

POST-MCCUTCHEON SUPER JFCS: A PATHWAY TO EXPOSURE AND DISCLOSURE

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INTRODUCTION

What can be done in 730 days? The possibilities are seemingly endless—this is America after all. However, to the incumbents and candidates fighting to win votes for a seat in either the chamber of Congress or the Oval Office, those days are seemingly numbered. Just about every one of those days is spent fundraising inside, and occasionally outside, of the Beltway.¹ Since the competition is so intense, consultants planning fundraisers are forced to be creative in order to attract the most attendees possible. Fundraising events include everything from breakfast and policy discussions,² cocktail receptions,³ spending a weekend at a Major League Baseball spring training camp⁴ or skiing,⁵ to even attending a Taylor Swift⁶ or Beyoncé concert.⁷ The cost to attend one of these events often starts around \$1,000 for an individual and \$2,500–\$5,000 for a Political Action Committee (PAC).⁸ Although, for a more

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1. “[T]he political and social world of Washington, D.C.” encircled by “Interstate 495.” *Beltway*, MEMIDEX, <http://www.memidex.com/beltway> (last visited Oct. 11, 2015).

2. *Breakfast and Policy Discussion for Scott Walker*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/39971> (last visited Oct. 9, 2015).

3. *Cocktail Reception for PAC to the Future (Nancy Pelosi)*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/37346> (last visited Oct. 9, 2015).

4. *Pirates Spring Training for Bob Casey*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/38464> (last visited Oct. 9, 2015).

5. *Annual Family Spring Ski Fling Weekend*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/37570> (last visited Oct. 9, 2015).

6. *Taylor Swift Concert for Heartland Values PAC (John Thune)*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/39444> (last visited Oct. 19, 2015).

7. *Beyonce Concert for Pete Sessions*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/36272> (last visited Oct. 9, 2015).

8. See *Annual Family Spring Ski Fling Weekend*, *supra* note 5.

intimate setting, one may prefer to host a candidate in their home⁹ or the home of an officeholder to fundraise.¹⁰ These types of events are designed to provide various levels of access to the candidate base on the level of contribution.¹¹ Looking to have a conversation with Hillary Clinton in support of Hillary for America at home with some friends? The contribution levels for such an event are as follows: \$1,000 to be a friend; \$2,700 to be a Champion, which includes a photo with Hillary; \$10,000 to be an event co-host raise, which includes a reception with Hillary; and finally \$27,000 to be a host raise, which includes a reception with Hillary and membership in the Hillstarters program.¹² These types of events are common for officeholders on both sides of the aisle. In fact, there are hundreds of them throughout the year.¹³ Officeholders attend these events whether they are in a race or not, because it is a means to an end, and that end is winning their election.

For those keeping track of time and curious as to when these officeholders set aside the competition to keep their jobs and actually perform their elected jobs: there are days allotted for legislative work. In the first session, members of the 113th Congress in both the Senate and House Chambers spent 156¹⁴ and 160¹⁵ days in session, respectively. In the second session, members in both the Senate and House Chambers spent 136¹⁶ and 135¹⁷ days in session, respectively. Although for most Americans—candidates and voters alike—everyone is just waiting for that second Tuesday in November of the election year to arrive, which marks the end of the obnoxious and overbearing phone calls, radio spots, emails asking for donations, and television advertisements from invading everyday life.

Campaign finance laws have been created, built up, and chipped away at for nearly as long as this country has existed. The first substantive piece of legislation to regulate campaign finance was the Federal Election Campaign Act (FECA), enacted in 1971 by Congress and later amended in 1974 to,

9. *Dinner for Mark Rubio*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/39734> (last visited Oct. 19, 2015).

10. *Reception for Democratic Senate Campaign Fund House Majority Project*, POLITICALPARTY TIME, <http://politicalpartytime.org/party/39940> (last visited Oct. 9, 2015).

