a candidate or party and to identify itself. But with many current speakers nonprofits with anodyne names – American Crossroads, Americans for the Future – the disclaimer provides little information to voters about who is paying for the ads. Although federal disclosure law requires the independent spender to disclose what the *Citizens United* court called “the

⁶⁷ 539 U.S. at 155.

⁶⁸ *Id.* at 160.

⁶⁹ 2010 WL 596397 (S.D. Cal. 2010).

⁷⁰ *Minnesota Concerned Citizens for Life, Inc. v Swanson*, (D. Minn. 9/20/10). Cf. *Michigan Chamber of Commerce v. Land*, 2010 WL 2925791 (W.D. Mich., 7/23/10) (suggesting in dicta that a ban on corporate expenditures coordinated with a candidate or party would be constitutional).

names of certain contributors” in filings with the FEC, a recent FEC action – discussed in the next part -- effectively eliminates that requirement for ads sponsored by nonprofits that combine electioneering with other public advocacy. The nine months since *Citizens United* have witnessed new efforts to require the greater disclosure of the donors to nonprofits and other organizations that pay for election ads and to publicize those donors by requiring their identification in the body of the ads. These efforts, and the constitutional issues they raise will be taken up in Part IV.

III. Other Campaign Finance Developments

A. Invalidation of Limits on Contributions Used to Pay for Independent Expenditures

Under campaign finance law, expenditures enjoy the highest level of First Amendment protection; expenditure restrictions are subject to strict judicial scrutiny; and, with *Citizens United*, there is currently no accepted justification for limiting or stopping campaign spending. Contributions, on the other hand, are less protected; restrictions on contributions are subject to less stringent review; and contributions may be limited to prevent corruption or the appearance of corruption. What, then, of contributions that are used to finance independent expenditures, e.g., where donor A gives to spender B who takes out an ad calling for the election of candidate C? Can A’s donation to B be subject to contribution limits? Can such a limit be supported by the anticorruption justification?

Surprisingly, until recently this issue had not been squarely faced. Since 1974, FECA has imposed monetary limits on individual donations to political committees, including noncandidate, nonparty committees such as PACs. *California Medical Ass’n v. FEC* (“*CalMed*”),⁷¹ in 1981, upheld application of the limit to a donation by a trade association to its own PAC, emphasizing that the limit was necessary to avoid circumvention of the limits on individual donations to candidates. The key fifth vote was provided by Justice Blackmun who, in a concurring opinion, indicated that the result

⁷¹ 453 U.S. 182 (1981).

would be different if the PAC undertook only independent expenditures and did not make contributions to candidates.⁷² That same year, *Citizens Against Rent Control (“CARC”) v. City of Berkeley*⁷³ held that donations to committees formed to support or oppose ballot propositions may not be limited because spending in ballot proposition elections poses no question of corruption. But it has only been in the last three years that federal courts and the FEC have held that donations to pay for independent expenditures in candidate elections cannot be limited.

In 2008 in *North Carolina Right to Life, Inc. v. Leake*,⁷⁴ the Fourth Circuit held that a North Carolina law limiting donations to political committees could not, constitutionally, be applied to committees that engage only in independent expenditures. In 2009, in *Emily’s List v. FEC*,⁷⁵ a panel of the United States Court of Appeals for the District of Columbia Circuit struck down multiple FEC regulations dealing with political committees that both contribute to federal candidates and make independent expenditures. The court held that although the FEC could require such a committee to pay for its contributions to candidates and parties and the associated administrative costs with funds subject to federal dollar limits and source prohibitions (e.g., no corporate or union money), the First Amendment barred it from imposing restrictions on the sources or amounts of donations used for “generic get-out-the-vote efforts and voter registration activities,” that is activities not promoting a specific candidate or party,⁷⁶ or to pay the costs of advertisements that “refer” to candidates.⁷⁷

In March 2010, the DC Circuit, sitting en banc, held in *SpeechNow.org v FEC*⁷⁸ that the federal statutory limit on donations to political committees could not, consistent with the First Amendment, be applied to committees that make only independent expenditures. Relying on *Citizens United’s* determination that there is no anti-corruption

⁷² Id. at 203.

⁷³ 454 U.S. 290 (1981).

⁷⁴ 525 F.3d 274 (4th Cir. 2008).

⁷⁵ 581 F.3d 1 (D.C. 2009).

⁷⁶ Id at 16.

⁷⁷ Id. at 17.

⁷⁸ 599 F.3d 686 (D.C. Cir. 2010).

interest in limiting independent expenditures,⁷⁹ the court concluded there is no anti-corruption interest in limiting contributions to committees that make only independent expenditures. The following month a Ninth Circuit panel followed suit, holding that a city ordinance imposing a monetary cap on contributions to independent expenditure committees violates the First Amendment.⁸⁰

The FEC followed *SpeechNow* with two important advisory opinions. In *Club for Growth, Inc.*⁸¹ the Commission agreed that it was permissible for the Club for Growth, a 501(c)(4) organization, which already had a PAC that made campaign contributions, to set up another committee that would make only independent expenditures. The independent expenditure committee could accept unlimited donations; could solicit and accept donations from the general public; and could solicit and accept unlimited donations even if earmarked for independent expenditures concerning specific candidates. In addition, the Club's president could serve as treasurer both of the PAC that makes contributions and of the independent expenditure committee, provided he pledges the two committees will not coordinate. In *Commonsense Ten*,⁸² issued the same day, the Commission confirmed that an independent expenditure committee could accept unlimited donations from corporations and unions as well as individuals.

Technically, these cases and FEC advisory opinions deal only with “political committees,” that is, organizations whose major purpose is electoral and, accordingly, are required to register with the FEC and abide by the organizational, record-keeping, and reporting rules applicable to such committees. But the principle that an organization that engages only in independent expenditures and does not make contributions to candidates or parties may accept contributions in unlimited amounts seems generally applicable to all politically active organizations. Indeed, the day after the two FEC advisory opinions were released, a federal district court in Michigan, in a case brought by the Michigan Chamber

⁷⁹ Id. at 693.

⁸⁰ Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684 (9th Cir. 2010).

⁸¹ A.O. 2010-10 (July 22, 2010).

⁸² A.O. 2010-11 (July 22, 2010)

of Commerce, held that after *Citizens United* Michigan's prohibition on corporate campaign contributions cannot constitutionally be applied to corporate contributions to a committee that makes only independent expenditures.⁸³

Thus, although many laws on the books, like FECA itself, may include provisions limiting contributions to organizations that make independent expenditures or barring corporations from doing so, the emerging doctrine is that contributions to organizations that make only independent expenditures may not be limited. Even if an organization makes both contributions and expenditures, if the funds for the two activities are carefully separated, the organization can accept uncapped contributions for its independent spending, including from business corporations. In any event, there appears to be nothing to prevent such an organization from setting up two affiliated committees – one that makes contributions and one that makes independent expenditures – and soliciting and collecting unlimited contributions for the latter. Or, considered from the perspective of the donors, multiple individuals, multiple corporations, or multiple corporations and individuals may, without monetary limit, pool their funds in committees that finance independent expenditures – and, of course, those independent expenditures may not be subject to a monetary limit, either.

