The
New
Soft Money
OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS

By Daniel P. Tokaji
& Renata E. B. Strause

A PROJECT OF ELECTION LAW @ MORITZ AT THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW
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INTRODUCTION AND EXECUTIVE SUMMARY

The explosion of independent campaign spending is one of the most important recent developments in American democracy. The Supreme Court’s 2010 decision in Citizens United v. FEC dramatically increased public attention to the subject of money and politics. In striking down the longstanding federal prohibition on corporate campaign expenditures, the Court triggered a vigorous debate over core democratic values. Supporters of the decision assert that it rests on vital principles of free speech and association under the First Amendment, while opponents claim that it has opened up the door to widespread corruption and to inequalities of political access and influence.

Whatever one’s view on Citizens United, there is no doubt that independent spending has increased dramatically in recent years. And so has the controversy over the money spent by individuals, corporations, labor unions, Super PACs, and other outside groups to influence federal elections. Because it implicates core democratic values, the subject of campaign finance tends to trigger passionate, sometimes caustic disagreement. The purpose of this report is not to resolve this debate. Our purpose, instead, is to inform the debate by shedding light on the effect that independent spending is actually having on the American political system. More specifically, it is to produce an accurate and nuanced description of the role that independent spending plays in both congressional campaigns and the federal legislative process.

For as much attention as campaign finance has received in the wake of Citizens United, these questions are surprisingly under-examined. There has been, to be sure, considerable attention to the raw numbers. The reports filed with the Federal Election Commission leave no doubt that spending by non-candidate, non-party groups has increased exponentially in recent election cycles, most conspicuously in 2012. The proliferation of groups engaged in such outside spending is also well documented.

Much less is known about the real-world effects of such spending. While we know something about the motivations of outside groups spending money to influence federal elections, we have relatively little evidence on how their spending affects federal election campaigns, nor of the effect that this spending has on the legislative process. In short, we know that the campaign finance landscape has changed, but we know relatively little about the impact of those changes on the political ecosystem – until now.

This report documents the effect of the new soft money on federal elections, based on conversations with those who are most directly involved in this system. There is precedent for the kind of evidence we present here. Over a decade ago, when the last round of campaign finance reform was being implemented (and challenged in court), there was an extensive record regarding the previously existing system of campaign finance. The Bipartisan Campaign Reform Act of 2002 (BCRA) was primarily designed to address two perceived problems: first, the increased flow of “soft money” through political parties, used to influence federal election campaigns; second, the proliferation of “issue ads,” designed to influence federal elections while evading the longstanding restrictions on contributions and expenditures. The following year, the Supreme Court upheld the twin pillars of BCRA – its soft money ban and its prohibition on corporate and union
electioneering communications. At the time of that decision, *McConnell v. FEC*, the Court had before it an extensive record regarding the impact of both soft money and issue ads. The decision relied on that record, as have lawyers and scholars in the years since.

The world of campaign finance is much different than it was at the time of BCRA and *McConnell*. The ban on corporate-funded electioneering was struck down in *Citizens United*, and the constitutionality of the soft money ban – though still part of federal law – is open to question after that case and the 2014 Supreme Court decision in *McCutcheon v. FEC*. There has, moreover, been a sea change in the quantity and sources of campaign spending. Much more money is coming from outside groups. Yet we lack an evidentiary record, comparable to that developed at the time of *McConnell*, on the effects of this spending on election campaigns and the legislative process.

This report aims to help fill that gap. Over a period of several months, we interviewed a diverse group of key political players. We spoke with former Members of Congress, such as Senators George Allen, Kent Conrad, and Ben Nelson, and Representatives Mark Critz, Tim Holden, Steve LaTourette, and Joe Walsh. We also spoke with recent congressional candidates, campaign staff, political operatives, legislative staff, and those working for outside groups. These are the people who are in the best position to know what effect outside spending is having on elections and politics, for they are the ones most directly affected by this brave new world of campaign finance.

By talking with key political players, we aim to cut through the fierce and sometimes acrimonious ideological debate that has often accompanied discourse over campaign finance regulation. Again, our goal here is not to resolve the difficult questions of law and policy that permeate campaign finance, but to inform their consideration. And that requires an understanding of what is actually happening on the ground.

We found a surprising level of agreement among our interviewees on how outside spending has altered the political landscape. Among our findings are that:

• There are four basic types of outside groups in contemporary congressional elections – we term them Shadow Parties, Old Hands, New Kids on the Block, and Buddy PACs – each with their own goals and strategies.

• Outside groups engaged in independent spending do much of the dirty work in congressional campaigns, running negative ads, while at the same time making it more difficult for candidates to maintain message discipline.

• Members of Congress see independent spending as a threat – usually implicit but sometimes explicit – for those who refuse to toe the line of outside groups.

• There is a high degree of cooperation between outside groups and congressional campaigns, generally through publicly-transmitted signals, even as campaign professionals and outside organizations tread carefully to avoid “coordination” as defined by federal law.

These and other key findings are detailed later in this introductory Chapter. Of course, there are pronounced differences on the desirability of these changes, as well as the root cause of problems that exist today. It is remarkable, however, that the political players we interviewed are largely in agreement in their views of how outside spending has changed the political landscape.
This report is the first of its kind, in seeking to document the effects of independent spending by interviewing political players across the ideological spectrum. The evidence we have found is, in some respects, more revealing than that which was compiled regarding the old soft money during the McConnell litigation. While no one report can hope to provide a comprehensive account of our campaign finance system today, our interviews reveal dramatic changes in the political landscape over the past few years. Equally important, they suggest directions for further research on the modern world of outside spending, the new soft money. This research will not end the debate over campaign finance regulation, in legislative bodies or in the courts. But it should in turn lead to more educated – and, we hope, more realistic – law and policy debates.

Methodology

Our primary mode of investigation was a series of interviews with those affected by the changes in campaign finance law in recent years: congressional candidates, Members of Congress, congressional campaign managers and operatives, and individuals involved in the operation of organizations that make independent expenditures in federal campaigns. In addition, we conducted extensive background research into coverage of independent spending in the news media, the ample record produced in the litigation of McConnell, and the discussion of Citizens United and related debates in Congress. We set out to analyze the effects of independent spending in congressional campaigns, with a particular focus on the 2012 election cycle and the first session of the 113th Congress.

As an initial matter, we identified 13 Senate races and 33 House races that were targeted with the most independent spending in the 2012 elections, including both primary and general election contests. For each race, we sought the names and current contact information for candidates and key campaign staff such as managers, political directors, and finance directors. We were able to identify approximately 300 individuals and found mailing or email addresses for roughly 250 of them. In addition, we contacted Members of the House and Senate not already among our targets who had lost re-election or retired in 2012 or who have announced their retirement since then. We also sent letters and emails to close to three dozen groups that made independent expenditures in 2012. Finally, we contacted individuals who met our criteria for being “of interest” and who were identified or referred to us by other respondents and colleagues throughout the research process. In total, we attempted to contact close to 400 individuals by phone, email, and regular mail, many of whom received multiple contacts over the course of the last year if our efforts yielded no response.

We offered interview respondents the leeway to determine their comfort level with speaking on background or on the record, but set the default that staff— for campaigns, Members of Congress, or outside groups— would speak without attribution and that candidates and elected officials would speak on the record. We also gave those speaking with us on the record the option of stopping recording and going “on background” for some or all of the interview. The mix of protocols gave us considerable flexibility in approaching potential interview subjects and, we believe, yielded significant candor from our respondents. Whenever possible, we have aggregated the information gathered from our interviews and other research. This is partly to protect the identities of our background interview subjects. It
is also because our overarching objective is to tell a larger story about congressional elections and the legislative process – including the perceptions of key political players – rather than determine the reasons for any particular candidate’s victory or the motivations of any specific interest group.

In total, we conducted 28 interviews on background and spoke with 15 respondents on the record. Although no current Members of Congress were willing to speak on the record, our on-the-record interviewees included nine former Members of Congress. We also spoke with three candidates who ran for Congress in 2012 and were defeated, but who have not served in federal office before, and with one long-time congressional aide who now works as a lobbyist alongside one of the former House Members we interviewed. The full list of on-record interview respondents, along with the relevant information about their candidacies and offices held, is included as an appendix to this report.

Our background interviews included campaign management, political, and finance staff; congressional aides; and individuals who worked for organizations that engaged in significant independent spending in the 2012 congressional elections. We also spoke with one candidate on background. Although we identified them based on their jobs in 2012 and 2013, many of our respondents also drew on experiences in similar positions in other races, working for party committees at various levels of government, and time spent in government.

Interviews conducted on the record and on background proceeded the same way: we began with an outline of general questions and added specific ones based on extensive research into the independent spending – both from the 2012 campaign and historically – and press coverage of the respondent or respondent’s campaign. We did not, however, stick to a particular script or order, instead allowing the conversations to focus on the experiences and expertise of the interviewee.

In general, what we wanted to know about campaigns was (1) why outside money was spent; (2) whether the campaigns were aware of the independent spending in the course of the campaign and if so, how they learned of them; (3) what, if any, adjustments were made to the campaign plan as a result of the outside spending; (4) to what extent the campaigns’ incentives were aligned with the incentives of the outside spending groups; and (5) whether there was any action short of formal coordination, such as statements made to the press or posturing on particular issues, that either campaigns or outside groups used to signal to one another.

For the legislative process, we were most interested in investigating (1) the extent to which communication ever occurs between outside spending groups and elected officials; (2) how elected officials and their staffs perceive the relationship between independent spending and lobbying efforts; (3) possible secondary effects of campaign-related independent expenditures, including increased pressures on incumbent legislators to fundraise larger sums, party polarization, and effects on personal relationships among Members.

In addition to the interviews, we conducted extensive research into the laws and regulations governing independent spending and disclosure, with particular attention to FEC proceedings on questions of coordination. Finally, we searched and tracked statements in the congressional record and in the press identifying possible impacts of independent election spending on the legislative process.
Summary of Findings

This report describes the effects of independent spending on congressional campaigns and the legislative process, based primarily on interviews with key players. It consists of six chapters.

Chapter I provides background on the current system of campaign finance regulation, in the form of a primer on federal campaign finance law. It first describes the four basic modes of regulation: expenditure restrictions, contribution restrictions, public financing, and disclosure requirements. It then traces the development of federal campaign finance law, starting with the Federal Election Campaign Finance Act of 1971 (FECA), as amended in 1974, and the Supreme Court’s decision in Buckley v. Valeo, and proceeding through Citizens United and other recent decisions of the Roberts Court. Chapter I concludes with a description of the current rules governing federal election campaigns, including the restrictions on different types of groups.

Chapter II provides an overview of spending in federal election campaigns, both historical and contemporary. It begins with a summary of reported data on federal campaign spending, which show a rapid increase in recent election cycles—most notably when it comes to independent spending by non-party groups. Next, we take an in-depth look at reported spending in the 2012 election cycle. That includes an examination of what groups made expenditures in that cycle, what congressional races they spent money on, and how that money was spent.

Chapter III describes the different types of groups that engage in independent campaign spending. Relying in part on our interviews of key players, we divide these groups into four categories: (1) Shadow Parties, which act as surrogates for the major parties; (2) Old Hands, groups with a policy agenda that engage in campaign spending as one way of achieving that agenda; (3) Buddy PACs, groups that work to support only one candidate; and (4) New Kids on the Block, recently-established groups with a narrow agenda focused on a specific issue or region. An increasing share of independent spending takes the form of so-called “Dark Money,” the ultimate source of which is unknown. Some believe that improved disclosure is needed, while others think that the best solution is to eliminate or loosen restrictions on contributions to candidates and parties.

Chapter IV examines the impact of outside spending on congressional campaigns. There is no doubt that outside spending has changed the landscape dramatically. Some interviewees lament the loss of message control that tends to accompany independent spending, while others see the proliferation of messages as a positive development that helps create a more robust political discourse. Lying beneath the normative disagreement over these changes is considerable descriptive agreement regarding the impact of outside spending on congressional campaigns—that it creates uncertainty, that it makes message discipline more difficult, and that there is often cooperation if not illegal coordination between candidates and outside groups.

Chapter V examines the impact of outside spending on the legislative process. Our interviews reveal no direct evidence of quid pro quo corruption, which the current Supreme Court holds to be the only rationale for restricting the free flow of campaign money. They do, however, provide some evidence of enhanced access and influence—particularly in the form of implied threats of spending if legislators do or don’t act in accord with the wishes of outside groups. There is also evidence that outside spending has
an effect on the legislative agenda. In addition, we found some evidence of indirect effects on the legislative process, including increased time spent fundraising, deteriorating relationships among Members of Congress, party polarization, and a loss of public trust.

Chapter VI concludes. After recapping our key findings, we consider its relevance to ongoing law and policy debates, identify changes to watch for in future election cycles, and address the need for further exploration of how outside spending affects election campaigns and the legislative process.
American elections are a multi-billion dollar enterprise. In 2012, the combined amount spent on federal campaigns by candidates, parties, and other groups topped six billion dollars.\(^1\) Out of that, roughly $3.6 billion was reportedly spent on congressional elections.\(^2\) The costs varied dramatically across races – Alabama saw $7.3 million in reported spending on its Senate race, less than 10% of the $75 million spent on courting votes for Senate candidates in Connecticut – but around the country, one factor remained constant: the complex system of regulation governing the flow of these billions. It is a system that has developed over four decades, evolving partly through federal legislation, partly through administrative regulations and enforcement, and partly through judicial decisions.

Detailing the full mosaic of campaign finance regulation is not our project here. Nonetheless, it will be important to have a handle on the four basic modes of regulation of money in politics as well as the arguments about their constitutional legitimacy.\(^3\)

### Modes of Regulation

Regulation of money in campaigns falls largely into four categories, all of which exist at the federal level. The first and longest-standing mode of regulation is a **contribution restriction**. Contribution restrictions include limits on the sources and amounts of money that federal candidates, parties, and certain registered political committees (PACs) can accept.\(^4\) Under federal law, unions, corporations, foreign nationals, and federal contractors are prohibited from giving money directly to campaigns, while individuals may contribute up to an amount that is indexed for inflation. In the 2012 cycle, individuals could give $2500 to a candidate for the primary election and another $2500 for the general election. These amounts were increased to $2600 for the 2013-14 election cycle. In 2012, there were also aggregate limits on the total amount an individual could contribute – no more than $46,200 to all federal candidates and no more than $70,800 to all federal political action committees and parties – but these aggregate limits were struck down by the Supreme Court in *McCutcheon v. FEC* in early 2014 and no longer apply.

Contribution limitations have generally been upheld by the Supreme Court as constitutional, provided they are closely drawn to a sufficiently important interest. The Court has identified the prevention of corruption and the appearance corruption as such an interest. On the other hand, contribution limits have been struck down where they are so low as to make it difficult adequately to fund a campaign.
The second mode of regulation is an expenditure restriction, a limitation on money spent directly to influence a federal election.\(^5\) Expenditure restrictions include caps on the amount of money a candidate can spend on her own campaign and complete bans on spending by particular entities – like corporations and unions – to influence campaigns. Expenditure restrictions are viewed with skepticism by the Supreme Court, and may only be upheld if narrowly tailored to serve a compelling interest. The Court previously upheld some expenditure limits – including bans on independent campaign spending from corporate treasuries. Those cases have now been overruled, however, and under current First Amendment law, government generally may not restrict expenditures that are independent – that is, not coordinated with a candidate’s campaign.

Another means of regulation is to provide public funds to qualifying candidates or parties. This mode of regulation is called public financing. At the federal level, it is only available to presidential campaigns, not congressional campaigns. There are, however, a number of state and local jurisdictions that have public financing schemes in place.

The final mode of regulation is disclosure. Disclosure laws require candidates, parties, and other groups to provide information about the money they raise and spend. That information is usually made available to the public. A complex regime of regulatory thresholds mandate disclosure of information like a contributor’s name, occupation, and employer; the recipient and purpose of all funds spent by a campaign or PAC; and the candidates targeted by an independent expenditure made by a Super PAC or nonprofit organization. Most disclosure regulations require electronically filing regular reports of financial activity with the Federal Election Commission (FEC), although candidates for Senate still file only paper reports.

The Making and Unmaking of Federal Campaign Finance Law

The legal regime governing federal election campaigns is a product of congressional action, judicial decisions, and regulatory action. As described below, Congress has long regulated campaign contributions and spending by corporations and labor unions and, in the 1970s, imposed restrictions on individual contributions and expenditures as well. While those contribution limits were upheld, restrictions on independent expenditures – including those by individuals and, more recently, corporations and unions – have been struck down, as have limits on candidate spending. Current law thus imposes restrictions on contributions to candidates, parties, and other groups, but generally prohibits restrictions on independent expenditures. In addition, the federal agency charged with implementation of federal campaign finance law, the Federal Election Commission (FEC), has promulgated regulations that govern federal elections. In this section, we summarize the key developments in federal campaign finance law.

The Federal Election Campaign Act

Legislation regulating the money in federal campaigns dates back to 1907, when Congress passed the Tillman Act.\(^6\) The law prohibited national banks and corporations from contributing to campaigns. Originally, this prohibition applied only to general elections and not primaries.\(^7\) Subsequent amendments to the Tillman Act and additional federal laws added layers of regulation over the next sixty-plus years, requiring disclosure of contributions...
### TIMELINE OF CAMPAIGN FINANCE REGULATION BEFORE BUCKLEY

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1907</td>
<td>Tillman Act bans contributions from national banks and corporations.</td>
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<tr>
<td>1910</td>
<td>Publicity Act requires post-election disclosure of contributions and expenditures by some party committees.</td>
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<tr>
<td>1911</td>
<td>Amendments to the Publicity Act mandate disclosure for House and Senate campaigns and cap the amount they can spend.</td>
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<tr>
<td>1921</td>
<td>The Supreme Court strikes down the 1911 spending limits as applied to primaries, ruling in <em>Newberry v. U.S.</em> that Congress does not have the power to regulate primary elections.</td>
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<td>1925</td>
<td>Federal Corrupt Practices Act of 1925 passed in response to the Teapot Dome scandal, requiring quarterly disclosure reports by all multicandidate political committees and raising spending limits.</td>
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<tr>
<td>1939</td>
<td>Hatch Act extends prohibitions on political activity by federal civil service employees.</td>
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<tr>
<td>1940</td>
<td>Amendments to the Hatch Act impose the first contribution caps: $5,000 per year on individual contributions to federal candidates and national party committees.</td>
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<tr>
<td>1941</td>
<td>In <em>U.S. v. Classic</em>, the Supreme Court reverses course and rules that Congress can regulate primary elections – nonetheless, Congress leaves primary financing untouched until the 1970s.</td>
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<td>1943</td>
<td>Smith-Connally Act prohibits labor unions from making campaign contributions drawn from their general treasuries – but, as a war measure, the law expires six months after hostilities conclude.</td>
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<td>1947</td>
<td>Adopted over President Truman’s veto, the Taft-Hartley Act makes the ban on union contributions permanent and also prohibits corporations and unions from making direct expenditures in connection with either primary or general campaigns for public office.</td>
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<tr>
<td>1948</td>
<td>In <em>U.S. v. Congress of Industrial Organizations</em> Supreme Court upholds the Taft-Hartley Act’s ban on independent expenditures on a narrow reading, avoiding the question of whether it runs afoul of the First Amendment.</td>
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<tr>
<td>1962</td>
<td>President Kennedy forms a Commission on Campaign Costs to study ways to address the rising costs of campaigns in the post-war television era. The group recommends reforms but none are pursued.</td>
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<td>1966</td>
<td>In response to fundraising scandals, Congress passes the Long Act to establish a public financing system that provides money to political parties to use for presidential campaigns.</td>
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<td>1967</td>
<td>Congress makes the Long Act inoperative by postponing its implementation indefinitely.</td>
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<tr>
<td>1971</td>
<td>Federal Election Campaign Act restricts campaign expenditures on media, limits candidate self-funding, and requires strict public disclosure of financial activity.</td>
</tr>
<tr>
<td>1972-74</td>
<td><strong>FECA Amendments significantly rework the 1971 Federal Election Campaign Act. The new law limits contributions to campaigns by individuals, parties, and political committees; imposes aggregate spending caps on presidential and congressional campaigns; strengthens disclosure requirements; and creates the Federal Election Commission to oversee compliance. The Amendments also create an opt-in public financing program for presidential campaigns.</strong></td>
</tr>
<tr>
<td>1974</td>
<td>FECA Amendments significantly rework the 1971 Federal Election Campaign Act. The new law limits contributions to campaigns by individuals, parties, and political committees; imposes aggregate spending caps on presidential and congressional campaigns; strengthens disclosure requirements; and creates the Federal Election Commission to oversee compliance. The Amendments also create an opt-in public financing program for presidential campaigns.</td>
</tr>
<tr>
<td>1976</td>
<td>The Supreme Court reviews the 1974 Amendments in <em>Buckley v. Valeo</em> and upholds the disclosure requirements, presidential public financing, and contribution limitations. The Court determines that campaign expenditures require heightened First Amendment protection and strikes down the expenditure limits. The Court also finds that the method of appointing the FEC is constitutionally flawed, although the agency is quickly reconstituted through acceptable means.</td>
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</table>
and expenditures, prohibiting labor unions from donating to campaigns, and capping the amount of money that individuals could give.8

In 1971, Congress attempted to bring a comprehensive order to the regulatory mosaic by enacting the Federal Election Campaign Act (FECA).9 The law employed three of the four basic modes of regulation – contribution limitations, expenditure restrictions, and disclosure – in an attempt to “halt the spiraling cost of campaigning for public office.”10 Contributions from candidates and their families were capped and the bans on money from union and corporate treasuries were revamped to allow for the creation of “separate segregated funds” – consisting of money raised voluntarily for political activity, what today we call PACs. The law also eliminated caps on individual contributions in light of enhanced disclosure requirements.

In addition, FECA required broadcasters to sell advertising time to political candidates at the “lowest unit rate” in the last 45 days before a primary election and the last 60 days before a general. The provision was intended to shorten the growing duration of federal campaign seasons by giving candidates access to the rates available to high-volume advertisers, but only for a short window. Still on the books today, the “lowest unit rate” provision in FECA means that Super PACs and other outside groups pay far more money for their ads than do candidates.11

The 1971 incarnation of FECA had been in effect for less than one full election cycle when Congress amended the law in response to the Watergate scandal. The FECA Amendments of 1974 were aimed at curbing campaign practices uncovered in the wake of Watergate. Enacted over President Ford’s veto, the 1974 amendments to FECA imposed a range of new rules governing federal election campaigns.12 As amended in 1974, FECA included all four modes of regulation summarized above and created a new agency – the Federal Election Commission (FEC) – charged with overseeing compliance with federal law and empowered to issue regulations to implement it.

**The First Amendment Framework: Buckley v. Valeo**

Less than three months after their enactment, the 1974 Amendments to FECA were challenged as unconstitutional. In the landmark case of *Buckley v. Valeo*, the Supreme Court upheld the contribution limits, presidential public financing scheme, and disclosure requirements, while striking down the expenditure limits and requiring Congress to go back to the drawing board on the structure of the FEC.13 Even more important, *Buckley* set the parameters for four decades of debates over campaign finance regulation.

*Buckley* set forth two critical elements of the constitutional framework for campaign finance regulation: first, that contributions and expenditures differ in their degree of constitutional protection; and second, that restrictions on either must be justified in anti-corruption terms. Both elements of *Buckley’s* constitutional framework, explained more fully below, remain in place to this day.

In drawing a constitutional distinction between contributions and expenditures, the Court reasoned that they implicate different First Amendment interests. While contributions mainly serve the interest in freedom of association, expenditures more directly concern freedom of speech. A contribution to a candidate or group generally expresses support for the recipient, *Buckley* reasoned, but does not convey either the reason for the support or its strength. The Court thus saw contributions primarily as a means of
associating with one’s preferred candidate, rather than as direct political speech. Contribution limits therefore don’t prevent donors from associating with a candidate, or signaling their approval of the candidate’s positions. Expenditures, on the other hand, are a more direct form of political expression because they fund the “discussion of public issues and debate on the qualifications of candidates.”\textsuperscript{14} The Court thus viewed expenditure limits as restricting political expression more directly than contribution limits. Accordingly, expenditure restrictions are subject to a higher level of constitutional scrutiny than contribution restrictions.

The second key element of \textit{Buckley} concerns the interests that may justify campaign finance restrictions. The Court held that the government’s interest in preventing the reality or appearance of \textit{corruption} may justify contribution limits, but generally cannot justify restrictions on individual spending. \textit{Buckley} recognized the possibility that large contributions could be given directly to campaigns in exchange for official government action by the legislator. Preventing the reality or appearance of such corruption was important enough to justify contribution limits. By contrast, the Court concluded that expenditures do not present the same risk of corruption, so long as they are not made in conjunction with a candidate’s campaign. For expenditures made independent of a candidate’s campaign cannot, by definition, be made in exchange for official legislative action. Accordingly, the government’s interest in preventing corruption is not served by limiting independent expenditures by individuals.

\textit{Buckley} also held that spending restrictions cannot be justified by the interest in promoting equality. In defense of the FECA Amendments’ expenditure limits, the government relied on the interest in democratizing federal elections by lessening the “disproportionate advantage, the distorting effect, of wealthy special interest groups.”\textsuperscript{15} The \textit{Buckley} Court held that this interest may not justify spending restrictions, saying that: “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”\textsuperscript{16}

When the \textit{Buckley} dust settled, the remaining parts of the 1974 Amendments to FECA would govern federal campaigns for the rest of the 20\textsuperscript{th} century.\textsuperscript{17} The Court struck down all of the 1974 expenditure restrictions on congressional campaigns, including limits on the total amount a campaign could spend, a $1,000 cap on any independent expenditure, and a ceiling on the amount a candidate could draw from his personal or family resources. Left standing were the restrictions on contributions to campaigns – $1,000 from individuals and $5,000 from PACs – the disclosure requirements, and the presidential public financing program, which limited expenditures if candidates accepted public funds. The structure of the newly-created Federal Election Commission was also found to be unconstitutional as a violation of the separation of powers principle, but Congress quickly reconstructed the agency in the form we have today: a six-member panel, appointed by the President and confirmed by the Senate, generally consisting of three Republicans and three Democrats.\textsuperscript{18} \textit{Buckley} did not address the bans on corporate and union independent expenditures which pre-dated the 1974 Amendments and were not challenged by the plaintiffs.

\textbf{Between \textit{Buckley} and BCRA}

Comprehensive and lengthy as the opinion in \textit{Buckley} was, it did not resolve all of the important questions regarding federal campaign finance
laws. Two questions, in particular, were left open. First, *Buckley* did not address the long-standing prohibition on expenditures by *unions and corporations*. Second, *Buckley* did not precisely delineate the boundaries of the anti-corruption rationale. The Court would address both issues in decisions over the next two decades.

Even before FECA, federal law prohibited both corporations and unions from making campaign-related expenditures from their general treasuries. In the 1980’s, a small nonprofit corporation challenged the constitutionality of the ban’s application to a newsletter exhorting people to vote for pro-life candidates. The Supreme Court’s 1986 decision in *Massachusetts Citizens for Life v. FEC* held the independent expenditure ban unconstitutional as applied to MCFL and to other political nonprofit organizations that were not funded by unions or business corporations. That decision did not, however, resolve the question of whether expenditures by *for-profit* corporations could be restricted.

In *Austin v. Michigan Chamber of Commerce*, decided in 1990, the Court addressed both the meaning of corruption and the constitutionality of bans on corporate spending. Justice Thurgood Marshall’s opinion for the Court in *Austin* concerned a state law prohibiting corporations from using general treasury funds to make independent expenditures. It upheld this ban on the ground that it prevented a “different kind of corruption” than the exchange of money for political favors. The Court described this corruption as “the corrosive and distorting effects of immense aggregations of wealth that are accumulated 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.” Some academics have argued – and the *Citizens United* majority agreed – that the corruption Justice Marshall wrote about in *Austin* was really rooted in a concern about equality. A ban on corporate expenditures would prevent distortion, the Court seemed to say, by preventing corporations from having an outsized voice in election campaigns.