11. Hold the rancorous comments, it is merely a conception of inclusion to usher satisfaction.

12. *Conversation with Hillary for Hillary for America*, POLITICALPARTYTIME, <http://politicalpartytime.org/party/39932> (last visited Oct. 9, 2015).

13. *The Year in Party Time*, POLITICALPARTYTIME, <http://politicalpartytime.org> (last visited Oct. 9, 2015).

14. *Senate of the United States: Calendar of Business*, U.S. GOV'T PUB. OFF. (Dec. 16, 2014), <http://www.gpo.gov/fdsys/pkg/CCAL-113scal-2014-12-16/pdf/CCAL-113scal-2014-12-16-pt0.pdf#5>.

15. *House of Representatives of the United States*, U.S. GOV'T PUB. OFF., <http://www.gpo.gov/fdsys/pkg/CCAL-113hcal-S2/pdf/CCAL-113hcal-S2-pt22.pdf> (last visited Oct. 9, 2015).

16. *Senate of the United States: Calendar of Business*, *supra* note 14.

17. *House of Representatives of the United States*, *supra* note 15.

among other things, create the Federal Election Commission (FEC).¹⁸ Since that time, there has been additional legislation, two other government agencies added to regulate money, and endless cases to support and challenge those laws.¹⁹ At the same time, the fundraising industry has evolved to become the nation's strongest and largest political machine.

The overall issue surrounding campaign finance reform lies within the effects of the remaining regulations coupled with the deregulation of campaign finance laws. The main result has been ineffective redirections of the flow of money into campaigns. There are eight entities that raise political money, abiding by different rules on contribution limits and disclosure of both expenditures and donors—plus three government agencies each regulating different entities.²⁰ It is easy to see why this issue is relatively complex with no simple solution. At the time, the 2014 midterm election suggested an atmosphere ripe for competition, indicating further campaign finance regulation on the horizon.

Part I of this Note provides a timeline of campaign finance law, beginning with the creation of the FECA and the regulations that were added to the FECA. The *Buckley*²¹ case is reviewed, providing the oldest remaining distinction in campaign finance law aimed at preventing corruption. Finally, ending with enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA),²² which has transformed our campaign finance laws leading up to *McConnell*,²³ *Citizens United*,²⁴ and *McCutcheon*.²⁵

Part II provides a synopsis of *McConnell*,²⁶ *Citizens United*,²⁷ and *McCutcheon*,²⁸ which have been the latest cases to drastically change the financial landscape of campaigns. This section describes the contribution limitations “then and now” as a result of each ruling and evaluates the implications and effects of the rulings to future election cycles.

Part III develops some clarity on the vehicles used by individuals, corporations, and organizations to exercise their right to political speech and association. Additionally, this section looks at the future of the expanding

18. Anna Stolley Persky, *Politics, Money, and the End of Campaign Finance Reform*, WASHINGTON LAW (Sept. 2014), <http://www.dcbbar.org/bar-resources/publications/washington-lawyer/articles/september-2014-campaign-finance.cfm>.

19. See discussion *infra* Parts I, II.

20. Sunlight Foundation, (@SunFoundation), TWITTER (July 11, 2015, 4:30 PM), <https://twitter.com/sunfoundation/status/620012195573661696>.

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

22. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

23. See *McConnell v. FEC*, 540 U.S. 93 (2003).

24. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

25. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

26. See *McConnell v. FEC*, 540 U.S. 93 (2003).

27. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

28. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

dynamic of political machines, such as the Joint Fundraising Committee (JFC), which is likely to develop as a result of the implications of the *McConnell*,²⁹ *Citizens United*,³⁰ and *McCutcheon*³¹ decisions.

Part IV explains the current proposal for disclosure reform, the Real Time Transparency Act of 2014.³² Additionally, Part IV provides an example of voluntary disclosure undertaken by United States companies, demonstrating the method individual, mega-donors, and mega-donor backers use to disclose their identities, and highlights certain individuals who have exposed themselves as mega-donor backers. Finally, this Note concludes with an assertion that *McCutcheon*³³ has created a self-correcting mechanism, the Super JFC, which would likely develop a path to more disclosure in the future.

