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## Note

### Blowing Up the Pipes: The Use of (c)(4) to Dismantle Campaign Finance Reform

Cory G. Kalanick\*

President Obama lamented in his first State of the Union Address: “With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe *will open the floodgates for special interests . . . to spend without limit in our elections.*”<sup>1</sup> Most political observers and legal scholars understood the truth of this prophecy and the significant impact that *Citizens United v. Federal Election Commission*<sup>2</sup> would have on campaign finance.<sup>3</sup> However, few casual observers would have ever envisioned that this political sea change would come from seemingly nonpolitical social-welfare nonprofits.<sup>4</sup>

America’s enterprising tendencies have produced an industry around politics that breeds entrepreneurialism and rewards

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1. President Barack Obama, State of the Union Address 8 (Jan. 27, 2010), available at <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000055.pdf> (emphasis added to highlight the President’s use of the storied political-money-as-water metaphor).

2. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

3. However, some disagreed with the sentiment. For example, Supreme Court Justice Samuel Alito “mouthed a silent ‘not true’ to protest the President’s characterization” during the State of the Union Address. Karl Crow, *Citizens United v. FEC: Protecting Free Speech for Nonprofit and For-Profit Corporations*, CAPITAL RES. CENTER, 1 (June 2010), <http://www.capitalresearch.org/pubs/pdf/v1275085482.pdf>.

4. Social welfare nonprofits are codified at I.R.C. § 501(c)(4) (2010). See *infra* Part I.A.2. While some donors actually began using § 501(c)(4) groups in previous elections, § 527 organizations have remained the dominant tool for outside money in modern politics. See *infra* Part I.A.1.

exploitation of campaign finance loopholes.<sup>5</sup> Modern political financiers have searched far and wide for pockets of “soft money” because of its precious quality of limitless use without regulation under federal election laws.<sup>6</sup> Entrepreneurs on the right were particularly active after the 2008 presidential election.<sup>7</sup> The loopholes taken advantage of by political financiers threaten the very nature of the democratic process by shielding “veiled political actors,” and these entities often resemble “Russian matryoshka dolls” because “each layer is removed only to find another layer obscuring the real source of money.”<sup>8</sup> The latest round of exploitation occurred in the 2010 midterm elections when donors participated in blatant political activities behind the façade of social welfare nonprofits.<sup>9</sup>

This Note examines the rise of § 501(c)(4) nonprofit organizations as a modern tool for bypassing campaign finance regulation. Part I explores the Internal Revenue Service (IRS) tax code to juxtapose the history and purpose of § 527 political organizations with similar objectives of § 501(c)(4) social welfare nonprofits. This Part also analyzes the advantages and disadvantages of using each entity as a vehicle for political contributions, and details the use of § 501(c)(4) nonprofits in the 2010

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5. See Doyle McManus, *Republicans’ Secret Formula*, L.A. TIMES, Oct. 21, 2010, at 21, available at 2010 WLNR 21028182 (“Like almost every pursuit in this free-enterprise country, political campaigning is a business. And, as in many businesses, success often goes not to the entrepreneur who brings a product to market first but to the one who exploits it best.”).

6. Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 256–57 (2004) (comparing “soft money,” defined as “funds coming directly from corporate or union treasuries or funds given in excess of the individual and PAC contribution limits,” with “hard money,” which is “money for federal campaigns that comes from legal sources, subject to contribution limits, and reported to the Federal Election Commission”).

7. This Note examines use of the campaign finance loophole by conservatives in the 2010 midterm elections, but it is important to note that liberal third-party groups—such as the Sierra Club—have also utilized § 501(c)(4) entities, and Democrats will likely do so at an increasing rate in future elections. See *infra* Part I.B.

8. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 296 (2005).

9. See Complaint at 4–5, Pub. Citizen v. Crossroads Grassroots Political Strategies (F.E.C. Oct. 12, 2010) [hereinafter Complaint, Crossroads G.P.S.], available at <http://www.citizen.org/documents/FEC-ComplaintAmericanxroadsGPS101310.pdf> (“The deployment of section 501(c)(4) organizations in 2010 as a vehicle for undisclosed money to pay for partisan activities to influence federal elections is simply the latest chapter in the long history of efforts to evade and violate federal campaign finance laws.”). For facts on the sources of 2010 midterm political dollars, see *infra* Part I.B.

midterm elections. Part II builds the case for increased regulation and assesses legal and political arguments for and against four options for regulating § 501(c)(4) groups, including: (1) stepped-up executive enforcement through the IRS; (2) legal suits under the Federal Election Campaign Act of 1971 (FECA)<sup>10</sup> and the Bipartisan Campaign Reform Act of 2002 (BCRA);<sup>11</sup> (3) caps on total contributions to § 501(c)(4)s; and (4) legislative requirements for compelled disclosure. Part III argues that disclosure and disclaimer requirements are the best option for reforming § 501(c)(4) political activity. Whether policymakers resort to disclosure or utilize any other options, this Note concludes that reform of § 501(c)(4) political activity must occur quickly before future elections further undermine the current campaign finance regime.

#### I. TAX-EXEMPT ENTITIES, POLITICAL ACTIVITY, AND THE 2010 MIDTERM ELECTIONS

In order to understand why the § 501(c)(4) nonprofit has been elevated as the current campaign finance loophole of choice, it is important to comprehend the intersection of tax exemptions, politics, and soft money in American political history. Accordingly, the first section examines the historical development of the tax treatment of nonprofit political activity by looking at two entities: (1) § 527 political organizations, and (2) § 501(c)(4) social welfare organizations. The second section turns to the midterm elections of 2010 to demonstrate how the § 501(c)(4) loophole is increasingly being exploited to allow nonpolitical social welfare nonprofits to funnel money into electoral activities.

##### A. NONPROFIT ENTITIES: THE INTERSECTION OF POLITICS AND THE TAX CODE

This section begins the analysis of nonprofit political activity by examining the § 527 political organization, which was the first nonprofit involved in electoral politics and continues to be utilized by many campaign financiers.<sup>12</sup> Then, the section turns its attention to the history and purpose of nonprofit entities traditionally concerned with nonpolitical activities, such as so-

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10. 2 U.S.C. §§ 431–456 (2006).

11. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C.).

12. *See, e.g., infra* note 74 and accompanying text (noting Karl Rove's use of both § 527 and § 501(c)(4) entities in the 2010 midterm elections).

cial welfare nonprofits organized under § 501(c)(4). The section concludes by comparing and contrasting the two entities with respect to political donors' abilities to utilize such entities for electoral activities.

#### 1. Section 527 Political Organizations: The Modern Tax Foundation for Soft Money in Politics

Traditionally, political organizations that put resources into campaigning for elected officials did not qualify for tax-exempt status.<sup>13</sup> That all changed in 1974 when Congress wrote § 527 into the tax code.<sup>14</sup> Somewhat surprisingly, the creation of tax exemptions for entities primarily engaged in influencing elections was part of a broader movement of post-Watergate reforms.<sup>15</sup> Section 527 defines a "political organization" as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."<sup>16</sup> The tax code essentially defines "exempt function" as influencing elections.<sup>17</sup> All such political groups organized under the tax code are exempt from federal income taxation.<sup>18</sup>

Political organizations formed under § 527 originally acted to "coordinate voter registration or turnout drives," and also

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13. Holman, *supra* note 6, at 266; Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next "Loophole"?*, 6 FIRST AMENDMENT L. REV. 41, 54 (2007). *See generally* Tobin, *supra*, at 67–74 (chronicling the history of tax treatment of political organizations).

14. Tobin, *supra* note 13, at 54. *See generally* Ellen P. Aprill, *Regulating the Political Speech of Noncharitable Exempt Organizations After Citizens United* 60–69 (Loyola-L.A. Law Sch., Legal Studies Paper No. 2010-57, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1727565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1727565) (detailing IRS treatment of § 527 organizations).

15. *See* Holman, *supra* note 6, at 266. The tax code did not include any disclosure requirements for § 527 organizations, however, because lawmakers at the time assumed that financial activity would come to light through required disclosure to the Federal Election Commission. *Id.*

16. I.R.C. § 527(e)(1) (2010).

17. I.R.C. § 527(e)(2) ("The term 'exempt function' means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.")

18. I.R.C. § 527(a); *see also* Paul S. Ryan, *527s in 2008: The Past, Present, and Future of 527 Organization Political Activity Regulation*, 45 HARV. J. ON LEGIS. 471, 480–81 (2008) (detailing the qualifications for tax-exempt political organizations).

“campaign[ed] on specific issues.”<sup>19</sup> However, partisan operatives soon realized that they could utilize political organizations entirely for influencing electoral outcomes and still retain the tax-exempt benefits.<sup>20</sup> Moreover, they could do so without having to disclose the identity of their donors because these organizations were regulated solely under the jurisdiction of the IRS, allowing them to avoid federal election disclosure requirements.<sup>21</sup> The first major electoral use of the § 527 loophole was effected by the Sierra Club.<sup>22</sup> While the Republican Party traditionally raised its funds through hard money, Democrats realized their soft money advantage with Bill Clinton at the helm.<sup>23</sup> Donors on the right quickly followed their ideological opposites into the § 527 game during the 2000 Republican primary when brothers Charles and Sam Wyly—wealthy friends of George W. Bush—targeted John McCain through a § 527 organization dubbed “Republicans for Clean Air.”<sup>24</sup> Through “issue advocacy,”<sup>25</sup> § 527 organizations provided an alluring alternative to Political Action Committees (PACs) for wealthy donors, corporations, and labor unions seeking to circumvent the \$5000 contribution limit.<sup>26</sup> Congress responded to the sly tactics in 2000 with requirements that § 527 organizations dis-

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19. Lauren Daniel, Note, *527s in a Post-Swift Boat Era: The Current and Future Role of Issue Advocacy Groups in Presidential Elections*, 5 NW. J.L. & SOC. POL'Y 149, 152 (2010).