Subsequent decisions embraced an expansive conception of “corruption” to uphold contribution limits. In *Nixon v. Shrink Missouri Government PAC*, decided in 2000, the Supreme Court upheld individual contribution limits for state campaigns. It reasoned that corruption is “not confined to bribery of public officials, but extend[s] to the broader threat from politicians too compliant with the wishes of large contributors.” This expansive view wove together a concern with “improper influence” and “opportunities for abuse.” Thus, corruption was not limited to the *quid pro quo* exchange of money for political favors. Moreover, government was entitled to restrict contributions to prevent the *appearance*, as well as the reality, of corruption, an interest that the Court defined expansively: “Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance.” This expansive conception of corruption remained in place for about another decade, until it was whittled back by the Roberts Court.

In the decades following *Buckley*, two major loopholes in the scheme created by FECA emerged. The first was the circumvention of spending and disclosure requirements through so-called “issue ads.” The other was the emergence of soft money, given to political parties and not subject to FECA’s contribution limits.

Recall that federal law prohibited campaign expenditures from corporate or union treasuries,
while requiring disclosure of expenditures by other people and entities. But these regulations applied only to express advocacy – that is, to ads that explicitly advocated the election or defeat of a federal candidate. To get around these restrictions, those seeking to influence federal campaigns used ads that avoided words like “vote for” or “defeat,” but included negative or positive information about federal candidates before elections.24 Such ads did not meet the “magic words” test for express advocacy set forth in Buckley and generally they weren’t considered campaign expenditures under federal law.25 Thus, corporations and unions were left free to fund such ads from their treasuries. In addition, the identities of those running these “issue ads” were not subject to disclosure requirements.

The other major loophole that opened in the decades following Buckley was “soft money.” The contribution limitations in FECA only applied to money used to influence federal elections, not state or local elections.26 But what about the party activities that support both federal and state candidates, like generic party advertising and get-out-the-vote drives? Shortly after Buckley, the FEC ruled that parties could fund these multi-level efforts in part with funds that were not subject to federal contribution restrictions.27 These non-federal funds were called “soft money,” as distinguished from “hard money” subject to contribution limits. These funds became even more important in 1995, when another FEC ruling expanded their permissible use to party advertisements that named a federal candidate for office – so long as they did not use the “magic words” expressly advocating for election or defeat.28

With expanded uses for soft money came increased pressure to raise it.29 Between 1984 and 2000, the two major parties’ combined soft money spending increased by 2300%, climbing from $21.6 million to nearly half a billion dollars. The change was more than just a rise in the volume of spending – as a percentage of the total amount spent by the parties combined, soft money went from 5% of the budget in 1984 to 42% in 2000. The dramatic increase was fueled by fundraising appeals by federal candidates who solicited contributions exceeding the source and amount limitations and directed donors to parties and helpful nonprofit organizations. In turn, a relatively small number of donors cut six- and seven-figure checks to the national and state parties, in exchange for access to elected officials and out of fear of what might happen if they did not oblige the parties’ requests.

**BCRA and the Rehnquist Court**

The Bipartisan Campaign Reform Act (BCRA) – commonly known as McCain-Feingold for its primary Senate sponsors – was designed to close the soft money and issue ad loopholes. Congress enacted BCRA in the wake of fundraising scandals in the late 1990s,30 and it was signed into law by President Bush on March 27, 2002.31 The two main components of BCRA were Title I’s soft money ban, and Title II’s restrictions on certain issue ads, referred to as “electioneering communications.” In addition, BCRA raised and indexed the “hard money” contribution limits so that they increase over time; created a different set of limits if a candidate’s opponent spent a certain amount of her own personal funds – the so-called “millionaire’s amendment”; and added disclosure and disclaimer requirements for federal campaign ads.

BCRA’s soft money provisions banned national political parties from soliciting, receiving, directing, or spending money raised outside the federal source and amount restrictions. State and
local parties were also prohibited from using soft money for the mixed-purpose federal/non-federal activities, so that the soft money did not simply get re-routed. The law also made it illegal for federal candidates to raise soft money for use in federal elections and limited their ability to do the same for state and local elections as well.

Title II of BCRA was aimed at issue ads that were really designed to influence federal elections. In order to stop evasion of the “magic words” test, BCRA expanded the definition of campaign expenditures to include “electioneering communications.” These were defined as ads referring to a federal candidate within 60 days of a general election or 30 days of a primary, transmitted through broadcast, cable, or satellite communications, and targeted to the candidate’s electorate. Corporations and labor unions were prohibited from funding such ads from their treasuries. BCRA also required disclosure of the sources of electioneering communications.

Almost immediately after BCRA became law, it was challenged as unconstitutional in McConnell v. FEC. The plaintiffs argued to the Supreme Court that the soft money provisions were not supported by a government interest in eliminating corruption, because the extensive record developed at trial did not include a single example of a federal official switching her vote because of a soft money contribution. The Court disagreed on both the facts and the law, noting evidence connecting soft money to “manipulations of the legislative calendar” in the form of congressional failure to act. Moreover, the Court explained that corruption and the government’s interest in avoiding it “extends beyond preventing simple cash-for-votes corruption.” Following Shrink Missouri, the Court embraced a broad conception of the anti-corruption interest. This interest was not limited to quid pro quo corruption, as plaintiffs would have it, but instead encompassed “undue influence on an office holder’s judgment, and the appearance of such influence” as well as the “substantial donations to gain access to high-level government officials.” That expansive view of corruption, however, was supported by only five justices. Writing for the four dissenting justices, Justice Kennedy argued that Congress only had the authority to regulate the quid pro quo exchange of money for political favors.

The McConnell majority also upheld BCRA’s new “electioneering communications” provisions. The Court understood BCRA’s ban on corporate electioneering to incorporate MCFL – that is, to exempt nonprofit corporations formed to serve ideological ends. So interpreted, five justices voted to uphold BCRA’s restrictions on electioneering communications, including its ban on corporations’ and unions’ funding such communications from their treasuries, based primarily on its decision in Austin.

McConnell thus upheld the two main pillars of BCRA – but, as we shall see, its holding on electioneering communications would be revisited and ultimately overruled, after a change in the composition of the Supreme Court.

Citizens United and the Roberts Court

The year after the Supreme Court’s decision in McConnell, Wisconsin Right to Life challenged the application of BCRA’s ban on corporate-funded electioneering communications to advertisements
the group planned to run. Although Wisconsin Right to Life was an ideological nonprofit, it accepted money from for-profit corporations and was therefore not covered by the exception carved out in *MCFL*. Its ads exhorted fellow Wisconsinites to ask Senators Kohl and Feingold to oppose filibusters of President Bush’s judicial nominees. Although one of the Senators was up for re-election that fall, the ads did not expressly urge a vote for or against him.

By the time the case reached the Supreme Court, there were two new justices. Chief Justice Roberts had replaced Chief Justice Rehnquist, and Justice Alito had replaced Justice O’Connor — a co-author of the majority opinion in *McConnell* upholding BCRA’s soft money and electioneering communications provisions. In *Wisconsin Right to Life v. FEC*, decided in 2007, the Court held the corporate electioneering communications ban unconstitutional as applied to the ads. So long as an ad could reasonably be interpreted as something other than a campaign ad, corporations could not be banned from funding it.

The next year, the Roberts Court considered a challenge to another provision of BCRA, the so-called Millionaire’s Amendment. The provision applied to races involving one or more self-funded candidates. If a candidate spent over a certain amount of his own money on a race, then the contribution limits for his opponents were increased. In *Davis v. FEC*, decided in 2008, the Court struck down the law, in an opinion authored by newcomer Justice Alito. The Court held that the Millionaire’s Amendment violated the First Amendment.

The Court revisited the ban on corporate electioneering communications in *Citizens United v. FEC*. The case arose from a 90-minute documentary, *Hillary: The Movie*, which the nonprofit advocacy organization Citizens United sought to run – along with advertisements for it – during the 2008 primary election season. A five-justice majority overruled *Austin* and part of *McConnell*, striking down the ban on corporate-funded electioneering communications as well as the ban on corporate-funded independent expenditures.

The most significant aspect of *Citizens United* was its consideration of the government’s basis for restricting corporate expenditures – specifically, its rejection of the anti-distortion rationale. The Court explicitly overruled *Austin’s* holding that a ban on corporate campaign expenditures could be justified by the interest in addressing the distorting effect of wealth acquired through the corporate form. The majority emphatically rejected the argument that the interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections” could justify expenditure restrictions. Nor were the disproportionate influence and access enjoyed by big spenders a sufficient justification, since influence and access would not “cause the electorate to lose faith in our democracy.” According to the *Citizens United* majority, corruption included only the *quid pro quo* exchange of money for political favors. Justice Kennedy thus narrowed the definition of corruption, purporting to settle the debate once and for all. At the same time, an 8-1 majority of the Court (with only Justice Thomas dissenting) upheld the disclosure requirements applicable
to electioneering communications, based on the interest in informing the electorate.

The immediate practical effect of *Citizens United v. FEC* was not obviously sweeping, as prior Court decisions had already limited BCRA’s ban on corporate- and union-funded electioneering communications. Before the decision, unions and for-profit corporations could spend directly from their general treasuries 30 days before a primary and 60 days before a general election, but only on advertisements that could not reasonably be interpreted as anything other than advocating the election or defeat of a specific candidate. After the decision, unions and for-profit corporations could run the exact same ads – which, ultimately, conveyed messages of approval and disapproval of campaigns – but now they could say “vote for” or “vote against.” *Citizens United*’s real importance lies in its narrow definition of the anti-corruption rationale and, thus, the basis for limiting either contributions or expenditures.40

The Court’s decision in *Citizens United* came down on January 21, 2010, less than ten months before the mid-term elections. While political operatives and candidates were still scrambling to figure out just what the case meant for the fall campaigns, the landscape changed yet again due to a decision from the D.C. Circuit Court of Appeals in March of that year. The case, *SpeechNow.org v. FEC*, challenged FECA’s limits on contributions to political committees that only make independent expenditures: SpeechNow planned to make independent expenditures, but not contributions to candidates; nor did it plan to coordinate its efforts with federal candidates.41

The D.C. Circuit held that an independent-expenditure-only committee – now commonly known as a Super PAC – was not subject to the usual contribution restrictions on federal PACs.42

Because it only made independent expenditures, there was no constitutional basis for limiting contributions to such a group. In response to *SpeechNow*, the FEC issued guidance for PACs seeking to follow this model; so long as they only make independent expenditures, such groups may raise money free of the contribution limits applicable to other PACs.43 With that guidance, the Super PAC was born.

The Supreme Court’s most recent decision on federal campaign finance law is *McCutcheon v. FEC*, decided in April of 2014. That case challenged the *aggregate* contribution limits, as established by FECA and amended by BCRA. The aggregate limits capped the total amount a person could give to all federal candidates, political parties, and PACs combined. The Court struck down the aggregate limits, finding them insufficiently tailored to the the interest in preventing corruption or the appearance of corruption. Following *Citizens United*, Chief Justice Roberts’s opinion for the five-justice majority held that “[a]ny regulation must ... target what we have called ‘quid pro quo’ corruption,” which it defined as “a direct exchange of an official act for money.”44 Disparities in access and influence are not corruption and therefore cannot justify limitations on campaign contributions. Because the aggregate contribution limits were not closely drawn to prevent the reality or appearance of *quid pro quo* corruption, they violated the First Amendment. The decision left other federal contribution limits in place, as well as the soft money ban, but opened the door for donors to give millions to federal candidates and parties per election cycle.
The New Rules of the Game

Understanding how independent spending mattered for congressional elections in 2012 requires more than just a sense of how the law has developed over time – it also requires understanding the law that governed the 2012 contests. Below is a summary of the rules governing federal election campaigns. We start with the four modes of regulation summarize above – expenditure restrictions, contribution restrictions, public financing, and disclosure. We then turn to the subject of coordination, the rules for which are significant for outside groups making independent expenditures in connection with federal election campaigns.

Expenditures

The Supreme Court’s rulings in Buckley and Citizens United generally prohibit government from restricting expenditures. Campaigns and parties are free to spend as much as they can raise, borrow, or obtain from the candidate’s own personal funds. Some of the parties’ expenditures can be coordinated with candidates’ campaigns and some must be kept independent.

Individuals, corporations, and unions may either spend directly from their own coffers or contribute to other organizations – Super PACs and nonprofit corporations are the usual vehicles – which then make the political expenditures. These expenditures are sometimes called “outside spending” or “independent spending” and are not subject to any amount restrictions. The one big limitation on this category of spending is that the expenditures must in fact be independent. Expenditures made in coordination with a campaign will be treated as a contribution to that campaign and therefore subject to all of the regular contribution restrictions elsewhere in the law.

Because of the complicated development of campaign finance regulation, federal law breaks spending by these outside groups into different categories and subjects them to different reporting requirements. Practically speaking, most categories are lumped together under the heading of “outside spending,” or sometimes “independent expenditures” because that’s how they mostly get reported to the FEC. But the different categories still matter for disclosure purposes and it can be helpful to get the terms straight.

- Express Advocacy

The term “independent expenditure” is often used as a catch-all term to include any campaign spending that is not coordinated with a candidate. FEC regulations, however, employ a very narrow definition of this term. Under that definition, an independent expenditure is a communication that expressly advocates for the election or defeat of a clearly-identified federal candidate and is not made in coordination with a campaign or party. Thus, the FEC defines independent expenditures as including only express advocacy, urging the election or defeat of a candidate.

- Electioneering Communications

This category was created by the Bipartisan Campaign Reform Act of 2002 as a way of capturing advertisements that do not expressly advocate the election or defeat of a candidate but that are nevertheless aimed at influencing the outcome of an election. BCRA defined an electioneering communication as a broadcast, cable, or satellite communication that (1) is publicly distributed within 60 days of a general election or 30 days of a primary; (2) refers to a clearly-identified federal candidate; and (3)
is targeted to the relevant electorate for that candidate.\footnote{18} An electioneering communication is thus a TV or radio ad run shortly before an election \textit{that refers to} a candidate – it does not matter what the ad says about the candidate or if it even mentions the upcoming election.

- **Issue Ads**

Another term sometimes used in discussions of campaign expenditures is “issue ads.” Like Super PAC, it is not defined in campaign finance laws, so its usage is not always consistent. But in general, an issue ad is an advertisement that at least purports to address a policy issue – rather than expressly advocating for or against a candidate. The electioneering communications category was created to deal with issue ads that, Congress believed, were really aimed at influencing elections. Today, most advertisements that mention candidates and run before an election are just called independent expenditures, but sometimes “issue ad” is still used to refer to ads that do not use the “magic words” like “vote for” or “defeat.”

- **Member Communication Costs**

The least-discussed of the forms of outside spending, “communication costs” are mostly a tool for unions, trade associations, and other membership organizations, although they are sometimes used by corporations as well. These organizations can communicate with their members and stockholders on any subject but when the communications expressly advocate the election or defeat of a clearly-identified federal candidate, the directly-associated costs have to be reported to the FEC. The organizations can pay for these communications, like other campaign-related expenditures, from their general treasury funds. For example, when SEIU sends a piece of direct mail only to its own members in Pennsylvania, asking the members to vote for Senator Casey on election day, the money spent on that mailing gets reported as a “communication cost” to the FEC, and can be paid for by funds collected through union dues. (Member communication costs could be funded by union and corporate treasuries before \textit{Citizens United} – that decision did not have any direct impact on the rules governing communication costs.)

In addition to the categories of spending described above, there may be additional spending for the purpose or with the effect of influencing elections that is not reported. Organizations that are not required to report all of their activity on a regular basis – mostly individuals and corporations

<table>
<thead>
<tr>
<th>GIVING/RECEIVING</th>
<th>CANDIDATE</th>
<th>PAC</th>
<th>NATIONAL PARTY</th>
<th>SUPERPAC</th>
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<tr>
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<td>$5,000 per year</td>
<td>$30,800</td>
<td>Unlimited</td>
</tr>
<tr>
<td>CANDIDATE</td>
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<td>Unlimited*</td>
</tr>
<tr>
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<td>$5,000 per year</td>
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<td>Unlimited</td>
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<td>Unlimited</td>
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<tr>
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<td>PROHIBITED</td>
<td>Unlimited</td>
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<tr>
<td>CORPORATION</td>
<td>PROHIBITED</td>
<td>PROHIBITED</td>
<td>PROHIBITED</td>
<td>Unlimited</td>
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</table>

* Although we are not aware of any candidate committee donations to Super PACs, the only restriction on candidate campaign funds is that they may not be converted to personal use. See 2 U.S.C. § 439a(b).
whose major purpose is not to influence federal elections – could pay for advertisements or other election-focused activities that do not meet the definition of “express advocacy” or of “electioneering communications.” Spending on such ads or other election-focused activities would not be reported publicly.\footnote{49}

**Contributions**

Most federal political organizations are subject to contribution limitations, both in the form of a cap on the amount of money they can receive from any one place and as a restriction on the source of the money. The contribution rules for 2012 are summarized in Table 1. (We use this election cycle, rather than the 2014 limits, because the main focus of this report is the 2012 elections.) For that election cycle, an individual could give $2,500 per candidate, per election. In other words, one could contribute $2,500 for a congressional candidate’s primary election campaign, and another $2,500 for that candidate’s general election campaign. Unions and corporations – whether for-profit or nonprofit – are prohibited from making contributions to federal candidates or parties, or to PAC accounts that give to federal campaigns. There were also limits on the aggregate amount an individual could contribute to all federal campaigns, parties, and PACs combined. These aggregate limits have since been struck down as unconstitutional.

A Super PAC is a political committee that can accept contributions in any amount and from any source, because it only makes independent expenditures. A Super PAC may not contribute any of the money it collects to campaigns or parties (unless it establishes a separate account, which is subject to FECA’s contribution limits, for so doing). The rationale for the contribution limitation is the desire to prevent the reality or appearance of corruption – which the Supreme Court now understands to mean the exchange of money for an official act. So long as Super PACs only make independent expenditures, those expenditures – and, by extension, the contributions Super PACs receive to fund those expenditures – present no risk of such corruption. Accordingly, there is no justification for Super PACs’ being subjected to contribution limits. The same holds true for other organizations, including nonprofits, that make independent expenditures, whether in the form of express advocacy or electioneering communications. Contributions to such organizations cannot constitutionally be limited.

**Public Financing**

At the federal level, public financing is limited to presidential elections.\footnote{50} The presidential public financing scheme is an optional program for candidates available for both party nomination contests and general elections. In the nomination phase, candidates can be eligible for funds matching up to $250 of each individual’s contribution to the campaign. To qualify for primary matching funds, a candidate must raise a certain amount of money from individuals in at least 20 states and must agree to limit overall and per-state expenditures. In the general election, party nominees are eligible for a $20 million grant, adjusted for inflation, in exchange for not accepting or spending any other money. In 2012, the general election grant would have been approximately $91.2 million per major party nominee, through neither President Obama nor Governor Romney used public funds. The public financing scheme has largely fallen out of favor with candidates, beginning with President Obama’s first campaign in 2008, because the public financing available has not kept up with
the cost of campaigns – and candidates’ ability to raise this money from private sources.

In addition to the presidential campaigns, the parties were eligible for limited public funding in past elections. The two major parties received $4 million, adjusted for inflation – up to $18.2 million in 2012 – to fund the presidential nominating conventions. In exchange, the parties agreed to use only the public money to fund the convention. (The plethora of unofficial activities that happen outside of the actual convention hall were not subject to the restriction.) However, in early 2014, President Obama signed legislation to end public convention funding.51

Disclosure

Some, but not all, of the money raised and spent for federal political activity is reported to a government agency and made public. The agency responsible for receiving reports and publicly disclosing campaign money is the FEC. Political committees of all stripes file electronic reports of different aspects of their activity with the FEC.52 Some reports must be filed on a regular basis – usually quarterly – while other reports are triggered by a threshold amount of activity, like spending $10,000 to influence a campaign.

Below is a summary of disclosure requirements for different types of groups:

Political committees (including candidate campaigns, parties, traditional PACs, and Super PACs)53 must register with the FEC and file reports of their activity on a regular basis. These reports must include:

- All contributions received, along with identifying information about contributors who give more than $200 per cycle.

- All disbursements, including independent expenditures, electioneering communications, and regular operating costs, with detailed information about the disbursement’s payee and the purpose for outlays over $200.

- Other financial information such as debts owed, investments held, and transfers made to other political committees.

Anyone who is not registered as a political committee (including individuals, partnerships, corporations, and any other group of persons that doesn’t have influencing elections as its major purpose) is required to file reports with the FEC if they spend over a threshold amount on election-related activities. When one of these unregistered persons or entities spends more than $250 on express advocacy in a calendar year, then they must file a report with the FEC at the end of the next reporting period. Additional independent expenditures in any subsequent reporting period will trigger further filing requirements. These reports must include contact information for the spender, the names of any donors who have given specifically for the purpose of funding the expenditure, and detailed information about the expenditure, including the targeted candidate and – for express advocacy expenditures – whether the expenditure is in support or in opposition.54

In addition to the reporting requirements described above, certain kinds of election spending must be reported to the FEC within a matter of days. Once anyone’s independent expenditures for express advocacy in a particular election hit a total of $10,000 for the year – regardless of what other reports they file with the FEC – they have 48 hours to report any previously undisclosed independent expenditures. Each additional independent expenditure triggers another report which must be filed within 48-hours. As the election approaches,
the reporting window tightens. Within 19 days of an election, independent expenditures for express advocacy must be reported within 24 hours.

Electioneering communications – which, by definition, happen shortly before an election – must be reported to the FEC within 24 hours, once the spender aggregates more than $10,000 on all such communications in the year. Like reports for independent expenditures for express advocacy, electioneering communication reports must be filed by any person or entity, regardless of whether or not they are registered as a political committee with the FEC. The reports for electioneering communications must include information about the spender; details about the payee, purpose, and candidate subject of the communication; and large contributions given for the purpose of funding the expenditure.55

Finally, some organizations must also file reports including information about their campaign-related activities with other agencies:

• Nonprofit organizations that do not have the major purpose of influencing elections, but do spend money on express advocacy or electioneering communications, must report those specific expenditures to the FEC, as noted above. They are not required to report other activities to the FEC. Those groups must instead file an annual tax return with the IRS (called a Form 990) listing all money raised and spent, but the contributors are not made public.

• Section 527 of the Internal Revenue Code requires organizations whose primary purpose is to influence elections – so called 527s – to report the expenditures they make and the contributions they receive, or pay a higher tax rate. The rules for 527s are discussed below.

**Coordination**

As set forth above, there is a critical distinction between contributions and expenditures. While contributions can be limited, expenditures generally cannot be, so long as they are independent – that is, not coordinated with a candidate’s campaign. Whether a particular disbursement is treated as an expenditure or as a contribution thus depends on whether or not there is *coordination* with a candidate’s campaign.

What distinguishes a coordinated expenditure (which can be and is restricted) from an independent expenditure (which cannot be)? The FEC regulations draw a line, the contours of which have been refined through Advisory Opinions and other decisions. As we discuss throughout this report, campaigns and groups may also draw their own lines – deliberately keeping a few steps back from what the FEC calls coordination or, sometimes, edging as close to it as possible – based on how comfortable they are extrapolating from an FEC decision in another case to the facts on the ground for their own campaign.

FEC regulations prescribe a *three-prong test* to determine whether a communication is coordinated between an outside group and a House or Senate campaign. All three prongs of the test must be met in order for coordination to be found.

1. **Payment** – A person or group other than the candidate or her campaign pays for the communication.

2. **Content** – A communication satisfies the content prong if it expressly advocates for a candidate’s election or defeat; or is an electioneering communication; or is republication or dissemination of campaign materials prepared in whole or in part by a candidate’s
committee. An ad can also satisfy the content prong if it refers to a clearly identified House or Senate candidate – or refers just to a political party and is made in coordination with a House or Senate candidate or party – and is run in that candidate’s jurisdiction within 90 days of an election.

3. **Conduct** – This is the critical portion of the test. The conduct prong is met by certain kinds of interactions between the outside spender and a candidate, her agent, or a political party committee. Any one of the following five actions will meet the conduct prong of the coordination test:

   a. The communication is made or distributed at the request or suggestion of the campaign, or if the outside group suggests it and the campaign assents.

   b. The campaign is materially involved in decisions about the communication’s content, targeted audience, timing, size, or mode.

   c. The campaign and the spender have substantial discussions before the communication is made – that is, they talk about the campaign’s needs, plans, projects, or activities and that information is relevant to the communication.

   d. The campaign andspender employ a common vendor within 120 days and the vendor uses information from the campaign to make the outside communication.

   e. A person previously employed by the campaign goes to work for an outside group and, within 120 days, uses information from the campaign to help make the group’s communication.

In addition to the FEC regulations, campaigns and outside organizations pay close attention to Advisory Opinions issued by the FEC. Some of these opinions have produced additional guidance about what is and is not coordinated activity. For example:

- A nonprofit 501(c)(4) can rent its email list to a political campaign. As long as it is rented at the fair market value, that is not coordination.\(^56\)

- A federal candidate can raise money for an outside organization like a Super PAC, including by appearing at a Super PAC fundraising event, as long as the candidate does not ask for money beyond the federal source and amount limitations.\(^57\)

The definition of coordination has a close relationship to the scope of constitutionally-permissible restrictions on independent spending. As Professor and former FEC Chairman Bradley A. Smith observes, the legal definition of prohibited coordination is narrower than the commonsense meaning of the term, and the FEC’s enforcement of coordination has made it still narrower in practice.\(^58\) What often is called “coordination” in the press and even in our interviews rarely meets the legal definition of improper conduct. On the other hand, Professor Richard Briffault suggests that we reconsider where the legal line between independent and coordinated spending is drawn.\(^59\) He focuses particular attention on the misfit between the FEC’s definition of coordination and the operation of single-candidate Super PACs that have become important players on the
electoral fields. Similar concerns may exist with respect to other groups that mirror the efforts of political parties, particularly where these groups’ donors are courted by and well-known to elected officials. In either case, the links between federal candidates or officeholders and the checkbooks of large donors appear much stronger. Others may raise questions about the legal definitions of coordination and independence where additional factors point to a close relationship between an outside group and candidate or elected official, particularly as players repeat over multiple election cycles and legislative sessions, such as we discuss further in Chapters IV and V.

The problem of finding an adequate definition of coordination brings us back to the different conceptions of corruption, described earlier in this Chapter. If corruption is limited to the *quid pro quo* exchange of money for political favors, as the current Supreme Court has held, there is little threat of corruption from outside spending, unless circumstances suggest the possibility that it is in exchange for a political favor. By that understanding of corruption, the outside groups may even act as a bulwark against corruption as they redirect money away from candidates’ campaigns, where the real threat of *quid pro quos* exists. By contrast, if “corruption” encompasses something more than *quid pro quo* – whether it is ingratitude to the donors who bankroll the campaigns, or a causal link between more money and more access to a legislator, or a worry that Congress will become dependent upon the largess of its Super PAC benefactors, legally independent their financial backing may well be – then the relationship between independent spending and candidate campaigns is likely to seem more troubling, even without any indication of a *quid pro quo*.

### The Players

Various types of groups are now engaged in the enterprise of trying to influence federal elections. Below is a summary of the various types of players engaged in federal campaign activity, along with the key rules applicable to each type of entity.

#### Candidates

Candidates for federal office must set up committees and register them with the Federal Election Commission. Campaign bank accounts are in the candidate committee’s name and that committee files reports listing contributions received, money spent, debts owed, and other financial information with the FEC on a quarterly basis and immediately before and after elections. Incumbents or repeat challengers can keep the same committee from one election to the next and carry over money raised in a previous election. (This carried-over money is what is often called a candidate’s “war chest.”) Contributions to candidate committees are limited, as discussed above, and candidate committees are required to disclose contributions they receive and expenditures they make.