I. THE EVOLUTION OF MONEY IN POLITICS—THE GROUNDWORK

The fear of election improprieties has existed since the first elections were held in the United States. In the beginning, “there were concerns over candidates buying votes and accepting donations in exchange for a variety of incentives, including promises of jobs in the new administration.”³⁴ Fast forward 104 years from the first substantive campaign finance law passed through Congress³⁵ to 1971, when the initial version of one part of our campaign regulation system was enacted, FECA.³⁶ The FECA laid out regulations for federal political campaigns. Due to a lack of enforcement and oversight, one individual believed that winning reelection came at all costs and took advantage of each worst-case scenario possibly imaginable. Enter President Richard M. Nixon and the infamous Watergate scandal.³⁷ Watergate involved “secretive, illegal corporate contributions, trades of cash for favors and, of course, break-ins—led to arrests, numerous convictions, and a presidential resignation.”³⁸ Promptly following the scandal, Congress decided the best course of action would be a series of hearings that ultimately lead to the amendment of FECA. In 1974, Congress created the Federal Election

29. See *McConnell v. FEC*, 540 U.S. 93 (2003).

30. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

31. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

32. Real Time Transparency Act of 2014, H.R. 4442, 113th Cong. (2014).

33. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

34. Persky, *supra* note 18.

35. *Id.* (The Naval Appropriations Bill was the first substantive campaign finance law, “which made it illegal for government officials to demand donations in so-called shakedowns of naval yard workers.”).

36. *Id.* FECA repealed the Federal Corrupt Practices Act (FCPA) that was enacted in 1910 that created “campaign spending limits for political parties in general elections for the U.S. House of Representatives. A year later, the bill was expanded to include the similar spending restrictions on U.S. Senate and primary elections.” *Id.* The FCPA expanded upon the Tillman Act of 1907, “which made it illegal for corporations and national banks to contribute to federal candidates.” *Id.*

37. *Id.* See also *Watergate Scandal*, HISTORY.COM, <http://www.history.com/topics/watergate> (last visited Oct. 9, 2015).

38. Persky, *supra* note 18.

Commission “to oversee the administration of federal election law.”³⁹ It also expanded the Act by creating the first disclosure requirements for donations, setting limits for particular contributions, and developing the public financing of presidential elections.⁴⁰

Whenever a campaign finance law case enters the Supreme Court’s docket, the challenge is most often based on alleged FECA breaches of fundamental First Amendment rights of freedom of political speech and association. The Court has ruled these rights extend to the conduct of campaigns for political office finding, “in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”⁴¹

The first challenge to the 1974 amendments of FECA came in 1976 when the Supreme Court heard *Buckley v. Valeo*.⁴² At issue was the legality of contribution and independent expenditure limits to political campaigns. The Court upheld the restrictions on individual contribution limits to campaigns and candidates as a means to protect the government’s interest against *quid pro quo* corruption and the appearance of corruption. The Court believed that the limit on a contributor’s ability to donate to a candidate or political party was only a “marginal” restriction on his ability to engage in free communication.⁴³ In contrast, the Court found the expenditure limits were an unconstitutional restriction on the amount of money an entity could spend on political communication during a campaign, “reduc[ing] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”⁴⁴ The Court acknowledged that communication in our society requires money—lots of it. It noted campaigns’ increasing dependence on the use of television, radio, and additional mass media as expensive, yet indispensable, modes of communication for effective political speech.⁴⁵ The takeaway from *Buckley*⁴⁶ was that the Court distinguishes between the contribution and expenditure limitations, the former of which are inherent to preserving government interests.⁴⁷

39. *Id.*

40. *Id.*

41. *Buckley*, 424 U.S. at 14–15.

42. *Id.*

43. *Id.* at 20–21.

44. *Id.* at 19.