20. Ryan, *supra* note 18, at 480; *see also* Holman, *supra* note 6, at 266 (“Two decades later, however, non-profit groups transformed Section 527 into a campaign finance loophole.”).

21. *See* Holman, *supra* note 6, at 266 (“Section 527 status was subject only to the tax code, which did not require public disclosure of financial activity, rather than the elections code, which did require disclosure.”).

22. *Id.*

23. *See* McManus, *supra* note 5 (“Democrats have been no slouches in finding innovative ways to funnel millions into political campaigning. In 1996, then-President Clinton held dozens of events in the White House to encourage donors to give ‘soft money’ to Democratic causes.”).

24. Holman, *supra* note 6, at 266. Though the Wyly brothers were later revealed as the funders of the group, their identities were unknown at the time. *Id.*

25. *See* Daniel, *supra* note 19, at 152–53 (describing the issue advocacy/express advocacy distinction created by *Buckley v. Valeo*, 424 U.S. 1 (1976)).

26. DANIEL HAYS LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 66–67 (4th ed. Supp. 2010) [hereinafter LOWENSTEIN ET AL., SUPPLEMENT] (referring to political organizations as “shadow parties”); *see also* Daniel, *supra* note 19, at 150 (“527s provide a vehicle through which wealthy individuals can redirect limitless contributions that would otherwise be subject to strict caps if received by political parties or individual candidates.”).

close contributions to the IRS.<sup>27</sup> However, these reforms had little impact on the forward march of the entity's use as a campaign finance loophole, and four years later, the presidential election delivered to the country "the year of the 527 organization."<sup>28</sup>

Seeking to close the loophole, citizens brought suit to classify § 527 political organizations as "political committees" subject to regulation under federal election law.<sup>29</sup> In response, the Federal Election Commission (FEC) equivocated. Instead of undertaking a thorough rulemaking process that could have clarified the scope of regulations and established bright-line guidance, the commission opted for a case-by-case approach.<sup>30</sup> Despite this failure, the FEC did assess fines against some of the worst offenders for failing to register as political committees—but not until after another election cycle had come and gone.<sup>31</sup> As a result, the FEC penalties had "little deterrent effect" because they were so small, and were ultimately seen as merely the "cost of doing business."<sup>32</sup>

It is worth noting that the § 527 organization is still the only tax-exempt organization that can set its primary purpose to focus on politics.<sup>33</sup> The involvement of the FEC began to patch up some leaks in the federal election pipes, but as a result, big-money donors began to search out new nonprofit loop-

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27. Holman, *supra* note 6, at 266; *see also* Garrett & Smith, *supra* note 8, at 318 ("In July 2000, Congress closed . . . the gap by passing legislation requiring Section 527 political organizations to disclose contributions of \$200 or more and expenditures of \$500 or more."); Aprill, *supra* note 14, at 66 (noting the quick congressional reaction to concern over "stealth" § 527 organizations).

28. Ryan, *supra* note 18, at 473 (quoting Richard Briffault, *The 527 Problem . . . and the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 949 (2005)). In that year, § 527 groups spent \$400 million influencing federal elections. *Id.* Contributing \$24 million, liberal donor George Soros was the biggest individual contributor to § 527 political organizations. LOWENSTEIN ET AL., SUPPLEMENT, *supra* note 26, at 67.

29. *See* Ryan, *supra* note 18, at 473 ("As a result, 527 organizations that should have registered, but did not register, as federal political committees in 2004 and 2006 illegally raised and spent hundreds of millions of dollars to influence federal elections . . .").

30. *See id.* (discussing the case-by-case approach adopted by the FEC).

31. Daniel, *supra* note 19, at 167; *see also* Ryan, *supra* note 18, at 490, 493–94 (detailing the conciliation enforcement agreement between the Swift Boat Veterans for Truth and the FEC).

32. Daniel, *supra* note 19, at 168.

33. Tobin, *supra* note 13, at 54.

holes. And thus, the § 501(c)(4) organization made its political debut.<sup>34</sup>

## 2. In Contrast: Social Welfare Organizations

When juxtaposed with § 527 organizations, the nonpolitical history of § 501(c)(4) entities becomes strikingly apparent. Congress passed legislation in 1913 upon the request of the Chamber of Commerce for a “civic and commercial” organization tax exemption.<sup>35</sup> The current statutory formulation provides tax-exempt status for

[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.<sup>36</sup>

The statutory text essentially gives rise to two categories: (1) “social welfare organizations,” and (2) “local associations of employees.”<sup>37</sup> Civic associations and volunteer fire companies provide the best examples of these respective categories.<sup>38</sup> In examining the impact on the current political landscape, this Note focuses on the former classification.

In contrast to the political groups organized under § 527 of the tax code, § 501(c)(4) historically led to the creation of nonprofits focused on a myriad of community interests. For example, § 501(c)(4) gave rise to entities designed to promote community art, neighborhood beautification, and housing/community redevelopment.<sup>39</sup> Additional groups include cultural organizations designed to promote local customs through annual festivals, organizations that operate recreational roller-

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34. See LOWENSTEIN ET AL., SUPPLEMENT, *supra* note 26, at 67 (“As the FEC began to regulate 527 organizations, albeit on a case-by-case basis, some election-related activity shifted to 501(c) organizations and newer ‘taxable’ nonprofits. Among other things 501 status may make it easier for groups to hide the identity of their donors.”); Daniel, *supra* note 19, at 175 (“Some pundits assert that 527s have not so much disappeared as they have evolved into a new breed—nonprofit, ‘social welfare’ groups.”).

35. JOHN FRANCIS REILLY ET AL., IRS 501(C)(4) ORGANIZATIONS, at I-2 (2003), available at <http://www.irs.gov/pub/irs-tege/eotopici03.pdf>.

36. I.R.C. § 501(c)(4) (2010).

37. REILLY ET AL., *supra* note 35, at I-2.

38. INTERNAL REVENUE SERV., PUBLICATION 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 45 (2010) [hereinafter PUBLICATION 557], available at <http://www.irs.gov/pub/irs-pdf/p557.pdf>.

39. See REILLY ET AL., *supra* note 35, at I-4 to I-10 (citing to various revenue rulings regarding social welfare organizations).



skating rinks, entities designed to facilitate cooperation with a parent-teacher association, and even a gun range organized to provide safety lessons for the use of rifles, shotguns, and pistols.<sup>40</sup> Other groups that are tax-exempt under § 501(c)(4) include veterans' associations, as well as homeowners' and tenants' associations.<sup>41</sup>

The key to § 501(c)(4) status is the social benefit. The IRS regulations make clear that a nonprofit operates "*exclusively* for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the people of the community."<sup>42</sup> The regulations elaborate on this point by stipulating that a social welfare organization "is one which is operated primarily for the purpose of bringing about civic betterments and social improvements."<sup>43</sup> More pertinent to this discussion, however, is what the regulations say about politics: "The promotion of social welfare *does not include* direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office."<sup>44</sup> Although there are exceptions to this general rule in the regulations, the basic premise is apparent: political activism and social welfare are mutually exclusive—at least when determining whether an organization's primary purpose is exclusively for social welfare.

Despite this clear intention, § 501(c)(4) nonprofits have been permitted to participate in some political activity relevant to their organization's primary purpose so long as no more than half of the overall activities are political.<sup>45</sup> In order to prove that an organization meets the statutory requirement, the IRS has established the "major purpose" test. An entity passes § 501(c)(4) muster if it can demonstrate that it devotes more than half of its resources to the promotion of social welfare

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40. *See id.*

41. *See id.*

42. Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (2010) (emphasis added).

43. *Id.*

44. *Id.* § 1.501(c)(4)-1(a)(2)(ii) (emphasis added); *see also* PUBLICATION 557, *supra* note 38, at 45–46.