#### Party Committees

There are a host of different kinds of party committees at the national, state, and local levels and they operate different kinds of accounts for different purposes. They can raise money from individuals in somewhat larger amounts than candidates and PACs, although they are still prohibited from raising money from corporate and union treasuries. Parties can give money to candidates or spend it directly on their campaigns, both through limited coordinated efforts and through unlimited independent expenditures for express advocacy. The party
committees that come up the most in this report – because they make the same kinds of independent expenditures as other outside groups – are the congressional committees: the National Republican Senatorial Committee (NRSC), the National Republican Congressional Committee (NRCC), the Democratic Senatorial Campaign Committee (DSCC), and the Democratic Congressional Campaign Committee (DCCC). Like candidate committees, party committees are limited in the contributions they can receive, and in the contributions they can make to federal candidates’ campaigns.

**Traditional PACs**

The term “political action committee” or “PAC” is not used in FECA or other federal statutes. FECA does, however, use the term “political committees,” which includes groups with a “major purpose” of nominating or electing candidates to federal office.

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- Amount limitations
- Source limitations: no union or corporate treasury funds
- Can give money to candidates and PACs
- All contributions and expenditures must be reported to the FEC

- No limits on source or amount of contributions
- Cannot give money to candidates or PACs
- Can make independent expenditures
- SuperPACs must report contributions and expenditures to the FEC; Non-Profits report some
The term PAC is sometimes used to refer to all non-candidate, non-party political committees. It is often used in a narrower sense, to refer to what FECA calls “multicandidate political committees,” defined as political committees with more than 50 contributors that have been registered for at least six months and, except for state party committees, have made contributions to at least five federal candidates. Federal PACs are thus non-party groups that solicit contributions from individuals, and then use that money to make contributions to federal candidates’ campaigns. An individual may contribute up to $5,000 to a PAC, and PACs may contribute up to $5,000 to each candidate for each election. (Unlike candidate and party committee limits, these caps are not indexed for inflation.) PACs are required to disclose contributions they receive and expenditures they make.

Some PACs are formed by unions, some by corporations, and some by groups of people with a common ideological agenda. For the most part they operate the same way, except that when a PAC is run by a union or corporation, there are special limits on who from the union or business can be asked to give money. The donations can only come from individuals but the overhead costs of operating the PAC can be paid for from the union or corporate treasury. When a PAC is associated with a corporation or a union, it is sometimes called a separate segregated fund (SSF).

One important subcategory of PACs is “Leadership PACs.” These are PACs started and run by Members of Congress and are used to help out other candidates. They are not subject to some of the restrictions that candidate committees are, so they are often used to fund a Member’s travel, polling, and other “political” but not quite “campaign”-related expenses.

Super PACs

The term Super PAC is not used in federal laws or rules. It was coined by a reporter at National Journal, to describe the new political committees created in the wake of SpeechNow, that may accept unlimited money from individuals, corporations, and unions, so long as all their expenditures are made independent of candidates and parties. At first, the FEC called these organizations Independent Expenditure Only Political Committees, or IEOPCs, but even the FEC has started to use the “Super PAC” terminology. Super PACs are subject to disclosure requirements, but neither contributions to nor expenditures by Super PACs are limited.

Nonprofits

A Super PAC is one vehicle for independent spending, but it is not the only one. Corporations, unions, and individuals can spend money directly, out of their own bank accounts, on campaign communications. Alternatively, they can contribute money to a group that isn’t subject to disclosure requirements. It is now common for independent spending to come from a nonprofit organization claiming tax-exempt status under Section 501(c) of the tax code.

Section 501(c) of the Internal Revenue Code lays out the different types of tax-exempt nonprofit organizations. It specifies 29 different categories of nonprofits, defined according to their membership and activities. To understand political activity – at least for the 2012 cycle – it’s enough to be familiar with just a few of the categories:

Charitable Organizations: These entities – formed under Section 501(c)(3) of the Internal Revenue Code include religious organizations, schools, and
hospitals. 501(c)(3)’s are not allowed to conduct any campaign activity that supports or opposes candidates or parties, but they may do non-partisan voter registration or get-out-the-vote drives and may also engage in issue advocacy. Lobbying is allowed, but it cannot make up a “substantial part” of the organization’s work. In addition to the exemption from income tax for the organization, donors may also deduct the money they give on their own tax returns. Donors are not publicly disclosed.

Social Welfare Nonprofits, Unions, and Trade Associations: These nonprofit corporations are where much of the action is in outside spending. They may all speak directly in campaigns, advocating for or against candidates and parties. They can also give money to Super PACs and other nonprofits for the same activities. However, political activity cannot be their “primary purpose”: for 501(c)(4)’s, their primary purpose must be promoting “social welfare”; groups organized under 501(c)(5) are trade associations or chambers of commerce; and 501(c)(6)’s are labor unions. The perils of determining whether political activity is a group’s primary purpose is one of the issues to have emerged in the recent scandal involving the IRS’s treatment of Tea Party groups.

Exactly when campaigning becomes an organization’s primary purpose is not clear. The IRS determines when a 501(c) group crosses the line and it uses a different test than the FEC uses to determine whether or not an activity counts as campaigning. For example, to decide whether money for a television ad was campaigning, the IRS will ask not just whether it was run close to an election and whether it mentions a candidate, but also how relevant the issue mentioned in the advertisement is to the campaign, and whether there was any other non-election event that the ad might target.

As a baseline rule, 501(c)(4), (c)(5), and (c)(6) groups neither pay income tax nor are required under federal tax law to disclose donors publicly. Unlike 501(c)(3) charitable organizations, their donors may not deduct the amount of their donation from their own tax returns and in fact, the donor may have to pay a “gift tax” on the amount they give to the organization above a certain threshold.

The main advantages to 501(c)(4), (c)(5), and (c)(6) organizations are their tax exemption and ability to keep their donors private. Both are largely dependent upon staying on the right side of the “primary purpose” line. If the organization does too much campaigning, it may be treated as a different kind of entity (a 527 political organization) and forced to disclose its donors. The IRS makes the determination of how much is too much based on either an application for tax-exempt status or an annual tax return.

527s

One other section of the tax code is important for understanding the rules for outside spending – Section 527. For a long time, it was unclear whether campaign organizations were taxable; their primary purpose was obviously political and not promoting social welfare or some other tax-exempt activity under 501(c), but the IRS issued conflicting rulings on the matter. In 1974, Congress enacted Section 527 to clear things up: political money is not subject to taxation – the donors do not pay a gift tax and the recipient organizations do not pay tax on their political income.
All political committees registered with the FEC are political organizations under Section 527 for IRS purposes, but not all of what the IRS calls “527 organizations” are political committees in the FEC’s eyes. What’s important to remember is that all of the rules regarding 527s are administered by the IRS. Any group of people engaged primarily in political activities – at the federal, state, or local level – will be considered a 527 by the IRS. Totally separate from that designation, the FEC requires certain groups involved in federal elections to register with the FEC as political committees and report their contributions and expenditures.\textsuperscript{69}

In the 1990s, there was a surge of organizations engaging in political activity – that is, they were 527s from the IRS’s perspective – but avoiding meeting any of the thresholds that triggered registering and reporting to the FEC. These groups came to be known as “Stealth 527s”; through issue advertising that never used the “magic words” of express advocacy, they avoided disclosure.

Congress dealt with “Stealth 527s” in two ways: First, it added a disclosure requirement on to section 527.\textsuperscript{70} In order to maintain its tax exempt status, a political organization now has to disclose its donors, either to the FEC or to the IRS. Second, it created the new category of “electioneering communications” in BCRA, which both prohibited corporations and unions from funding the issue ads and imposed new disclosure requirements for broadcast advertisements, regardless of what kind of organization put them out.

Although technically all political committees registered with the FEC are 527s for tax purposes, the term “527” is often used in a more narrow sense, to refer to groups established under Section 527 that are not (or at least claim not to be) political committees under FECA. They rest that claim on the difference between the IRS rules and the FEC rules for political activity because influencing elections is their primary purpose (to the IRS) but influencing federal elections is not their major purpose (to the FEC). Such groups attracted considerable attention during the 2004 election, but have become less prominent since then, as outside spending by Super PACs and nonprofits has proliferated.

* * * *

The aim of this Chapter has been to provide an overview of federal campaign finance law, starting with the modes of campaign finance regulation, proceeding through the development of federal law, and concluding with a summary of the current rules of the game and the players in that game. While recognizing the enormous complexity of the legal rules in this area, we have endeavored to provide a primer that is understandable to non-lawyers. We now turn from the law to the real world – specifically, to an examination of actual spending in connection with federal elections.

2 Id.

3 The following discussion relies in part on Daniel P. Tokaji, Election Law in a Nutshell 273-326 (2013).

4 Contributions can take the form of money, property, or services. 2 U.S.C. § 431(8)(A)–(B).


14 Buckley, 424 U.S. at 14.


16 Buckley, 424 U.S. at 48–49.


23 Shrink Missouri, 528 U.S. at 390.

24 McConnell v. FEC, 251 F.Supp.2d 176, 526-29 (2003) (opinion of Kollar-Kotelly, J., examining reports and expert testimony on the use of issue advertising before BCRA and
concluding “the uncontroverted record demonstrates that since the 1996 election cycle, candidate-centered issue advertisements have been used by corporations and labor unions to influence federal elections with general treasury funds.”); see also Remarks of Sen. Snowe, 147 Cong. Rec. S2455-S2459 (describing “broadcast ads on television and on radio that masquerade as informational or educational but are really stealth advocacy ads for or against candidates”).

25 See Buckley, 424 U.S. at 44 n.52 (“This construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”). See also Paul S. Ryan, Wisconsin Right To Life and The Resurrection of Fugatch, 19 Stan. L. & Pol’y Rev. 130 (2008) (discussing various definitions of “express advocacy” as employed by the courts and the FEC).


27 See McConnell, 540 U.S. at 123 n.7 and accompanying text.


30 See McConnell, 540 U.S. at 122-132 (summarizing the background of soft money, issue ads, and the 1998 investigation by the Senate Committee on Governmental Affairs as the impetus for BCRA).


32 McConnell, 540 U.S. at 149.

33 Id. at 150.

34 Id. (quoting Colorado II, 533 U.S. 431, 441 (2001)).

35 McConnell, 540 U.S. at 294 (Kennedy, J., dissenting).

36 FEC v. Wisconsin Right to Life, 551 U.S. 449 (2007) (hereinafter WRTL II). The Court built upon a qualification in McConnell that the definition of “electioneering communication” in BCRA was not overbroad – restricting more speech than necessary to meet its legitimate goals – as long as the kinds of ads that were covered by the definition were the “functional equivalent” of express advocacy. Id. at 456 (citing McConnell, 540 U.S. at 204-06). In Wisconsin Right to Life, the Court explained that an ad was 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 specific candidate.” WRTL II, 551 U.S. at 469-70. This interpretation affected not only the plaintiff’s ads in that case but also prompted the FEC to apply the “functional equivalent” approach to other places in the law where express advocacy is regulated. See, e.g., 11 C.F.R. § 100.22 (defining “express advocacy”).


38 Citizens United v. FEC, 558 U.S. 301 (2010). See id. at 365 (noting that by overruling Austin, the Court was also invalidating 2 U.S.C. § 441b’s prohibition on the use of corporate treasury funds for express advocacy).


41 SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).


McCutcheon v. FEC, No. 12-536, slip op. at 6 (Apr. 2, 2014).

We use “outside spending” or “independent spending” throughout the report as catch-all terms to include all non-coordinated, non-party expenditures reported to the FEC. We use the more specific terms when necessary, such as “non-candidate spending” to refer to independent spending by parties as well as other entities.

11 C.F.R. § 100.16(a) (defining “independent expenditure”). Although the FEC’s definition of “independent expenditure” is limited to communications that expressly advocate for a candidate’s election or defeat, the definition of what constitutes “express advocacy” goes beyond the familiar “magic words” to include a test quite similar to the Court’s “functional equivalent” test in *WRTL II*. 11 C.F.R. §100.22(b).


For a discussion of the ways that election-focused spending could be left unreported and the research problems any such gap may pose, see Justin Levitt, *The Drunkard’s Search For Money In Politics*, SUMMARY JUDGMENTS (May 27, 2014), http://summaryjudgments.lls.edu/2014/05/the-drunkards-search-for-money-in.html#more.


There is, however, an exception. Senate campaigns and committees that support only Senate candidates may file electronic reports but are only required to file paper reports with the Secretary of the Senate. 11 C.F.R. § 105.2. See also Center for Responsive Politics, e-Filing Senate Campaign Reports, http://www.opensecrets.org/action/issues/efiling-senate-campaign-finance-reports/ (last visited May 22, 2014).

We describe the characteristics of PACs and other non-party groups later in this Chapter, under the heading “The Players.”


*Electioneering Communications*, BROCHURES (last updated Jan. 2010), http://www.fec.gov/pages/brochures/electioneering.shtml. Litigation is ongoing at the time of publication over the disclosure of donors to unions and corporations (including nonprofits) that make electioneering communications but are not political committees under FECA. After the Supreme Court’s decision in *FEC v. Wisconsin Right to Life*, the FEC promulgated a regulation, under which only donors who give “for the purpose of furthering electioneering communications” have to be disclosed. See 11 C.F.R § 104.20(c) (9). Rep. Chris Van Hollen filed a lawsuit in 2011 challenging the FEC’s regulation, arguing that the limited donor disclosure requirements exceeded the FEC’s authority under BCRA. The D.C. Circuit determined that BCRA was not as clear on the point, and the FEC continues to defend its regulation. For more on this case, see Ongoing Litigation, Van Hollen v. FEC.


57 Response to Advisory Opinion Request by Majority PAC and House Majority PAC, Op. FEC 2011-12 (June 30, 2011); see also 11 C.F.R. § 300.64(b) for restrictions on non-federal fundraising by federal candidates.


60 We discuss these groups as “Shadow Parties” in later chapters.


63 Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (as amended in 1990) (an organization is an action organization and does not qualify for § 501(c)(3) status if it “participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office”).

64 Treas. Reg. § 1.501(c)(3)(ii) (an organization is an action organization and does not qualify for § 501(c)(3) status if a “substantial part of its activities is attempting to influence legislation by propaganda or otherwise”).


66 501(c) organizations may be subject to tax on their political activity, but the tax is capped at the amount of their investment income, which financial planning can keep at a minimum. The organization can also avoid the tax altogether by maintaining a separate segregated fund in the form of a section 527 organization. See IRC 527(f); Ellen P. Aprill, Regulating The Political Speech of Noncharitable Exempt Organizations after Citizens United, 10 ELECTION L.J. 363, 388–89 (2011).


68 Section 527 does, however, require that political organizations pay tax on investment income.

69 The primary purpose test is similar but not identical to the “major purpose” test that applies in determining whether a group is a political committee under FECA. First, Section 527 provides exempt status to groups with the primary purpose of affecting elections at the federal, state, and local level, as well as the nomination of individuals to appointed office such as judges. Also, the IRS considers multiple factors in determining whether a group’s primary purpose is to influence election campaigns, including whether candidates are mentioned, whether they express approval or disapproval of candidates, and how close they are to elections. Revenue Ruling 2007-41 (“Issue Advocacy and Political Campaign Intervention”); see also Donald Tobin, Campaign Disclosure and Tax-Exempt Entities: A Quick Repair to the Regulatory Plumbing, 10 ELECTION L.J. 427, 435 (2011).

CHAPTER II. WHERE DOES ALL THE MONEY GO?

- Spending by outside groups – those that aren’t formally affiliated with candidates or parties – has increased dramatically, most conspicuously in the 2012 election cycle.
- The total amount of non-candidate spending on 2012 congressional races ($714 million) was greater than the non-candidate spending in the presidential contest.
- Nearly 600 groups reported spending money to influence congressional elections in 2012, with the 21 largest outside groups accounting for 45 percent of the total – exceeding the political parties’ spending on congressional elections.
- The vast majority of outside spending in congressional races funded express advocacy in opposition to a candidate.

The cost of running for federal elections has increased dramatically in recent decades, with more and more of that money spent by outside groups. In 2012, reported federal campaign spending – including by candidates for the House, Senate, and White House, as well as spending by the parties, PACs, and outside groups – reached almost $6.3 billion, according to the Center for Responsive Politics. The cost of election campaigns has been rising even faster than the cost of gas or higher education.

What did that money buy? Answering that question is at the heart of this project. But before considering the impact of campaign spending, it’s essential to take a close look at the increase in campaign spending over the years, as well as the amount of money spent – and who was spending it – in the 2012 federal election cycle.

Fig. 1. Candidate Expenditures in Congressional Campaigns, 1974-2012 (in 2012 dollars)

![Graph showing candidate expenditures in congressional campaigns, 1974-2012. The chart indicates a steady increase in expenditures over time, with a significant spike in 2012. The y-axis represents expenditures in millions, ranging from 0 to 2000, and the x-axis represents years from 1974 to 2012.](source: Vital Statistics on Congress)
That includes spending by candidate campaigns, political parties, and non-party groups.

**The Rise in Federal Campaign Spending**

For the first half of the Nation’s history, the only data available about campaign costs are rough estimates of party and presidential spending.\(^2\) It was not until 1911 that the Publicity Act mandated the disclosure of campaign contributions and expenditures by House and Senate campaigns.\(^3\) However, the reports were far from comprehensive: they were filed with offices internal to the Congress, to whom prosecutorial discretion for initiating criminal proceedings for violations was effectively delegated\(^4\) – what one Member called “tantamount to putting the fox in charge of the chicken coop”\(^5\) – and excluded primary activity entirely.\(^6\) Moreover, analysis of the data that were disclosed is limited, mostly consisting of estimates compiled by reporters or congressional committees tasked with investigating potential abuses.\(^7\)

The first major attempt to improve disclosure happened during congressional crafting of the Federal Election Campaign Act of 1971 (FECA). An amendment approved overwhelmingly on the Senate floor would have created a new independent agency to administer federal campaign finance regulations, but it was stripped from the bill in conference at the behest of the House Democrats.\(^8\) Instead, reporting for House and Senate campaigns remained in the respective chambers and the General Accounting Office (GAO) – today called the Government
Accountability Office – was charged with oversight of the presidential campaigns.9

FECA did not take effect until April 7, 1972, and so complete information for the 1972 cycle is not available.10 Beginning in 1974, however, the picture becomes a bit clearer. Thanks to the American Enterprise Institute, Brookings Institution, and the Campaign Finance Institute’s Vital Statistics on Congress collaboration, data on the financing of House and Senate races over the past four decades are available. These data help put spending in the 2012 election cycle into historical context.11

The cost of running a congressional campaign has increased dramatically over the past four decades. In 1974, the average spending by the campaign of a major party nominee was $53,384 for a House seat and $437,482 for a Senate seat – or, translated into 2012 dollars, $248,613 and $2.037 million respectively. By 2012, the average spending by a House campaign was $1.178 million and the average spending by a Senate campaign, $9.325 million. If candidates raised and spent money at 1974 levels today, they would have a hard time funding winning campaigns. The average House campaign in 1974 would fall second-to-last in a ranked list of spending by 2012 winning House candidates, just above the $209,532 spent by New York Democrat José Serrano running for his twelfth term in Congress.12 In the Senate, the 1974 average would rank at the very bottom –$800,000 less than the least expensive Senate race, where Independent Angus King spent $2.8 million to secure his 2012 victory in Maine.13

Total expenditures by all major party nominees in House and Senate campaigns likewise increased between 1974 and 2012. Accounting for inflation, the total spike is close to 450% – outpacing even the rise in cost of college (240% for private four-year schools and 218% for public schools)14 and the rise in the cost of gasoline (148% for a gallon of regular)15 over roughly the same period of time.

A closer look at the data presented in Figure 1 shows that the rise in congressional campaign expenditures has not been steady. Eight of the 20 cycles saw a decrease in overall expenditures from the previous cycle, mostly in presidential election years when congressional candidates have additional competition for funds. Put even more sharply by looking at the percent change in spending over the two years prior, as depicted in Figure 2, it appears that at least in the 21st Century, a sharp increase in spending by candidates correlates with party control flipping in at least one chamber.

It’s not just candidates’ campaigns that have increased their spending
over the years. Other political players, including both parties and outside groups, have also increased their spending. Data on independent expenditures for “express advocacy” in House and Senate races go back to 1978. Figure 3 shows this increase in 2012 dollars.

As Figure 3 shows, express advocacy spending by non-party groups remained fairly modest for around three decades, hovering under $50 million per cycle. In the last two election cycles, however, spending on express advocacy has skyrocketed, going to just over $200 million in 2010 and over $450 million in 2012.

It bears emphasis that this chart only includes independent expenditures for express advocacy. It doesn’t include so-called “issue ads,” which identify a federal candidate but don’t expressly urge a vote for or against that candidate. Such ads rose to prominence in the mid-1990s, and some of them were captured by the “electioneering communications” category established by BCRA in 2002. Figure 3 also leaves out “communication costs,” the monies spent on organization-to-member advocacy favored by unions.16 We use the data on express advocacy for the purpose of historical comparison, however, because data on spending for electioneering communications are available only after BCRA.

Beginning in 1996, the Vital Statistics data add one more layer to the picture of campaign finance in congressional races – party expenditures. The political parties can engage in two kinds of spending on behalf of their candidates for federal office – independent expenditures and coordinated party expenditures – and they may make direct contributions to campaigns. The rules work the same for parties as they do for any other outside group, with one important distinction: political parties may only use money raised subject to federal contribution restrictions to pay for independent expenditures for express advocacy in congressional campaigns. Both national and state parties may also make expenditures that are coordinated with federal campaigns, subject to their own amount limits based on the size of the population and an inflation index.17

Figure 4 shows the total reported spending in House and Senate races in three categories – party
expenditures, candidate expenditures, and non-party independent expenditures over the last nine election cycles. The line representing party activity, which includes coordinated and independent expenditures as well as party contributions to candidates, shows a dramatic increase between 2002 when BCRA was passed and 2006, the year the Democrats gained majorities in both the House and the Senate. Over the next three cycles, the combined party expenditures decline – by roughly $45 million dollars – while the non-party independent expenditures for express advocacy increase dramatically, passing the parties for the first time in 2012. (Moreover, the line for non-party spending does not include money spent on anything other than express advocacy as reported to the FEC.) Although the total spent by candidates still amounted to almost double the

combined expenditures of parties and non-party groups in 2012, a closer look at the last election reveals that was not true in every race.

### Spending in the 2012 Election

The first full federal election cycle after *Citizens United* and the birth of the Super PAC also saw a hotly contested presidential race. The Republican nomination fight abounded with stories of large donors, like Las Vegas magnate Sheldon Adelson and conservative investor Foster Friess, who contributed large amounts to candidate-specific Super PACs. Controversy also erupted when late-night host Bill Maher gave a million-dollar donation to Priorities USA Action, the Super PAC supporting President Obama. By the general election, mega-donors on either side of

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**Fig. 5: Non-Candidate Spending in 2012 Federal Elections**

- Presidential: $652,788,075
- Senate: $376,601,063
- House: $338,098,486

*Source: Center for Responsive Politics*

**Fig. 6. Non-Candidate Spending in 2012 Congressional Elections, by type of Spender**

- 21% ($150M)
- 45% ($323M)
- 34% ($237M)
- 20 largest non-party spenders
- All other outside spenders
- Party Committees

*Source: Center for Responsive Politics*
the aisle had Super PAC vehicles for supporting their preferred presidential candidate: to the tune of $142 million for Governor Romney’s Restore Our Future and $65 million for President Obama’s Priorities USA.\(^\text{18}\)

Despite the media’s focus on presidential campaign spending, more than half of the reported non-candidate spending in 2012 was actually in congressional races. Reported spending on congressional races – including spending by parties and non-party groups – was over $714 million, exceeding presidential spending by close to $62 million. (See Fig. 5) Even accounting for the spending that occurred in connection with the fight for the Republican presidential nomination, the proportions of non-candidate spending among federal offices remain roughly the same. In the general election alone, 29% of total outside spending was directed at Senate races, 27% at House races, and only 44% at the presidential contest.\(^\text{19}\)

Reported non-candidate spending in connection with the 2012 congressional campaigns came from 581 different entities, including political committees, newly-formed Super PACs, long-lived ideological and membership-based groups like labor unions and the NRA, and some nonprofit organizations that did not disclose their donors. Only a very small proportion of independent spending in congressional races came directly from for-profit corporations or individuals.

Of the nearly 600 groups that reported spending money on congressional races, the four congressional party committees accounted for roughly one-third of the money. As Figure 6 shows, the twenty heaviest-hitting non-party groups account for another 45% of the total, and the remaining 557 entities spent 21% of the money, or about $150 million. Table 2 shows the highest-spending groups, including the party committees.

The vast majority of reported non-candidate spending in 2012 took the form of express advocacy, primarily in the form of ads opposing a particular candidate. In fact, fully 77% of the non-candidate spending in 2012 congressional races was reportedly for express advocacy against a candidate. Another 17% of reported spending was for express advocacy in support of a candidate. Only 0.66% of spending – roughly $4.6 million – was reported as electioneering communications, the category created by BCRA to capture certain “issue ads” run shortly before an election.

<table>
<thead>
<tr>
<th>Table 2. Top Spending Groups</th>
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<tbody>
<tr>
<td><strong>TOTAL SPENT</strong></td>
</tr>
<tr>
<td>NRCC $69,366,306</td>
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<tr>
<td>DCCC $65,893,959</td>
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<tr>
<td>DSCC $62,210,337</td>
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<tr>
<td>Crossroads GPS $48,822,464</td>
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<tr>
<td>NRSC $39,715,150</td>
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<tr>
<td>Majority PAC $37,210,757</td>
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<tr>
<td>US Chamber of Commerce $32,355,439</td>
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<tr>
<td>House Majority PAC $30,464,549</td>
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<tr>
<td>Freedomworks for America $19,014,635</td>
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<tr>
<td>Club for Growth Action $16,573,650</td>
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<tr>
<td>Americans for Tax Reform $15,794,552</td>
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<tr>
<td>AFSCME $14,700,859</td>
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<tr>
<td>American Crossroads $13,631,239</td>
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<tr>
<td>American Action Network $11,689,399</td>
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<tr>
<td>League of Conservation Voters $11,499,718</td>
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<tr>
<td>SEIU $11,324,106</td>
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<tr>
<td>Congressional Leadership Fund $ 9,450,223</td>
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<tr>
<td>Independence USA PAC $ 8,230,454</td>
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<tr>
<td>National Assn of Realtors $ 8,210,268</td>
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<tr>
<td>Now or Never PAC $ 7,760,174</td>
</tr>
<tr>
<td>Women Vote! $ 7,737,991</td>
</tr>
</tbody>
</table>
Another 1.44% of total outside spending paid for organization-to-member communication costs, nearly all of which advocated support for particular candidates rather than opposition. This form of independent spending was primarily used by labor unions – especially teachers’ unions – who together spent roughly $7 million on these internal communications. Communication costs were also made by membership-based issue groups like the Human Rights Campaign, the League of Conservation Voters, and the National Rifle Association. The group making the largest outlay for communications costs, however, was the National Association of Realtors (NAR), the country’s largest trade association. NAR communicated its support for 93 candidates to its members, generally to a tune of less than $30,000 each.

The remaining non-candidate spending in 2012, at the top of the column in Figure 7, was made in coordination with candidates’ campaigns. Nearly 4% of non-candidate spending in congressional campaigns came from political parties making “coordinated expenditures.” Coordinated expenditures are exactly as their name describes – they are coordinated with the campaigns.

Political operatives use different names for coordinated spending on different sides of the aisle. Democrats call this arm of their campaign efforts “the coordinated campaign” and Republicans call it “the victory campaign.” But its function is the same. Typically coordinated expenditures pay for voter outreach that will serve the entire party ticket strategically but that specifically name a federal candidate. The funding for coordinated expenditures must be raised subject to a political party’s source and amount limitations, and the total coordinated spending for any given race is capped based on population and indexed for inflation.