The one decision that arguably cuts the other way is the Supreme Court's recent action in the *Family PAC* litigation. A Washington state law puts a \$5000 limit on an individual contribution to a political committee in the final three weeks before a general election. The law was challenged by a conservative advocacy group seeking to play a role in ballot measure campaigns in the state. A district court struck the restriction down in September 2010, but on October 5, the Ninth Circuit granted a stay for the rest of the current election period. On October 12, the Supreme Court declined to vacate the stay.⁸⁴ The state defended the restriction on late donations as essential to effective disclosure in ballot proposition campaigns. Noting that \$45 million in contributions had been raised for ballot campaigns in the state as of October 9, the state also contended that the law did not

⁸³ Michigan Chamber of Commerce v. Land, 2010 WL 2925791 (W.D. Mich., July 23, 2010).

⁸⁴ Family PAC v. McKenna, 562 U.S. ___, case no. 10-35832, Oct. 12, 2010.

operate as a limit on ballot proposition spending. The law does seem to be in tension in *CARC*'s invalidation of dollar limits on contributions to ballot proposition campaign committees. However, the Ninth Circuit stay and the Supreme Court's denial of the application to vacate may reflect a judicial reluctance to upset election laws on the eve of an election rather than a view of the merits of the restriction.

B. Limited Disclosure of Donations Used to Pay for Electioneering

Federal law requires that any person who spends more than \$10,000 on electioneering communications in a calendar year must, within 24 hours, file with the FEC a report that *inter alia* includes the names and addresses of all persons "who contributed an aggregate amount of \$1000 or more to the person making the disbursement" since the start of the preceding calendar year.⁸⁵ The Supreme Court upheld the application of this provision to a nonprofit (c)(4) in *Citizens United*, but the Court did not address which donors to the organization would be subject to disclosure.

This provision was adopted concurrently with the ban on corporate and union electioneering communications and so was not intended to apply to their electioneering. After *WRTL*, however, the issue arose as to how to apply the contributor disclosure requirement to corporations and unions, which are not formed for or primarily engaged in electoral activity, and receive funds from sources -- shareholders, customers, members, "or in the case of a non-profit corporation, donations from persons who support the corporation's mission"⁸⁶ -- not necessarily intending to fund electioneering. Accordingly, after *WRTL* the FEC adopted a regulation limiting the disclosure of donations only to those "made for the purpose of furthering electioneering communications."⁸⁷

This past spring, by a 3-2 vote, the FEC determined that disclosure of a donor will not be required unless the donation was made *expressly* "for the purpose of furthering the

⁸⁵ 2 U.S.C. § 434 (f).

⁸⁶ FEC, Electioneering Communications: Final Rule and Transmittal to Congress, 72 Fed. Ref. 72899, 72911 (Dec. 26, 2007).

⁸⁷ 11 C.F.R. § 104.20(c)(9).

electioneering communication that is the subject of the report.” The case involved Freedom’s Watch, Inc., a nonprofit advocacy corporation that spent \$126,000 on electioneering communication ads in a Congressional special election in the spring of 2008. Freedom’s Watch filed the required electioneering communication report concerning its spending but did not disclose any donors. Indeed, Freedom’s Watch did not disclose any donors for any of its 2008 electioneering communications because all the donations it received were to support the organization’s general purposes, and none were earmarked for specific electioneering communications.⁸⁸ Three members of the FEC concluded that under those circumstances Freedom’s Watch was under no duty to disclose its donors and, as a result, the complaint brought against Freedom’s Watch because of its failure to disclose its donors was dismissed.

Freedom’s Watch involved the FEC’s interpretation of its own regulations. It is not a constitutional case; it does not affect state disclosure laws or even limit the ability of the FEC to adopt new regulations that would require the disclosure of donations used to pay for electioneering communication. However, the decision and the FEC rule it construes gesture at the difficulty of obtaining donor disclosure from an organization that is not primarily electoral but that does engage in electioneering. In any event, given *Freedom’s Watch*, organizations other than regulated political committees that accept donations not specifically earmarked for electioneering ads and use them to make electioneering communications currently are under no federal election law requirement to disclose the identities of their donors or the amounts donated.

IV. Disclosure

In the post-*Citizens United* world, disclosure⁸⁹ is the principal campaign finance law issue for nonprofits that engage in electioneering activity. The press has beaten a steady

⁸⁸ M.U.R. 6002, In the Matter of Freedom’s Watch (complaint dismissed and file closed on April 27, 2010).

⁸⁹ As contributions may be limited but expenditures cannot be, the other significant regulatory issue is the determination of when an organization’s expenditure may be deemed sufficiently coordinated with a candidate or political party that it may be regulated like a contribution.

drumbeat of stories and editorials describing the lack of disclosure of the donors to the nonprofits that have been spending tens and hundreds of thousands of dollars – and millions in the aggregate – in this year’s House and Senate races.⁹⁰ *Citizens United* and the post-*Citizens United* decisions of the lower federal courts including *SpeechNow.Org* confirm that reporting and disclosure requirements – including disclaimer rules – can be applied to the election-related expenditures of nonprofits and other independent organizations, even though those expenditures may not be limited.

But disclosure raises constitutional issues. Even though disclosure does not limit spending, the Supreme Court has found that “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”⁹¹ As a result, disclosure requirements are subject to a heightened standard of review – not the strict scrutiny that applies to spending limits, but an “exacting scrutiny” which requires that disclosure be of “substantial relation” to a “sufficiently importantly” governmental interest.⁹² *Buckley* recognized three “sufficiently important” governmental interests, including “provid[ing] the electorate with information,” and the Court concluded that disclosure of those who pay for independent spending has a “substantial relation” to that interest “because it increases the fund of information of those who support candidates.” Although independent spending raises no danger of corruption, “the informational interest can be as strong as it is in coordinated spending, for disclosure helps voters define more of

⁹⁰ See “Secret Campaign Money,” *Washington Post*, October 12, 2010, Jim Rutenberg, Don Van Natta, Jr., and Mike McIntire, “Offering Donors Secrecy, and Going on Attack,” *N.Y. Times*, October 11, 2010; Eugene Robinson, “Midterm campaigns, brought to you by . . . ?” *Washington Post*, October 5, 2010; Kenneth P. Vogel, “Secret donors fuel Crossroads media buy,” *Politico*, October 5, 2010; T.W.Farnam and Dan Eggers, “Interest-group spending for midterm up fivefold from 2006; many sources secret,” *Washington Post*, October 4, 2010; Mike McIntire, “The Secret Sponsors,” *N.Y. Times*, Oct. 2, 2010; Mike McIntire, “Hidden Under Tax-Exempt Cloak, Political Dollars Flow,” *N.Y. Times*, Sept. 23, 2010; Michael Luo and Stephanie Strom, “Donor Names Remain Secret as Rules Shift,” *N.Y. Times*, Sept. 20, 2010; T.W. Farnam, “Disclosure of ‘issue ad’ funding is on the wane,” *Washington Post*, Sept. 16, 2010; T.W. Farnam, “Despite Supreme Court support, disclosure of funding for ‘issue ads’ has decreased,” *Washington Post*, Sept. 15, 2010.