45. Although fifty percent is the general rule of thumb, opinions vary regarding how much political activity actually constitutes "primary purpose." *See* April, *supra* note 14, at 50 (citing academic support for a fifty percent threshold, the ABA Tax Section recommendation of a "40 percent safe harbor," and a proposed sliding scale approach).

causes previously discussed, rather than to politics.<sup>46</sup> Note, however, that acts of lobbying and public education are not considered political activity, and can be conducted to further a group's social welfare purpose.<sup>47</sup> Section 501(c)(4) organizations are subject to tax on political advertisements made to the extent that they deviate from standard public policy expression.<sup>48</sup> Factors demonstrating taxable political communication focus on communications that identify a candidate, the timing of the ad near a political campaign, targeting of voters, the inclusion of a candidate's policy position, and the extent to which one candidate is distinguished from other candidates.<sup>49</sup> When a § 501(c)(4) nonprofit does take part in the political process, it must file a Political Organization Income Tax Return.<sup>50</sup>

Social welfare nonprofits and political organizations are similar in that they are both exempt from federal income tax, can receive unlimited donations, and their donors cannot write off the tax contributions.<sup>51</sup> However, when it comes to permitted activities and associated requirements, the two entities diverge. Section 527 organizations can participate in unlimited political activity, but can conduct only limited lobbying efforts.<sup>52</sup> Further, political organizations accepting or spending more than \$25,000 a year must disclose expenditures and contributions—including the identities of their donors—to the IRS through regular electronic reports similar to those made to the FEC by political committees, and the IRS makes these reports public on its website.<sup>53</sup> The IRS penalty for nondisclosure is the

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46. See, e.g., INTERNAL REVENUE SERV., INTERNAL REVENUE MANUAL, §§ 7.25.4.6–8 (1999), available at [http://www.irs.gov/irm/part7/irm\\_07-025-004.html](http://www.irs.gov/irm/part7/irm_07-025-004.html) [hereinafter INTERNAL REVENUE MANUAL]; Crow, *supra* note 3, at 4 (“[T]he IRS ‘major purpose’ test . . . means the majority of expenditures made by these organizations must be for its tax-exempt programs and purposes, and not for political candidates.”).

47. Ryan, *supra* note 18, at 478–79.

48. See INTERNAL REVENUE MANUAL, *supra* note 46, § 7.25.4.7(1) (“IRC 501(c)(4) organizations are subject to the tax imposed by IRC 527 on any expenditure for a political activity that comes within the meaning of IRC 527(e)(2).” (citing Rev. Rul. 81-95, 1981-1 C.B. 332)).

49. Rev. Rul. 2004-6, 2004-1 C.B. 328–30.

50. PUBLICATION 557, *supra* note 38, at 46.

51. See Ryan, *supra* note 18, at 482 (comparing the benefits and burdens of tax-exempt organizations in a chart).

52. *Id.*

53. *Id.* at 481 & n.41; see also PUBLICATION 557, *supra* note 38, at 12–13; Holman, *supra* note 6, at 266. Section 527 organizations registered as “political committees” must make disclosures directly to the FEC. See Ryan, *supra* note 18, at 483.

loss of the tax exemption on the undisclosed amount.<sup>54</sup> Section 501(c)(4) entities, on the other hand, can conduct unlimited lobbying, but cannot spend all of their resources on political activity. However, they are not subject to the same registration and disclosure requirements as § 527 groups. Although they must file financial activity reports with the IRS on an annual basis, these reports are only required in paper form, and to the extent that any donors are listed in the report, their identities are not made available to the public.<sup>55</sup> Hence, while there are some limitations on using § 501(c)(4) nonprofits for campaign purposes, the nondisclosure benefit makes them “a potentially more lucrative soft money conduit than even Section 527s.”<sup>56</sup>

While 2004 was the “the year of the 527,”<sup>57</sup> the previously discussed changes in the political fundraising landscape led to the dubbing of the 2010 midterms as “the 501(c)(4) election.”<sup>58</sup> The next section examines the implications that *Citizens United* had on the nonprofit world, and details the increasing use of social welfare nonprofits in funding the 2010 elections.

#### B. ENTER STAGE RIGHT: THE RISE OF 501(C)(4)S IN THE 2010 MIDTERM ELECTIONS

President Obama’s State of the Union forecast proved true as *Citizens United* ripped open the possibilities inherent in the nonprofit loophole. Although it has been suggested that the decision’s biggest impact was a psychological one, there have been real effects.<sup>59</sup> While the “nightmare situation” of a corporate “Super Bowl-style frenzy of advertising bearing their company logos” has not yet come to fruition, nonprofits have become the covert means of political financing due to their ability to collect unlimited contributions without disclosure.<sup>60</sup> Although

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54. See Ryan, *supra* note 18, at 481 (referring to the penalty as a “non-disclosure option”). See generally Aprill, *supra* note 14, at 67 (detailing registration and disclosure requirements, as well as penalties for § 527 organizations).

55. See Holman, *supra* note 6, at 267–68 (calling these requirements “lax”).

56. *Id.* at 268.

57. See *supra* note 28 and accompanying text.

58. Rick Cohen, *The New Normal of Money in Politics*, NONPROFIT Q. (Nov. 3, 2010), [http://www.nonprofitquarterly.org/index.php?option=com\\_content&view=article&id=6956:the-new-normal-of-money-in-politics&catid=155:nonprofit-newswire&Itemid=986](http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=6956:the-new-normal-of-money-in-politics&catid=155:nonprofit-newswire&Itemid=986).

59. Michael Luo, *Changes Have Money Talking Louder Than Ever in Midterms*, N.Y. TIMES, Oct. 8, 2010, at A13 [hereinafter Luo, *Changes*], available at 2010 WL 20105301.

60. *Id.*

§ 501(c)(4) nonprofits could have done this prior to *Citizens United*, the decision allows them to pay for political communications directly from their general treasury.<sup>61</sup> Moreover, such communications had been previously limited to noncandidate-oriented issue ads, but *Citizens United* opened the door to express advocacy for or against a candidate.<sup>62</sup>

In the aftermath of the decision, Senator Russ Feingold, a champion of campaign finance reform, bemoaned that the “[n]ext time voters want to send us a message at the ballot box, they may find their voices drowned out by wealthy corporations with their own special-interest agendas.”<sup>63</sup> Indeed, without reform, the 2010 midterms are a precursor for what is to come in future elections.

The midterms witnessed political spending amounting to a whopping \$4 billion—or put another way, \$45 for every single person that turned out to the polls.<sup>64</sup> Of the total amount, nearly \$293 million came from outside groups, which is only \$9 million less than in the last presidential election, but more than \$224 million more than in the last midterm election.<sup>65</sup> Moreover, at least \$138 million came from interest groups with anonymous donors.<sup>66</sup> With these figures, the true impact of *Citizens*

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61. Crow, *supra* note 3, at 3. For a comprehensive overview of the *Citizens United* opinion and its place in campaign finance jurisprudence, see Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 585–603 (2011).

62. Michael Luo, *Groups Push Legal Limits in Advertising*, N.Y. TIMES, Oct. 18, 2010, at A10 [hereinafter Luo, *Groups Push Legal Limits*], available at 2010 WLNR 20808108 (noting that a post-*Citizens United* ad by the American Future Fund expressly advocating “Vote against Bobby Bright” would have been prohibited by prior limitations to “issue ads”); see also Luo, *Changes*, *supra* note 59 (“What *Citizens United* did was to ostensibly remove that remaining shackle of ‘issue advocacy.’”). For the precedential origin of the express advocacy test, see *infra* note 129 and accompanying text. Granted, such political communications can only be in the form of independent expenditures, and therefore cannot be coordinated with campaigns. Crow, *supra* note 3, at 3.

63. Editorial, *Topic A: The Post Asked Political and Legal Experts to Explain Who Is Helped, and Who Is Hurt, By Last Week’s Supreme Court Decision*, WASH. POST, Jan. 24, 2010, at A15 [hereinafter *Who Is Helped or Hurt*] (asking the opinions of nine experts).

64. Michael Booth, *Vote’s Over; Ads Aren’t*, DENVER POST, Nov. 14, 2010, at A01, available at 2010 WLNR 22793829.

65. *Id.*

66. *2010 Outside Spending, by Groups*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=A&chrt=D> (last visited Apr. 28, 2011). Other sources suggest similar overall totals. See, e.g., Charles Kolb, *It’s the Money, Stupid*, HUFFINGTON POST (Dec. 22, 2010, 12:14 PM), <http://www.huffingtonpost.com/charles-kolb/its-the-money>

*United* is clear: “[t]he use of undisclosed funds has skyrocketed.”<sup>67</sup>

The amount of money coming from outside groups correlated, largely, with winners and with Republicans. One commentator observed that while “the biggest money doesn’t always win, . . . [it] does win more often than not.”<sup>68</sup> For example, independent groups spent almost three times as much money on winning candidates.<sup>69</sup> As a result, ads funded by wealthy and corporate donors tipped the balance in fifty-eight of seventy-four congressional seats that changed parties.<sup>70</sup> Conservative candidates benefited from a two-to-one independent expenditure advantage.<sup>71</sup> Significantly, of the more than \$138 million coming from outside nondisclosure groups—including § 501(c)(4) nonprofits—over \$120 million came from conservative organizations.<sup>72</sup>

While it is not yet known how much of the total outside money came specifically from § 501(c)(4) entities, it is clear that they were the source of a vast amount of political dollars. One of the most successful social welfare nonprofits was Karl Rove’s Crossroads Grassroots Political Strategies (Crossroads GPS). Targeting resources on battleground races, all of Rove’s organizations—including the American Crossroads PAC—reported spending nearly \$39 million on outside expenditures, and still have significant war chests left over after raising more than

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-stupid\_1\_b\_800268.html (“The counting is not yet over, but we do know that the recent midterm elections saw substantially more money spent on political campaigns than ever before in a nonpresidential election year, with some \$135 million spent in secret contributions by nonprofit groups to influence the elections.”).