**Party Spending**

Coordinated expenditures are only one tool in the parties’ toolbox – and not the one they use most, in terms of dollars spent. Although our research is primarily focused on non-party spending, it is important to be aware of the parties’ campaign activities. Those activities are necessary to understand the role that other groups’ spending played in the 2012 congressional elections.
Each major party has two congressional committees: one for the Senate and one for the House. These committees are the primary vehicles for party involvement in congressional races. Other party-affiliated groups, like state or local party committees, can use federal funds to support congressional candidates with coordinated or independent expenditures for express advocacy, but such activity is uncommon. Only a handful got involved in 2012 congressional races, and almost exclusively by making small independent expenditures in support of their local candidates. The notable exceptions to the rule came from the Republican Parties in Arizona and Michigan, each spending more than $100,000, and from the Democrat-Farmer-Labor Party in Minnesota, which bought over $450,000 worth of air time for television and radio ads for the 8th Congressional District contest between the incumbent Chip Cravaack (Republican) and former Congressman Rick Nolan (Democrat).

All told, the parties’ congressional committees spent just over $237 million on 2012 House and Senate races. That amounted to more than one-third of total spending by non-candidates. Each party spent more money where it had a chamber to defend: Republicans outspending Democrats by about $4 million on House campaigns and Democrats spending $24 million more on Senate campaigns.

The parties followed a similar pattern in the way they divided their spending. On both the Democratic and Republican sides, Senate committees dedicated a higher percentage of funds to coordinated efforts than did House committees. Each party’s independent spending, moreover, was mostly devoted to attacking the other party’s candidate. No committee devoted more than 2.5% toward express advocacy in support of their own candidates. Put together, the money spent by national party committees in
congressional races went overwhelmingly (more than 86%) to fund express advocacy opposing candidates. The party committees, just as other outside groups, have stepped in as the “attack dogs” in campaigns.

**Outside Spending**

We now turn to spending by non-party groups in the 2012 congressional elections. Setting aside the activities of the four party committees, the remaining 577 non-party groups spent a total of $473 million in this election cycle. More than $458 million of that money funded express advocacy, nearly three-quarters of which called for the defeat of a clearly-identified candidate for the House or Senate. The remaining $15 million was split between communication costs (which also contain express advocacy) and electioneering communications.

What did all that money buy? We’ll dig deeper into that question in the remaining chapters of this report, but let’s start with an overview of the numbers. We focus here on who was doing the spending, who benefitted from the spending, and what outside groups spent their money on.

**Who spends?**

Many of the names of the biggest outside spenders – listed in Table 2 – are well-established players in the system. Some of these groups, like the U.S. Chamber of Commerce, the League of Conservation Voters, and labor unions AFSCME and SEIU, have been involved in electoral politics for a long time.

Other groups are newer on the political scene but, like Karl Rove’s affiliated American Crossroads (a Super PAC) and Crossroads GPS (a social welfare nonprofit), have drawn significant media attention in recent years. And some names are becoming more familiar in the 2014 election cycle. Those include House Majority PAC, Majority PAC, and Congressional Leadership Fund, which are generally understood to be affiliated with the elected party leadership in the House and Senate.

For as much attention as these “heavy hitters” get, a plethora of other groups made independent expenditures in 2012 in amounts far less than the tens of millions of dollars spent by those groups that dominated the news. There is much that we do not yet know about these smaller groups.

Consider, for example, the 130 groups that spent between $100,000 and $1 million. (The top 10 such groups are listed in Table 3.) Do they occupy the same space in the ecosystem of influence and competing political speech as a group with close to $50 million at its disposal? What if their much smaller efforts are concentrated on only a few races, or only one key demographic in that contest? We address these questions to an extent in Chapters III, IV, and V of this report, but additional research is needed.

<table>
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<tr>
<th>Table 3. Top Ten Outside Spenders Under $1 Million</th>
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<tr>
<td>Americans for Responsible Leadership</td>
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<tr>
<td>Freedom Fund North America</td>
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<tr>
<td>International Assn of Fire Fighters</td>
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<td>Planned Parenthood Votes</td>
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<td>Conservative Renewal</td>
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<td>Working America</td>
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<td>Michigan League of Conservation Voters</td>
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<td>Credit Union National Assn</td>
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<td>ARDA-Resort Owners’ Coalition</td>
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<td>Independent Women’s Voice</td>
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Source: Center for Responsive Politics
Who benefits?

Some of the groups active in the 2012 elections were created to support only one candidate. This trend was most noted in the presidential campaign but played a role in congressional races as well, especially in Senate contests. In 12 races, spending by these single-candidate groups topped more than $1 million. (See Fig. 9) Eleven of the campaigns were Senate contests, with the Incumbent-vs.-Incumbent fight between Rep. Brad Sherman and Rep. Howard Berman rounding out the set.

For the most part, however, groups with significant amounts of money to spend spread their money across multiple races. Predictably, the biggest targets for outside spending were the most hotly contested races. In the Senate, each of eleven states saw more than $10 million. The $313 million spent in the 2012 general election was roughly split between supporting Democratic candidates and supporting Republicans, with the overall spending advantage favoring Republicans by only 7.7%.

In the House, the Republicans’ edge was slightly greater – about 9% more of the $299 million total general election spending favored their party’s candidates – but the money was spread out among far more races. Out of 422 House contests that drew some amount of independent expenditure or communication cost activity, the Republicans were favored in 241 races. The vast majority of House campaigns, however, saw very little outside spending: in the general election, only 95 races were the target of $100,000 or more, 59 races hit the $1 million mark, and 29 saw over $5 million in outside spending. Republican candidates were favored with more help from outside groups in about two-thirds of these top-draw races. The Republicans, however, also saw more money spent in their primary contests: $13.1 million compared with $8.9 million in Democratic primaries. The margin holds when primary spending is narrowed down to only express advocacy in opposition to a candidate; Republican candidates were hit with $6.9 million spent against them in primaries, versus $2.5 million spent against Democrats.

Fig. 9. 2012 Races Where Single-Candidate Groups Spent More Than $1M
What do outside groups spend money on?

What, exactly, does $473 million buy? When groups (or candidates or parties, for that matter) report their expenditure activity to the FEC, they are required to list a purpose for the outlay. This information is self-supplied, meaning it does not necessarily fall into easily-delineated categories. However, our analysis of the 24- and 48-hour reports filed by groups making large independent expenditures provides some insight.

Most of the reported outside spending, by far, was for television communications. As Figure 12 shows, nearly three-quarters of the reported outside spending paid for TV production costs or air time. The amount of money outside groups spent on television does not, however, give the full picture. In one of its most lasting provisions, the Federal Election Campaign Act of 1971 requires television stations to give candidates a favorable rate for advertising time, known as the “lowest unit charge.” Outside groups like Super PACs and nonprofits are not entitled to this lower rate and, as a result, have to spend more money than a campaign would to run an ad the same number of times.

Outside groups spent another 19% of their money on radio advertising, direct mail, and web-based advertising and email contacts – all staples of voter persuasion and motivation. Perhaps less expected, though, is the more than 5% of outside spending that funded direct voter contact. This category encompasses any spending that was reported in connection with door-to-door canvassing, phone calls to voters, or events such as bus tours and rallies. The major groups engaged in this kind of independent spending were labor unions on the left and, on the right, newcomer FreedomWorks.

Fig. 10. Non-Candidate Spending in 2012 Senate Races – Top 10

Source: Center for Responsive Politics
It is no secret that federal election spending has increased markedly in recent decades, nor is it a secret that an increasing share of this money comes from outside groups – that is, from entities other than candidates and parties. The primary aims of this Chapter have been to trace the increase in federal campaign spending and provide a snapshot of the spending in 2012 congressional elections. This examination reveals that many different groups are spending money on many different congressional races, with most of that money going for TV ads. But the raw numbers, while useful, provide a limited perspective on what is really going on. It tells us very little about the aims of these groups, their effect on election campaigns, or the impact of their spending on the legislative process. In the chapters that follow, we explore the impact and implications of this spending more deeply. We start with a more thorough categorization and description of the various groups spending money to influence congressional campaigns.
ENDNOTES


3 Publicity Act Amendments, 37 Stat. 25 (1911).


7 See, e.g., Patch, W.B., Control of Campaign Abuses, Editorial Research Reports, Congressional Quarterly (1952) (on file with the authors); Wheildon, L., Campaign Spending and the Law, Editorial Research Reports, Congressional Quarterly (1946) (on file with the authors).

8 Berry et al., supra note 4, at 354.

9 Adamany et al., supra note 6, at 204.


15 Taken from Consumer Price Index data for May 1974 (https://fraser.stlouisfed.org/docs/publications/cpi/1970s/cpi_071974.pdf) and May 2012 (http://www.bls.gov/cpi/cpid1206.pdf) (comparing U.S. city average price for one gallon of regular gasoline, converted into 2012 dollars: $0.55 cents in 1972 (p. 18, Table 9) which is $2.56 in 2012 dollars; $3.79 in 2012 (p. 106, Table P3)).

16 Data on communication costs are available beginning in 1990 and electioneering communications are available beginning in 2004 from the Center for Responsive Politics, but these figures aggregate spending in all federal elections – presidential and congressional. Total Outside Spending By Election Cycle, Excluding Party Committees, Center for Responsive Politics http://www.opensecrets.org/outsidespend-
Chapter II. Where Does All The Money Go?

17 11 C.F.R. § 109.32.


21 11 C.F.R. § 109.32.

22 This analysis only takes into account the types of independent spending for which groups must report candidates targeted for election or defeat and therefore does not include electioneering communications, which made up approximately 1% of total outside spending in 2012 congressional races.
CHAPTER III. THE GROUPS

- Groups that engage in outside spending can be divided into four categories: Shadow Parties, Old Hands, Buddy PACs, and New Kids on the Block.
- Some groups, including Super PACs, publicly disclose their donors, while other political players – including many nonprofit corporations that seek to influence congressional campaigns – do not.
- The candidates, campaign staff, and political operatives we interviewed mostly agreed on the value of disclosure, though they disagreed about the best means to achieve this end.
- There are opportunities for bipartisan agreement on improving the process by which campaign finance information is disclosed and made available to the public.

Instead of viewing “outside spending” as a monolith, we divide the different types of actors spending money in campaigns based on their goals and tactics. As we explain, the non-party groups active in 2012 congressional elections can be separated into four categories. We then discuss another important dividing line among outside groups: the degree to which their activities are publicly disclosed. Much of the outside spending in federal elections today comes from groups that do not publicly disclose their funders.

Four Kinds of Groups

Drawing primarily upon our interviews, along with our analysis of FEC data provided by the Center for Responsive Politics and press reports – particularly by media covering campaigns and Capitol Hill – we have developed a four-part typology of non-party outside spending groups that were engaged in congressional elections in 2012.

This typology suggests the need to disaggregate outside spending along practical lines experienced in the real world of campaign politics.²

Shadow Parties

The first category of outside spending organization is the Shadow Party. The primary objective of this type of group is to win seats for its preferred party, with the ultimate goal of controlling the gavel in both chambers of Congress. While Shadow Party groups have existed for years, the ones we discuss in this report came into existence only after Citizens United.³

The key distinguishing feature of a Shadow Party group is that it supports either Democratic or Republican candidates, without being associated with a particular issue area or region of the country. These groups tend to draw staff and lead-

In the immediate aftermath of the 2012 election, two points were repeatedly made by those attempting to analyze the mountain of FEC reports on outside spending: First, commentators remarked on the dramatic increase in the amount of money spent. Second, they questioned whether all that spending mattered at all, in terms of the results of the November 5, 2012, election. These questions are particularly relevant when the focus is on the $652 million in outside spending on the presidential contest, where money spent to assist Governor Romney more than doubled the amount spent to assist President Obama.¹
ership with experience working for party committees, have sitting Members of the House and Senate appearing at fundraising events, and generally receive high marks from campaign staff for the effectiveness of their advertising. Examples on the Democratic side are easily identified as House Majority PAC and Senate Majority PAC; with regard to groups helping Republicans, the Shadow Party description fits less tightly, but still tends to capture the work of groups like American Crossroads, Crossroads GPS, and the Congressional Leadership Fund.

Shadow Party groups are perceived as connected to the political parties. They may well be connected to the parties in fact, including both the elected party leadership and campaign committees. The connection appears to be stronger on the Democratic side. Our interviewees describe the pair of Super PACs tied to congressional leadership – House Majority PAC and Senate Majority PAC – as closely associated with the party’s campaign operation. This association is borne out in one donor’s description of the reasons for giving to a Shadow Party as “wanting to be on the team” and in order to “get credit with” the party’s elected officials, who saw lists of donors after the election.\(^4\)

In another interview, a campaign operative described the perception that spending decisions by the Democratic-leaning House Majority PAC follow the decisions of the Democratic Congressional Campaign Committee. The staffer’s point was not that there was evidence of direct coordination, but rather that it was the calculation of campaign staff that where the DCCC prioritizes a race, the House Majority PAC will soon follow. Whether House Majority PAC in fact follows the strategic lead of the DCCC is an empirical question, the answer to which is beyond the scope of this project. At the very least, there were only six races (out of 51) into which the DCCC put at least six figures of independent spending where House Majority PAC did not do the same.\(^5\)

Shadow Party groups are less clearly delineated on the Republican side, probably due to the lesser degree of party cohesion among congressional Republicans compared to their Democratic counterparts.\(^6\) We heard in several interviews – with both Democrats and Republicans – how the Democratic outside groups were better coordinated with one another in the 2012 congressional races. Moreover, there was no one group focused exclusively on helping elect all Republicans of a particular Chamber. However, interview respondents did indicate a perceived connection between the Republican Party and two Crossroads groups: American Crossroads (a Super PAC) and Crossroads GPS (a social welfare nonprofit).\(^7\) One operative posits that the entire reason the Crossroads organizations exist is because the party committees can no longer accept soft money contributions. Also on the Republican side, the Congressional Leadership Fund fits the bill for a Shadow Party organization, although with far less activity in the 2012 election than its Democratic House counterpart.\(^8\)

**Old Hands**

The second major type of outside spending group we refer to as the Old Hands. These groups are long-established organizations with known interests and policy agendas. The Old Hands have multiple organizational forms and typically engage in both electoral and legislative advocacy. They want to help win elections and want cred-
it from the legislators for that help. At the same time, they have their own constituencies to worry about in the form of members and donor bases.

For the Old Hands, *Citizens United* and *SpeechNow* opened up new avenues for pursuing their goals but did not dramatically change these goals. Examples of the Old Hands include the U.S. Chamber of Commerce, the National Association of Realtors, the League of Conservation Voters, the National Rifle Association, and labor unions such as the Service Employees’ International Union and the AFL-CIO, to name just a few.

For the Old Hands, *Citizens United* and *SpeechNow* opened up new avenues for pursuing their goals but did not dramatically change these goals.

We interviewed staff from a number of groups that fall into the Old Hands category. Across the ideological spectrum, there were a few features they shared in common, most notably the close connection between their independent election spending and their legislative agendas. They use questionnaires or interviews to gauge a candidate’s agreement with their outlook or platform before deciding to spend money to assist someone new to the congressional scene.

The Old Hands groups typically communicate their views on legislation to sitting members through emailed alerts and score cards that tally up a legislator’s agreement with the group’s preferred votes. The scores – both for a given session of Congress and cumulative over the Member’s career – matter to the group in determining the level of support to give to an incumbent, in addition to keeping the group’s constituents (its members or donors) informed of their legislative agenda and congressional allies.

The Old Hand groups all described substantial efforts to maintain walls of non-coordination between their independent spending efforts (discussed in Chapter IV) and their lobbying efforts. In addition to their independent spending, the Old Hands typically have hard money PACs (subject to contribution limits and disclosure) that contribute money directly to congressional candidates. Some of them support candidates of both parties. The various facets of their work – independent spending, the PAC contributions, and the legislative advocacy – are part and parcel of pursuing the same objective: parlaying money and membership into political power on Capitol Hill.

As is the case with contributions by many interest group PACs, some of the Old Hands – such as the National Association of Realtors, the Chamber of Commerce, and the NRA – spend money to assist both Republican and Democratic candidates. Some scholars have argued that PAC contributions are also given on both sides of the aisle in order to secure access to elected officials. Whether the same strategy applies to outside spending – and how successful it may be – is a question we discuss further in Chapter V.

For now, we simply note that support for candidates of both parties may be a less helpful characteristic for understanding outside spending than PAC contributions for two related reasons. First, increased partisan polarization and ideological realignment may mean that groups find fewer and fewer candidates on one side of the aisle whose policy preferences match with the group at even a minimum level. Second, among long-established PACs that seek political power
on Capitol Hill in service of their legislative aims, there may be a correlation between the ability to raise the large amounts necessary to engage in independent spending and the efficacy of narrow, ideologically-based spending to achieve their legislative ends; that is, we suspect that among interest groups with the resources to add significant independent spending operations to existing PAC programs, they may be more likely to have membership or donor bases that are ideological in nature. If partisan polarization and party alignment continue on their current courses, we expect that more of the Old Hands will behave like Shadow Parties – focused on control of legislative chambers and spending to support candidates of only one party – but with spending also focused on shaping the party through primary election victories.

**Buddy PACs**

The distinguishing characteristics our third category of group – the Buddy PAC – are their recent appearance on the political scene and their focus on supporting only one candidate. These groups were created after *Citizens United* and had no prior organizational form. We call them “Buddy PACs” because while they may not coordinate with a candidate’s campaign, they exist to be supportive of that campaign and that campaign alone. Examples include the Texas Conservatives Fund, started to help Lt. Gov. David Dewhurst in his failed bid for the Texas Senate nomination, Senator Kaine-focused Independence Virginia PAC, and the dueling Super PACs engaged in the incumbent face-off between Rep. Brad Sherman and Rep. Howard Berman in California.

Increasingly, Buddy PACs are a force to be reckoned with. Of the total $683 million of reported independent spending targeting congressional races in 2012, more than $42 million came from a group spending in only one race. To be sure, some of that money was raised in hard dollars, and many of the groups spent negligible amounts. Of the 270 groups that spent in only one race, 110 made expenditures totaling less than the biennial cap on what a PAC can give to a candidate directly. However, at the top of the single-race spenders, the amounts concentrated on supporting one congressional candidate are in the millions. Ten candidates benefitted from $1 million or more spent by a group only interested in their particular race. Many of the single-race groups were established by friends, relatives, or former staff of the candidate they assisted.

Outside spending with such a singular focus as these Buddy PACs prompts greater possibility of coordination. In many of our interviews, campaign staff expressed suspicions or repeated rumors that their opponent had coordinated illegally with a friendly outside group, although most were also quick to acknowledge they lacked hard evidence to back up the claim.

At the same time, campaigns that had benefited from such spending were quick to assert the absence of coordination and to note that they lived in fear of the perception of a too-cozy relationship with an outside group. There is, perhaps, a hidden problem for the campaigns that benefit

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**We call them “Buddy PACs” because while they may not coordinate with a candidate’s campaign, they exist to be supportive of that campaign and that campaign alone.**
from large outside spending: difficult though it may be to prove illegal coordination, it may be just as hard to prove the absence of coordination. As one respondent put it, “voters already believe most politicians are on the take, so it’s already baked in.” It was not as clear, however, that the outside groups share this worry of the appearance of coordination even where no unlawful relationship exists. One respondent spoke of the experience of setting up an outside group focused on a single candidate, only to be “jilted” when the candidate targeted for assistance “blessed another Super PAC.”

**New Kids on the Block**

Something of a catch-all, the final category of outside spenders we distinguish is the New Kids on the Block. These groups differ from the Shadow Parties in that rather than supporting candidates of a particular party, these groups focus on an issue or region. They differ from the Old Hands because they had no organizational form prior to *Citizens United* and do not have an associated hard money PAC or obvious lobbying agenda. And the New Kids can be distinguished from the Buddy PACs by their support of or opposition to more than one candidate. Examples of the New Kids include the Real Street Conservatives, Make America Strong and Secure PAC, and Restoring Our Community.

The most common reaction to the activities of New Kids on the Block among our interview respondents was non-reaction. That is, the campaign operatives either did not recall a named group’s activities or they dismissed the activities as unimportant to the outcome of the race. It is possible that such groups in fact do not spend with the objective of ensuring a candidate’s victory or defeat, but rather seek to raise particular issues in the election discourse or hope to secure access to an elected official.

In addition, several political operatives expressed concern that less-reputable political consultants are capitalizing on the post-*Citizens United* opportunities for independent spending to fleece donors, which we argue may be of particular concern for Buddy PACs and New Kids on the Block. In some cases, the worry was focused on money raised from family and friends of the candidate and spent unwisely. Other respondents, including some of the more seasoned campaign veterans we interviewed, described the ease of padding consulting bills in ways that would be difficult to ascertain. They expressed frustration with consultants less interested in winning a race than in making money.

On both sides of the aisle, we also heard accusations of certain outside spending groups being “pay to play” – approaching candidates with an offer to set up a Super PAC if the candidate will share a list of donors – or “opportunistic” in their approach to donors, offering to spend money where the donors want, regardless of any local expertise in the targeted race.

**Who Discloses, Who Doesn’t**

The other important dividing line among outside spending groups concerns disclosure. Campaign managers care how much information they can get about an organization that is making a play to convince voters one way or another. Candidates and Members of Congress want to know who is coming in to help them or who is spending money to attack them. And the groups are divided: Many of them, especially the Old Hands, want to get credit for the election work they’re doing. Others are concerned with keeping the identities...
of their donors out of the public spotlight. Just how much a group has to disclose about its finances and its donors depends on the legal form the group takes and the specific kinds of activities in which it engages.

**How disclosure works**

For many organizations working in the political sphere, disclosure happens on both sides of their operation: money coming in (contributions) and money going out (expenditures). Certain types of groups that influence elections – including campaigns, parties, PACs, and Super PACs – file regular reports with the Federal Election Commission, listing the contributions they have received and all of the expenditures they have made, along with their amount and date. Disclosure of contributions they receive includes the name, address, occupation and employer for anyone whose contributions aggregate more than $200. The disclosure of expenditures must show the payee’s name and address and declare the purpose of the expense.

Disclosure by old-fashioned political groups is relatively straightforward. At the risk of over-simplification: What do they disclose? Everything. When do they disclose it? According to a pre-set, predictable schedule. To whom do they report? The FEC. Disclosure is more complicated when it comes to the newer arrivals to the scene that made outside spending an especially controversial issue in the 2012 congressional races.

Although there have been many changes to campaign finance law in the wake of *Citizens United*, the only truly new creation is the Super PAC. A Super PAC is nothing more than a political action committee that has promised the FEC it will not make contributions to parties or candidates or coordinate with them. As a result, the Super PAC is not subject to source and amount limitations on the money it takes in.

For disclosure purposes, however, a Super PAC operates just like a traditional PAC. It must file regular reports with the FEC that include the identities of large contributors and details about its expenses. Like any other PAC or candidate, a Super PAC only reports the identifying information for the person who actually wrote the check. In the case of a contribution from an individual or business corporation, that information might be enough for campaigns to keep an eye on the outside groups and for voters to hold their elected officials accountable if they bend too far to serve the wishes of big funders. But what if the contribution comes from another group that has pooled contributions from multiple donors?

**Dark Money**

Disclosure starts to wane where the political world meets the nonprofit world. As we discussed in Chapter I, nonprofit corporations organized under Section 501(c) of the Internal Revenue Code are not required to disclose their donors publicly.

Although a Super PAC must report its donors to the FEC, if some of its money comes from a 501(c)(4) social welfare organization, the Super PAC will only report the name and address of the nonprofit that actually wrote the check. That nonprofit’s coffers may be filled entirely by one or two very wealthy people or it may reflect the pooling of thousands of small contributions. It may also include money drawn from the treasuries of for-profit corporations or labor unions. The law generally does not require that level of information to be made public when the 501(c)(4) gives to a Super PAC, or when the nonprofit funds political activity directly. This is the area
of political funding that campaign finance reform organizations and the press have started to call “dark money”: when political advertising is funded, either directly or through an intermediary, by an organization that does not disclose its donors.

Although they do not disclose the money coming in, politically active nonprofit organizations are subject to rules that require disclosure of some of their expenditures. For the FEC, the triggers for disclosure are activity-based – money spent on express advocacy or electioneering communications must be disclosed. As originally enacted, BCRA required that when a group reported an electioneering communication to the FEC, it also report information about the donations that funded the communication. However, the FEC’s regulation administering that section of BCRA only requires disclosure of donations designated as funding that specific electioneering communication – an easy rule to get around for groups not wishing to disclose their donors.

In addition to reporting political activity to the FEC, nonprofit organizations must also file informational returns with the IRS. These reports – called Form 990s – are filed once a year, no later than half-way through the fifth month after the taxable year ends, and with an easily-obtained six month extension for filing. Because the organization can decide to run its “taxable year” from the date it forms, it is possible for a new 501(c)(4) to exist for over 22 months before reporting anything to the IRS. When filed, the report includes information about the group’s purpose, its governing officers and key employees, and the total amounts spent in different categories like direct political activity and issue advocacy. Form 990s can also provide some clues about a nonprofit’s income, but only indirectly. Each organization must report its donors who give a total of $5,000 or more and must also report the grants it makes to fellow nonprofits. Although the names of donors are redacted when the forms are released publicly, extensive efforts by the press and advocacy organizations – most notably through a joint project by National Public Radio and the Center for Responsive Politics – have matched up transactions across politically active nonprofit organizations to shed light on complex networks of funding relationships.

Transfers from one like-minded social welfare nonprofit to another can serve a variety of purposes. On the one hand, they bolster the finances of ideological allies and can allow a group to work like a political investment fund for large donors who want to spend money to influence elections but don’t know how best to do so. On the other hand, each transfer takes the money one more step from being publicly connected to the campaign its original source wants to influence. Moreover, transfers can allow allied social welfare organizations to increase the amount of money they can dedicate to political activity without crossing the threshold that would make electoral politics their “primary purpose.” As the Center for Public Integrity explains:

Say “Nonprofit A” has $1 million and “Nonprofit B” has $1 million in unrestricted funds. Working separately, the two can only spend a bit less than $500,000 apiece on ads advocating for or against political candidates.

But let’s say Nonprofit A transfers $500,001 to Nonprofit B for exclusively “social welfare” purposes.

Nonprofit A spends the rest — $499,999 — on overt political campaigning. Meanwhile, Nonprofit B now has $1.5 million. It spends half of that, a little under $750,000, on politics.
The end result: Separately, the two social welfare nonprofits spend less than $1 million on political campaigning. Working in concert, they can spend almost $1.25 million.\(^{16}\)

Regardless of the purpose behind the transfers, the dramatically increased role of 501(c) nonprofits, especially 501(c)(4) social welfare organizations, means that a lot of the money spent to influence elections is much harder to trace back to its original source—a new fact of life that many of the people we interviewed find very frustrating.

**Complaints about Disclosure**

Lack of disclosure was a common complaint lodged about the current campaign finance system in our interviews. As on other topics, our interviews reflected two common traits among campaign professionals: first, the belief that money will always play an important role in elections; and second, that they would rather the campaigns control that money. In addition, respondents of varying affiliations and political leanings thought it was important for campaigns and voters to have better information about the money spent on elections than they have now. The respondents were divided, however, over how best to shed more light on political spending.

For many of our interviewees, accountability is the key to understanding their view of disclosure—specifically the accountability of a candidate for the messages he or she articulates in a campaign. These respondents lament that candidates have become “bit players in their own campaigns,” as one campaign staffer put it. They want to see the balance of financial power shifted away from outside groups and back to candidates. Some of these respondents would view a world with “full disclosure” of campaign money as a positive development. But revisions to the rules governing nonprofit organizations aren’t necessarily the preferred means to that end.

Instead, many campaign staffers believe that removing caps on contributions to federal candidates and parties would naturally redirect money back to these more transparent players. Doing so, they argue, would strengthen accountability in two respects: First, more of the information voters are considering when casting their votes would be coming directly from the candidates and not from an outside group with its own viewpoints and agenda. Second, campaigns could make an issue of money coming to an opponent from an undesirable source. For example, Democrats could show a rival propped up by an out-of-state trial lawyer and if either is enough of a problem to merit disapproval at the ballot box, the voters will have their say.