⁹¹ *Buckley*, 424 U.S. at 64.

⁹² *Id.* at 64-66.

the candidates' constituencies.”⁹³ But disclosure of those who pay for political communications that are not about candidates cannot be so justified.

Recent legislative efforts to increase disclosure of spending by, and especially of donors to, nonprofit organizations – and recent and pending litigation challenging disclosure laws – have focused on three issues.

First, when is an advertisement or other public communication sufficiently election-related that it can be subject to campaign finance rules? This continues the thread over express advocacy/issue advocacy/electioneering communication elaborated by the Supreme Court in *Buckley*, *McConnell*, and *WRTL*..

Second, under what circumstances can the donors to organizations engaged in election-related speech be disclosed? For multi-purpose organizations that engage in a mix of legislative lobbying, voter education, public advocacy, and electioneering, this involves addressing both constitutional and practical concerns in deciding whether a donor can be treated as contributing to the organization's electioneering activity.

Third, in order to more effectively publicize the sources (particularly the business corporate sources) of the funds used by ideological nonprofits to pay for their election ads, a prominent feature of a number of recent legislative proposals, including the DISCLOSE Act, has been to require the sponsor of an electioneering message to identify the principal funders of its electoral activity in the message itself instead of just in a report filed with the campaign finance regulator. These laws are sufficiently recent – and there is none at the federal level – that there is little or no case law analyzing them. But they can be seen as presenting constitutional questions.

A. Definition of Electioneering Message

A central issue in campaign finance regulation has been what can be treated as an election-related message that can be regulated. As already discussed, (i) *Buckley* initially

⁹³ Id. at 81.

embraced a narrowing “express advocacy” requirement; (ii) Congress expanded that in BCRA to include “electioneering communication;” (iii) *McConnell* sustained that broader definition; and (iv) *WRTL* held that the First Amendment required that “electioneering communication” be sharply pared back to the “functional equivalent of express advocacy” in a case involving the prohibition of the use of corporate and unions treasury funds to pay for express advocacy. Left unaddressed in *WRTL* was whether the First Amendment limited disclosure to the “functional equivalent of express advocacy.” Several courts had held that *WRTL* did not narrow the scope of disclosure requirements,⁹⁴ but the issue was unsettled.

Citizens United has now resolved that issue conclusively. Disclosure and disclaimer requirements can be required beyond the “functional equivalent of express advocacy” and at least as far as the “electioneering communication” defined in BCRA. Following *Citizens United*, a federal district court recently upheld the application to a nonprofit advocacy organization of an Illinois statute that closely tracked the language of BCRA.⁹⁵

However, there are still limits on what can be deemed electioneering even just for purposes of disclosure. This summer a federal district court invalidated a portion of Maine’s law requiring an organization to register as a political committee if it spends more than \$5000 a year “for the purpose of promoting, defeating *or influencing in any way* the nomination or election of any candidate to political office.” The court found that “influencing in any way” was unconstitutionally vague and struck it down; however, the rest of the statutory language was constitutionally acceptable and was upheld after the court severed the “influencing” phrase.⁹⁶

⁹⁴ See, e.g., *Koerber v. FEC*, 583 F.Supp.2d 740 (E.D.N.C. 2008); *Ohio Right to Life Society, Inc. v. Ohio Elec. Comm’n*, 2008 WL 4186312 (S.D. Ohio 2008); *Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 (W.D. Wash. 2009). But cf. *Center for Individual Freedom, Inc. v. Ireland*, 613 F.Supp.2d 777, 799-800 (S.D. W. Va 2009) (finding that West Virginia law defining “electioneering communication” was even broader than BCRA and therefore not “narrowly tailored”).

⁹⁵ *Center for Individual Freedom v. Madigan*, ___ F. Supp. 2d ___. 2010 WL 3404973 (N.D.Ill., Aug. 26, 2010).

⁹⁶ *National Organization for Marriage v. McKee*, ___ F.Supp.2d ___, 2010 WL 3270092 (D. Me., Aug. 19, 2010).

So, too, a pre-*Citizens United* decision struck down West Virginia’s definition of “electioneering communication” because it applied not just to broadcast media but to mass mailings, telephone banks, billboard advertisements, newspapers, and magazines. The court determined that under *WRTL* the state bore a heavy burden of proving that it had an interest in requiring disclosure beyond the broadcast media covered by BCRA, and it followed the *Leake* case in treating BCRA’s definition of “electioneering communication” as the outer limit of regulation, even just for disclosure. However, the court seems to have garbled *WRTL*’s narrow tailoring requirement for anti-corruption regulation with the more relaxed standard of review applicable to disclosure.⁹⁷ *Citizens United* undermines this decision. Indeed, just last month a federal district court in *South Carolina Citizens for Life, Inc. v. Krawcheck* relying on *Citizens United* agreed that South Carolina could include telephone banks, direct mail, and any paid advertisements “conveyed through an unenumerated medium that cost more than five thousand dollars” in its statutory definition of electioneering communications subject to disclosure. The court also agreed that South Carolina could also apply a slightly wider pre-election period than does BCRA, when it held that the state could regulate messages identifying state candidates disseminated within 45 days before a primary, even though BCRA had adopted a 30-day window.⁹⁸

Based on the DISCLOSE Act and the disclosure reforms that have already become law in a number of states, it would appear that the principal new electioneering definition issues involve (i) the regulation of nonbroadcast media and (ii) the expansion of the pre-election period. The North Carolina reform law adopted this year defines “independent expenditure” to include “mass mailing” and “telephone banks,”⁹⁹ and West Virginia’s law includes newspapers, magazines, and other periodicals.¹⁰⁰ In the DISCLOSE Act, the House of Representatives sought to extend the statutory pre-general-election period from

⁹⁷ Center for Individual Freedom v. Ireland, *supra*.

⁹⁸ *South Carolina Citizens for Life, Inc. v. Krawcheck*, 2010 WL 3582377 (D.S.C., Sept. 13, 2010).

⁹⁹ North Carolina Session Law 2010-170, section 1, amending G.S. § 163-278.6.

¹⁰⁰ W. Va H.B. 4647.

60 days to 120 days¹⁰¹ or, in other words, to treat ads that mention candidates (including incumbent officeholders) as electioneering that are broadcast as early as early July of an election year as electioneering communications. This would cut fairly deeply into the year, including periods when Congress will almost surely be in session. Each type of regulatory reflects political reality – that significant electioneering activity, particularly at the state level, involve nonbroadcast media, and that general election campaigns, particularly at the federal level, seem to start earlier and earlier.

It is difficult to predict how these measures would fare in court. Although they do not bar speech, reporting and disclosure requirements do impose a burden on speech. With respect to the reporting of electioneering communications, the burden – saving for the moment the question of the reporting of the identities of donors – is fairly modest. Typically, an independent expenditure filing lists the name and address of the spender; the amount and date of the expenditure (above a threshold level); the recipient of the disbursement; the election affected; and the candidates supported or opposed. These are not particularly onerous obligations;¹⁰² certainly they are much less so than the PAC organizational and reporting requirements discussed in *Citizens United*. And, as in *Citizens United* these extensions of the spending subject to disclosure advance the public’s “interest in knowing who is speaking shortly before an election” – although the long pre-election proposed in DISCLOSE does push the envelope of “shortly before.”