67. Matt Viser, *Donor Names Stay Secret as Nonprofits Politick*, BOS. GLOBE, Oct. 7, 2010, at 1, available at 2010 WLNR 19987068 (“During the 2006 midterms, for example, 97 percent of groups taking out a broadcast ad just before an election disclosed the donors funding the ads. This year, fewer than a third have made such disclosures . . .”).

68. Booth, *supra* note 64 (quoting Charlie Cook, editor of Cook’s Political Report).

69. See Taylor Lincoln, *Outside Job: Winning Candidate Enjoyed Advantage in Unregulated Third-Party Spending in 58 of 74 Party-Shifting Contests*, PUB. CITIZEN, 3 (Nov. 3, 2010), <http://www.citizen.org/documents/Outside-Job-Report-20101103.pdf> (“Winning candidates in elections in which power changed hands were aided by average spending of \$764,326 by independent groups, while losing candidates were aided by average spending of \$273,268 . . .”).

70. *Id.*

71. Eliza Newlin Carney, *Democratic Dilemma*, NAT’L J. (D.C.), (Nov. 8, 2010, 12:25 PM), <http://www.nationaljournal.com/columns/rules-of-the-game/progressives-face-tricky-question-20101108>.

72. *2010 Outside Spending, by Groups, supra* note 66.

\$71 million from wealthy conservatives.<sup>73</sup> Of these totals, Crossroads GPS raised \$43 million and spent \$17 million.<sup>74</sup> Senator Patty Murray (D-Wash.) narrowly escaped defeat despite Rove's group spending nearly \$4 million in an attempt to take her down.<sup>75</sup> In the forty-three contests that Crossroads GPS blanketed with outside money, twenty-eight of the candidates rode to victory.<sup>76</sup>

While President Obama warned his party to stay away from these secretive organizations and their "funny money," many on the left are looking to mimic Republican successes by collecting undisclosed contributions through their own social welfare nonprofits.<sup>77</sup> Although the move is not popular with everyone,<sup>78</sup> others warn that "to not play the game . . . would be self-defeating."<sup>79</sup> Unfortunately, the advantages of the § 501(c)(4) loophole indicate that the outside spending problem will only be exacerbated in future elections.<sup>80</sup>

## II. COMPELLING GOVERNMENT INTERESTS AND REFORM OPTIONS

While Part I demonstrated the basis for the § 501(c)(4) loophole in the tax code and the reasons for its increasing prevalence among campaign finance entities, this Part makes the case for reform and develops possible options. The first section highlights the particular problems created by the use of § 501(c)(4) organizations in politics and frames them as compel-

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73. Carney, *supra* note 71. Breaking down the near-\$39 million total, Crossroads GPS spent \$17,122,446 and American Crossroads spent \$21,553,277. 2010 *Outside Spending, by Groups*, *supra* note 66.

74. Michael Beckel, *Conservative Juggernaut American Crossroads Finished Election Season with Fund-Raising Flourish*, OPENSECRETS.ORG (Dec. 2, 2010, 11:20 PM), <http://www.opensecrets.org/news/2010/12/american-crossroads-finished-electi.html>.

75. Kyung M. Song, *Murray a Top Target for Anonymous Cash*, SEATTLE TIMES, Nov. 4, 2010, at A7, *available at* 2010 WL 22128301. Outside groups were more successful in President Obama's old Senate seat, where they spent \$4.4 million against Democratic candidate Alexi Giannoulias. *Id.*

76. Booth, *supra* note 64.

77. Carney, *supra* note 71; *see also* Lucy Madison, *Liberal Donors Meeting to Strategize Fundraising Tactics for 2012*, CBSNEWS.COM, Nov. 15, 2010, [http://www.cbsnews.com/8301-503544\\_162-20022843-503544.html](http://www.cbsnews.com/8301-503544_162-20022843-503544.html) (discussing a recent meeting of top liberal donors to plan campaign finance strategy for 2012).

78. *See, e.g.*, Cohen, *supra* note 58 ("It would be sad to see . . . Democrats . . . join the secret political donors' gusher.").

79. *Id.*

80. *See* Booth, *supra* note 64 ("[T]he noxious campaigns are on the verge of becoming perpetual and infinitely more expensive.").

ling governmental interests allowing policymakers to take action. The second section examines four possible means for eliminating or discouraging the § 501(c)(4) loophole and assesses each option's political and jurisprudential viability.

#### A. PROBLEMS WITH § 501(C)(4) NONPROFITS IN POLITICS

The use of social welfare nonprofits raises a number of concerning issues that could provide the government with grounds for regulation. Social welfare organizations allow donors to bypass hard-fought campaign finance reforms, denigrate the overall political message, and threaten the integrity of the democratic process. This exploitation further undermines legitimacy and public faith in the nonprofit sector. This section highlights seven key problems with § 501(c)(4) nonprofits in politics.

First, the entities allow wealthy donors to circumvent individual contribution limits. In a Fox News interview, Karl Rove explicitly appealed to wealthy donors: “[I]f you’ve maxed out the to [sic] senatorial committee, the congressional committee or the RNC and would like to do more, under the Citizens United [sic] decisions, you can give money to . . . Crossroads GPS.”<sup>81</sup> This runs antithetical to the history and purpose of social welfare nonprofits.

Second, donors also dodge campaign finance reforms because they can donate an unlimited amount of money to nonprofit § 501(c)(4) entities. This feature tends to advantage special interests at the expense of candidate committees. For example, a former FEC chairman envisioned a post-*Citizens United* scenario in which interest groups could solicit a quarter-of-a-million dollars through a single wealthy donor and unleash a slew of attack ads in the waning days of a campaign, forcing the targeted candidate into an impossible position that would require finding 100 donors willing to give the maximum just to adequately respond.<sup>82</sup>

Third, transparency in the democratic process suffers from the use of § 501(c)(4) groups. One tax scholar has noted that the lack of disclosure requirements is likely the chief draw of do-

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81. Complaint, Crossroads G.P.S., *supra* note 9, at 14 (quoting Alex Seitz-Wald, *Rove Admits His ‘Shadow RNC’ Attack Group Functions Largely Because of the Citizens United Decision*, THINKPROGRESS.ORG (July 6, 2010, 6:15 PM), <http://thinkprogress.org/2010/07/06/rove-citizens-united-crossroads>).

82. *Who Is Helped or Hurt*, *supra* note 63 (citing Robert Lenhard, former chairman of the FEC).

nors to social welfare nonprofits.<sup>83</sup> Yet this lack of disclosure leaves citizens in the dark as to the funding sources of advertisements—as well as their motivations.<sup>84</sup> Entities sometimes “intentionally mislead voters by using patriotic or populist sounding names” despite corporate funding.<sup>85</sup> This not only harms traditional elections, but also has dire consequences for ballot initiatives, referendum elections,<sup>86</sup> and judicial races.<sup>87</sup> Based on one of the Supreme Court’s rationales for upholding disclosure requirements, voters should have access to information indicating “where political campaign money comes from” to aid in their election-time evaluations.<sup>88</sup> For § 501(c)(4) organizations, then, the lack of disclosure is both harmful to the democratic process and symptomatic of many other problems.

Fourth, outside money often causes modern elections to become even more negative and ugly.<sup>89</sup> Lack of disclosure results in “the roughest and most misleading ads, because [interest groups] are not accountable to local leaders or shamed by bad publicity.”<sup>90</sup> As a result, they are willing to cross lines that few candidates would dare to approach.<sup>91</sup>

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83. See Garrett & Smith, *supra* note 8, at 309 (“Achieving deductibility for contributors seems less important than the ability to accept contributions from any sources without limitation while at the same time avoiding disclosure.” (quoting Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 32 EXEMPT ORG. TAX REV. 27, 43 (2001))).

84. Viser, *supra* note 67; see also McManus, *supra* note 5 (“Voters deserve to know who’s paying for campaign commercials, on both sides, even if an ad isn’t directly coordinated by the candidate who benefits from it.”).

85. Garrett & Smith, *supra* note 8, at 305; see also Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 289 (2010) (noting that many groups take on “names often suggestive of an interest or ideology quite different from that of their principal backers—‘Citizens for Better Medicare,’ ‘Republicans for Clean Air’—or simply sounding patriotic or populist themes—‘Citizens for a Sound Economy,’ ‘Of the People’”).

86. Briffault, *supra* note 85, at 296–97.

87. See Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1247 (2008) (“In many states, a [judicial] candidate can be given secret support by contributions to ‘stealth PACs’ like 527s and 501(c)(4)s.”).

88. *Buckley v. Valeo*, 424 U.S. 1, 66–67 (1976) (quoting H.R. REP. NO. 92-564, at 4 (1971)).

89. See Daniel, *supra* note 19, at 182 n.243 (citing Richard Hasen for the proposition that, unlike political parties, outside groups are more inclined to run negative ads).

90. Booth, *supra* note 64.

91. Ezra Klein, *More Money, More Problems: The Soul-Crushing Life of a Senator*, NEWSWEEK, Nov. 8, 2010, at 23 (“[I]deological hit groups that delight in the scurrilous attacks that candidates themselves would never make.”).