Former Congressman Joe Walsh put it this way:

> So if people are angry about Super PACs, figure out where they came from. They came into being because we limited what these... and really we’re talking about wealthy peo-
ple. What wealthy people can give me. Whoever was bankrolling [the Super PAC] Now or Never, isn’t it a better world if he can just give me $1 million directly? But there’s instant disclosure and you as the voter right away can see it, isn’t that a healthier world? And then you as a voter got to [get] up off your butt and get educated and if it bothers you that that guy’s giving me $1 million, don’t vote for me. But now it’s all secret and then there’s all this kind of communication and not communication. Nobody knows what’s going on.

Virginia’s former Governor and Senator George Allen expressed a similar view in favor of more accountability for the messages in campaigns, but was quick to emphasize that was not his primary motivation for seeing limits on contributions to candidates eliminated:

It’s first a better world because of freedom and as I said in the beginning, I don’t like restrictions. I don’t like limits or restraints and so I do think you’d have A, greater freedom; B, equally – almost equally as important, you’d have greater responsibility and accountability for those people to follow through on those issues or ideas or promises that they made or commitments they made to the voters.

Would disclosure really be improved if restrictions on contributions to candidates and parties were eased? The affirmative argument depends on a prediction that, in the absence of such restrictions, donors to outside groups would redirect their money to campaigns and parties. Respondents were divided on the accuracy of this prediction. Some were certain that money would flow back to the candidates – including a key staffer from one national outside group, who asserted that the organization would prefer to shut down its independent spending if it had the option of directing large donors to give to candidates instead. Yet even among respondents who prefer deregulation, some thought that certain donors, particularly business corporations, would prefer the public anonymity available by giving through nonprofit organizations.

To be sure, the prediction that some donors may prefer to continue giving to groups that provide public anonymity may be particularly understandable in light of concerns that donors will be subject to harassment for their political donations. Although such concerns did not feature prominently in our interviews, a few respondents did mention controversies surrounding political donations by corporations and corporate executives, as well as the recent scandal involving the IRS’s treatment of Tea Party groups. The arguments opposing additional disclosure requirements beyond current regulation were not laid out in our interviews, but generally cite concerns about reprisal, as well as Supreme Court precedent regarding a right to publish one’s views anonymously and the protection of NAACP membership lists in the Jim Crow South.17

Interviewees more favorably inclined toward campaign finance regulation were generally skeptical that, in a world without contribution restrictions, more money would flow toward candidates and parties. Former Ohio Representative Steve LaTourette, now heading up sister Super PAC and 501(c)(4) organizations, Defending Main Street and Republican Main Street Partnership, thought the result of such a change would be an increase in the overall volume of political spending:

Question: One of the things I hear a lot ... is that maybe really the best change now to the campaign finance system would be to elimi-
nate caps on what can be given to candidates and parties directly and that that would force the money back into disclosed sources. I'm curious what you think about that.

Rep. LaTourrette: No I don’t think so. I mean you know too much money in politics is why I supported McCain-Feingold way back when. But all it did was change…everybody wants to change the money but they want to change it to a way that benefits them, you know. It’s kind of like redistricting, so I...”yeah, we should make it fair but make it fair so that it tilts towards us.” Until everything is sort of thrown in there, I mean the campaign finance stuff to date has taken the power out of the hands of the candidates and the parties and it’s put it in these…and no, I mean if you said raise the limits all you would do is, there’d be more money not less.

Question: Do you think that groups that now want to donate to the 501(c)(4)s so that they’re not disclosed . . . would suddenly donate directly, so that it was disclosed or they’d continue donating to undisclosed?

Rep. LaTourrette: No, they’d continue to give it to (c)(4)s as long as we were able.

Rep. LaTourrette’s skepticism was echoed in background interviews with congressional and campaign staff as well. For example, one former campaign manager of a state-wide race expressed particular skepticism that money would return to political parties, seeing them as so weakened in their current state that donors would not trust their money to be put to good use – a charge we will examine further in the next chapter.

In addition to the respondents who argued for improving overall disclosure by removing contribution restrictions, we heard from many others who expressed frustration with the lack of information in more general terms. When asked whether he saw benefits to outside spending, Senator Ben Nelson of Nebraska replied: “No. It's shadowy. If they’re disclosed, then you can’t have the same argument ’cause at least you can see who’s saying what…. And you would have the transparency to go and see who’s contributing.”

Other respondents stressed that without better disclosure of the sources behind money in politics, it would be difficult for instances of corruption (whether conceived as quid pro pro or more broadly) to come to light. One respondent described the problem of lack of disclosure as akin to a conflict of interest existing in the mind of the American public: Voters see the advertisements run by outside groups and, without knowing the potential pecuniary interests of the people running them, don’t think as critically about the information in the advertisements as they should.

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“I’ve been working on the FEC website for 15 years and I can’t figure out what I’m looking at – how can voters?”

Improving campaign disclosure may require more than publicly reporting donors to the IRS or eliminating contribution caps. The campaign operatives we interviewed were either skeptical that voters perceive any distinction between ads run by the campaign and those run by outside groups, or are certain that they perceive no distinction. Moreover, we also heard complaints about the complicated and unwieldy nature of disclosure as it now exists, both from the groups trying to comply with the rules and from campaigns trying to track what the outside groups are doing. As
one campaign staffer put it: “I’ve been working on the FEC website for 15 years and I can’t figure out what I’m looking at – how can voters?” These sentiments were echoed in statements by witnesses and Senators at the Senate Rules Committee’s hearing on disclosure held April 30, 2014, where the current campaign finance system was repeatedly described as “byzantine.”

The concerns regarding the existing system of disclosure are particularly salient in view of recent decisions of the U.S. Supreme Court. The Court views disclosure as a less restrictive means of promoting the government interests served by campaign finance regulation than other forms of regulation. As Chief Justice Roberts recently wrote for the Court in 

**McCutcheon v. FEC:**

With modern technology, disclosure now offers a particularly effective means of arming the voting public with information. In 1976, the Court observed that Congress could regard disclosure as “only a partial measure.” That perception was understandable in a world in which information about campaign contributions was filed at FEC offices and was therefore virtually inaccessible to the average member of the public. Today, given the Internet, disclosure offers much more robust protections against corruption. Reports and databases are available on the FEC’s Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time 

*Buckley*, or even *McConnell*, was decided.

Chief Justice Roberts is undoubtedly right that public access to campaign finance information has improved dramatically over the last 30 years – although “supplemented” may not be the most accurate word to capture fully the critical role that the private entities play in making campaign finance information meaningful to the voters. Nonetheless, the frustrations experienced by those most familiar with the disclosure system suggest the need for simplification and technological modernization. This is one of the rare points of bipartisan agreement in this deeply contested area of law.

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The aim of this Chapter has been to describe the different types of groups engaged in outside spending, focusing especially on the extent to which their sources of funding are disclosed. Although it is tempting to speak of outside spending monolithically, our interviews suggest that the groups engaged in outside spending today can be divided into four categories: (1) Shadow Parties, groups acting as surrogates for the major parties; (2) Old Hands, groups with a policy agenda that engage in campaign spending as one way of achieving that agenda; (3) Buddy PACs, formed to support a particular candidate; and (4) New Kids on the Block, recently established groups with a narrow agenda focused on a specific issue or region.

While some outside groups disclose their funding, an increasing share of independent spending takes the form of so-called “Dark Money,” the ultimate source of which is unknown. A common theme of our interviews was the dysfunction in the current system of disclosure, although there is disagreement on the appropriate remedy. Some believe that improved disclosure is the answer, while others think that the best solution is to eliminate or loosen restrictions on contributions to candidates and parties.
We do not undertake to resolve this disagreement in this report. We do, however, hope to inform the debate over these and other campaign finance laws. Toward this end, we turn from the groups themselves to their role in federal election campaigns.

ENDNOTES


2 We suspect that the same categories could apply to the groups that “played” (the phrase commonly used in our interviews to describe an outside group’s involvement) in the presidential contest as well. Indeed, the role of the single-candidate groups that we call “Buddy PACs” was a signature feature of the campaign landscape at the presidential level. However, there may be features of outside spending groups that are particularly salient to presidential campaigns. Another caveat: some groups occupy a border region between two or more types. This is particularly true among long-established groups with legislative agendas (whom we call “Old Hands”) that support candidates of only one political party (a characteristic of “Shadow Parties”) – they may behave like Old Hands in a primary fight and like Shadow Parties in a general election.

3 Although we used the term “Shadow Parties” or a variation of it in a number of our interviews -- which produced considerable agreement on the meaning -- we cannot take credit for the term’s provenance. In a speech she delivered as the Boden Lecture at Marquette University Law School, Professor Heather K. Gerken argued that Citizens United produced two twin concerns: the oft-discussed phenomenon of “dark money” and the unexamined potential for “shadow parties--organizations outside of the party that house the party elites.” Heather K. Gerken, The Real Problem With Citizens United: Campaign Finance, Dark Money, and Shadow Parties, 97 MARQUETTE L. REV. (forthcoming 2014) (manuscript at 3). Professor Gerken went on to describe the reasons to worry “that the SuperPACs and 501(c) organizations might someday become shadow parties, as political elites adapt to the new regulatory environment ushered in by Citizens United.” The results of our interviews with political elites seem to confirm Professor Gerken’s worries, more in present tense than future.

4 As was often true in our interviews, the sentiments on this point were not unanimous. Senator Bob Kerrey characterized the Senate Majority PAC as “basically an advertising agency” that could not consult with candidates or assist with meeting people or events, although he stressed that he did not know about their operation because his viewpoint was only from the “receiving end.”

5 Based on our analysis of the FEC data provided by the Center for Responsive Politics, the DCCC spent at least $100,000 in each of 47 House races. The House Majority PAC did the same, except for NY-21, CA-9, IN-8, CO-3, KY-6, and NY-25.

7 Our respondents did not distinguish between the two, referring only to “Crossroads.”

8 The Congressional Leadership Fund spent approximately $9 million, compared with the House Majority PAC’s $30 million.


10 The “PAC” part of the Buddy PAC moniker is included because all of the major groups in this category that spent in 2012 were registered as Super PACs. If an individual, non-profit, or other association could spend only to assist one candidate, that spender might play the role of a “Buddy PAC” as well. However, as a description of activity in the 2012 election – and, we suspect, the 2014 cycle as well – the organizational features of a “Buddy PAC” such as their population with former staff of the candidate and donor base of candidate supporters are features of equal salience as the group’s concentration on one contest.


15 See Secret Persuasion, supra note 14.


18 UC Irvine Professor and election law expert Richard Hasen has made this same point: “[i]f we can’t trace their connections to the actions of elected representatives, we’re much less likely to find out about illegal quid pro quo.” Richard L. Hasen, *Worse Than Watergate*, Slate (July 19, 2012, 2:55 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/07/campaign_finance_after_citizens_united_is_worse_than_watergate_.html.

19 *Dollars and Sense: How Undisclosed Money and Post-McCutcheon Campaign Finance Will Affect the 2014 Election and Beyond: Hearing Before the S. Committee on Rules and Administration*, 113th Cong. 7 (2014) (joint statement of Neil Reiff and Donald McGahn, Atty., Sandler, Reiff, Young & Lamb), available at http://www.rules.senate.gov/public/?a=Files.Serve&File_id=b217abde-13d0-419a-b737-04e5ac7dee6d (“In the short time that we have today, we can only briefly touch upon the byzantine nature of federal regulation that state parties are subject to.”).

20 *McCutcheon v. FEC*, No. 12-536, slip op. at 24–25
CHAPTER IV. CAMPAIGNS

- Outside groups are doing much of the “dirty work” in contemporary congressional campaigns, focusing most of their spending on negative ads.
- Outside spending – even by friendly groups – can take control of a campaign’s message away from the candidate.
- Political operatives working on congressional campaigns do not look to state parties for significant support.
- Campaign professionals and outside groups work hard to avoid illegal coordination but do engage in cooperation through a tapestry of signals that allow them to pursue their electoral goals in concert.

For all that has been written in the pages of academic journals about the changed campaign finance landscape, the ones actually trekking over this new terrain are often quiet. Based on our interviews with candidates, campaign staff, and outside groups’ staff, we offer a glimpse into congressional campaigns in the post-Citizens United world.

Our interviewees expressed a range of views, both positive and negative, on the impact that outside spending has had on federal election campaigns. Some candidates and campaign staff see outside spending as helpful to their campaigns, perhaps even the reason they were able to run. Others blamed outside spending as the reason for their defeat. The one constant in all of our interviews was an acceptance – whether happily or begrudgingly – that outside spending is part of the new reality for campaigns, a reality that is unlikely to change any time soon.

We consider first fundraising, messaging, and relationships with the parties in this new world of campaigns with large outside spending. We then describe an issue that is at the heart of legal controversies surrounding outside spending in elections: coordination.

Fundraising

Our interviewees expressed a range of views on the effects of outside spending on campaign fundraising. Some respondents, including a few candidates, felt pressure to raise more money than ever before and named outside spending as the cause. This was particularly true where the respondent had a view from the Senate side.

The average cost of winning a 2012 House campaign increased from $1.4 million to $1.5 million over the previous cycle, and from $8.3 million to $10.2 million for a Senate contest. The average expenditures by winners of House and Senate seats have increased steadily over time, with no obvious spike in the wake of Citizens United.1 The campaigns in our interview set were the focus of significant attention from outside spending groups and so it is possible that their experiences cannot be extrapolated to congressional campaigns as a whole. Nonetheless, we offer their views as a glimpse into the possible effects of increased outside spending.

Part of the reason campaigns may feel an increased pressure to fundraise is simply the uncertainty factor that the uptick in outside spending has introduced, especially at the congressional level. As Senator Ben Nelson explained, “when I don’t know how much is going to come in, it’s hard to know how much I’m going to need to raise to run a credible campaign.” Senator Conrad offered a similar sentiment, noting that his decision to retire depended in part on an expectation that he would have to dedicate significantly more time to fundraising, at the expense of his
efforts to craft a deal on the federal budget. (The impact of fundraising demands on legislators’ time is discussed further in Chapter V.)

A few campaigns also reported a more direct impact from outside spending on their fundraising efforts. One staffer told us their race had difficulty engaging would-be bundlers – donors who solicit other contributions from friends and relatives and “bundle” them for the campaign – because they preferred simply to write a check to a friendly Super PAC instead. Another campaign received similar responses when it solicited contributions for the combined efforts with the state party – typically called the “coordinated campaign” in Democratic circles and the “victory fund” in Republican camps. Donors were hesitant to give because they thought it might be more effective to give their money to Super PACs instead. A third campaign reported an entirely different problem, namely that some donors were confused about whether they had given to the campaign or to an outside group.

**Message**

Money matters in elections, because it is necessary to get your message out. What effect does outside spending have on candidates’ ability to communicate their preferred message? On this question, many of our respondents were in agreement: independent spending has made it harder for candidates to control their message.

As one long-time campaign operative told us, “the campaign is not fully in charge of its own destiny as far as the messaging goes.” That is partly because voters assume the campaign is speaking when hearing independent ads. There was broad agreement among campaign staff that voters either do not perceive or do not care about distinctions between advertisements coming from outside groups and ads coming from the campaign. Over and over again, campaign staff repeated a common complaint:

- the “campaign lost control of the message,”
- “independent expenditures drove the agenda,”
- “if we truly believe that standing by your message is important, then it’s better for the message to be in the candidates’ control,”
- independent spending made the campaign “dumber and sillier,” forcing candidates to spend their resources addressing non-substantive allegations, rather than issues, and
- candidates had become “bit players in their own campaigns.”

The loss of message control also arises from the increased expense of buying ad time, as more and more buyers compete for ad space, especially on TV. As another campaign manager from a targeted Senate race put it: “It was like a giant poker game and I wasn’t even sitting at the table.”

Did campaigns find outside spending helpful? This question yielded more varied responses, depending on both the campaign and the group making the independent ads. A frequent refrain from campaign staff was that even independent spending by “friendly” sources was less useful than it could have been. Respondents complained that ads were cookie cutter – that is, made to run
in multiple races across the country and not appropriately tailored to their particular race – were not in sync with the campaign’s message, or were poorly timed. Other respondents were less critical of the independent spending. Not surprisingly, those who lost tended to be more critical than those who won.

Another important aspect of independent advertising in elections is tone. Many respondents observed that independent ads tend to be more negative in tone than those from candidate campaigns are – or, at least, than they would be in the absence of outside spending. Some thought that this was actually good for the campaigns; someone else does the “dirty work,” while the candidates focus on positive messaging. Others noted a tension between the messages sent by candidate campaigns and outside spenders. They worry that outside spending could lead to a “ scorched earth” approach, with little regard for regional political differences or long-term impact on the political system.

Finally, there was one other intersection of campaign messaging and outside spending that came up in our interviews that bears mentioning: the ability to run at all. In two of our interviews – both with people associated with campaigns supported by Tea Party groups – outside spending was identified as a factor that allowed a candidate to run in the first place. One of those interviews was with Rep. Joe Walsh who, when asked whether he thought outside spending made his 2012 race more competitive, replied:

Rep. Walsh: Yeah, absolutely. Even though I was the incumbent and even though the NRCC and my Republican colleagues had to support me, they knew I was long shot and that was an odd dynamic and I don’t know what the exact NRCC number is…. relatively speaking, I don’t think they came in with goo gobs.

Question: They didn’t.

Rep. Walsh: Not compared to all their other endangered incumbents. So, again, it wasn’t like 2010 where I was all by myself, but I was … I certainly felt it was that kind of a campaign. And, again, then without these outside groups I wouldn’t have been on the playing field at all.

The other interview was with a campaign staffer, who noted that the prediction that outside money would come in to help was “fundamental to the decision to get in – if we thought we couldn’t attract outside support, we probably wouldn’t have done it in the first place.” The campaign staffer elaborated on what was required to attract that support, noting that it was mostly a matter of fundraising and endorsements, particularly among key grassroots leaders. This desire to bring in helpful outside spending crossed the aisle, and we heard about similar efforts to show viability – especially by demonstrating strong fundraising – from a Democratic campaign as well. We heard some indications that campaigns may be more deliberate in courting the support of outside groups in the 2014 cycle. One respondent, who provides consulting support to multiple races, suggests that campaigns make fundraising totals public on a monthly basis. Another respondent talked about a push to spend money earlier in the campaign season to attract outside support and shape its message.

**State and Local Parties**

Not so long ago, hopeful candidates were mainly focused on drawing attention from state and
local party leaders. That is no longer the case, at least from the perspectives of campaign staff with whom we spoke. Republicans and Democrats from different parts of the country uniformly told us that the state and local parties play little role in the federal campaigns they run today. They rarely seek any substantial support from state and local parties – aside from their ability to send mail at a reduced rate and “run[ning] money through them” for the coordinated efforts parties can undertake on behalf of their slate of candidates. Campaign staff described state and local party organizations as “useless” and “a formality.” Others simply noted that the parties had weakened and that they lack top talent because “that’s not where the action is anymore.”

Although some campaign staff just talked about independent spending as the cause of parties’ weakened state, a number of our respondents lay the blame at the feet of BCRA’s soft money ban. Generally speaking, those respondents who believed BCRA weakened the parties also thought that restrictions on candidates’ and parties’ fundraising should be eliminated. These changes, they believed, would stem the tide of outside spending and return candidates and parties to center stage. But another high-level campaign manager – one who was also skeptical of regulation – questioned the hypothesis with regard to the parties, arguing that donors will not return to parties they continue to see as unprofessional and irrelevant.

It is beyond the scope of this report to assess whether loosening restrictions on contributions – including BCRA’s soft money ban – would strengthen parties. But the differing views we heard on the subject suggest the desirability of additional empirical research.

**Coordination and Communication**

Without a doubt, the questions about the current landscape that prompted the most animated responses concerned coordination between campaigns and outside groups. Across party lines and organizational roles, respondents all conveyed the challenge of maximizing the efficacy of outside allies while staying clearly within the legal lines drawn around prohibited activity. This section reports on what we learned from those on both sides of the line, candidate campaigns and outside groups.

We start with what we did not hear: there was no smoking gun, no clear-cut evidence of unlawful coordination. To be sure, we heard plenty of rumors and suspicions from campaigns that their opponents had crossed a line. Press reports of the same abound. The challenge in this critical area of campaign finance law is to grapple with the gap between the line the law draws and the line outside observers expect it to draw. There may be an “appearance of coordination” problem, insofar as some observers suspect or even believe there to be coordination; whether there is actual coordination, however, is a different question.

**Avoiding coordination**

The reality, according to our interviewees, is that both candidate campaigns and outside groups try very hard to avoid coordination. The people we interviewed from both campaigns and outside groups described a variety of operating procedures and organizational rules for policing this boundary. For some groups – most notably those we categorized as “Old Hands” in Chapter II – the boundary existed within their own organizations as well.
Although all of the campaign staff we interviewed were quick to state that they were careful not to cross the legal coordination line, some also described significant sensitivity to the problem of appearing to coordinate with outside groups. This was particularly true where a Buddy PAC was funded by a candidate’s friends or relatives. Methods for policing non-coordination varied but included having the campaign’s attorney vet all communications with outside groups; attorney participation on any phone calls; limitations on access to sensitive information within the campaign (one respondent stressed this was an important practice generally, regardless of the question of outside groups); and reminders about the coordination rules on nightly calls with field staff. Although we stress that we lack sufficient data to make our own comparison between the parties, we did hear from numerous Republican operatives who thought that their campaign and party lawyers were especially conservative about drawing a line around permissible collaboration with outside groups during the 2012 cycle. This conservative approach included, in some cases, a delay in using some of the public signaling tactics we describe below. As one Republican operative explained: “It’s a cultural thing, our lawyers are very cautious.”

A number of campaign staffers expressed considerable frustration at not being able to coordinate with the outside groups. For example, there was a common experience of being on the receiving end of an attack and wanting to respond with a particular message but lacking the resources. Meanwhile, an outside group wanting to support the campaign has the resources to respond but lacks the critical information or, from the campaign’s perspective, gets the message wrong.

For many of our interviewees from outside groups, independent spending is only one component of their electoral activities. Respondents from these groups universally spoke about a “wall” or a “firewall” within their own organizations to separate activities that may be coordinated with campaigns (like contributions and endorsements) from those that may not (independent spending). By “firewall,” the groups generally meant blocking of internal communications so that one side of the operation is kept from information about the other side of the operation – and, importantly, isolating the approval process for strategic decisions on either side. Outside groups employed different practices for policing that line, depending in part on the complexity and scope of their operations and in part on the differing advice of their legal counsel.

One important tactic by which outside groups sought to avoid coordination was to keep contact with campaigns to a minimum. Although conversations between outside spending groups and campaigns are allowed, they cannot involve discussions about strategy or needs, and so some respondents found it easier simply not to talk to targeted campaigns at all or to minimize the number of staff members who could interact with campaigns. Another practice respondents described was to have memos outlining the firewall circulated and signed by staff at the outset of the electoral season or in advance of a decision on a particular independent expenditure. One respondent from a national group with subnational affiliates also explained procedures for vetting an affiliate’s contacts with a campaign before an independent expenditure is made, in order to ensure that no improper coordination has taken place at that level.

**Cooperation without coordination**

Although our interviews did not unearth clear evidence of campaigns’ and outside groups’ cross-
ing the coordination line, they did show just how narrow that line is. We heard an array of stories from operatives about various ways that campaigns and outside spending groups signal their needs and strategies through public channels while carefully avoiding coordination. Perhaps more so here than in any other corner of campaign finance law, it is difficult to separate the legal meaning of words from their more commonly understood definitions. Much like the word “corruption” means far more to most people than a narrow *quid pro quo* exchange, the word “coordination” usually means more than just the activities prohibited by 11 C.F.R. § 109.21. As Senator Kent Conrad explains:

So this whole idea well, oh, they don’t coordinate, therefore it’s really independent is just nonsense. If you look at who makes up these organizations, on all sides, they’re loaded with political operatives. They know the way these campaigns are run, modern campaigns. They can see for themselves what’s up on the air. They can see the polling, a lot of it’s public. Some of it’s, you know not public but pretty much the same thing as what’s public. So they don’t need to talk to anybody in the campaign in order to know what to do.

As we noted in Chapter I, Professor and former FEC Chairman Bradley A. Smith has used the term “common sense’ coordination” to distinguish the kind of signaling and communication that many (like Senator Conrad) find troubling — but that the law allows — from illegal coordination.6 The distinction, according to Professor Smith, is that illegal coordination presents the “opportunity for quid pro quo bargaining” through a direct interaction between the campaign and the outside group.7 The common sense meaning of the coordination, by contrast, doesn’t necessarily include the opportunity to exchange money for a political favor.

Even where the opportunity for *quid pro quo* is not present, there may be something to learn from the way candidates and campaigns think about coordination (common sense or otherwise). To start, there were frequent expressions of skepticism if not disbelief among our interviewees in response to the proposition that coordination is not happening. As one campaign operative told us, “at the end of the day, it’s all just kind of a fiction – it’s just kind of a farce, the whole campaign finance non-coordination thing.” In the words of another, “there’s always coordination – the media is the coordination,” referring to the various ways campaigns and outside groups can send “smoke signals,” as the operative called them, through press releases and the media to indicate their needs and strategies. We heard about these publicly-transmitted signals from a number of campaigns, the specifics of which are described below.

Another common refrain in interviews was, essentially, “you hear things.” As one campaign operative explained, the consultants, pollsters, and political operatives all talk to each other about their work and “there’s a whole economy of sharing information on races.” For example, a number of campaign staff reported that they learned from media vendors about air time purchased by other actors in their race – though it is worth noting that television stations are required to keep public records of advertising buys, and so it is possible that a media vendor would simply be the first person to obtain such public information.8 In some cases, it seems as though the candidate is the nexus of the informal information economy. As former Rep. Walsh noted, responding to a question about when he started to realize that the outside groups would spend big in his 2012 campaign:
I think early on that summer you begin to hear of or learn of other outside groups or individuals or interests who may have an interest in helping. And, you know, again, ... it’s my downfall. ... [I] can’t tell a lie. You factor that into how you’re going to run your campaign. You don’t for sure that this big wealthy guy’s coming in but you’ve heard he is. You don’t exactly know how much he’s going to spend, but you look at what you have to do, what Duckworth’s going to do. And so a campaign factors it into your overall game plan.

Rep. Walsh’s comments were echoed in interviews with campaign staff, who told of their candidates’ certainty that a particular group would be coming in with independent spending to assist in the race or claiming that “so-and-so is going to do a super PAC for me.” Of course, as the campaign staff pointed out – both to us and to their candidates – such statements do not mean the candidates have actual knowledge of an outside group’s plans, but rather highlight the disconnect between a common understanding of the word “independent” and the on-the-ground reality of independent spending.

With regard to information flowing the other direction – that is, from the campaigns to the outside groups – we heard about a number of practices, some of which have also come to light in press coverage of the 2014 congressional campaigns. Some respondents talked in terms of broad strategy. As one campaign operative argued, campaigns have more control over message than they think they do, provided the campaigns know how to “be the conductor.” For example, operatives suggested being especially communicative about the campaign’s message and needs in public, particularly online. We similarly heard that the signals are being picked up – as one operative told us, independent expenditure group staff have become “conditioned to check the website” of the campaigns they’re trying to help.

We also heard about specific tactics for leading outside spending down the campaign’s desired path. One campaign staffer suggested putting out press releases, even on items the campaign does not expect to have written about in the media. We also heard about a tactic of creating a campaign advertisement but purchasing little airtime for it, and then putting out an accompanying press release stating that the ad is “really moving voters.”

The most common signaling tactic we heard about in our interviews was the quiet release of “b-roll,” high-resolution photographs, and targeted talking points, either available through a hidden link on the campaign’s website or through some other microsite or YouTube account.
a friend of a friend of a friend who told me to make sure there’s b-roll on the website.” When asked if the information passed back to the outside groups the same way, the staffer replied, “It’s not the campaign that usually gets it out but I tell my media vendor, who tells someone else, who tells someone else, who you hope tells the right person.” At the same time, other respondents reported seeing links to sites with similar resources Tweeted out by people connected to the campaign. On this point we also learned that the clarity of signals may build over multiple election cycles as professional operatives move between jobs. As one operative told us about the relationship between campaign staff and those working for independent spending groups, “It’s all operatives moving back and forth between the parties and the groups and the campaigns – and it’s mostly people who can finish each other’s sentences.” That same operative was quick to stress, however, that along with the ability to think and strategize similarly, the political professionals in this orbit share an aversion to any behavior that might lead to or even appear to be improper coordination.