I would speculate that the expansion of media regulated from broadcast to print, mailers, and telephone banks would pass muster, provided that the laws target mass mailings, general circulation newspapers and periodicals, etc, rather than more individualized communications, and there is an appropriate regulatory threshold, like dollars spent, or volume of messages sent, to avoid regulating individual or small group activity. The expansion of the regulatory period may be more questionable, since it does seem likely to pick up considerable grass-roots legislative lobbying as well as electioneering.

¹⁰¹ DISCLOSE Act, Section 202 (amending 2 U.S.C. 434(f)(3)(A)(i)(II)(aa)).

¹⁰² See *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 788-89 (9th Cir. 2006).

Much might turn on the facts of specific cases, such as the length of the legislative session, or the content of the ads so regulated.

B. Donor Disclosure

Citizens United confirms that nonprofits that engage in independent electioneering can be required to disclose the identities of the donors who finance those electioneering messages. But how is that disclosure to be obtained from an organization that engages in both electoral and non-electoral activities, but is primarily non-electoral? Can it be required to disclose all donors who give above a certain dollar threshold? Or, can it be required to disclose only the names of those who give expressly for the purpose of financing electioneering – which, as *Freedom's Watch* suggests, may mean no disclosure at all. Is there some intermediate position for distinguishing electoral from non-electoral donors to organizations that combine electoral and non-electoral activities?

Recent legislation and legislative proposals suggest four possible strategies for obtaining disclosure of those who pay for campaign ads: (1) Widen the definition of the “political committee” subject to reporting and disclosure requirements; (2) Provide standards for determining whether a particular donation was given for an electoral purpose; (3) Encourage or require nonprofits to create electoral activity accounts that would be the sole source of electoral activity and require the disclosure only of donors to those accounts; (4) Presume that unless a donor, above a dollar threshold, has asked that her donation not be used for political purposes, her money is one of the sources for electioneering and require its disclosure. These alternatives are discussed more fully below.

(1) Political Committee. Many election laws provide that if an organization’s activities are sufficiently election-related, it will be regulated as a “political committee.” This typically involves registering with the FEC for federal political committees or with the appropriate state agencies for committees active in state elections, and providing certain basic information, such as the name and address of the organization and its principal officers; maintaining a designated bank account; maintaining and retaining for a period of time certain financial records; and filing reports concerning expenditures made

and contributions received including the names and addresses of donors who give above a threshold amount. The specific administrative, organizational, and reporting requirements vary from jurisdiction to jurisdiction; even within a state, recordkeeping and reporting requirements may vary with the level of election-related activity of the organization.

The central question for determining whether an organization is to be regulated as a political committee is what is the threshold level of electoral engagement that triggers regulation? Can the threshold be purely quantitative (e.g., electoral spending above a dollar amount)? Or does it have to be qualitative, that is, does electoral activity have to be **the** or even a “primary” or “major” purpose of the organization?

In *Buckley*, the Supreme Court considered FECA’s reporting and disclosure requirements. The Court stated that the requirement that “political committees” disclose their expenditures could raise vagueness issues since the law defines a political committee only in terms of whether it receives \$1000 in contributions in a calendar year or make \$1000 in expenditures in a year so that the term “could be interpreted to reach groups engaged purely in issue discussion.” Noting that two lower courts had interpreted the statute more narrowly, the Court stated that “[t]o fulfill the purposes of the Act” the words “political committee” “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”¹⁰³

It is not clear whether the Court meant to limit the duty to register as a political committee to groups or organizations whose predominant activity is electoral. That is how *Buckley* interpreted FECA, which continues to be so read in determining whether an organization is a political committee under federal election law. But it is less clear whether this a constitutional mandate binding the states or potential future federal legislation. *Buckley*’s statement is certainly much less clearly constraining than the Court’s determination that “expenditure” requires express advocacy.

¹⁰³ 424 U.S. at 79.

Some courts have held that the major purpose test is constitutionally mandatory. The Fourth Circuit said so most emphatically in 2008 in *North Carolina Right to Life, Inc. v. Leake* when, relying heavily on *Buckley*, it struck down as unconstitutionally vague and overbroad a North Carolina law that defined political committee to include an organization that “has a major purpose to support or oppose the nomination or election of one or more clearly identified candidates.” *Leake* concluded that “the major purpose” threshold was necessary to avoid having “political committee burdens . . . fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate.” “Permitting the regulation of organizations as political committees when the goal of influencing elections is merely one of multiple ‘major purposes’ threatens the regulation of too much ordinary political speech to be constitutional.”¹⁰⁴

Other courts, however, have disagreed with *Leake* and have upheld state laws imposing political committee registration and reporting requirements on groups that have “a” major purpose of influencing elections,¹⁰⁵ or to a group that has “one of its primary purposes” supporting or opposing political campaigns.¹⁰⁶ For these courts, an organization that devotes significant effort, as measured by its expenditures, to election activity can be required to register as a political activity even if election activity is not its predominant or even its leading activity. Indeed, some courts have upheld state laws that simply use a dollar spending threshold to determine whether a spender is a political committee. Thus, this past August a federal district court upheld Maine’s law requiring an organization to register as a political committee if it spends more than \$5000 in a year “for the purpose of promoting, defeating . . . the nomination or election of a candidate to political office,”¹⁰⁷ and the federal district court in Illinois rejected a challenge to that state’s law that imposed

¹⁰⁴ 525 F.3d 274, 286-89 (4th Cir. 2008). Cf. *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 391-92 (D.C. Cir. 1981).

¹⁰⁵ *Independence Inst. v. Coffman*, 209 P.3d 1130 (Colo. App. 2008), cert. denied, 130 S.Ct. 625 (2009); *Cerbo v. Protect Colorado Jobs, Inc.*, 2010 WL 1915042 (Colo. App., June 10, 2010).

¹⁰⁶ *Human Life of Washington, Inc. v. Brumsickle*, 2009 WL 62144 (W.D.Wash, Jan. 8, 2009). See also *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 786-94 (9th Cir.), cert. denied, 549 U.S. 886 (2006) (upholding Alaska law requiring “nongroup entity” to satisfy registration, reporting and disclosure requirements if it wishes to make independent expenditures).