Fifth, the nature of the tax-exempt organization leads to a number of temporal concerns. Many § 501(c)(4) organizations open up shop just a few months before election day, so to avoid any kind of tax reporting until late in the season.<sup>92</sup> For example, a group known as the 60 Plus Association has “been filing with the [IRS] based on a fiscal year, instead of the calendar year, so it may have until July 2011 to get its ledgers in order.”<sup>93</sup> FEC reporting dates for independent expenditure reports also mean that the full impact of § 501(c)(4) groups will not be known until at least the December 31st after an election, if not later.<sup>94</sup>

Sixth, the use of nonprofits can and does result in coordination with political parties and candidates, or at least the appearance of coordination. This makes a mockery out of attempts by these groups to claim that their activities are “independent expenditures.”<sup>95</sup> One example of such coordination, Americans for Job Security—a business league organized under § 501(c)(6) of the tax code—sublet its office space from Karl Rove’s Crossroads Media, which boasted the RNC and the Republican Governors Association as clients.<sup>96</sup> These organizations seem to have revolving doors with political parties, consulting groups, candidates, and elected officials.<sup>97</sup> In one instance, a Crossroads director formerly served as one of President George W. Bush’s political directors.<sup>98</sup>

Seventh, the use of nonprofits can and does result in corruption, or at least the appearance of corruption. Wealthy donors are motivated to contribute large sums of money to buy

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92. Daniel, *supra* note 19, at 176.

93. Luo, *Groups Push Legal Limits*, *supra* note 62, at A13. The 60 Plus Association purports to be the conservative answer to AARP. *Id.*

94. Song, *supra* note 75.

95. *See supra* note 62; *see also* Luo, *Groups Push Legal Limits*, *supra* note 62 (“[A]t least two major Republican-leaning groups . . . have now devoted more than half of their spending this year on television advertising for express advocacy.”).

96. Mike McIntire, *Under Tax-Exempt Cloak, Political Dollars Flow*, N.Y. TIMES, Sept. 24, 2010, at A1, *available at* 2010 WL 18994156.

97. *See id.* (“It is sometimes hard to discern the boundaries separating Americans for Job Security from the consultants in its office suite and the interests of their Republican clients.”).

98. *Id.*; *see also* Letter from Melanie Sloan, Exec. Dir., Citizens for Responsibility & Ethics in Wash., to Douglas H. Shulman, Comm’r, Internal Revenue Serv. (Feb. 1, 2011), *available at* <http://www.scribd.com/doc/47975763/2-1-2011-AFF-IRS-Letter> (drawing attention to the partisan ties of the American Future Fund, including the fact that the organization’s president also serves as a Republican state senator).

access to elected officials, and anonymous donors hope to “purchase the votes that will make them richer.”<sup>99</sup> Because § 501(c)(4) nonprofits have no disclosure requirements, “there will be no check on the corruptive influence of large campaign contribution[s] and our democracy will surely suffer.”<sup>100</sup> David Cobb, the Green Party’s presidential nominee in 2008, opines that the Supreme Court allows for the “corporate bribery of our elected officials,”<sup>101</sup> and another commentator worries that “we’re returning to the bad old days when powerful interests could buy politicians without any way to trace it.”<sup>102</sup> Many are troubled by the proposition that “[t]he U.S. is due for a huge scandal involving big money, bribery and politicians.”<sup>103</sup> Whether these concerns are based in reality or merely fueled by cynicism, money funneled through nonprofits creates the impression that our elected officials are bought and paid for.

#### B. SEALING THE PIPES: REGULATING § 501(C)(4) ORGANIZATIONS

While the problems with the § 501(c)(4) loophole are easy to recognize, developing a solution provides a much more complicated challenge. This section explores current efforts to regulate § 501(c)(4) organizations and analyzes the potential effectiveness and constitutionality of these and other reform options.

##### 1. The Obvious Starting Point: IRS Regulation

Since § 501(c)(4) entities are tax-exempt organizations, it makes sense to look first to the IRS for some sort of regulatory fix.<sup>104</sup> It is, after all, a Treasury Regulation that stipulates that electoral politics does not constitute social welfare.<sup>105</sup> Looking to IRS regulation of § 501(c)(4) nonprofits may also be more po-

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99. Klein, *supra* note 91, at 23. Writing of the status quo, Klein says: “Pity our democracy, yes. But pity our politicians, too.” *Id.*

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

101. Crow, *supra* note 3, at 3.

102. Jonathan Alter, *Back to the ‘Bagman,’* NEWSWEEK, Nov. 8, 2010, at 45.

103. *Id.* (quotation marks omitted).

104. See Viser, *supra* note 67 (“[T]he IRS is the primary overseer of such nonprofit groups.”).

105. See *supra* note 44 and accompanying text.

litically feasible than taking legislative action.<sup>106</sup> Because the Republicans now control the U.S. House of Representatives, President Obama will likely need to push reforms through executive action.<sup>107</sup> As noted above, § 501(c)(4) nonprofits are essentially beholden to the “primary purpose” test where political activities must account for less than half of their overall functions.<sup>108</sup> For many § 501(c)(4) organizations in the last election, it would be a “Herculean task” to argue that most of their ads are nonpolitical.<sup>109</sup> Because there is “no opt-out provision” for the classification of political organizations, the IRS has the power to reclassify an entity that claims to be a § 501(c)(4) nonprofit but acts like a § 527 political organization as such.<sup>110</sup> Upon making this determination, the IRS could force disclosure and assess penalties.<sup>111</sup> Other options at the IRS’s disposal to dissuade large donors from § 501(c)(4) nonprofits include charging gift taxes to donors,<sup>112</sup> or increasing registration and disclosure requirements similar to those that exist for § 527 groups.<sup>113</sup>

Enforcement through the IRS has already gained traction in Congress. In September, the Chairman of the Senate Finance Committee penned a letter to the IRS requesting investigation into the political activities of many nonprofits, including § 501(c)(4) entities, to determine whether tax-exempt

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106. Dan Froomkin, *Obama Can Pursue Ambitious Agenda Without Congress’s Help*, HUFFINGTON POST (Nov. 4, 2010, 9:30 AM), [http://www.huffingtonpost.com/2010/11/03/obama-can-pursue-busy-age\\_n\\_778583.html](http://www.huffingtonpost.com/2010/11/03/obama-can-pursue-busy-age_n_778583.html).

107. *Id.* (“There’s zero chance a Republican House is going to limit money in politics. But Obama on his own could roll back some of the excesses of the 2010 election.”).

108. Viser, *supra* note 67. However, many lawyers have stated that “the I.R.S. has never explicitly ruled that 50 percent is the official limit for political spending,” and that the number “could, in fact, be less. . . . The crucial question is how a group’s ‘primary purpose’ is evaluated.” Luo, *Groups Push Legal Limits*, *supra* note 62, at A10.

109. Luo, *Groups Push Legal Limits*, *supra* note 62, at A10.

110. Tobin, *supra* note 100.

111. Froomkin, *supra* note 106; *see also* Luo, *Groups Push Legal Limits*, *supra* note 62, at A10 (“Problems with the I.R.S. could lead to tax penalties and revocation of tax-exempt status.”).

112. *See* Aprill, *supra* note 14, at 56 (observing that while the stated position of the IRS is to apply the gift tax to contributions made to § 501(c)(4) nonprofits, there have been no recent indications of enforcement); Tobin, *supra* note 100 (“While there is a statutory exemption from the gift tax for contributions to (c)(3) and 527 organizations, there is no such exemption for (c)(4)s.”).

113. *See* Aprill, *supra* note 14, at 90–96 (proposing a myriad of regulatory options through the IRS).

status should be revoked.<sup>114</sup> The letter asked: “Is the tax code being used to eliminate transparency in the funding of our elections—elections that are the constitutional bedrock of our democracy?”<sup>115</sup> In addition to the “primary purpose” test, Senator Max Baucus (D-Mont.) raised concerns that nonprofits were failing to make required notifications to their members regarding political activities, and that they violated the code by allowing benefits to advance private interests.<sup>116</sup> Republicans responded with accusations of unfair politicization, arguing that “audits and investigations are specifically intended to be separated from the political process.”<sup>117</sup>

However, specific regulations for § 501(c)(4) entities do have a number of drawbacks. First, a timing problem exists because the IRS cannot feasibly regulate social welfare nonprofits until after they file tax returns.<sup>118</sup> Second, organizations formed explicitly for electoral purposes can seek to avoid the fifty percent rule by ramping up spending on nonpolitical advertising after the elections.<sup>119</sup> Crossroads GPS still has millions of dollars in the bank to spend on issue ads regarding “pending policy fights over taxes, health care and climate issues,”<sup>120</sup> and groups have already flooded the airwaves with similar ads in order to increase the numbers on the nonpolitical

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114. See Letter from Max Baucus, Chairman, Senate Fin. Comm., to Douglas H. Shulman, Comm’r, Internal Revenue Serv. (Sept. 28, 2010), available at [http://www.politico.com/static/PPM176\\_100929\\_irs.html](http://www.politico.com/static/PPM176_100929_irs.html).

115. *Id.*

116. *Id.* I.R.C. § 501(c)(4)(B) (2010) provides the crucial prerequisite: “[N]o part of the net earnings of [501(c)(4)s can inure] to the benefit of any private shareholder or individual.”