The use of “b-roll” – favorable images of the candidate engaged in activities like talking with voters, working at a desk, or sitting with family – became widely known when two minutes of footage of Senator Mitch McConnell drew the attention of Daily Show host Jon Stewart in 2014, prompting a contest to pair the video with humorous songs or voiceovers. But the practice of providing video and other information to non-coordinating allies is not Senator McConnell’s innovation. The parties’ congressional committees, all of which have dealt with maintaining an internal wall between coordinated and independent activities since before Citizens United, post extensive opposition research and video footage shot by campaign trackers on publicly-accessible – but not publicized – websites. What appears to be new in the 2012 cycle is that campaigns are doing the same, and they are very clear about hoping to catch the eye of a strategist for an outside group. Although the Campaign Legal Center argues the use of campaign-created “b-roll” counts as republication of campaign materials and is therefore an illegal in-kind contribution to the beneficiary campaign, campaigns see a grey area where the law is not so clear and the potential legal risks worth taking. They rely on repeated deadlocks

“So the Member calls and says ‘Hey, I know you’re maxed out – and I can’t take any more money from you – but there’s this other group. I’m not allowed to coordinate with them, but can I have someone call you?’”

by the FEC on the question and the reasoning of three Commissioners that the outside groups may utilize footage from a campaign, provided they add their own message.13

Another area where campaigns and outside groups collaborate without crossing the coordination line is fundraising. Here, the FEC’s guidance has been somewhat more straightforward. In an Advisory Opinion issued in June 2011, the FEC concluded that, while federal candidates and officeholders are prohibited from asking for money outside of the source and amount restrictions placed on hard dollar contributions, they may “attend, speak at, and be featured guests at fundraisers for” outside groups that accept unlimited funds.14 Thus, a federal candidate or Member of
Congress can headline a fundraiser where contributions well over the federal limit are collected, or where unions and corporations give checks, provided that they disclaim they are not there to ask for anything over $5,000. Some of these events have attracted press attention, questioning whether such groups can plausibly claim to be acting independently of the candidate whom they support.

In some cases, the fundraising for helpful Super PACs by Members of Congress may happen over the phone. As one campaign operative told us:

You have a donor who wants to do a lot more than just max out to your campaign. One day, you get a call from someone who asks if you have any maxed out donors who might also like to give to a group that makes independent expenditures. They say, “If you have anyone who would like to help your candidate, you can let them know that Sally from Super PAC XYZ will give them a call and that they should make a decision about what Sally says and that you have no control over it.” So the Member calls and says “Hey, I know you’re maxed out – and I can’t take any more money from you – but there’s this other group. I’m not allowed to coordinate with them, but can I have someone call you?” Then you give the list of your maxed donors to Sally. Sally calls and says “Hi Max Donor – I got your name from Rep. Joe Smith’s campaign – I don’t know if they’ve told you that there’s this other thing that you do can do to help. I know you want to help Joe and so if you give to our group, we’ll be able to help Joe out.” The more sophisticated the donor, they know exactly what that call is. After the first time, they’re looking for it in future cycles and make a note in the memo line of the check – “Go Joe Smith!”

We learned about a similar tactic to help fill the coffers of outside groups, without crossing the coordination line, from two additional campaigns. These campaigns would simply share lists of their highest donors with a friendly Super PAC, before the donors’ names were reported to the FEC. Arguably, there might be little worth noting in such a practice; the campaign makes the same information public at least quarterly and donors willing to give a candidate $5,000 directly might well be expected to consider giving additional money to helpful efforts outside the campaign. But in election campaigns as elsewhere in politics, what matters is not just what you know but also when you know it. Such advance information would not itself constitute coordination under the FEC regulations described in Chapter I. It is another example of how candidate campaigns and outside groups can cooperate without crossing the coordination line.

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This Chapter has explored the impact of outside spending on election campaigns. While our interviewees presented a variety of perspectives on this subject, there can be no serious question that outside spending has changed the landscape considerably. It has created uncertainty about how much money campaigns need to raise and where that money will come from. Some candidates and campaigns lament the loss of message control that tends to accompany independent spending, as well as its perceived negative effect on the strength of political parties. Others see the proliferation of messages as a positive development, one that helps create a more robust political discourse. And some campaign staff welcome outside groups’ taking responsibility for the negative ads, thus allowing the candidates to focus on positive messaging. There are also a variety of views regarding coordination. While some interviewees
believe that candidates and outside groups are coordinating with winks and nods, we found no evidence of illegal coordination. It is clear, however, that there is a great deal of cooperation between campaigns and outside groups, even though it falls short of illegal coordination.

Lying beneath the normative disagreement is considerable descriptive agreement regarding the impact of outside spending on congressional campaigns – that it creates uncertainty, that it makes message discipline more difficult, and that there is cooperation if not illegal coordination between candidates and outside groups. There is little doubt that those effects have been significant.

What remains to be explored are perhaps the most important questions surrounding outside spending: What effect does it have on the legislative process? Does it result in quid pro quo corruption? Does it give outside groups and their supporters greater access and influence? Is it used as a threat, either explicit or implicit, if Members fail to comply with the demands of outside groups? Does it have other, more subtle effects on the legislative process? It is to these questions that we turn in Chapter V.

ENDNOTES

1 See Russ Choma, Election 2012: The Big Picture Shows Record Cost of Winning a Seat in Congress, Center for Responsive Politics (June 19, 2013) http://www.opensecrets.org/news/2013/06/2012-overview.html (2012 overview); see also Center for Responsive Politics, Election Stats, http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2012 (last visited May 17, 2014) (over time). Note that these numbers represent spending by the campaign alone and do not include outside or party spending.

2 David A. Graham, The Incredible Negative Spending of Super PACs—in 1 Chart, The Atlantic (Oct. 15, 2012 at 5:16 PM), http://www.theatlantic.com/politics/archive/2012/10/the-incredible-negative-spending-of-super-pacs-in-1-chart/263643/; Felicia Sonmez, Negative Ads: Is It the Campaigns, or the Super PACs?, The Washington Post (Mar. 22, 2012), http://www.washingtonpost.com/blogs/post-politics/post/negative-ads-is-it-the-campaigns-or-the-super-pacs-thursdays-trail-mix/2012/03/22/glIQAOf8VTS_blog.html (By March of 2012, an average of 77% of the ads run by the super PACs supporting the four GOP candidates were negative, as compared to an average of 54% of all ads aired by the four candidates’ campaigns were negative ones.); cf. Frederick Reese, New Stats Show Rise in Positive Political Ads, MintPress News (May 6, 2014), http://www.mintpressnews.com/new-stats-show-rise-positive-political-ads/190116/ (suggesting that voter exhaustion with political negativity may be encouraging a new wave of positive ads in 2014); Ashley Parker, Politicals Ads, Often Negative, Try Instead to Accentuate the Positive, N.Y. Times (Apr. 17, 2014), http://www.nytimes.com/2014/04/18/us/politics/in-a-switch-some-campaign-ads-press-the-positive.html (attributing the pivot toward positive ads to renewed hope that positive commercials can break through the advertising clutter; lessons of the 2012 presidential race, and the increasing prevalence of stock or “b-roll” footage made public by campaigns that makes producing positive ads easier).


4 Another interviewee simply responded to our question about the role of state parties with laughter.


Id. at 632.


Press Release, Campaign Legal Center, *Watchdog Groups File FEC Complaints Against National Republican Congressional Committee and Democrat-
CHAPTER V. GOVERNANCE

- Independent campaign spending, while just one of many influences, can affect the legislative process in ways comparable to the impact that was exerted by soft money to given political parties before BCRA.
- Perceived threats to incumbent Members of Congress are one of the most important ways outside spending affects the legislative process, and explicit threats of outside spending occasionally occur.
- There is some evidence that outside spending and attendant lobbying affects Congress’s legislative agenda.
- Some interviewees – including former Members of Congress – believe that outside spending has other, more subtle effects on the legislative process by increasing the time spent fundraising, making it more difficult to establish relationships with colleagues, contributing to partisan polarization, and negatively affecting public trust.

At the end of the day, campaign finance regulation is about the relationships between money spent on elections and governance. We say relationships – plural – because the interaction is complex. There is not one clear and obvious causal mechanism between the campaign funding inputs and legislative outputs – the mechanisms are varied and they change over time in response to regulatory developments, technological innovation, and the shifting interests of the electorate. It is often said that money in politics is like water – restrict its flow in one place and it will find another outlet.1 An apt analogy, to be sure, but not the entire picture: if campaign money is a flowing river, traversing over constraints to carry on downstream, it is only one part of a complex ecosystem of power, influence, and personal relationships that connect electoral and legislative politics.

In this Chapter, we look closely at one kind of campaign funding input – the independent spending that has become so important following Citizens United – and try to understand its impact on the entire ecosystem. We turn primarily to our interviews with former elected officials, congressional staff, and groups that engage in independent spending to describe both what effect this independent spending might have on legislative governance and also the mechanisms by which those effects are produced.

Unsurprisingly, our research did not uncover evidence of quid pro quo corruption, in the form of an exchange of campaign money for political favors. We did not expect campaign staff or outside groups to volunteer information about such exchanges of votes for money – in the first place because such instances of bribery are no doubt rare and also because it seems implausible that anyone who had engaged in such an exchange would respond to an interview request such as ours. Moreover, searching for signs of quid pro quo corruption was not our aim. Instead, our research tries to provide a window into how elected officials and political operatives understand independent spending. Their knowledge of whether and how that money affects the legislative process is the focus of this Chapter.

The Big Picture

Before discussing our interviewees’ thoughts on the effects of independent spending, it is helpful to take a big-picture view of how money spent on elections might affect the legislative process. The chart in Figure 13 is complex, but it captures what we learned in our interviews and may thus serve as a rough map of the campaign finance landscape this Chapter describes.
On one side, we have all of the possible ways that resources enter this complex campaign finance ecosystem. Financial inputs – our primary concern – include direct contributions to candidates; contributions mediated through PACs; contributions to political parties; expenditures for issue advocacy – either genuine issue advocacy or the kind of advertising of concern in BCRA that is really aimed at affecting an election; and expenditures for express advocacy – which may further be divided by the identity of the spender. But money is not the only resource that can benefit candidates. Other types of resources include volunteer time, endorsements from community leaders or the media, organizational and communication support like an email to voters in the district that commands their attention and conveys information, and valued advice. The non-financial resources are not the center of our research but we include them here because they can play an important role in the ecology we describe, as is clear from some of our interviews.

All of these paths for inputting electoral resources into the system can differ dramatically in their efficacy and possible volume. They also differ in their constitutional implications. For example, the Supreme Court has since Buckley treated expenditures and contributions differently under the First Amendment, as we explained in Chapter I. For constitutional or other reasons, some forms of political expression might be given more value than others.

On the right side are the full range of legislative functions: floor votes; amendments formally offered in committees; positions taken in non-public negotiations; “constituent services” such as weighing in on matters with Executive Branch agencies or private actors; earmarks; public statements made on a topic in venues such as floor speeches, op-eds, or questions in a hearing; prioritizing and agenda-setting – both within an individual Member’s office and through the positions that have influence over subsets of the legislature,
such as committee chairs and caucus leaders. Like the resource inputs, the governance outputs are not all created equal; they vary in the importance assigned to them and the attention paid to them – both by voters and by academics. Most important for our purposes, they vary in an outsider’s ability to observe them, much less to know the underlying reasons that may lead a Member to do (or not do) one of these things.

The middle boxes describe the mechanisms that can connect the resources coming into an electoral contest with the panoply of actions an elected legislator might take: a quid pro quo exchange; some lesser form of influence; access to the legislator; a threat of assistance to one’s opponent; and the decisions made by voters at the ballot box. In theory, money can affect the process and its outputs in all these ways. We call them “primary effects,” because of their direct effect on the legislative process.

There may be indirect effects as well: more time spent fundraising, deteriorated relationships with colleagues, and polarization. We call these secondary effects because, while they have a direct effect on the lives of legislators, their ultimate impact on the legislative process is more attenuated, requiring at least one additional step. For example, more time spent fundraising might matter because it takes time away from constituent services or committee work, or it might be of concern because the need to fundraise more leads to a shift in the legislator’s priorities towards those groups and interests that can more easily give money and thus lessen the amount of time required. Similarly, an effect of campaign activity on personal relationships within Congress or an increase in polarization would not be considered a governance output on its own, but if the ability to find common ground within a chamber is reduced, there may be a resulting decrease in legislative outputs entirely.

Just as with the resource inputs and the governance outputs, the list of relationships that might connect one with the other contain a few critical distinctions, including how much attention they have received in academic study, what kinds of evidence that courts will consider to show the relationship exists, and how much it is even possible to observe and measure them. Most importantly, the relationships differ in whether they provide a constitutionally sufficient rationale for a particular kind of regulation. Note that there are two moving parts to that sentence – the rationale offered and the kind of regulation.

The Court said in *Citizens United* that the only acceptable rationale for restricting independent expenditures is the threat of quid pro quo corruption. The holding did not say that no other mechanisms connect independent spending and governance. The Court also did not say that quid pro quo is the only acceptable rationale for any response to independent spending – a range of other responses are still available, both to voters and to Congress, such as changing institutional norms, private ordering in campaigns, public funding options, or the creation of new political actors.

The deficiency is in what we know. Writing for the Court in *Citizens United*, Justice Kennedy noted that the *McConnell* record contained “only scant evidence that independent expenditures even ingratiates” – but that absence from the *McConnell* record does not mean absence from the world at large. Moreover, this record was compiled over a decade ago. We do not yet know whether and to what extent independent spending affects governance today. Understanding the complex relationships between independent expenditures and
Primary Effects: Access and Influence

In court opinions and in academic literature, access and influence are often lumped together as one combined description of the impact of campaign money on the legislative process. They are closely related, but more like cousins than twins.

On one hand, concern about gaining access in return for campaign money speaks to our intuitions about political equality – we worry that because legislators have a limited amount of time and bandwidth for considering information and hearing opinions (as all people do), equating cash with a Member’s attention excludes the information and opinions coming from constituents who do not have financial resources at their disposal.

On the other hand, access serves an evidentiary function. It may be that separate from any worries about how a Member of Congress spends her time, we worry about the weight she assigns to various factors she considers when making a legislative decision. For example, deciding how to vote on a Farm Bill might take into account the opinions voiced by constituents and the intensity of their preferences, the Member’s individual convictions about the role of government and industry, pressures from party leadership, the effect on a particular employer in the Member’s district, and the impact of the vote on the Member’s reelection prospects, including campaign funds. Exactly how that individual Member of Congress balances the various factors is virtually impossible to know. In particular, it is hard to isolate the importance of campaign funding because an individual Member is unlikely to quantify the role it plays in her own head, let alone admit it out loud.

Professor Daniel Lowenstein has explained the difficulty of untangling the influences on a legislator in this way:

From the beginning of an issue’s life, legislators know of past contributions and the possibility of future ones from the interest groups that are affected, just as the legislators know of relevant constituency effects, party positions, various aspects of the merits of the issue and so on. All of these combine in a manner no one fully understands to form an initial predisposition in the legislator. Thereafter, the legislator may receive new information on any or all of these factors. The new information may modify the legislator’s initial position, but the information that is received and the manner in which it is processed will themselves be influenced by the initial position. In reality, then, the influence of campaign contributions is present from the start, and it interacts in the human mind with other influences in an unfathomable but complex dynamic.8

Although Professor Lowenstein was focused on campaign contributions, the same sort of influence may arise from outside spending. While influence is hard to prove or disprove, access is more easily demonstrated and admitted to in neutral terms. Where a record shows that large donors have more access, sometimes in combination with other factors, some will infer that there is a greater likelihood of improper influence.9

The potential for candidate contributions to yield influence or access for donors comes from a combination of the need for private funding for campaigns and the likely interaction between the candidate and the donor in handing over the check.10 The McConnell record detailed how the same conditions were present in the raising of
soft money by the political parties. One of the Court’s key findings was that soft-money donors often gave to party committees not for ideological association and expression, but rather because they were “seeking influence, or avoiding retaliation.”¹¹ On this point, the Court relied on the testimony of Robert Rozen, a lobbyist and partner at the firm of Washington Council Ernst & Young who had experience organizing fundraisers for federal candidates and advising clients on political contributions.¹² Rozen testified to the motivations of donors:

They give soft money because they believe that’s what helps establish better contacts with members of Congress and gets doors opened when they want to meet with Members. There is no question that money creates the relationships. Companies with interest before particular committees need to have access to the chairman of that committee, make donations, and go to events where the chairman will be. Even if the chairman is not the type of Member who will tie the contribution and the legislative goals together, donors can’t be sure so they want to play it safe and make soft money contributions. The large contributions enable them to establish relationships, and that increases the chances they’ll be successful with their public policy agenda. Compared to the amounts that companies spend as a whole, large political contributions are worthwhile because of the potential benefit to the company’s bottom line.¹³

The Court also found probative Rozen’s testimony as to the response soft money donations elicited from Members of Congress:

You are doing a favor for somebody by making a large [soft money] donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone — that is, write a larger check — and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings.¹⁴

According to this testimony, a sense of obligation was borne out of the need for the financial well not to run dry. As Rozen further testified: “Too often, Members’ first thought is not what is right or what they believe, but how it will affect fund-raising… . When you don’t pay the piper that finances your campaigns, you will never get any more money from that piper.”¹⁵

Also important for connecting party soft money contributions to governance through the mechanisms of influence and access in McConnell was testimony from then-current and former Members of Congress. A number of Members described, in general terms, the reasons donors gave large amounts to political parties.¹⁶ Two Senators were far more specific. The Court relied on testimony by former Senator Paul Simon, corroborated by testimony by then-current Senator Russ Feingold, of a “good example of [large contributors seeking legislative favors in exchange for their contributions] which stands out … because it was so stark and recent.” According to Sen. Simon, on the next to last day of the 1995-96 legislative session:

Federal Express wanted to amend a bill being considered by a Conference Committee, to shift coverage of their truck drivers from the National Labor Relations Act to the Railway Act, which includes airlines, pilots and railroads. This was clearly of benefit to Federal Express, which according to published reports had contributed $1.4 million in the last 2 year cycle to incumbent Members of Congress and almost $1 million in soft mon-
ey to the political parties. I opposed this in
the Democratic Caucus, arguing that even if
it was good legislation, it should not be ap-
proved without holding a hearing, we should
not cave in to the special interests. One of my
senior colleagues got up and said, ‘I’m tired
of Paul always talking about special interests;
we’ve got to pay attention to who is buttering
our bread.’ … This was a clear example of
donors getting their way, not on the merits of
the legislation, but just because they had been
big contributors. I do not think there is any
question that this is the reason it passed.17

In addition to Senator Simon’s specific recol-
lection, the Court cited less specific testimony
from Senators John McCain and Alan Simpson
connecting soft-money contributions, the phar-
maceutical industry, trial lawyers’ and tobac-
co companies to “manipulations of the legisla-
tive calendar.”18

The same kinds of questions that were asked
about party soft money before BCRA arise with
regard to independent spending in elections to-
day. To what extent do Members know about
donors who are funding the outside groups? Do
either the groups or their donors receive special
access to elected officials? Do Members take
the possibility of outside spending into account
when making their internal political calculations
on legislative actions and if so, how? Moreover,
what are the various goals of independent spend-
ers and do they include access to or influence over
the legislative process?

We begin with the threshold question: what do
candidates and elected officials know about out-
side spending? In general, our interviews with
former Members of Congress show that they are
aware of outside spending and, in some cases, of
the donors to helpful groups. As former Rep. Dan
Boren told us, the ability for outside spending to
match or even surpass the amount that candi-
dates expect to have their campaigns raise and
spend is significant: “If someone were to spend
$1 million or $2 million in a congressional race…
when someone can come in and unload that sort
of money … I believe it has much more of an ef-
fect on members today when you’re talking about
these large sums.”

Similarly, former Rep. Tim Holden noted that,
while “money’s always been the mother’s milk of
politics,” things had changed since Citizens Unit-
ed because now “any Member of Congress … is
scared to death that they might get hit from the
outside.” Senator Ben Nelson was more specif-
ic when said that he believed that some outside
spenders have what he called “unhealthy expec-
tations” of the elected officials they assist and
that there was “no question” that Members have
corollary expectations that certain groups will
come in and spend independently either for or
against them.19

Rep. Dan Boren elaborated on a similar point
when we asked him whether he thinks a Mem-
ber knows that a certain group might be unhappy
with a particular vote by the Member and like-
wise, whether that political knowledge is then
tied to the Member’s understanding that the
group will make independent expenditures. Rep.
Boren told us:

It depends. I would say that’s certainly out
there… . If you’ve been through a bunch of
cycles and you’ve been on the receiving end.
I’ve heard conversations of, “Hey, I hope
they know that I did something good for
them,” you know, whatever the group is, you
know, trying to show that, “Hey, hopefully
they won’t spend a bunch of money against
me next time.” … Even if it’s in the back of
their mind you can’t tell me that if somebody spends a couple of million dollars in your race that you’re not going to ... that’s not going to affect the decision making process... . It never did with me but I can tell you I’m sure it has an influence.

Rep. Boren’s response to our question highlights an important aspect of the relationship between outside spending and the legislative process: the role of repeat players over multiple cycles. A candidate may have limited information about the outside spending in her race in real time, but may learn more about the spending after the election. The expectation that the same group or donors will make similar efforts two years later may affect the Member’s legislative behavior during the interim.

The potential impact of this information delay appeared throughout our interviews, both with staff and with Members. At a macro level, the former Members and candidates generally knew which groups had made expenditures for and against them. For example, we spoke with Rep. Tim Holden about Common Sense Movement, a nonprofit organization that describes itself as “a group of individuals and businesses committed to ensuring the availability of affordable, reliable and secure sources of energy for American consumers.”20 The group spent just under $30,000 on a radio ad supporting Rep. Holden, and has not reported any other direct election-related spending before or since.21 When we asked whether he had any recollection of the organization, he responded:

Well obviously I couldn’t meet with them or anything, I couldn’t coordinate... . But I do know when I felt this coming on, I lobbied hard and fundraised hard in the coal industry, saying I need help, so I was sending the SOS signal for the direct money and I guess they tried to do a little something on the side.

On one hand, that Rep. Holden reported “sending the SOS signal for the direct money,” in response to our question about this group indicates that he at least knew about the possibility of independent spending generally and where it might come from to help him. On the other hand, when we asked Rep. Holden about specific individuals whose names appeared on the Form 990 filed by Common Sense Movement, he replied that they were unfamiliar to him.

Approaching the question from a more general perspective, we asked former Ohio Congressman Steve LaTourette whether a Member’s awareness of the groups that make independent expenditures to help them get elected includes an awareness of the donors who give to those groups. Former Rep. LaTourette, who is currently head of the outside spending organization Main Street Partnership, responded:

I don’t know. I think it depends on the group. I can just say, if someone was whacking me on a regular basis, I would make it a point to find out what I could about them. And sometimes you’re successful, sometimes you’re not.

However, he went on to note that he did not believe Members necessarily know about the donors to outside groups unless they include a “bogey man” like the Koch brothers for Democrats or George Soros for Republicans.

Not all of our interviewees shared Rep. LaTourette’s view on Members’ familiarity with the donors who contribute to helpful outside groups. In the first place, one campaign reported having the candidate thank “big donors” when they heard the person gave to a helpful Super PAC:
“We wouldn’t know how much they gave, but the candidate would thank them for the support.” A similar level of awareness by candidates might also be suggested by press reports and research by the Sunlight Foundation indicating that some Members of Congress are personally involved in raising money for outside expenditure groups, including through events where donors are present.22

Other interviews indicated that Members’ knowledge of outside spending included the identity of donors. A staffer for an organization said about giving to Senate Majority PAC: “We wanted to get credit with the Senators. I know that the list of donors was shown the Senators after the election – and that some Senators, not as many as I would have liked, asked to see [a subset of the donor list], and so the Senate Majority PAC showed it to them.” Similarly, Senator George Allen told us: “Well, the ones that get reported. The ones that get reported, you know that they’ve given to it… You find out after the election and when you find out later, that gosh, that’s really nice of her, I didn’t realize she’d done…but you find out afterwards, after the election.”

With regard to the groups that do not report donors, Senator Allen told us that he did not hear from the donors themselves that they had given, but that he had sometimes heard, “from others who say, well so and so, I think really put a lot of money into such and such.” Staff speaking on background similarly thought it is likely that candidates and elected officials might learn very general information about donors in such an ad hoc way, for example being told that a donor was “really helpful in 2012” when being introduced to the donor in an unrelated context.

On the other hand, Rep. Joe Walsh pointed out that he thought candidates might intentionally be kept uninformed about donors. We asked if he ever got information about who was funding the outside groups that spent in his race. He responded: “No, no. I would think most smart campaigns would shield the candidate, him or herself, from any of this. Again, you know the rules. There’s supposed to be no talking going on. Is there talking going on? I’m sure there is.”

Rep. Walsh’s response begs the question of what knowledge legislative staffers have of the outside groups and to what extent that might matter. We asked one former Senate staffer, who thought that Chiefs of Staff might have knowledge that extends to the identity of major donors to outside groups, though more based on their tendency to be politically savvy rather than any specific efforts to find out. This interviewee also told us that a staffer’s awareness of the potential for outside spending in their boss’s race was not something that was discussed openly, but rather that it might factor in “what you decide to take to the Senator – who you meet with at a staff level versus raise to the Senator’s attention and how you frame it.”

As the Senate staffer’s comments illustrate, the ways in which independent spending might affect governance are often quite subtle and difficult to observe. Senator Bob Kerrey explained the impact of money on a legislator’s decision-making as having a “corrupting” effect:

There’s a big difference between corrupt and corruption … . Corruption implies a state, a constant state where everybody is groveling and everybody is behaving in almost a bestial fashion. Whereas corrupt is, I make a decision to say something that I don’t really believe. I make a decision to vote on one issue that’s different than what I really – or I just don’t examine it any further. I persuade myself that I’ve always been against raising the
minimum wage and people are contributing to me because I’ve always been against raising the minimum wage. But the fact is I’ve closed my mind off to any thought of voting to raise the minimum wage because I know it’s going to cut off a significant amount of financial support if I do. That’s what I’m saying. I say it’s corrupting as an impact upon what you’re willing to at least consider as the possible right course of action.

The idea of a bending of perspective or closing off that happens inside the mind of a legislator is something we heard about in other interviews as well. One staffer described Members as “being extremely cautious” with taking legislative positions. Rep. Tim Holden saw Members as hewing more and more to party lines in voting because of a worry about money. And Senator Kent Conrad talked about Members “trimming their sails” in response to outside spending.

Former Rep. Mark Critz called the problem of explaining how outside spending affects the legislative process “a tough nut to crack.” He seemed concerned about the potential for extrapolating an entirely rotten Congress from a few bad apples, telling us: “It can be so subtle ... so many times what is written about or what people notice is the very small percentage that, in other words, game the system. You know, that break the rules. And many times people like to stereotype an entire group by what that small percentage is doing.” Nonetheless, Rep. Critz acknowledged that outside spending would affect governance: “So is the risk there? Obviously. Are there going to be people that are influenced in a way that they might not otherwise be? Obviously. It’s a large pool of people over time.”

Other interviewees were less guarded. When we asked Senator Conrad if groups that make large independent expenditures get a different level of access to legislators, he responded: “I’m sure they do. I mean if somebody has got somebody that’s coming in to help them and they’re spending huge amounts of money, maybe as much as the person’s spending on their own race or their own campaign or close to it, I mean those people are – they’re going to have somebody’s ear.”