¹⁰⁷ *National Organization for Marriage v. McKee*, 2010 WL 3270092 (D. Me., Aug. 19, 2010).

registration and reporting requirements on a nonprofit organization that accepts contributions, make contributions, or makes expenditures of more than \$5000 a year or behalf of or in opposition to candidates for public office and a lower \$3000 a year threshold for organizations other than nonprofits that engage in such activities.¹⁰⁸

The Maine court expressly rejected any “major purpose” requirement for political committee regulation, finding such a test “would yield perverse results, totally at odds with the interest in ‘transparency’ recognized in *Citizens United*.” According to *National Organization for Marriage v. McKee*, the major purpose test would have the effect of covering a small organization with just a few thousand dollars that spends most of its money on election ads while excluding a “megagroup” that could spend over a million dollars if that was not its major purpose.”¹⁰⁹

Of course, even if “major purpose” is not required, there are limits on just how far a state can go in treating a group as a political committee. The Tenth Circuit has twice rejected as unconstitutional state laws that base political committee status on a dollar threshold of election spending unconnected to the organization’s total spending, although in those cases the dollar thresholds were quite low -- \$200 and \$500 – and the court did not insist that electoral activity be “the” major purpose in order for an organization to be subject to regulation.¹¹⁰

Citizens United does not shed much light on the question of how much electoral activity is needed to treat an organization as a political committee or, rather, it may be said to point in two different directions. On the one hand, the Court’s endorsement of disclosure, especially the voter “interest in knowing who is speaking about a candidate”¹¹¹ suggests that disclosure requirements may reach broadly to inform the public about organizations active in electoral politics even if elections is not their one major or primary

¹⁰⁸ Center for Individual Freedom v. Madigan, 2010 WL 3404973 (N.D.Ill. August 26, 2010).

¹⁰⁹ National Organization for Marriage v. McKee, 2010 WL 3270092 at *10.

¹¹⁰ See Colorado Right to Life Committee, Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007); New Mexico Youth Organized v. Herrera, 611 F.3d 669 (10th Cir. 2010).

¹¹¹ 130 S. Ct. at 915.

purpose. The Court also contrasted regulations that promote public information with those that limit or prohibit speech. *Citizens United* indicates a greater receptivity to requirements that promote disclosure than *Leake* was willing to acknowledge.

On the other hand, in dismissing the government’s argument that the ban on the use of corporate treasury funds did not really restrict corporate speech because corporations could speak through their PACs, *Citizens United* emphasized the “burdensome” nature of the “extensive regulations” applicable to PACs.¹¹² Indeed, the Court went to some effort to list the obligations accompanying PAC status -- including “appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report change to this information within 10 days”¹¹³ -- as well as the monthly reports the PAC has to file with the FEC. To that extent, *Leake*’s concern with the burdens of regulation is reflected in *Citizens United*.¹¹⁴ However, *Citizens United*’s discussion of the burdensomeness of political committee status was in the context of a requirement that corporate and union speech be channeled through a PAC. To the extent that committee registration is mandated simply for voter information and general law enforcement requirements, the Court might be less troubled.

The standard for determining when an organization becomes a political committee, thus, involves balancing the public’s interest in knowing which organizations are paying for electoral ads (and the donors behind those organizations) against the burdens on speech that even basic organizational, registration, and recordkeeping requirements may impose. Combining the two strands of *Citizens United*, it seems likely that the Court’s concern for effective disclosure might lead it uphold a relatively broad definition of when an organization is deemed sufficiently electoral that it must register as a political

¹¹² Id. at 897.

¹¹³ Id.

¹¹⁴ A district court in the Fourth Circuit recently correctly noted that “the issue of the major purpose test as it relates to political committee designation” was not addressed in *Citizens United*, so that “the Fourth Circuit’s analysis on the issue . . . has not been altered.” *South Carolina Citizens for Life, Inc. v. Krawcheck*, 2010 WL 3582377 at *11.

committee and file the requisite reports. But the degree of scrutiny of the political committee definition might turn on just how much of a burden the organizational and reporting requirements place on speech.

Thus, the D.C. Circuit, in holding that SpeechNow was required to comply with the organizational and reporting requirements applicable to federal political committees – even as it held that SpeechNow was not subject to contribution restrictions because it made only independent expenditures – emphasized that SpeechNow was already subject to reporting requirement for its independent expenditures and “the additional reporting requirements that the FEC would impose on SpeechNow if it were a political committee are minimal.” The court concluded that “the organizational requirements that SpeechNow protests, such as designating a treasurer and retaining records, [do not] impose much of an additional burden upon SpeechNow.”¹¹⁵

The federal district court in *McKee* upheld Maine’s political committee definition in part because the state’s “disclosure, registration, and recordkeeping requirements are not unconstitutionally burdensome.”¹¹⁶

“It is not unusual to require a corporation doing business in the state to identify its organizational form, provide a name and address, and identify a treasurer and principal officers. Here, in addition, [a political committee] must identify its primary fundraisers and decisionmakers and state which Maine candidates or committees it supports or opposes, hardly a huge burden.”¹¹⁷

The federal district court’s treatment of Washington State’s political committee law is also instructive. The state imposes two levels of registration and reporting requirements. Organizations that raise and spend less than \$5000 per year and do not accept more than \$500 from any single donor are required only to appoint a treasurer, establish a bank account in the state, and file a statement of organization with the state’s Public Disclosure Commission. Only political committees that spend or receive above those thresholds are

¹¹⁵ 599 F.3d at 697. As of this writing, SpeechNow’s petition for certiorari in the Supreme Court challenging this ruling is pending.

¹¹⁶ 2010 WL 3270092 at *10.

¹¹⁷ *Id.*

required to regularly report on their contributions, expenditures and funds on hand. The court concluded that these burdens were “relatively minor,” focused on the political committees “most able” to comply, and serve the compelling interest in voter information.¹¹⁸

Still, even the more expansive political committee cases have dealt primarily with a committee’s duty to register, follow certain organizational forms (like have a treasurer), and keep certain records. It is less clear whether such an organization, which is only partly electoral, can be forced to disclose all of its donors. The Maine law upheld in *McKee* required the disclosure of “only contributions and expenditures *for* the promotion or defeat of a candidate (and transfers to other PACs).”¹¹⁹ A recently enacted West Virginia law requires the disclosure by independent spenders of donors of \$250 or more “whose contributions were made *for the purpose of furthering* the expenditure.” Colorado similarly now requires disclosure of a donation above a dollar threshold “that is given *for the purpose of making* an independent expenditure.”

The problem with a purposive test like these is that -- as the *Freedom’s Watch* non-enforcement decision demonstrates -- it can be easily evaded by organizations that solicit, or donors who give, to support a group’s efforts generally without earmarking their funds for electioneering.

This is, of course, the same problem that arises if a jurisdiction does not try to regulate organizations that engage in electioneering as political committees but instead simply seeks reporting of independent expenditures and electioneering communications and disclosure of major donors – in other words, those that follow the approach of the federal statute construed in *Citizens United* and *Freedom’s Watch*.

Several jurisdictions have adopted or are considering other options to obtain the disclosure of the donors who fund the electoral activities of electorally active nonprofits. These do not bother trying to register the nonprofits as political committees or subjecting

¹¹⁸ Human Life of Washington, Inc. v. Brumsickle, 2009 WL 62144 at *9, *11-*12.

¹¹⁹ *McKee*, supra, at *10.

them to the full panoply of requirements that political committee status entails. Instead, they focus on determining who can be said to be paying for a mixed-purpose nonprofit organization's electoral activities.