117. See, e.g., Eric Lichtblau, *Republicans See a Political Motive in I.R.S. Audits*, N.Y. TIMES, Oct. 7, 2010, at A26, available at 2010 WL 19996323 (quoting Senators Orrin Hatch and Jon Kyl); see also Allison Hayward, *Baucus Sics IRS on Political Nonprofits, Cites Influence of Conservative Groups*, EXAMINER (Oct. 7, 2010, 11:00 PM), <http://washingtonexaminer.com/blogs/examiner-opinion-zone/Baucus-sics-irs-political-nonprofits-cites-influence-conservative-groups> (“No one today is willing to defend the abusive tactics of Nixon, Johnson or Roosevelt in investigating their political opponents through IRS manipulation. Perhaps we can we agree, then, to unite in outrage against their modern-day cohorts?”).

118. McManus, *supra* note 5; see also *supra* notes 92–94 and accompanying text.

119. See Luo, *Groups Push Legal Limits*, *supra* note 62, at A10 (“[501(c)(4)s] may, for example, broadcast a lot of advertisements during the lame-duck Congress.”).

120. Carney, *supra* note 71.

side of their ledgers.<sup>121</sup> Third, disclosure does not seem to be a part of the mission of the IRS since it “cares if you pay your taxes,” but “does not care so much about transparency.”<sup>122</sup> Finally, regulating specific tax-exempt entities rather than political speech “merely encourages organizations to seek out an alternative entity for their speech.”<sup>123</sup> Although IRS regulation is possibly more feasible in the current political climate, it may not provide the best approach for limiting the political activities of § 501(c)(4) organizations. As a result, campaign finance regulation may prove to be a more comprehensive and effective solution.<sup>124</sup>

## 2. Hardening the Money: Section 501(c)(4) Groups as Political Committees Under the FEC

Another way to regulate § 501(c)(4) groups is to call a spade a spade and treat political nonprofits as political committees under the regulatory authority of the FEC. This was the method applied to § 527 entities,<sup>125</sup> and has gained traction with recent FEC legal filings. Such treatment would subject social welfare nonprofits to registration requirements, contribution limits, and disclosures since “[p]olitical committee’ status is the linchpin of most campaign finance law restrictions.”<sup>126</sup>

In order to bring § 501(c)(4) nonprofits within the ambit of the FEC, the “major purpose” of the nonprofit must be to engage in political campaigning.<sup>127</sup> This distinction originated with *Buckley v. Valeo*, where the Supreme Court held that the term “political committee” in FECA “encompass[es] organiza-

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121. See Booth, *supra* note 64 (“Scranton-area residents are now seeing generic attack ads warning against global-warming legislation and looser labor laws . . . . Groups seeking to keep 501(c) tax-exempt status are required to show spending on ‘education’ besides elections, so they will likely increase off-year ads informing voters about legislation and issues . . .”).

122. Jeff A. Taylor, *Call for Disclosing 501 Donors Runs Afoul of IRS Regulations*, LINCOLN TRIB., Nov. 2, 2010, <http://lincolntribune.com/?p=466> (quotation omitted).

123. Tobin, *supra* note 13, at 99.

124. Aprill, *supra* note 14, at 8 (providing detailed recommendations for regulating the political activity of noncharitable exempt organizations such as § 501(c)(4) entities, but conceding that “tax law regulation cannot substitute for campaign finance regulation”).

125. See LOWENSTEIN ET AL., SUPPLEMENT, *supra* note 26, at 67 (noting that some 527 organizations could be regulated as political committees based on the “major purpose” test); *supra* notes 29–31 and accompanying text.

126. Ryan, *supra* note 18, at 471–72; see also 2 U.S.C. §§ 431, 433, 434, 441 (2006).

127. Luo, *Changes*, *supra* note 59, at A13.

tions that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”<sup>128</sup> Over time, the Court has narrowed its application of the major purpose test to “express advocacy.”<sup>129</sup>

A nonprofit organization known as Public Citizen recently filed complaints with the FEC to classify Crossroads GPS and American Future Fund as political committees.<sup>130</sup> The complaints argue that a group’s “self-proclaimed tax status” does not determine its major purpose<sup>131</sup> and that the FEC has misapplied an “express advocacy” requirement to the major purpose test.<sup>132</sup> The complaints rely on the statutory definition of political committee, which requires registration for any group receiving contributions or making expenditures over \$1000 during a calendar year, and further defines “expenditure” as an amount made “for the purpose of influencing any election for Federal office.”<sup>133</sup> Based on this language, Public Citizen contends that the major purpose test should apply to any organization that spends money to influence an election, regardless of whether expenditures are for “express advocacy.”<sup>134</sup> Under this interpretation, many more groups—including politically active § 501(c)(4) nonprofits—would be subject to the campaign finance regulatory requirements of registration and disclosure. This argument finds some support in federal jurisprudence that has questioned the current regulatory frame-

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128. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). See generally Ryan, *supra* note 18, at 481–82 (detailing the history of the test); Daniel, *supra* note 19, at 165 (discussing the “major purpose” test to determine political committee status).

129. See Ryan, *supra* note 18, at 500. “Express advocacy” relates to the “magic words” test in *Buckley*. 424 U.S. at 44 n.52 (“[E]xpress words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

130. Complaint at 1–3, *Pub. Citizen v. Am. Future Fund* (F.E.C. Oct. 12, 2010) [hereinafter Complaint, *Am. Future Fund*], available at [http://www.citizen.org/documents/FEC\\_Final\\_Complaint\\_AmericanFutureFund101510.pdf](http://www.citizen.org/documents/FEC_Final_Complaint_AmericanFutureFund101510.pdf); Complaint, *Crossroads G.P.S.*, *supra* note 9.

131. Complaint, *Crossroads G.P.S.*, *supra* note 9, at 7.

132. *Id.* at 9.

133. *Id.* at 5 (citing 2 U.S.C. § 431(4), (8)(A) (2006)); see also Complaint, *Am. Future Fund*, *supra* note 130, at 8 (citing similar language).

134. Complaint, *Crossroads G.P.S.*, *supra* note 9, at 8; cf. Ryan, *supra* note 18, at 484–85 (“[W]hen 527 organizations spend money ‘for the purpose of influencing’ federal elections—regardless of whether or not they engage in express advocacy—such organizations should be deemed to fall within the federal statutory definition of ‘political committee.’”).

work adhered to by the FEC.<sup>135</sup> While the outcome of these cases will probably not be known for some time, the likely scenario is grim unless the composition of the FEC changes. Currently, the six-member commission is stuck in partisan deadlock, and the three Republican members are unlikely to rule against groups like Crossroads GPS.<sup>136</sup>

The other possible method for classifying § 501(c)(4) groups as political committees is to bring their ads within the new definition of a “coordinated communication”<sup>137</sup> under the BCRA such that ads run for or against candidates—but not directly coordinated with any campaign—would still be considered contributions rather than independent expenditures. The FEC recently adopted the “functional equivalent” standard, effective December 1, 2010, which provides that “a communication is the functional equivalent of express advocacy if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”<sup>138</sup> This standard originated in *Federal Election Commission v. Wisconsin Right to Life, Inc.*, where the Court held that ads instructing citizens to call their senators and tell them to oppose a filibuster on judicial nominees were not the “functional equivalent” of express advocacy because they looked like issue ads, they did not mention a candidate, and they took no position on a candidate’s electoral qualifications.<sup>139</sup> The Court again applied the test in *Citizens United*, but this time found that a documentary entitled *Hillary: The Movie* was the functional equivalent of express advocacy.<sup>140</sup> The application of this test will materialize over time. It is possible that members of the FEC could apply a very narrow reading of the “no reasonable interpretation” lan-

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135. Complaint, Crossroads G.P.S., *supra* note 9, at 9 (citing the “FEC’s Misinterpretation of *Buckley*” section in *Shays v. FEC*, 511 F. Supp. 2d 19, 26–27 (D.D.C. 2007)).

136. Luo, *Changes*, *supra* note 59, at A13; *see also* Richard L. Hasen, *The FEC Is as Good as Dead*, SLATE (Jan. 25, 2011), <http://www.slate.com/id/2282257/> (noting that the three-to-three bipartisan gridlock on the FEC is “business as usual,” and that “[f]or the past several years the three Republican FEC commissioners have blocked enforcement of much of what remains of federal campaign finance law”).

137. 11 C.F.R. § 109.21 (2006).

138. Coordinated Communications, 75 Fed. Reg. 55,947, 55,952 (Sept. 15, 2010) (to be codified at 11 C.F.R. pt. 109).

139. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 459, 469–70 (2007).

140. *Citizens United v. FEC*, 130 S. Ct. 876, 890 (2010) (“[T]here is no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator Clinton.”).

guage. Again, the current makeup of the commission indicates that plaintiffs will have a hard time arguing for regulation absent blatant coordination.<sup>141</sup>

### 3. Maximum Contribution Limits for Individual Donors

One solution to the outside money problem lies in overturning the ban on expenditure limits.<sup>142</sup> Although the Court thought in 1976 that independent advocacy did “*not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions,”<sup>143</sup> the time has come to revisit this conclusion.<sup>144</sup> However, the current balance of the Court disagrees.<sup>145</sup> Nevertheless, there may be another way to control nonprofit conduits for political dollars. Since § 501(c)(4) organizations are clearly set up as loopholes to circumvent FECA’s maximum contribution limits,<sup>146</sup> another solution could be to apply an overall cap on individual contributions to social welfare nonprofits.