The people from outside spending groups we interviewed were even more direct than the former Members in discussing the desire for a relationship between their independent election activities and governance, but also noted the results were a mixed bag. One person in charge of independent spending for a group told us that one of the goals for their 2012 election spending was to “pave the way for policy conversations after the elections,” but lamented that they were unsuccessful in obtaining the desired legislative results. Similarly, an interviewee from a different group told us that although there was a “robust program” to equate direct PAC contributions with access to candi-

“If somebody has got somebody that’s coming in to help them and they’re spending huge amounts of money, maybe as much as the person’s spending on their own race or their own campaign or close to it, I mean those people are – they’re going to have somebody’s ear.”

— Fmr. Sen. Kent Conrad
dates and elected officials, Members did not seem to perceive a connection between access and supportive independent spending.

Does money buy access or influence? Based on our interviews, it is uncertain whether independent spending yields greater access to Members of Congress for the groups that spend directly in support, beyond the level of access and influence the groups already have with Members. With regard to significant donors to outside organizations, there may be fruitful research to be done in looking for evidence of relationships between Shadow Party donors and Members of Congress similar to what the Court found helpful for understanding the soft money at issue in McConnell. The comments of our respondents suggest two hypotheses on the relationship between outside spending and access, worthy of additional research.

First, it is possible that legislators perceive helpful outside spending as coming from exactly the places they already expect to get support, and so there is no access “bonus” to the independent spending above and beyond what the groups already enjoy. As one campaign staffer and longtime legislative aide explained, a person who has access to the Member is someone with whom the Member has some kind of a relationship – whether as a donor or an old supporter – and the person willing to give $100,000 to help the campaign is someone who already has that relationship with the candidate and who is “making an investment.”

Rep. Joe Walsh made a similar point when he told us: “Nobody’s going to give me money unless they agree with how I think… . I can tell you that anybody who maxes out to my campaign is going to have every bit as much access to me as some guy who spent $2 million on an independent expenditure or a super PAC.” Continuing, Rep. Walsh made a further case both for and against the “maxed access” hypothesis:

I mean, and play it out. Say I had beaten [2012 opponent Rep. Tammy] Duckworth and then the people at this Now and Never PAC said, “Joe, it was us, blah blah blah.” Would that person all of a sudden then have instant access to me? Again, me? No, no more than any of my major contributors or really for that matter, major supporters. Now, does every member feel that way? No. I’ve got people who knocked on doors every single day of the week for me last year, two years ago now. That person would have as much access. That person’s got my cell phone number just like the guy who maxed out to me. But am I the norm in members of Congress? No.

The second hypothesis is that, to the extent outside groups seek access and influence over Members of Congress, independent spending is a poor means of achieving this end. Rather than building relationships with candidates and Members of Congress they support, some groups influence elections and legislation by spending money to defeat candidates they dislike in both primaries and general elections. We consider the operation and success of that strategy in the next section.

**Primary Effects: Threats**

There is another mechanism by which independent spending might affect governance: threats to aid an opponent. The threat of $10,000 in independent spending supporting a Member’s opponent – whether explicit or implicit – could have the same effect as an offer of $10,000 in support of the Member. Senator Sheldon Whitehouse described the potential for a hidden threat this way: “A rich donor can secretly threaten massive
spending against a candidate without even putting up the money. If the candidate doesn’t take the right position on an issue, then they can pull the trigger, but they can make the threat quietly.”24 Conceptually, threats bear comparison to quid pro quo corruption, insofar as money is disbursed (or not) in response to a legislator taking (or not taking) an official act. Accordingly, threats may have constitutional significance, possibly justifying some forms of regulation even under the narrow definition of corruption that the Roberts Court has adopted.

Evidence of threats, of course, cannot be found from FEC filings alone. If someone threatens a Member of Congress or a candidate with an expenditure in opposition and the threat achieves its objective, no money is spent and no record filed. It is necessary to interview players in the political process to ascertain whether such threats exist and, if so, what effect they have. As some political science research indicates, it may be the case that incumbents over-estimate their own electoral vulnerability.25 We are not equipped to assess the validity of that claim with respect to congressional candidates in 2012; however, we note that where such over-estimation does occur, that bias might actually reinforce the kinds of concerns we heard about in our interviews – namely that perceived threats of outside spending affect the legislative process. Where the perception of threats among Members is strong and widespread – whether through the mechanisms we describe below or other factors in heightened electoral anxieties such as further ideological polarization – the potential for legislative effects may actually be greater than our small sample shows.26

**Evidence of Threats**

Our interviews suggest that direct threats, while rare, do sometimes occur. In all of our back-ground interviews, we heard from one congressional staffer who, in communication with a lobbyist, was threatened with independent spending by the lobbyist’s client if the staffer’s boss took a particular legislative action. The threat was not heeded – indeed the staffer expressed considerable disgust at its mention – and the lobbyist was rebuked. No others speaking on background reported such experiences, nor did they offer specific information about colleagues or friends who had been similarly threatened. The individuals we spoke with from groups that make independent expenditures likewise said that they had never personally conveyed such a direct threat, nor did they know of anyone in their organization doing so.

Of the former Members of Congress we interviewed, only Senator Ben Nelson told us he received a direct threat. As with the incident described above, the threat went unheeded and the Senator’s lingering disgust was palpable:

Sen. Nelson: I can tell you that in my personal experience only one time, wasn’t a promise for money if I did something, it was a promise to spend against me significantly and try to defeat me if I voted a certain way. Only once. 

... 

Question: And it was a direct threat? 


Question: And it was a direct threat of outside independent spending? 

Sen. Nelson: Yes. Well it would’ve been any kind of spending.
Question: … [S]ay as much as you feel comfortable saying but how was this threat communicated to you?

Sen. Nelson: By phone, person to person. By the person who was making the threat, that I'll do that and I did not…I voted the way I was going to vote regardless. It didn’t influence…in other words it bothered me to have somebody do that but it didn’t influence how I voted.

Question: … [D]o you think that that’s an isolated incident? That other Senators didn’t have that sort of experience but….

Sen. Nelson: I’m sure it is. Well there may be that experience, but only once in 20 years. So it was never obviously an everyday occurrence. It didn’t happen before, but I don’t know about other people’s experience but; I had one. Got my attention.

None of the other Members we spoke with reported such an explicit threat. However, many of them explained to us that threats do not need to be said aloud to be understood. From former Rep. Dan Boren:

Well, I would say, I mean, I know the story looks better if it’s like someone’s in the room going, “We’re not putting $2 million in your district unless you vote for this.” … Those kind of conversations — I’m not saying they haven’t happened, but that just … that’s not happened in my case. But, you know, the campaign type stuff is really kept out of the official office… . It’s, you know, people understand, “Hey, if I’m going to be a big opponent of this group it’s probably not going to help me in my election efforts” or whatever.

When asked whether he had ever received a threat of independent spending, former Senator Bob Kerrey, who ran for the Senate again in 2012, explained the idea of an indirect threat this way:

You’re already threatened… . You’re sitting there saying … is Americans for Prosperity going to advertise against me in a primary, yes or no? Is American Crossroads … going to spend on me in a primary?…. If you’re sitting there making a decision, well I’ve looked at the facts and god, it seems to me we are putting more carbon in the atmosphere, and there is a relationship between that and the temperatures rising, and that’s going to be very bad for the world. We’d better do something about it, but if I do something about it, I know the Koch brothers are going to run an ad against me. I know they’re going to put a lot of money to try to defeat me in a primary. I know it.

And another issue, if I vote to raise the minimum wage, I know the Chamber is coming in here. I know. I don’t have to be told. They don’t have to threaten me. I just know they’re going to do it. If I vote for [a]trade agreement, I know labor is going to advertise against me … they don’t have to threaten me. I know it.

And so the fact of knowing it is what produces… the net effect is the same. I’m afraid to do what I think is right. Or I persuaded myself: I’m already doing what I think is right, and they’re just supporting me because of it. Either way, now it might be a situation where you actually believe that, and therefore, they’re supporting you for it.

But that wasn’t the question you’re asking. The question you’re asking is do they threaten you, and the answer is they don’t have to.
They threaten you — they’re threatening because you know what they can do.

This idea of an implied threat came up again and again in our interviews, both with Members and with the groups that engage in outside spending. However, as Rep. Mark Critz explained, even indirect threats may be difficult to prove:

I would hazard a guess that there are people who because of fear or whatever reason they may have, take into account what’s in the realm of possibility of money being spent against them in a future race. And the truth of the matter is that no one would ever admit that they’re afraid of money being spent against them. No one would ever admit that they vote according to what they’re told or what a certain group tells them they should vote.

Suppose that Rep. Critz is correct and a Member will not admit that a perceived threat of outside spending affected a legislative decision. Is there some other indicator of a successful threat we can look for instead?

A comment by Rep. Steve LaTourette suggests a different approach: “I don’t think they have to make a [direct] threat. One, I think people are smarter than that; two, it was implied. It was implicit in the scorecard.”

“I don’t think they have to make a [direct] threat. One, I think people are smarter than that; two, it was implied. It was implicit in the scorecard.”

– Fmr. Rep. Steve LaTourette

perhaps seemingly unlimited, financial resources available for making independent expenditures also has a legislative agenda that it communicates to Members of Congress, Members may perceive that if they do not take the legislative actions preferred by the group, then they will be targeted with retaliatory independent spending.

We next consider the tools groups commonly use to communicate their legislative agendas – “key” or “scored” vote alerts and legislative scorecards before turning to the belief that groups will carry through with oppositional independent spending based on the perceived threat.

**Vote alerts and scorecards**

Scorecards are exactly what they sound like: interest groups select certain legislative actions — usually votes taken on the House or Senate floor, although not exclusively — and give Members a score based on how closely their votes on a set of actions match the group’s preferences. A “key vote” or “scored vote” is what each individual legislative action is called when a decision is made by the group to include it on its next scorecard. In a number of our interviews, respondents described a perceived connection between scorecards and the potential for outside spending against Members whose scores do not add up the way a well-financed group would prefer.

The use of scorecards dates back at least to 1976, when the Congressional Research Service first published a report on the practice. Typically they are published yearly or biennially, although many groups also offer updates throughout the year on their websites. The scorecards usually provide a summary about each selected bill or resolution and explanation of the group’s preferred action, list how individual Members voted, and calculate some kind of cumulative tally or ranking that al-
lows for easy comparison among different Members. Members of Congress are alerted in advance when a particular vote is going to be a “key vote” or “scored” and included in a scorecard. These alerts are usually communicated via email to lists open to public membership.29

Both scorecards and vote alerts are issued by interest groups across the spectrum,30 although they have received particular attention in recent years as an important tool for conservative organizations.31

Vote alerts and scorecards serve multiple purposes for an organization. Importantly, they communicate a group’s priorities and positions to elected officials and are understood by Members as an important part of the calculus for where the group will target independent spending in the next election, particularly oppositional spending. Rep. LaTourette talked about discussions with congressional colleagues, “centered around the vote alerts and the knowledge that if they voted a certain way it was going to be scored a certain way and it was going to go on your permanent file in the principal’s office.” As Rep. Joe Walsh put it, somewhat more directly:

You certainly assumed that money was going to be a byproduct of whatever that number was. But, again, this is such a tough issue because it’s every member for himself. I generally support 100% on all these conservative scorecards just because that’s who I was. But it’s definitely something that Members are more than well aware of.

Whether and to what extent a Member’s awareness of a scorecard affects her voting is difficult to pin down. In one background interview, a person from an outside spending group told us that the organization “recognizes who’s studying for the test.” Perhaps as a result, many organizations also calculate a lifetime score along with the annual or biennial score for each Member. On this point, we asked Rep. Joe Walsh if he thinks there are Members who consciously try to up their scores. He responded:

That’s a good question. How would I phrase it? There are certainly members ... and when have I ever been diplomatic ... there are members that factor that score into how they’re going to vote on a bill. There’s no doubt about that. The fact that the Club [for Growth] or Heritage [Action] or FreedomWorks or any of these groups came out for or against that Farm Bill, Members openly talk about it and if Members feel that it’s in their best interest and they’re afraid of a potential conservative challenge.

Other Members were suspicious of 100% ratings. Rep. LaTourette noted, “you don’t get 100-percent on somebody’s scorecard without paying attention to what it is they’re scoring.” The sentiment was echoed by former Senator Bob Ker-

Rep. LaTourette talked about discussions with congressional colleagues, “centered around the vote alerts and the knowledge that if they voted a certain way it was going to be scored a certain way and it was going to go on your permanent file in the principal’s office.”
rey who told us the following story, ending with speculation about the impact such interactions may have:

This last campaign, a very good friend of mine, who had always supported me, said, “I can’t support you. You’ve got to talk to the NRA.” I said, “I know what they’re going to say.” “Well, no, you’ve got to go talk to them.” I said, “Out of courtesy to you, I’m going to be back in Washington, I’ll go see them.” So the guy [at the NRA] brings out a stack of things that had every vote I’d ever cast against what they wanted to do. If he had one on a piece of paper as opposed to twenty pages – didn’t matter. If there was only one page with one vote, they’d spend money against me in a general election. Because I know the NRA requires 100%, not 99.9. I know they require 100%, and I’m not voting… . “I don’t want to be challenged. I want to win the general election; therefore, I’m not going to take on the NRA.”

Regardless of how one views a 100% rating by an organization, it is critical to note that scorecards and vote alerts do convey valuable information about legislation both to elected officials and to voters. As Rep. Mark Critz explained, vote alerts can provide a kind of information shortcut to Members:

Many times if Members are talking to one another they’ll remind people or let them know this group is scoring this vote. And sometimes if you don’t know the full details of the legislation it brings to mind like: “Oh okay. I understand. That’s a group that I’m usually in parallel with. Why are they so interested in this vote?”

In some ways, the scorecards and vote alerts are a very public lobbying effort. In fact, their public nature creates some of their power. Rep. La-Tourette noted that the lists of affiliated – or at least interested – constituents is another of the strengths of groups that utilize scores:

It’s also the organizations have done a decent job of building up sort of and capturing email addresses and so forth and so on and so it’s sort of a double whammy that if you don’t vote right, they would send out a blast fax or a blast email for FreedomWorks members in your district or in Ohio or Club for Growth members in Ohio or in your district. And then they’d follow it up with, if you had a primary opponent, yeah, they would make independent expenditures.

Senator Allen went even further, arguing that the ratings are helpful to voters and that Members view scores as a way to attract support from voters or other “consumers” of the scorecards: “that if … ‘Let’s Represent Small Business’ makes you have a 100-percent rating, that’ll help you with small business owners.”

Scorecards and voter alerts are time-tested methods by which groups try to achieve their legislative ends. To be clear, there is nothing inherently objectionable about these methods. The question is whether they are used as a means by which to threaten legislators, explicitly or (more likely) implicitly. In other words, do outside groups use these devices as means of communicating to candidates that they will spend money against them, if they fail to act in accord with the groups’ legislative agenda? And if so, are the threats ever acted upon? We now turn to those questions.
Carrying through

A critical element for the success of any threat is its credibility – a belief by the threat’s recipient that it will be carried out. In the case of perceived threats that straying from a group’s preferred legislative path will result in oppositional inde-

Following a primary fight in 2012 and facing similar vulnerability in 2014, Hall tried to appeal to a credible outside group by sending it an autographed picture of himself along with a note stating that Hall sided with the group on a particular issue.

pendent spending, the credibility comes from observing other elections where the group has spent money to help a straying Member’s opponent. The spending need not occur in the threatened Member’s own electoral past. Rather, it seems that only a few examples from other races are needed to lend credibility to threatened outside spending.

Our interviews also indicated that an actual defeat at the polls for an incumbent is not always necessary to show the strength of an outside group spending to support an opponent. As one respondent from a group told us, “even when we lose, we win.” One particular illustration of this point came in a story about Rep. Ralph Hall. Following a primary fight in 2012 and facing similar vulnerability in 2014, Hall tried to appeal to a credible outside group by sending it an autographed picture of himself along with a note stating that Hall sided with the group on a particular issue.

The list of incumbents who have recently faced difficult or unsuccessful re-election campaigns adds credibility to the possibility of implied threats arising from outside spending. Among Republicans, Senators Richard Lugar (who lost) and Orrin Hatch (who won) were at the top of the list. On the Democratic side, Rep. Tim Holden’s primary defeat by Rep. Matt Cartwright was also notable. However, the model of putting credibility behind a threat of outside spending goes back farther than the 2012 primaries. Rep. Dan Boren told us that “there was a message” from labor after he voted against the Employee Free Choice Act that they would “come in big” in retaliation if his primary opponent had been viable. The opponent was not and the threatened spending did not occur, but in telling us the story, Rep. Boren noted that at the time, Senator Blanche Lincoln had been the target of oppositional outside spending by labor organizations; his telling illustrates the connection between outside spending in other races and how Members perceive indirect threats against their own campaigns.33

Rep. Dan Boren told us that “there was a message” from labor after he voted against the Employee Free Choice Act that they would “come in big” in retaliation if his primary opponent had been viable.

The list of “bogey men” whose incumbency was threatened or defeated by outside spending have another common element: the spending occurred in the primary election rather than the general
election. Here again, it is important to qualify our findings, acknowledging that they are based upon a limited number of interviews. That said, these interviews suggest a hypothesis deserving of further research: that groups making “implied threats” are closely associated with one party or the other and therefore that spending in primaries is the most effective means by which to pursue their legislative agenda. If that is true, then outside spending in primary elections may well increase in years to come. Even hotly contested primary elections tend to have lower voter turnout than general elections, so that mobilizing just a relatively small group of voters by oppositional ads can be decisive. Moreover, independent spending need only occur and produce results in a small number of races to present a credible threat.

In addition to questions appropriate for future empirical research, we also see our interview subjects’ extensive considerations of perceived threats as prompting important questions about the ways that groups mediate the information between elected officials and their constituents. The ultimate power behind a group’s threat – implied or otherwise – is the incumbent’s fear of not being re-elected. As Rep. Walsh told us, Members frequently said in conversation with one another:

“Oh, my God, I will be challenged in the primary,” or “this will make my general election tougher.” Now the supposition there is that there will be money behind the challenger or there will be money behind my general election opponent. But it was really much less the talk of money and more the talk of, “I want to avoid a challenger.”

It is hard to sympathize with an incumbent who feels “threatened” with losing her seat. In fact, the entire notion of democratic accountability hinges on the threat that Members of Congress face every two or six years at the ballot box. But threats arising from outside spending – as opposed to constituent opposition – may be viewed in a different light. If legislators know that they will face outside spending in reaction to particular votes, it raises the concern that they will make decisions based on the wishes of spenders rather than the wishes of their constituents. On the other hand, ads that expressly criticize certain votes may well inform the electorate; and to the extent ads serve this function, the threat of such spending may ensure that legislators really are in sync with their constituents. Our point here is not to argue about whether threats of outside spending – explicit or implicit – are a good thing or a bad thing. It is instead to note the evidence of threats we have found and to suggest that future researchers pursue this subject further.

**Specific legislation**

Beyond the impact of indirect threats on actions taken by individual Members of Congress, we also wanted to understand whether threats of outside spending were felt in the aggregate by Congress as a whole body. We heard in general terms that the threat of outside spending had made Congress more conservative. Other interview respondents suggested areas where rhetoric in congressional debates had changed significantly in recent years. But what about changes to legislative outcomes? On this point, Rep. LaTourette explained:

When Club for Growth first came out we used to laugh about them, we used to chuckle on the floor. And there was no Heritage Action at the time. FreedomWorks, you know, that was Dick Armey and that didn’t impress us very much either. But, after the *Citizens United* case, they became much more – and then you did see the birth of Heritage Action – they became much more active. And so they
enhanced or increased scorecards, they sent out these voter alerts, and I saw them sink legislation where Boehner couldn’t get 218 votes to move forward in an agenda based upon the vote alerts sent by these groups. And they became, you know, sort of the Moveon.org of the right and that is the 800lb gorilla – that if you didn’t behave in a certain way they would come into your district and spend a lot of money to make sure you were defeated in the primary.

We pressed for more details and he told us the following story about a meeting with Republican Members in the tense final days of 2012 when America approached the so-called “fiscal cliff.”:

[Probably] the best example of that was the fiscal cliff. Boehner does Plan B, we’re in the room and you could see all this whispering going on inside that and it became apparent that Club for Growth and FreedomWorks and maybe Heritage Action had sent out an alert that if they backed Plan B they were going to get a negative score. And you could see the discussion and the mood of the room change as 48 of them or whatever it was, decided that they couldn’t be supportive.

Rep. LaTourette’s fiscal cliff example neatly illustrates the effect of the threat of outside spending as understood through scorecards and vote alerts on the aggregation of congressional decisions on legislation. But what about the impact of outside spending on the direction of legislative chambers more generally, such as in what legislation gets considered? We turn to the question of agenda setting in the next section.

**Primary Effects: Agenda Setting**

In addition to the impact of outside spending on the legislative actions of individual Members, some of our interviews yielded interesting insights into the effect of outside spending on agenda-setting in Congress. The importance of agenda-setting was also underscored by the Supreme Court in *McConnell*, when it noted that the “evidence connects soft money to manipulations of the legislative calendar” in the form of congressional failure to act as a result of contributions from the pharmaceutical industry, trial lawyers, and tobacco companies. Does independent spending have a similar effect on agenda-setting today?

In our interviews, the most extensive statement regarding the effects of outside spending on the legislative agenda came from Rep. Dan Boren:

If you’re a massive donor to the DNC, DCCC and I’d say this is the same way with the Republicans, if you get a lot of money and you have outside influence and now you’re giving to the Majority PAC unlimited amounts of money… . You can’t tell me if you sit down with the leadership of any party that that legislative agenda is not going to reflect a lot of the wants and needs of those interest groups.

At the same time that groups can effectively contribute unlimited and corporate and union funds to party organizations through the House or Senate Majority PAC and similar outfits, Rep. Boren pointed out that the congressional party leadership associated with those Shadow Party Super PACs have become increasingly powerful:

Now, you look at the days when John Dingell was running the Energy Commerce Committee and he was crafting legislation, he’s bringing together all different sorts of people, they
were working on compromises. Now it’s like if it even goes through the Committee it’s a big deal. I mean, a lot of times we were having bills just thrown out on the floor… . You know, and this is a leadership position: Vote yes or no. So you got to think about how all the tentacles work together in one fell swoop.

Not everyone agrees. We asked Senator Nelson a similar question about whether he thought outside spending affected the legislative agenda. He thought it did not, that such spending was mostly focused on elections. It is impossible to draw firm conclusions based upon just two perspectives. More research on the topic is needed.

Finally, Rep. Joe Walsh also talked to us about the importance of money in setting the legislative agenda. His view was somewhat different from Rep. Boren’s, in that he believed the primary impact still comes from PACs. Rep. Walsh told us that what he observed was: “the Members being influenced by PACs in DC to push a certain issue. Very rarely do outside groups or even PACs change the way a member of Congress thinks, but it impacts what you’re going to push and prioritize.” We then asked him whether outside spending also played that prioritizing role or if he saw it as starting to. Rep. Walsh’s response is informative, both about the relationship between legislative action and PACs and also about the issue of coordination discussed at length in Chapter IV:

Well, that’s more difficult because remember you can’t … I can’t sit down with outside money like you and I are talking right here. I can sit down with the Farm Bureau. I can sit down with the banker’s PAC and hatch a strategy with them and march a potential bill to the floor and set up a fundraising meeting somewhere and put twenty other PACs in a room. And oh, by the way, I can sit down with my insurance PAC guys and talk about what I need to do to try to help win and get myself to win in 2012 and get a buddy of mine in Wisconsin to win. Legally, I can’t do that with these outside groups. So I don’t know how – but, again, this is all a bit of a game. Because we do talk but we’re not supposed to and technically we can’t. So I think it’s more difficult to push an agenda with these outside groups. The outside groups really are more of a wildcard. There’s a general connection. You and the PAC are lovers. You’re like having an affair. It’s like you and the outside groups are … you’re like looking at each other from afar and you think you’re both really cute but you can’t really consummate the affair. How awkward of an analogy is that? But you know what I mean? You can’t really.

Secondary Effects

In addition to the primary mechanisms by which outside spending affects legislation, our research also revealed a number of what we call “secondary effects.” Specifically, our interviews provide at least some evidence that outside spending leads to an increase in time spent fundraising, a deterioration of relationships with colleagues, and heightened polarization. These too are effects that outside spending has (or at least may have) on Members of Congress. There is considerable variation in the strength of our evidence regarding each of the points below but we hope to be clear in where hypotheses to be tested by further research are filling in the gaps.

The reason for categorizing these effects as “secondary” is that one or more additional steps are required for independent spending to affect the outputs of the legislative process. That is not to say that secondary effects are less important than
“primary effects.” In fact, the long term impact of the secondary effects may be greater.

**Fundraising time**

The secondary effect of the increased independent spending activity in recent years most commonly noted in our interviews with Members of Congress was the impact on their time spent fundraising. Even when partisan gridlock is at its worst, colleagues across the aisle can agree – they hate dialing for dollars.

In numerous interviews, both with Members and with staff, we heard that the possibility for large amounts of outside spending had created an even greater sense of urgency to raise as much money as possible for their own campaigns than existed in years past and that as a result, candidates spent more time on the phone asking for money. Whether or not that characterization is true, the more interesting question for our purposes is what effects more time spent fundraising has on governance. We heard about a few possibilities.

Former Rep. Holden suggested that the danger in more time spent fundraising lies in a trade-off of time spent on legislative duties:

> You miss out on what you should be doing; concentrating on the committees you serve on and meeting your constituents and doing that. You know you’re spending all that time down at DCCC or the RNC on the phone, it’s not very productive for the citizens of the country but you have to do it.

By contrast, former Senator Nelson suggested that the additional fundraising time took away not from office work, but rather from time spent with family. Although missing time with family might seem at first like a frustrating, but wholly personal, effect of more fundraising, as we note below, it is possible that there is a related impact on the legislative process as well.37

Separate from any particular access and influence available because of independent spending, we heard examples of many of the oft-articulated concerns about contributions. Senator Bob Kerrey, for example, described “a corruption that occurs” when “you ask somebody for $5,000”:

A fair number of them, by the way, don’t ask for anything, but not the PACs. They’re organized just for a relatively select group of issues. Do you support increasing the minimum wage, yes or no? If the answer is yes, you might get a PAC check from labor… . If you say no, you’re certainly not going to get a PAC check from them. But if you say yes, you’re going to get lots of money from individuals … and entities whose economic interests are at stake. And they don’t have to be told the importance of having somebody in that’s going to vote against them or raise

> “You miss out on what you should be doing; concentrating on the committees you serve on and meeting your constituents and doing that. You know you’re spending all that time down at DCCC or the RNC on the phone, it’s not very productive for the citizens of the country but you have to do it.”

the minimum wage. They don’t need a direct mail campaign. They don’t need anybody making phone calls for them. Just, you know, so it tends to corrupt the decision making. It messes up the agenda.

Former Rep. Boren thought that the access available to campaign contributors might mean a more direct pushing of donors’ legislative interests. He observed:

When you’re at a fundraiser, where it used to be the topic of legislation or issues was much more general when I started, and as I went on it was much more, “Hey, you know, we’re for the... hey, here’s a donation and we’re really pushing the X issue.” ... It was much more just open.

Another way that legislative interests may be more closely tied to fundraising as the push for campaign cash intensifies came up in a comment by Rep. Holden. He explained that, like almost all Members, he strongly disliked fundraising, but pointed out that it was less painful to call lobbyists and ask for money: “because it’s their job to take those calls and they do it for a living.” Rep. Holden indicated that the personal discomfort Members feel with asking others – that is, constituents who are not lobbyists – might actually make them more likely to stick with fundraising from lobbyists.

Finally, from the other side of the table, we also heard from interview respondents who complained about strong-armed fundraising practices by Members of Congress, such as threatening to cut off access if a contributor gives to his or her opponent. We also heard from one person who worked for an outside group that also made PAC contributions about being “shaken down” for money by Members, including being screamed at by Members and told things like a “$1,000 contribution is demeaning.”

Although we heard widespread agreement that fundraising is unpleasant, it is worth reiterating that our interview respondents disagreed on the source of the problem. Rather than blame Citizens United or the resulting changes to campaign finance law, Rep. Joe Walsh was quick to identify contribution limits as the root of his “three nights a week, four nights a week... on the phone all night” raising money. He went on to explain that for a non-wealthy candidate and one outside of the orbit of PAC money, independent spending was important to the viability of his campaign:

I was the poorest member in Congress... So I have to raise money. I can’t write myself a check. These contribution limits rig the game for wealthy people and incumbents ... I would have got just killed without outside money. And I had to spend too much time trying to raise money to compete because of these limits.