(2) Defining “for the Purpose.” North Carolina's disclosure law requires that organizations that undertake independent expenditures or electioneering communications disclose the identities of donors who gave “to further” those activities. But instead of limiting that to donors who so earmark their funds, North Carolina provides four criteria for determining whether a donor gave for that electoral purpose, only one of which is express earmarking. In addition, a donation will be deemed as in furtherance of electioneering (i) if it was expressly solicited for an electoral purpose; (ii) if the donor and the spending organization “engaged in substantial written or oral discussions regarding the donor's making, donating, or paying for” an independent expenditure or electioneering communication;” or (iii) if the donor knew or had reason to know of the recipient's intention to make an independent expenditure of electioneering expenditure.

This test gives some meaning to the notion of purpose even if the “discussion” factor seems a little cumbersome and the “reason to know” factor a little vague, although similar language has been upheld by the Ninth Circuit which agreed that California could treat as a “contribution” subject to disclosure when “the donor know or has reason to know that the payment will be used to make a political contribution or expenditure.”¹²⁰ Still, it is not clear how a court would handle a solicitation that indicated that contributions would be used for a mix of purposes including, but not limited to, electoral advocacy. It is not clear at this time if this will provide for effective disclosure or will draw a constitutional challenge on vagueness grounds. The North Carolina approach does seem to get at what “for the purpose” means, but it could be difficult to apply in specific cases.

¹²⁰ California Pro-Life Council, Inc. v. Randolph, 508 F.3d 1172, 1181 (9th Cir. 2007). See also, Brumsickle, supra, at *21-*23 (upholding Washington law defining a contribution when the “contributor knows or has reason to know that the funds will be used for political purposes”).

(3) Campaign Activity Accounts. Another approach, reflected in the DISCLOSE Act, in Colorado’s newly adopted law concerning independent expenditures, and Minnesota’s new law dealing with corporate spending, is to have the politically active nonprofit set up an account dedicated to campaign activity and to require disclosure only of donors to that account. Thus, the DISCLOSE Act encourages a covered organization to set up a Campaign-Related Activity Account (“CRAA”), which, if established by voluntary action of the covered organization, would have to be the sole source of the funds it uses for campaign-related activity. If a nonprofit sets up such an account and makes it the sole vehicle for its campaign activities, only donations of \$6000 or more to that account would have to be disclosed.

The DISCLOSE Act’s CRAA superficially resembles a PAC, but it differs in two significant ways. First, the CRAA is optional. The nonprofit does not have to use it. Second, there is no limitation on the size of the donation to such an account. As a result, unlike a PAC it does not limit the funds available for campaign spending. The CRAA itself presents no constitutional difficulty. If a nonprofit sets up a CRAA, then the problems of separating those donors who give for electoral purposes and those who do not and of disclosing the major donors financing electioneering are solved. Only CRAA funds would be used for electioneering and all CRAA donors above the threshold would have to be disclosed. Of course, the CRAA is voluntary.

Colorado takes a stronger approach and appears to require the use of dedicated accounts for electioneering. It provides that “any person” – defined to include corporations and labor unions -- that “accepts any donation that is given for the purpose of making an independent expenditure or expends any money on an independent expenditure” over \$1000 in a calendar year “shall establish a separate account” for that purpose; all donations accepted by that “person” for independent expenditures shall be deposited in that account; and – here’s the key point – “any moneys expended for the making of the expenditure shall only be withdrawn from the account.”¹²¹ The law then

¹²¹ Colorado, 67th General Assembly, 2nd Reg. Sess., S.B. 10-203, adding new 1-45-103.7 to the Colorado Revised Statutes.

provides that disclosure will be limited to donors to the independent expenditure account, and “no discovery may be made of information relating to the person’s general donors.”

The Colorado law tightly links up the electoral use of the funds, donor intent, and public disclosure. In so doing, it resolves the *Freedom Watch* problem of evasion of “for the purpose” since it provides an incentive to the recipient organization to identify donations as for an electoral purpose.

Of course, by requiring that only donations to a nonprofit’s independent spending account can be used by the nonprofit for electioneering, the Colorado law may be said to place a limit on the amount of money the nonprofit can spend on elections, and so may be subject to constitutional challenge. But there are good arguments that can be made in its support. The law protects the interest of donors to mixed electoral/non-electoral organizations in not having their donations used for electoral activity unless they affirmatively indicate that intention. Unlike the former federal ban on the use of corporate treasury funds for electioneering, the Colorado law does not bar the nonprofit from using its resources to engage in electioneering but it recognizes that a nonprofit’s resources come from voluntary donations and so empowers the donors to determine whether their donations will be used in elections. There is no cap on the amount of donations to the account, nor on the nonprofit’s freedom to solicit funds for the account. The Colorado law resembles the “shareholder protection” rationale for the corporate spending ban rejected in *Citizens United*, but unlike the now-unconstitutional law, it permits willing donors to give their funds in unlimited amounts to the nonprofit to be used for electoral purposes. Nor does it impose the full organizational requirements of a PAC on such an account but essentially uses it as a bookkeeping device.

The Colorado law will almost surely be challenged in court. It remains to be seen whether it will be sustained, but as I have suggested there are good arguments for its constitutionality.

(4) Presumption of Electoral Purpose: The DISCLOSE Act provides for (i) disclosure of donations to nonprofits earmarked for electoral use, (ii) disclosure above the

high \$6000 threshold to donations to the optional CRAA, (iii) a mechanism for donors to nonprofits to provide that their funds will **not** be used for electoral purposes; (iv) but if a nonprofit does not create a CRAA and does undertake independent expenditures or electioneering communications then all donations of \$600 or more are subject to disclosure unless the donors has expressly directed that the donation will not be used for electoral purposes. In other words, for organizations that do not take the CRAA option but do engage in electoral spending, donors above the \$600 threshold will be disclosed unless they take affirmative steps to exclude their donation from the organization's electoral activities. In effect, the electoral purpose of such donations would be presumed.

It is not clear if this would be constitutional. On the one hand *Citizens United* articulates a public "interest in knowing who is speaking about a candidate." On the other hand, it is not clear a donor who gives to a multi-purpose but not primarily electoral organization who has not indicated one way or the other her views as to whether the funds can be used for electoral purposes is "speaking about a candidate." Arguably, this goes beyond the "constructive knowledge" that donations will be used for electoral activity that has been upheld in some other cases.

Moreover, it seems problematic to apply a much higher disclosure threshold for donations expressly given for campaign-related activity than for donations not expressly so given. The \$6000/\$600 differential thresholds for disclosure is intended to be a carrot for organizations to create CRAAs. Still it seems hard to justify greater disclosure of funds arguably given for a mixed of electoral and non-electoral purposes than for those that are earmarked for a campaign-related activity account.

It may be that the authors of the DISCLOSE Act thought they could not force nonprofits to rely exclusively on CRAAs. But the carrot of differential disclosure thresholds relies on the stick of disclosure of all donors above \$600 other than those who have expressly requested that their donations be excluded from political activity, and it is not clear that it is constitutional. Indeed, the CRAA model seems to more carefully respect the constitutional concern to limit disclosure to those who are supporting electoral

activity. It also provides a good mechanism for protecting the interest of donors in determining whether their funds are used for electoral purposes, and assuring public disclosure of funds given for that purpose, without actually falling afoul of *Citizens United*'s prohibition of spending limits. Should Congress return to the nonprofit donor disclosure question, mandating CRAAs for organizations such as (c)(4)'s and (c)(6)'s that rely on donors for their funding, would make sense and there is a good case that such a requirement would pass constitutional muster.