Such an approach would certainly be an uphill battle, especially given the recent D.C. Circuit opinion in *Speechnow.org v. Federal Election Commission*.<sup>147</sup> That case struck down the \$5000 individual contribution limit for individuals donating to PACs that only make independent expenditures.<sup>148</sup> The decision was predicated on *Citizens United*’s conclusion that “inde-

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141. See Hasen, *supra* note 136 (“As we enter the 2012 election season, the FEC is as good as dead, and the already troubling campaign finance world of secret unlimited donations is bound to get worse.”).

142. This view is shared by many others. See, e.g., David Schultz, *Revisiting Buckley v. Valeo: Eviscerating the Line Between Candidate and Independent Expenditures*, 14 J.L. & POL. 33 (1998).

143. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976) (emphasis added).

144. “[E]ven if the *Buckley* Court was correct in 1976 that money spent for independent advocacy did not then appear to pose the threat of real or apparent corruption, it certainly [did] by 1998,” Schultz, *supra* note 142, at 36, and in light of the evidence presented in this Note, it absolutely does in 2011.

145. See Hasen, *supra* note 61, at 617 (lamenting the Court’s “incoherent” approach on the varied evidentiary standards for corruption needed to justify contribution—as opposed to spending—limitations); David Schultz, *Buckley v. Valeo, Randall v. Sorrell, and the Future of Campaign Finance on the Roberts Court*, 123 NEXUS 153, 174 (2007) (“At least five Justices would continue to apply *Buckley*, at least in some manner, to future cases . . .”).

146. See *supra* note 81 and accompanying text.

147. *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 553 (2010).

148. See LOWENSTEIN ET AL., SUPPLEMENT, *supra* note 26, at 67; see also Carney, *supra* note 71 (discussing the future possibilities for “super PACs”).



pendent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.”<sup>149</sup>

However, the Supreme Court cannot conclude that an independent expenditure will *never* give rise to corruption; such a conclusion is plainly one of fact and not of law. Moreover, *Speechnow.org* seems to conflate *Buckley*'s basic distinction between contribution limits and expenditure limits. If wealthy individuals want to make their own expenditures, current jurisprudence allows them to do so in the name of political speech, but the government's interest in preventing corruption or the appearance of corruption could provide support for a maximum contribution limit.<sup>150</sup> Relying on *Buckley*'s rationale, it could be argued that the act of donating to § 501(c)(4) groups is, in and of itself, the free speech act, and contributions can thus be limited because such limitation is only a “marginal restriction” on free speech.<sup>151</sup> The “expression rests solely on the undifferentiated, symbolic act of contributing,” not on the quantity of the contribution.<sup>152</sup> It should be noted that such limits, if upheld, would bolster the government's interest in requiring disclosure because recordkeeping, disclosure, and reporting requirements give the government the ability to detect violations of contribution limits.<sup>153</sup>

#### 4. Legislative Action: Requiring Disclosure of § 501(c)(4) Donors

The final option for successful campaign finance reform seems to come in the form supported by virtually everyone: disclosure.<sup>154</sup> Numerous public opinion polls show that citizens are deeply concerned with the role of money in politics,<sup>155</sup> and a

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149. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010).

150. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (2000) (“[W]e recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”); *see also* DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 795 (4th ed. 2008) (noting that *McConnell v. FEC* defined corruption as “access”—“[e]ven if that access did not secure actual influence, [because] it certainly gave the ‘appearance of such influence.’” (quotation marks omitted)).

151. *See Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976).

152. *Id.* at 21.

153. *Id.* at 67–68.

154. *See* Garrett & Smith, *supra* note 8, at 295 (“Disclosure elicits fairly widespread support; those who oppose contribution or expenditure limits are often willing to support disclose statutes.”).

155. Carney, *supra* note 71.

large majority of voters want to know who is bankrolling political ads.<sup>156</sup>

In the last session of Congress, the Democracy Is Strengthened by Casting Light On Spending In Elections Act (DISCLOSE Act) was introduced by congressional Democrats.<sup>157</sup> That legislation would have expressly required nonprofits to disclose all contributions and expenditures over \$1000, and to disclaim their top five corporate contributors.<sup>158</sup> The Act's requirements generally applied to § 501(c)(4) entities, but an exemption existed if a social welfare nonprofit had more than 500,000 dues-paying members with representation in all fifty states, D.C., and Puerto Rico, the organization only received fifteen percent of its revenue from corporations and labor unions, and it did not spend any of that money on campaign-related activity.<sup>159</sup>

The DISCLOSE Act passed the House in June of 2010, but died in the Senate a month later on a party-line vote.<sup>160</sup> One commentator has cautioned that absent passage of the Act, or similar disclosure legislation, "the 2012 campaign will be about as transparent as a Chinese sovereign-wealthfund."<sup>161</sup>

### III. SHINING LIGHT ON POLITICAL MONEY FUNNELED THROUGH SOCIAL WELFARE NONPROFITS

The previous Part developed the need for regulation and initially explored some potential options for reform. However, many of these options have their own drawbacks that diminish their respective chances of successful regulation. As a result, this Part makes the case for disclosure and disclaimer requirements as the best possible option for reforming the nefarious usage of the § 501(c)(4) campaign finance loophole.

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156. See, e.g., Cohen, *supra* note 58 ("An ABC News/Washington Post poll indicates that three-fourths of registered voters think it is 'very' or 'somewhat important' for them to know who is paying the freight for these political nonprofits and their campaign ads.").

157. H.R. 5175, 111th Cong. (2010). Senators Patrick Leahy (D-Vt.) and Chuck Schumer (D-N.Y.), created a website explaining the legislation and encouraging citizens to "co-sponsor" the Act. See WE WANT THE DISCLOSE ACT, <http://www.discloseact.com/> (last visited Apr. 28, 2011).

158. H.R. 5175; Crow, *supra* note 3, at 5.

159. H.R. 5175, § 211(c).

160. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 172 n.179 (2010).

161. Alter, *supra* note 102, at 45; see also *id.* ("Without reform, a flood of undisclosed money could swamp Obama in 2012 and send even more Democrats into retirement.").

It is true that disclosure could be accomplished through some of the other options previously discussed. For example, in addition to enforcing current regulations, the IRS could also add stronger rules to specifically regulate the political activity of social welfare nonprofits. For example, disclosure provisions could be added for § 501(c)(4) nonprofits similar to those that exist for § 527 groups.<sup>162</sup> Regulating § 501(c)(4) groups as political organizations or mandating contribution caps for nonprofit donations would also result in disclosure requirements. However, IRS regulation may be neither feasible nor successful,<sup>163</sup> and the FEC is mired in gridlock, making the regulation of § 501(c)(4) organizations under current federal election law a virtual impossibility.<sup>164</sup> Supreme Court jurisprudence has struck down expenditure limits, and in some cases, even contribution limits involving independent expenditures.<sup>165</sup>

Despite the difficulties surrounding the passage of legislation—particularly in the current Congress where the Republicans control the House and the Democrats control the Senate—disclosure legislation may be the most politically feasible option.<sup>166</sup> This is true for two reasons. First, disclosure has broad-based support among the public.<sup>167</sup> Second, and perhaps more important in the current political climate, conservatives generally support disclosure requirements.<sup>168</sup>

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162. See Tobin, *supra* note 100 (noting that this was part of the original legislation).

163. See *supra* notes 118–23 and accompanying text.

164. See *supra* Part II.B.2.

165. See *supra* Part II.B.3.

166. See, e.g., Kolb, *supra* note 66 (“[G]iven the Republicans’ enormous successes on virtually every level – the House, the Senate, the governorships, state legislatures, and even state judicial races – it will be virtually impossible for basic reforms to pass the Congress before 2012, with the exception of the new disclosure provisions that nearly passed this year.” (emphasis added)).

167. See *supra* note 156 and accompanying text; see also Briffault, *supra* note 85, at 274 (“Disclosure generally gets high marks from the public, academics, and the courts. Opinion polls find very high levels of public support for campaign finance disclosure.”); Megan R. Wilson, *Groups Fight to Put DISCLOSE Back on the Senate Floor, Face Resistance*, OPENSECRETS.ORG (Nov. 18, 2010, 4:17 PM), <http://www.opensecrets.org/news/2010/11/groups-fight-to-put-disclose-back-o.html> (“72 percent of Americans are concerned that outside groups don’t have to disclose the funders behind their ads.”).

168. See Briffault, *supra* note 85, at 274, 286 & n.107 (mentioning Republican backing in Congress as well as libertarian support for disclosure); Kolb, *supra* note 66 (noting conservative George Will’s support for the “‘sunlight is the best disinfectant’ approach”); *Who Is Helped or Hurt*, *supra* note 63 (quoting a former GOP White House staffer advocating to “remove the limits and disclose everything. That way everyone gets a fair shot”).