Relationships with colleagues

Another secondary effect of independent spending we heard about in interviews is the lack of personal relationships with colleagues. The reason for the decline is part fundraising – time that would have been spent socializing, including with one another’s families, is now dedicated to meeting higher campaign financing goals – and part result of a lengthened campaign season with hard-hitting, negative advertising, and increased pressure to return home to the district as often as possible. The result on the legislative process is a failure to keep the lines of communication and doors for compromise open. As one staffer told us:
Usually when you’re elected to the U.S. Senate, you have a great relationship with your state and an understanding of your state—what you don’t have is a relationship with your fellow Senators and an understanding of the institution. So when you’re spending all of your time fundraising, you don’t get to know your colleagues. You don’t get to know what they think and how they reason. You’re not spending time debating issues over dinner. You also don’t hang out and have your families get to know each other. And it becomes a lot easier to demonize someone and of course the media loves that and picks it up.

Rep. Mark Critz told a similar story from the perspective of a House Member:

One of the things that you’ve seen in Congress is that lack of personal relationships between Members of Congress now. We don’t know each other. And now it’s just become this show and confrontation sells. Fighting is what is popular now. I think that’s why cable news is so popular is because it’s all about pointing the finger and saying why someone’s wrong and obviously why we’re right. They’re wrong and let’s fight about it.

Longing for the “good ol’ days” should no doubt be taken with a grain of salt, and other former Members have disagreed with assessments that paint too rosy a picture of the pre- Citizens United era of congressional relationships. Nonetheless, if personal relationships really have deteriorated to the point of negatively affecting governance, there may be a panoply of responses available to Congress that require neither legislation nor risking speech restrictions.

**Partisan polarization**

Another possible secondary effect of independent spending appears to be on partisan polarization in Congress. In recent years, considerable attention has been given to the causes and effects of polarization, both in scholarly work and in the popular press. Many of those we interviewed believe that independent spending has increased the partisan polarization of Congress, driving Republicans further to the right and Democrats further to the left. We also frequently heard other important factors in understanding the roots of party polarization, especially partisan gerrymandering; in total, the nuanced views of our respondents reflected the spectrum of academic debate over the subject. Nonetheless, our conversations were particularly focused on understanding the relationship between outside spending and polarization, as the political elites we interviewed see it.

A number of the former Members we interviewed were identified as political moderates while they were in office and so perhaps it is unsurprising that they frequently cited increased polarization as one of the biggest impacts of Citizens United. Former Rep. Mark Critz explained the feeling of being part of a waning political middle and how it relates to legislative compromise:

You see it in Congress now that you’re either … with us or you’re against us. There is no sort of middle and people like me who resided in the middle are becoming fewer and fewer. And it’s frightening because that’s where a lot of the work comes together is that people sitting down and saying “Okay I’m willing to give up this, but I’m not going to accept that.” And I think that’s what [independent expenditures] focuses—all that energy, that ideology—is that you’re either with us or you’re
against us. I always try to remind people too that the Constitution was a compromise. It was a very violent, argumentative compromise but it’s a compromise nonetheless.

Former Rep. Dan Boren echoed the sentiment, describing independent spending as “further polarizing.” He explained that Members are “mainly worried about a primary now,” a characterization expressed in other interviews as well, both on and off the record. “You’re pulled further and further to be 100% with that group or your party,” he said, and offered labor as a “perfect example”:

“No one’s saying, ‘Here’s $50 million for a good compromise.’”

— Fmr. Rep. Dan Boren

I have voted with labor sometimes. There are other times I didn’t. But they wanted purity. You know, I voted against the Employee Free Choice Act … which is a big one by labor. People like me don’t exist anymore because they are so worried about a primary they’re going to have to be 100% with the environmentalists, labor, or whatever or on the Republican side … I think that money pulls you further and further away.

Further emphasizing his point that money and congressional leadership are intertwined, Rep. Boren also told us:

It’s almost virtually impossible for someone who is independent-minded to be a member of the leadership. And that’s been the case for a long time, but the money has accelerated the polarization and the ability for the groups to influence who the leaders are and in a way you could see them as figure heads of the groups on either side.

Put simply, in Rep. Boren’s words, “No one’s saying, ‘Here’s $50 million for a good compromise.’”

The difficulty of getting to a legislative compromise today also came across in what Senator George Allen told us he hears from colleagues still in the Senate:

From what I understand, talking to folks having run again more recently, they say, oh, things are just so awful now and I hear that. I’m not going to bring up the specific person — he’s a Democrat, one that I like a lot — and he has a really good idea, but no Republican will sign onto it, because this person’s in a close Senate race and they don’t want to do anything to help him win the Senate race.

The breakdown in the ability to craft bipartisan legislation was conveyed by Members who had served on both sides of Capitol Hill. Rep. Tim Holden said it had become “almost impossible” and his former colleague, Rep. Steve LaTourette explained that before 2010: “there was a teamwork sort of view that you can still get things done … for your district. You can get things done that you thought were good.” After the 2010 election, he said “that broke down.” He told us: “nothing was getting done and it wasn’t just the ideological stuff that I was used to; it was the Farm Bill and the Transportation Bill and things that were never political before but somehow became political.”

Public trust

Although it was not a subject discussed in length in most of our interviews, we at note the concerns expressed by some of our respondents that the post-Citizens United campaign finance ecology – both increased outside spending and its lack of disclosure – has spurred public distrust of government. This was of particular concern to Senator Nelson, who told us:
I don’t know that you can really identify many, if any, candidates or elected officials who allow money to overrule their better judgment for their constituents. But it’s pretty hard to disprove that belief that people have and it’s quite possible that it’s easier for people to believe that it’s much more a corrupt system.

The Senator elaborated later in the interview:

I can say this that I think [the changes to campaign finance law over his career] gives, at the very least it gives the appearance that money has mattered in the development of policy because people will easily conclude that much money must buy something and that’s unfortunate. I’m not sure it does but I can understand the public perception. And that’s sad.

Rep. Mark Critz was also concerned with the public’s perception of government, and particularly lamented constituents’ belief that they do not have access to their elected officials:

Politics, especially at the federal level, has been turned into a TV show…. You run every couple of years as a member of Congress. You’re on TV. People don’t think they really have access to their member of Congress anymore. They think everyone lives in DC and nobody knows what’s going on back here and it’s a popularity contest. It’s a beauty contest.

We have no specific evidence to offer about an effect on governance resulting from the public perception of outside spending, although some of our respondents speculated that voter participation could eventually be depressed.41

This Chapter has examined how independent spending affects the legislative process. The subject is inherently challenging to investigate, given the multiplicity of factors that may affect legislative decisions, the multitude of actions that Members of Congress take, and the inherent difficulty of determining the causal relationship between money and action. As Professor Lowenstein once observed, campaign money can affect a legislator’s decisions in a way in which the legislator herself is not even aware.

We did not find evidence of *quid pro quo* bribery, in the form of a promise or agreement to spend money in exchange for a particular official act. We did, however, find other evidence of influence. The most significant takes the form of threats – mostly implicit but occasionally explicit – of retaliatory independent spending, for legislative acts of which the spender disapproves. Members of Congress today, it seems, are quite cognizant of the threat of such spending, particularly in primary elections. There is also some evidence of secondary effects of outside spending on time for traditional legislative functions, relationships among legislators, party polarization, and public trust.

Despite the normative disagreements surrounding independent spending, there was considerable agreement among our interviewees on how independent spending has actually affected gover-
nance. Difficult though it is to trace the effects of outside spending on any particular decision, those we interviewed generally shared the sense that it puts considerable pressure on legislators, particularly in primary elections. But what are the implications of these findings for ongoing law and policy debates, future elections, and subsequent research? We turn to these questions in our last chapter.

ENDNOTES


2 See Justin Levitt, The Partisanship Spectrum, 55 Wm. & Mary L. Rev. 1787, 1843-63 (2014) (discussing role morality and situational norms).


7 Of course, for the five Justices who formed the majority in Citizens United, whether or not there was evidence that independent expenditures ingratiate was beside the point. It might not, however, be beside the point if either the Court takes a different view of the permissible rationale for regulation or if the response to ingratiation is something other than restrictions on speech.

8 Daniel Hays Lowenstein, On Campaign Finance Reform: The Root of All Evil Is Deeply Rooted, 18 Hofstra L. Rev. 301, 325 (1989). Professor Lowenstein goes on to suggest that, in the face of this entanglement problem, it is best to think about the impact of campaign contributions as creating a conflict of interest for recipient legislators. Although we take no position here on whether a similar conflicts of interest approach works for understanding the impact of independent spending, we hope that our research reported here sheds some light on changes to the “unfathomable but complex dynamic” in recent years.

9 We discuss the relationship between Professor Lowenstein’s conflict of interest approach and the task of building an evidentiary record in campaign finance cases in a forthcoming article, Building a Record for the Next Court, prepared for the Symposium on “The Future of Campaign Finance Reform” hosted by the Duke Journal of Constitutional Law & Public Policy and the Center on Law, Race, and Politics at Duke Law School. A draft of the article is available here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427679. The following discussion of the McConnell record relies on our work in this forthcoming article.

10 With regard to the former, it is true that candidates may contribute unlimited funds to their own campaigns but it is not a common practice. In the 2012 congressional races, only 48 candidates self-funded, of whom only 34 provided 50% or more of their own total campaign funds. Millionaire Candidates, Center for Responsive Politics, http://www.opensecrets.org/bigpicture/millionaires.php?cycle=2012 (last visited May 20, 2014). With regard to the latter, although the check may now be a credit card and the physical hand-off may be through the mail, internet, or a campaign staffer, the point is that candidates are involved in asking for and receiving the funds for their own campaigns.

12 See McConnell, 540 U.S. at 147-48; 251 F. Supp. 2d at 472 n. 46, 492-93 (Kollar-Kotelly, J.).

13 McConnell, 251 F. Supp. 2d at 492-93 (Kollar-Kotelly, J.).

14 McConnell, 540 U.S. at 147 (citing 251 F. Supp. 2d at 493 (Kollar-Kotelly, J.)).

15 Id. at 149 (quoting Declaration of former Senator Alan Simpson, 251 F. Supp. 2d at 481).

16 McConnell, 251 F. Supp. 2d at 490 (Kollar-Kotelly, J.) (quoting testimony by former Senators Rudman, Bumpers, Wirth, Brock and Boren).

17 Id. at 852 (Leon, J.); 251 F. Supp. 2d at 482 (Kollar-Kotelly, J.).

18 McConnell, 540 U.S. at 150-51.

19 Rep. Joe Walsh, although a strong critic of campaign finance regulation, was even harsher in his criticism of Members who might have the kind of “unhealthy expectations” Senator Nelson described:

You drill down on access. That’s the liberal fear. Oh, some guy gives five million dollars; they’re going to be able to like sit in your office any time. I always put access on the member. It’s up to the Member. If the Member gets influenced like that, screw him or her. There’s nothing you can do about access. You’re either fair about it or you’re not.


22 Eliza Newlin Carney, Super PACs Target Congressional Races, Roll Call (Mar. 5, 2012, 12:00 AM), http://www. rollcall.com/issues/57_103/Super-PACS-Target-Congressional-Races-212830-1.html (pointing out that lawmakers from both parties seemed trapped between a rock and a hard place when it comes to outside spending, on one hand decrying Super PACs, and on the other hand raising money for them); see also Eliza Newlin Carney, Rules of the Game: Super PACs Multiply, Head to Hill, Roll Call (Oct. 18, 2011 at 12:00 AM), http://www.rollcall.com/issues/57_43/Super-PACs-Multiply-Head-to-Hill-209545-1.html?pos=adps.

23 See Marco Chamon and Ethan Kaplan, The Iceberg Theory of Campaign Contributions: Political Threats and Interest Group Behavior, Am. J. on Econ. Pol’y 1–31 (2013), available at http://econweb.umd.edu/~kaplan/jmp_final.pdf (The authors hypothesize that special interest groups garner candidate support not only by contributing to candidates, but also by threatening to contribute to candidates’ opponents). In his testimony before the Senate Judiciary Committee in July 2012, Larry Lessig harped on a similar note, decrying the post-Citizens United state of campaign finance disclosure. Borrowing from Senator Evan Bayh, Lessig points out that an incumbent’s real fear of a Super PAC barrage a month before an election is enough to drive incumbents to buy “‘Super PAC insurance’: the assurance that if a Super PAC attacks, there will be another Super PAC on the incumbent’s side to defend.”


26 We suspect the potential impact of perceived threats posed by outside spending will be continue to be a fruitful area for further research for some time to come, as some political scientists have recently argued that the “trajectory of congressional polarization is unlikely to reverse course any time soon.” Christopher Hare, Keith T. Poole, and Howard Rosenthal, Polarization in Congress Has Risen Sharply. Where Is It Going Next?, The Monkey Cage (Feb. 13, 2014 9:15AM) http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/13/polarization-in-congress-has-risen-sharply-where-is-it-going-next/.

27 To be sure, there are other ways that organizations convey their positions to and exert pressure on Members of Congress, even as might be tied to threats of independent spending. However, scorecards and vote alerts were by far the method most commonly discussed in our interviews. Two of our interviews also touched on the anti-tax pledge promoted by Americans for Tax Reform, but in neither case did the conversation about that pledge turn to a discussion of related outside spending. Other organizations use pledges as a tool for conveying priorities and keeping Members in line, but as Rep. LaTourette told us, “A pledge? Well sure everybody’s got a pledge today. I think, I mean my grandmother used to say, you can’t swing a dead cat without hitting a pledge. And so everybody thinks it’s the thing to do but I mean the gold standard continues to be Grover Norquist anti-tax pledge.”


29 It appears from interviews and from other research that different groups call the votes either a “keyed vote” or a “scored vote.” Where we report on information gained from interviews conducted on background, we have changed all references to either “keyed votes” or “scored votes” to simply “vote alerts,” so as to avoid inadvertently revealing identifying information about our respondents.

30 For example, a Google search for the term “congressional scorecards” yields links to FreedomWorks, Club for Growth, Americans for Prosperity, Heritage Action, the Human Rights Campaign, AFSCME, Planned Parenthood, the Christian Coalition of America, and the Family Research Council.


McConnell, 540 U.S. at 150-51.

For the most thorough research regarding the impact of fundraising time on legislatures to date (albeit state legislatures), see Lynda W. Powell, The Influence of Campaign Contributions in State Legislatures (2013).

See Dan Merica, Washington Gridlock Linked to Social Funk, CNN Politics (Jan. 25, 2013), available at http://www.cnn.com/2013/01/25/politics/social-congress/ (quoting former Congressman Dan Glickman as saying “Sometimes I remember my life as a congressman in the ‘80s positively and my wife says I am dreaming. ‘You hated it,’ she will say,” and former Senate Majority Leader Trent Lott, “I don’t want too much revisionist history. Everybody said that was the golden era [in the early 90s]. It was not always easy, though. We had some pretty tough disagreements.”).

See, e.g., Jon Terbush, In Elaborate Prank, Oregon Lawmakers ’Rickroll’ the State Legislature, TPM Muckraker (Apr. 11, 2011, 4:02 PM), http://talkingpointsmemo.com/muckraker/in-elaborate-prank-oregon-lawmakers-rickroll-the-state-legislature (noting comments from organizer of the event, “It’s obviously a little silly thing,’ he admits. ‘But even just having a little fun together helped develop some professional relationships. Just a tiny spoonful of sugar to let the political medicine go down, so to speak.”).


CHAPTER VI. WHAT’S NEXT?

Love it or hate it, independent spending is here to stay. It has had a significant impact on congressional elections and politics, and will continue to do so in the future. This report has documented some of the present effects, based on interviews with those who are in the best position to know: the players in the congressional elections and politics. While our interviewees were not all of the same mind on the desirability of changes that have occurred in recent election cycles, there was considerable agreement on what is actually happening today.

To recap, we have seen a marked increase in both the number of outside groups spending money to influence congressional elections and in the reported dollars spent. There are a variety of different types of groups with equally diverse agendas now playing in this space: In addition to Shadow Parties and Old Hands, a number of New Kids of the Block and Buddy PACs have sprung up in recent years, often pursuing a very narrow agenda. In general, the explosion of outside money has made it more difficult for candidates to control their message. That said, we found considerable evidence of cooperation between candidate campaigns and outside groups, though not of illegal coordination, as the Federal Election Commission defines it.

Perhaps most important is the impact of independent spending on governance. We did not find evidence of quid pro quo corruption, in the form of exchange of money for political favors, which the Supreme Court holds to be the only rationale for restricting the flow of campaign funding. Without additional evidence, then, reformers will have a hard time making a case for new contribution limits under existing First Amendment precedent.

What we did find was evidence of other effects of outside spending. The primary effects include threats of making or withholding outside spending – usually implicit, but occasionally explicit – as well as changes to the legislative agenda. Some of our interviewees also believe that outside spending has more subtle, secondary effects on the legislative process, by consuming Members’ time, fraying relationships, contributing to polarization, and spurring greater public distrust of Congress.

We conclude with some thoughts on the future of campaign finance regulation in general and outside spending in particular. We start by canvassing the implications of our research for the ongoing debate over campaign finance regulation. Next, we consider what additional changes observers might look for, in 2014 and beyond. Finally, we discuss avenues for further research that are worthy of exploration.

Arguments over Regulation

We have repeatedly stressed that the purpose of this report is not to formulate law or policy recommendations, but to uncover evidence regarding the effects of outside spending on congressional campaigns and governance. We thus leave it to others to debate whether the findings in this report call for additional regulation, deregulation, changes to existing legal precedent, or maintenance of the status quo. That said, it is possible to anticipate some of the arguments that will be made:

• The Supreme Court is wrong. Supporters of campaign finance reform can be expected to argue that these findings strengthen the case for limiting campaign expenditures and contributions, and for overruling existing
Supreme Court precedent constraining such limits. In particular, they can be expected to argue that the Roberts Court is wrong to hold that only the reality or appearance of a *quid pro quo* exchange can justify limits on the flow of campaign-related money. Some will argue for a more expansive conception of corruption that the Court allowed in *Citizens United* or *McCutcheon*. Others will argue that the Court should hold that inequalities in access or influence justify restrictions on campaign money, effectively overruling *Buckley*’s holding to the contrary.

- **Contribution limits should be repealed or struck down.** Opponents of regulation can be expected to argue that the flow of campaign money demonstrates the dysfunction of the current system in a quite different way. They would argue that federal restrictions on contributions to candidates and parties are to blame for the increased flow of money to outside groups. This argument relies on the hydraulic theory of money – that like water, it will find a way into the political system. Given that reality, we would be far better off with that money going through candidates and parties that are accountable to the electorate rather than through outside groups that are not. On this argument, we might prefer relaxing or eliminating existing restrictions on contributions to candidates and parties, including BCRA’s soft money ban and the longstanding ban on corporate and union contributions.

- **Coordination rules should be modified.** A narrower argument is for changes to the existing rules on coordination. Both sides may argue for changes to the FEC’s existing rules which focus on both the content of communications and the interaction between the outside spender and candidate. Skeptics of regulation will continue to argue that coordination should be understood and applied quite narrowly, so as to avoid ensnaring the unwary, in circumstances where there is no real risk of *quid pro quo* corruption. Reformers, on the other hand, can be expected to argue for a broader definition that would encompass what we have called “cooperation,” although such a definition may be hard to justify before the current Supreme Court.

- **Public financing should be enhanced (or scrapped).** Those inclined toward reform may argue that our findings counsel in favor of the expansion of public financing. As noted in Chapter I, public financing has long been a feature of federal law for presidential elections – although that system is no longer functional. Public financing has never existed for congressional elections. Given the practical and legal difficulties associated with stopping the flow of outside spending, some may argue that the only plausible means of reform is the implementation of public financing in congressional elections, and the updating of the presidential public financing system to meet current needs. Regulatory skeptics, by contrast, can be expected to argue that expanded public financing is a fool’s errand, given the practical difficulty in creating an effective, politically viable, and constitutional scheme. We would be better off, on the deregulationist argument, by getting rid of public financing completely.

- **Disclosure should be improved.** One of the most striking features of the current federal campaign finance system is that so much of the money comes from undisclosed sources. While candidates, parties, and other political committees must disclose the contributions
they receive and expenditures they make, the donors of many outside groups – especially nonprofit organizations – are unknown. Many of our interviewees favored the expansion of disclosure requirements. One response, generally favored by reformers, is to expand disclosure requirements as the DISCLOSE Act proposed a few years ago would have done. On the other hand, some regulatory skeptics argue that limits on contributions to candidates and parties are really to blame of the lack of disclosure; without those limits, they assert, more money would flow through entities that must disclose their donors. Other skeptics will argue that the benefits of disclosure are exaggerated and that its harms – especially to those who fear retaliation for their political contributions – are underappreciated.

This report takes no position on any of these debates. Campaign finance regulation is an area in which many players and observers have deeply held and entrenched views, and we are under no illusion that this report is likely to change their minds. We do hope, however, that our research will lead to a more informed and productive discourse over outside spending and related campaign finance issues.

2014 and Beyond

The sharp increase in outside spending is a relatively recent development. We have endeavored to provide a snapshot of what impact that spending is having now. But our interviews also shed some light on what trends we can expect to see in the 2014 midterm elections and beyond. Most of our interviews with campaign, congressional, and outside group staff eventually touched on this question. Below are some of the developments to follow and stories to watch, in the current election cycle and future ones:

• More candidate-specific Super PACs and more questions. Candidate attention is increasingly focused on outside groups’ supporting and opposing them. According to one 2012 campaign staffer who is advising multiple candidates in 2014, a frequent refrain among candidates is that someone will “do a Super PAC for” them. Of course, knowledge of support from an outside group does not equate to illegal coordination. It does, however, raise questions for beneficiary candidates. We expect to see more accusations of unlawful coordination between candidates and outside groups. These charges may even become standard operating procedure for opponents. Moreover, as the years pass, we expect to see more intermingling between the staff of outside groups and the campaigns they support. That includes closer relationships between candidates and leaders of outside groups, which may try to play the role of kingmaker in this new world.

• Personality- or Leadership-driven groups. In addition to the rise of Super PACs focused on one specific candidate, we expect to see more outside groups focused on one specific donor or galvanizing figure. This category includes the efforts of politically-active billionaires who spend to promote particular issues and wealthy donors who want to use Super PACs to exert more control over where their money goes. Some of our interviewees also indicated that they expect to see the creation of outside groups that are akin to Leadership PACs. The FEC ruled in late 2011 that actual Leadership PACs – like all political committees controlled by federal candidates – may not raise and spend money outside of federal
source and amount restrictions. Despite this ruling, de facto Leadership Super PACs are likely to appear soon. What remains to be seen is whether the association between such groups and federal elected officials will be informal, as is now the case for groups like Senate Majority PAC and the Congressional Leadership Fund, or, alternatively, whether these groups will find a way to make the connection formal.

- **Outside spending goes state and local.** If there was any common prediction among interviewees across the country and across the ideological spectrum, it is to expect increased outside spending in state and local elections. The reasons for the trend are as numerous as the examples already visible in the 2014 cycle. The reasons to expect more outside spending in state and local races include: (1) candidates’ aides splitting from the campaign in time to form and run a candidate-specific group that was understood as the “blessed” outside organization; (2) national organizations investing in a “Farm Team” at the state and local level – promising candidates who will be leaders at subnational levels and possibly run for national office some day; (3) a recognition of the importance of legislation and regulation at the state and local level, and consequent desire to affect those decisions; and (4) weak state and local party organizations.

- **Changes in who runs for office.** A number of interviewees expect to see the increase in outside spending affect who decides to run for office. Interviewees cited the increase in fundraising pressure and the negative tone of outside ads as factors discouraging some potential candidates from running. It is possible that this dynamic will produce more wealthy candidates. On the other hand, some believe that outside spending actually makes it possible for candidates without personal wealth or large donor networks to compete. It is also possible that we will see increased ideological consistency between candidates and large outside spenders in their particular jurisdiction.

It bears emphasis that all of these potential changes are speculative – and certainly not comprehensive. We have no crystal ball, and so cannot say with certainty what will occur in the future. The only inevitability is change itself, and these are some of the leading trends to look out for in elections to come.

**Further Research**

The interviews we have conducted provide a window into understanding the effect that outside spending is now having on elections and politics. They may also help us anticipate future developments, while informing ongoing law and policy debates over campaign finance regulation. But this report is not the be all and end all when it comes to documenting the effect of outside spending, predicting what lies ahead, or formulating potential changes to existing rules. There is a great deal more to learn about outside spending. Among the many questions we think worthy of future research, both qualitative and quantitative, are the following:

- Does it alter candidate fundraising in other ways?
- Do voters perceive a difference between advertisements sponsored by non-candidate and non-party groups or do they perceive advertising in terms of “sides” of an election?
• What happens to the candidate-specific groups of one election cycle in future election cycles? Will they become repeat players for that candidate’s campaign or will they expand their focus?

• To what extent is there overlap between donors to party committees and donors to outside groups, especially the ones we label “Shadow Parties”? Do donors to these groups enjoy access to public officials comparable to that which party committees offered in the pre-BCRA world?

• To what extent do outside groups pursue different goals in primary elections versus in general elections? To what extent has the availability of new avenues for federal election spending affected the groups’ relationships with parties?

• What’s happening to state and local party organizations? That includes changes in their fundraising, spending, staffing, and activities, as well as their perceived strength? Are there regional variations?

We close with expressions of both gratitude and concern. First, we thank all the former elected officials, candidates, campaign staff, legislative staff, and staff of outside groups who were kind enough to speak with us. They gave generously of their time and knowledge. And this report would obviously have been impossible without their cooperation. Although none of them received any tangible personal benefit for speaking with us, we hope that their assistance will ultimately help lead to improvements in the democratic process to which they have devoted their lives.

Careful research is vital to the improvement of our democracy as well. We were therefore disappointed that some of those with whom we tried to speak – including the dozens of current Members of Congress we approached – were unable or unwilling to do so. Some congressional offices informed us that they have a blanket policy against participating in academic studies. We understand the many demands on legislators’ time, as well as the political sensitivity of this subject. At the same time, the knowledge that current Members of Congress have – about outside spending and many other subjects integral to the democratic process – is indispensable both to research and reform.

Without those involved in elections and politics sharing their knowledge, we can neither understand the inner workings of democracy nor hope to improve it. We are grateful to all of those who were willing to share information and insights with us. And we hope that all those involved in elections and politics — including candidates, campaign staff, legislative staff, and legislators — will show the same generosity with future researchers. Our democracy depends on all of you.

ENDNOTES


## APPENDIX A. INTERVIEW RESPONDENTS

On-record interviews with former Members of Congress and candidates for Congress

<table>
<thead>
<tr>
<th>NAME</th>
<th>2012 PARTY AFFILIATION</th>
<th>POSITIONS HELD</th>
<th>2012 ELECTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Richard Carmona</td>
<td>Dem.</td>
<td>No elected office; 17th Surgeon General of the U.S.</td>
<td>Dem. nominee for U.S. Sen. in AZ, lost in general election</td>
</tr>
<tr>
<td>Chad Condit</td>
<td>Independent</td>
<td>No elected office</td>
<td>Ind. candidate for House in CA-10, lost in general election</td>
</tr>
<tr>
<td>Linda Parks</td>
<td>Independent</td>
<td>Ventura County Supervisor, 2002-present; Mayor and Councilmember, Thousand Oaks Cal., 1996-2002</td>
<td>Ran as “no party preference” in CA-26, lost in top-two primary</td>
</tr>
<tr>
<td>Larry Rosenthal</td>
<td>N/A</td>
<td>Partner, Ietan Consulting, LLC (Lobbyist) (previously Legislative Director for Rep. Dale Kildee and Director of the Cong. Native American Caucus)</td>
<td>N/A</td>
</tr>
</tbody>
</table>
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