C. Disclaimers/Attribution Provisions

Citizens United upheld the current BCRA provision requiring that a televised electioneering communication funded by anyone other than a candidate include a disclaimer that the independent organization (and not a candidate) "is responsible for the content of this advertising." The required statement must be made in a "clearly spoken manner" and be displayed on the screen in a "clearly readable manner" for at least four seconds. It must also state that the communication is not authorized by a candidate and must display the name and address (or Website) of the person or group that paid for the ad.¹²² The problem for many reformers is that telling viewers that "Citizens United," "Americans for Prosperity" or the "American Future Fund" is responsible for the content of the ad doesn't tell viewers much. In particular, it doesn't tell them who is Citizens United or Americans for Prosperity or the American Future Fund.

Thus, a recurring theme in the reform legislation taken up in 2010 has been to force greater disclosure of the identities of the donors contributing to organizations that engage in independent expenditure or electioneering communications in the body of their ads. Rather than relying on voters – or more plausibly the media, bloggers, public interest organizations, or competing interest groups – to ferret out and publicize the donor information from campaign finance filings with federal or state regulators, these measures would make the identities of the principal donors immediately apparent in the ads. Although still some times referred to under the rubric of disclaimer measures – because

¹²² 130 S.Ct. at 913-14.

they involve disclaiming that a candidate has paid for the ad – these laws are probably better referred to as attribution measures.

The most prominent and complex of these problems was in the DISCLOSE Act, which sought to require that a radio or television independent expenditure or electioneering communication paid for by a nonprofit include a “significant funder disclosure statement” or a “Top Five Funders list” in the ad. The determination of whether a donor is a “significant funder” would vary according to both the size of the donation and the degree to which the donor specifies the campaign use of the money so provided. Thus, if a nonprofit engages in independent spending or electioneering communication, and receives one or more donations of \$100,000 or more from an individual or another organization, and those donations specify that they are to be used for a “specific” independent expenditure of electioneering communication, then the person (including an organization) that provides the largest such donation would have to appear in the radio or TV ad. If the significant funder is an individual, the donor would have to give his/her name and home city and state and say “I helped to pay for this message and I approve it.” If the significant funder is an organization, then a representative of the organization would have to appear in the ad, give his/her name and title, and the name and location of the principal office of that organization and state that the organization helped pay for the ad and approves of it.

If there were donors who gave more than \$100,000 and no one of them directed that it be used to a specific ad, but one or more of them specified that it be “used for campaign-related activity with respect to the same election or in support of the same candidate” as addressed in the ad, then the largest such donor would be the “significant funder” who would have to make the individual or organizational “significant funder” statement. If no donors fell into that category, but there were donors of \$10,000 or more who gave simply for the purpose of being used for campaign-related activity or in response to a solicitation to funds for campaign-related activity – but not earmarked for a specific ad, election, or to discuss a specific candidate – then the largest such donor would have to make the significant funder disclaimer.

If no donors fell into any of the preceding categories, then the largest donor of more than \$10,000 in unrestricted funds would have to make the significant funder disclosure statement. If no donor gave more than \$10,000, the “top five funders” provision would apply. The names and addresses of the five persons (two in the case of a radio ad) who provided the largest payments of any type in an aggregate amount equal to or greater than \$10,000 that would have to be reported as for independent expenditures or electioneering communication would also have to be included in the ad.

Although this extremely complex measure has not become law, a number of states have adopted more streamlined requirements intended to get the names of the principal funders of independent electioneering messages into those ads. For example, Alaska now requires that when a campaign ad is taken out by a “person other than an individual or candidate,” the ad must identify the name, and city and state of residence, or the principal place of business, of the sponsor’s three largest contributors.¹²³ If the ad has a “video component”, then the list of top three donors must be read aloud.

Connecticut’s new law provides that in the case of a TV or Internet video ad paid for by a 501(c) or a 527 organization, the ad must visibly display the statement: “The top five contributors to the organization responsible for this advertisement” followed by a list of the five people or entities making the largest reportable contributions during the preceding twelve months.¹²⁴ A radio ad by a 501(c) or 527 must include a similar audio statement, and the narrative by a robo call by a 501(c) or 527 must include a message indicating “the top five contributors responsible for this telephone call are. . . .”¹²⁵

North Carolina now requires the disclosure of the top five donors within the preceding six months to the sponsor of a print ad that is an independent expenditure or electioneering communication.¹²⁶ Television or radio ads must include a disclaimer spoken by the chief executive or principal decision maker of the sponsor, and “[i]f the sponsor is a

¹²³ Ak. Stat. § 15.13.090

¹²⁴ Conn. Gen. Stat. § 9-621(h)(2).

¹²⁵ Conn. Gen. Stat. § 0-621(h)(3),(4).

¹²⁶ N.C. Gen. Stat. § 163-278.39(a)(7),(8).

corporation that has the purpose of promoting social, educational, or political ideas,” the ad must also include a legible list for TV or an audible statement for radio indicating that the viewer or listener “may obtain additional information on the sponsor and the sponsor’s donors from the appropriate board of elections” including the statement “for donor contact [name of the board of elections with whom information filed].”¹²⁷

The current federal disclaimer law¹²⁸ was adopted as part of BCRA in 2002; it was sustained with virtually no discussion in *McConnell*.¹²⁹ As noted, *Citizens United* summarily rejected Citizens United’s challenge to the application of that law to the ads for *Hillary*. It is perhaps surprising that the Court has given so little attention to the issues raised by forced disclosure of the sponsors of an ad in the body of the ad itself. In one sense, the disclaimer provides the listener or viewer with no new information, since the sponsor of such an ad is already required – or can be required -- to report the expenditure to the FEC, or the appropriate state regulator, so the information can be obtained without the disclaimer. Moreover, the disclaimer directly intrudes into the sponsor’s message; it can distract the audience’s attention from the message, and, for radio and TV ads, it consumes precious (and expensive) on-air seconds.¹³⁰

The case for the disclaimer is that it makes disclosure of the identity of the sponsor more effective by bringing it home to the voter as she listens to, watches, or reads an ad. Moreover, as *Citizens United* points out, a disclaimer/attribution requirement can help dissipate the confusion as to whether an ad that discusses a candidate was sponsored by a candidate, party, or independent organization.

These new laws and proposals, however, go much further. Some of those regulating radio and TV ads require not simply that a representative of the sponsoring

¹²⁷ N.C. Gen. Stat. § 163-278.39A(b)(5)-(7), (c) (5), (6).

¹²⁸ 2 U.S.C. § 441d(d)(2).

¹²⁹ 540 U.S. at 230-31.