Constitutionally, disclosure requirements appear to be the safest option for withstanding a legal challenge. Disclosure avoids the complex constitutional questions raised by the Court's jurisprudence on contribution and expenditure limits.<sup>169</sup> Disclosure requirements could, however, be constitutionally challenged based on the free speech interests of members developed in *NAACP v. Alabama ex rel. Patterson*.<sup>170</sup> In that case, the NAACP challenged Alabama's requirement that the organization disclose the names and addresses of all its members to the state Attorney General.<sup>171</sup> The Court pointed out that "compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association," and as a result, it struck down the membership-list disclosure requirement on grounds that it violated First Amendment associational freedom, as incorporated to the states through the Due Process Clause of the Fourteenth Amendment.<sup>172</sup> The Court reasoned that disclosure of the membership lists might discourage individuals from joining the organization out of fear of harassment or other retribution.<sup>173</sup>

The Court applies exacting scrutiny to disclosure requirements due to the potential First Amendment associational rights implications, requiring disclosures to have a "relevant correlation" with, or a "substantial relation" to, the government's interests.<sup>174</sup> It is true that when challengers to FECA's disclosure requirements attempted to argue a distinction between members and contributors, the *Buckley* Court refused to "draw fine lines between contributors and members," but rather treated them "interchangeably."<sup>175</sup> However, a membership-based challenge would still likely fail because well-crafted disclosure legislation would only require disclosure of some donors

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169. See Briffault, *supra* note 85, at 273 ("Disclosure is viewed as a means of discouraging potentially corrupting practices without having to resolve the knotty questions of which contributions and expenditures are corrupting or even what corruption means in the campaign finance context."); *supra* note 145 and accompanying text.

170. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). For a general discussion of this case and other cases dealing with the "right to anonymity" in the disclosure and disclaimer context, see Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 646–50 (2010).

171. *Patterson*, 357 U.S. at 462.

172. *Id.*

173. *Id.* at 463.

174. *Buckley v. Valeo*, 424 U.S. 1, 65 (1976).

175. *Id.*

who have aggregate contributions over a certain threshold amount, but not all members of the nonprofit entity.<sup>176</sup>

Disclosure has been supported by the Supreme Court because it improves voter confidence in the electoral process, prevents corruption or the appearance of corruption, aids in the enforcement of contribution limits, and allows voters to completely evaluate candidates.<sup>177</sup> Petitioners would likely argue that the government's interest is diminished in situations involving donations to outside groups rather than to candidates. However, in the case of § 501(c)(4) nonprofits, all of these and other compelling governmental interests exist.<sup>178</sup> Additionally, the government has an interest in detecting abuse of the tax-exempt status, and disclosure would certainly aid that process.<sup>179</sup> Furthermore, the *Buckley* Court specifically noted that the informational interest applies with equal force to uncoordinated independent expenditures.<sup>180</sup> These interests directly relate to disclosure of contributors—not full member lists. Because disclosure and disclaimer requirements bear a “relevant correlation” and a “substantial relation” to the government's interests, they would likely survive constitutional scrutiny.

Moreover, the *Buckley* Court held that while disclosure requirements might deter some individuals from contributing and subject others to harassment or retaliation, disclosure requirements usually “appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption.”<sup>181</sup> With respect to the DISCLOSE Act,<sup>182</sup> the government could argue that the exemption for large nonprofits proves that the Act is narrowly tailored because it would lessen the burden on legitimate national § 501(c)(4) groups while requiring disclosure from any entity set up by a few millionaires seeking to in-

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176. See *supra* note 158 and accompanying text.

177. LOWENSTEIN ET AL., *supra* note 150, at 913; Briffault, *supra* note 85, at 280; Garrett & Smith, *supra* note 8, at 296–99; *cf.* Doe v. Reed, 130 S. Ct. 2811, 2819–20 (2010) (upholding disclosure requirements for the preservation of electoral integrity without addressing the government's interest in providing information to the electorate).

178. See *supra* Part II.A (detailing the harms of § 501(c)(4) organizations in politics).

179. See *supra* note 152 and accompanying text (discussing *Buckley* and disclosure).

180. *Buckley*, 424 U.S. at 81.

181. *Id.* at 68.

182. See *supra* Part II.B.4.

fluence elections. The \$1000 threshold in that legislation provides further evidence of narrow tailoring and safeguards associational rights of both smaller donors and nondonating members.<sup>183</sup>

Disclosure has emerged as the reform tool standing on the safest constitutional ground. *Citizens United* upheld disclaimer and disclosure requirements based on the public's interest in "knowing who is speaking about a candidate shortly before an election."<sup>184</sup> The Court values "transparency" because it "enables the electorate to make informed decisions and give proper weight to different speakers and messages."<sup>185</sup> While compelled disclosure "may burden the ability to speak," the Court reasoned that such requirements "do not prevent anyone from speaking."<sup>186</sup> Even if petitioners had actual evidence to prove egregious harms amounting to a chilling of speech caused by compelled disclosure, language similar to that in the DISCLOSE Act would insulate any disclosure legislation from challenge based on a provision waiving disclosure requirements where there is "reasonable probability that the disclosure of the information would subject the person to threats, harassments, or reprisals."<sup>187</sup>

Based on this constitutional analysis, it is clear that the DISCLOSE Act provides a sound model for withstanding a legal challenge. Although Congress failed to pass the Act in its last session, Congressional leadership should continue to move forward with this crucial campaign finance legislation. In order to survive constitutional scrutiny, all future legislation should focus on contributors—not members—and should include provisions such as the \$1000 donor threshold and the waiver for harassment.

Aside from being politically and constitutionally feasible, disclosure requirements discourage the political exploitation of § 501(c)(4) entities.<sup>188</sup> Many supporters of disclosure legislation believe it is necessary in order to "strip away the anonymity of

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183. See *supra* note 158 and accompanying text. For a general discussion relating to privacy concerns of smaller donors, see William McGeeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003).

184. *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

185. *Id.* at 916.

186. *Id.* at 914; see also Sullivan, *supra* note 160, at 172–74 (discussing the disclosure and disclaimer implications from *Citizens United*).

187. H.R. 5175, 111th Cong. § 402 (2010).

188. See *supra* note 83 and accompanying text.

outside groups.”<sup>189</sup> Although disclosure and disclaimer legislation would not rein in the unlimited contributions that § 501(c)(4) entities can currently collect, it would limit the nonprofit’s attractable qualities to wealthy donors who wish to remain anonymous.<sup>190</sup>

### CONCLUSION

When Congress amended the Internal Revenue Code in 1913 to create tax-exempt social welfare organizations, it could not have predicted the campaign finance loophole that came to dominate the 2010 midterms. In fact, the IRS has expressly stated that social welfare does not encompass political activity, and a tax exemption did not emerge for political activity until the creation of § 527 political organizations in 1974. Nonetheless, savvy campaign financiers will continue to seek out cracks in the pipes given the Supreme Court’s warning that “[m]oney, like water, will always find an outlet.”<sup>191</sup> This time around, political operatives have shown the promise of the § 501(c)(4) nonprofit. In light of the Supreme Court’s recent election law jurisprudence, one might be tempted to throw her hands in the air and argue that absent a constitutional amendment “affirming Congress’s power to regulate elections,”<sup>192</sup> all hope is lost. However, this Note has attempted to demonstrate that multiple avenues exist for possible campaign finance reforms, and that these options have the legal support to withstand constitutional scrutiny. Regulation of § 501(c)(4) groups through the IRS, the FEC, contribution caps, and disclosure legislation is vital, and all of these efforts should be attempted as soon as possible. Par-

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189. Song, *supra* note 75; *see also* Booth, *supra* note 64 (citing support for a “Surgeon General’s warning” on political ads).

190. Arguably, those individuals that do contribute large sums should “stand up in public for their political acts” and demonstrate “civic courage, without which democracy is doomed.” Briffault, *supra* note 85, at 294 (quoting *Doe v. Reed*, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring)).

191. Holman, *supra* note 6, at 244 (quoting *McConnell v. FEC*, 124 S. Ct. 619, 707 (2003)).

192. *See* Crow, *supra* note 3, at 4 (noting just such an amendment, proposed by Senator Chris Dodd and Representative Donna Edwards). The proposed amendment, which may not be a bad idea for the future of campaign finance reform, declares: “Section 1. The sovereign right of the people to govern being essential to a free democracy, Congress and the States may regulate the expenditure of funds for political speech by any corporation, limited liability company, or other corporate entity. Section 2. Nothing contained in this Article shall be construed to abridge the freedom of the press.” H.R.J. Res. 74, 111th Cong. (2010).

particularly, legislative disclosure and disclaimer requirements for contributors of § 501(c)(4) organizations provide the best option for limiting the entity's attractiveness to donors and withstanding constitutional challenge. Although piecemeal reforms might lead to fears of donors exploiting the next unknown loophole,<sup>193</sup> something must be done to restore integrity to nonprofit entities and the electoral process by ensuring that social welfare organizations serve real societal interests—not veiled political ends.

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193. See, e.g., Richard L. Hasen, *Show Me the Donors*, SLATE (Oct. 14, 2010, 4:06 PM), <http://www.slate.com/id/2271187/> (noting that the DISCLOSE Act failed to “bar secret contributions to nonprofit veterans organizations, leading to speculation that they could be the new front groups”).