¹³⁰ The DISCLOSE Act did provide an exemption from the significant funder and top five funder disclosure requirements for ads that are of such short duration, that those statements “would constitute a hardship” to the sponsor; the Connecticut and North Carolina laws also provide for exemptions for short ads.

organization take responsibility for the message, but that the funders (or senior officers of corporate funders) of these organizations appear personally, or that their names and addresses be listed in the ad. Again, these requirements just repeat already-disclosed, or otherwise-disclosable, information; take up space in, intrude on and potentially distract from the organization's message; and focus greater attention on the top contributors, particularly, in the case of the DISCLOSE Act, the significant funder who must actually appear personally in the ad.

The two post-*Buckley* cases in which the Supreme Court struck down disclosure requirements¹³¹ – *McIntyre v. Ohio Elections Commission*¹³² and *Buckley v. American Constitutional Law Foundation* (“ACLF”)¹³³—are relevant but not exactly comparable. *McIntyre* involved anonymous leaflets an individual composed and printed on her home computer and placed on cars parked in the lot of a middle school at the time of a meeting concerning a proposed school tax levy. The Court struck down the Ohio law banning the distribution of anonymous literature which McIntyre had violated because “in the case of a private citizen who is not known to the recipient, the name and address of the author add little, if anything, to the reader’s ability to evaluate the document’s message.”¹³⁴ By the same token, “compelled self-identification” on a “personally crafted statement” struck the Court as “particularly intrusive” and likely to chill political speech by ordinary citizens.¹³⁵ The new disclaimer laws and proposals, on the other hand, focus on sophisticated broadcast and other mass media ads and on “significant funders” whose names might mean something to viewers, who are unlikely to be chilled by the disclaimer, and who are subject to disclosure anyway.

ACLF is closer. In that case, the Court struck down a requirement that referendum petition circulators wear identification badges stating their names and indicating whether

¹³¹ This is in addition to cases, such as *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982), in which an organization can win an as-applied exemption from an otherwise valid disclosure law on a showing that disclosure would expose donors to threats, harassment, and reprisal.

¹³² 514 U.S. 334 (1995).

¹³³ 525 U.S. 182 (1999).

¹³⁴ 514 U.S. at 348-49.

¹³⁵ *Id.* at 355.

they were paid or volunteers. The Court concluded that the badges imposed a significant burden on political activity given the reluctance of potential circulators “to face the recrimination and retaliation that bearers of petitions on ‘volatile’ issues sometimes encounter.” Moreover, they provided the public with no new information since a circulator was already required to give her name in an affidavit filed with the state when she submits the signatures she has collected. That much less intrusive form of disclosure satisfied the public’s informational interest.¹³⁶ As in *ACLF*, there are less intrusive means of obtaining the names and addresses of the significant funders and/or top contributors. However, unlike in *ACLF* the new disclaimer laws apply only to mass media activity and so do not threaten the contributors whose names are so disclosed with the personal discomfort of “volatile” encounters with other individuals.

The Supreme Court has accepted the principle of disclaimer/attribution requirements, notwithstanding the interference with ad sponsor’s message. The issue posed by these laws is whether the important public purpose of making disclosure more effective can justify including the names of top contributors in an ad and, in the most extreme case, requiring the most significant funder to appear personally in the ad (or to have a top executive appear if the funder is an organization).

My guess is requiring nonprofits to include the names of their top funders in their ads will pass constitutional muster. With many electorally active nonprofits operating under non-descriptive names, a disclaimer that a particular nonprofit paid for an ad does not tell the voters “who is speaking about a candidate.” Many electorally active nonprofits are operating in effect as pools of electorally active firms or wealthy individuals. If an individual firm or person were to directly pay for an independent expenditure or electioneering communication, that sponsor would have to make the necessary disclaimer. But if those firms or individuals pool their funds and channel their expenditures or communications through an intermediary organization with an anodyne name, the disclaimer does not disclose their role. Thus, extending the disclaimer to include the most

¹³⁶ 525 U.S. at 197-200.

significant funder or the top three to five donors is consistent with the principle supporting disclaimer, subject to the limitation that the required list not be so long or time-consuming as to unduly eat into the campaign message.

But I don't see what justifies mandating that "an unobscured, full-screen view" or a "voice-over accompanied by a clearly identifiable photograph or similar image" of the individual "significant funder" or the CEO of an organizational significant funder appear in a television ad, as the DISCLOSE Act would have required. Given that most funders probably are not celebrities, it is not clear that showing the funder's picture gives the voter more information than the funder's name. Putting the significant funder personally in the ad may be a way of making the funder take responsibility for the content of the ad, but the significant funder is not a candidate, not the head of the nonprofit sponsor, and need not be the source of a majority of the funds used to pay for the ad. The requirement seems more likely to have the effect – if not the intent -- of discouraging large donations, which would be unconstitutional.

V. Conclusion

It is unclear just how much *Citizens United* may be said to have unleashed corporate and union campaign spending. Given the narrow definition of election-related speech subject to limitation that the Court had embraced previously, considerable corporate campaign spending was permissible before the *Citizens United* decision. Certainly, corporations and unions that wanted to participate in campaigns could find it easy to do so. Nevertheless, *Citizens United* removed whatever uncertainties that might have held certain firms back.

Moreover, *Citizens United* may have contributed to the appellate court and FEC rulings that have made it easier for corporations to pool their funds with each other and with wealthy individuals in intermediary organizations, including nonprofit (c)(4)'s and (c)(6)'s. This enables them to combine their financial strengths; hire skilled political professionals to help them hone their messages and direct their funds to the races where

they are likely to be strategically significant; and, overall, magnify their electoral impact. It also enables them to avoid disclosure under current campaign finance law.

But *Citizens United* also confirmed the constitutionality of applying disclaimer and reporting and disclosure requirements to the electioneering activities of politically active nonprofits. Indeed, *Citizens United* embraced a fairly broad definition of election-related communications for purposes of disclosure and so strongly endorsed the idea of disclosure that it has been used by lower courts to sustain state laws that define election-related activity even more broadly than does federal law.

Thus, *Citizens United* simultaneously created the situation which has given rise to an intense media and public outcry for more disclosure concerning the sources of funds for the nonprofits that have been so active in the current election cycle, while also signaling that more expansive laws requiring the disclosure of those donors may be constitutional. Although the current Congress failed to enact the aggressive disclosure measure that passed the House of Representatives, a number of states did adopt more forceful disclosure laws and it is likely that more states – and, possibly, a future Congress – will do so.

These laws will surely raise questions about the definition of election-related spending; how to determine whether a donation to a multi-purpose nonprofit that combines electoral and non-electoral activity is subject to disclosure; and whether to extend disclaimer/attribution requirements to include the disclosure of the identities of the significant funders or top contributors supporting the electoral activities of nonprofits.

None of these questions have clear answers. *Citizens United* supports a broader definition of election-related spending, but there are still limits and some laws may press against those limits. There is precious little precedent concerning the scope of disclaimer or attribution requirements. And the law governing the disclosure of donors outside the context of political committees – and determining what organizations can be treated as political committees – is particularly murky.

Much will turn on the specific laws and regulations adopted and on the outcome of the challenges likely to be brought against them. The one thing that seems certain is that there will be extensive and ongoing debate concerning the content and scope of the campaign finance disclosure laws as they apply to nonprofits.