45. *Id.*

46. *Id.*

47. *Id.* at 58–59.

The next step in reform was the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA) better known as the McCain-Feingold Act.⁴⁸ In 1998, the Senate Committee on Governmental Affairs issued a six-volume report of its investigation into the 1996 federal elections with “particular attention to the effect of soft money on the American political system, including elected officials’ practice of granting special access in return for political contributions.”⁴⁹ Both the majority and minority reports’ findings led the Committee to agree that “the ‘soft money loophole’ had led to a ‘meltdown’ of the campaign finance system that had been intended ‘to keep corporate, union and large individual contributions from influencing the electoral process.’”⁵⁰ Upon the Committee’s recommendation, Congress restricted the use of soft money in federal elections with BCRA. The Act “prohibit[ed] national party committees and their agents from soliciting, receiving, directing, or spending any soft money.”⁵¹ To prevent circumvention, state and local parties are prohibited from using soft money for activities affecting federal elections.⁵² The Act created a new provision of FECA that “restrict[ed] federal candidates and officeholders from receiving, spending, or soliciting soft money in connection with federal elections and limits their ability to do so in connection with state and local elections.”⁵³ The following year, the Supreme Court upheld most of the BCRA’s core principals as constitutional when it decided *McConnell v. FEC*.⁵⁴

II. THE CAMPAIGN FINANCE SYSTEM LIMITATIONS—HOW DOES THE MONEY STACK

A. *McConnell Initiates the Destruction of National Parties, Officeholders and Candidates*

With BCRA in place for about a year, the Supreme Court considered whether large soft money contributions had a corrupting influence or gave rise to the appearance of corruption in the *McConnell*⁵⁵ case. The Court had a central concern over “the manner in which parties have sold access to federal candidates and officeholders that has given rise to the appearance of undue

48. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in scattered sections of 52 U.S.C.).

49. *McConnell*, 540 U.S. at 129 (explaining that soft money, or nonfederal money, is that which is used by political parties for activities intended to influence state or local elections and are not bound to FECA requirements and prohibitions).

50. *Id.* (quoting S. REP. NO. 105-167, at 4611 (1998); S. REP. NO. 105-167, at 7515).

51. *McConnell*, 540 U.S. at 133 (citing FECA § 323(a)).

52. *McConnell*, 540 U.S. at 133–34 (citing FECA § 323(f)).

53. *McConnell*, 540 U.S. at 134 (citing FECA § 323(e)).

54. *McConnell*, 540 U.S. at 224 (upholding the control of soft money and the regulation of electioneering communications).

55. *See* *McConnell v. FEC*, 540 U.S. 93 (2003).

influence.”⁵⁶ The Senate Committee report exposed many problematic instances of corruption. The Democratic National Committee hosted coffees at the White House, which provided access to President Clinton.⁵⁷ The Republican National Committee had promotional materials for their donor programs that “promised ‘special access to high-ranking Republican elected officials, including governors, senators, and representatives.’”⁵⁸ Nonetheless, this type of undue influence, “unlike straight cash-for-votes transactions . . . is neither easily detected nor practical to criminalize.”⁵⁹ Naturally, the Court’s suggestion of the best means to protect against this type of corruption was to “identify and to remove the temptation” which is inherent in “soft-money contributions to political parties.”⁶⁰ However, the Court clarified, “Congress is not required to ignore historical evidence regarding a particular practice or to view conduct in isolation from its context.”⁶¹ Thus, the Court cleared up the interpretation of corruption by stating, “mere political favoritism or opportunity for influence alone is insufficient to justify regulation.”⁶² Unfortunately, that clarification has turned into a form of public opinion where favoritism and opportunity are heavily criticized and smeared as adequate corruption.⁶³

Arguably, the most devastating reform to campaign finance regulation was through the enactment of BCRA. The fundamental understanding in *McConnell*⁶⁴ was that § 323 of FECA “does little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders.”⁶⁵ In theory, that understanding—restricting the flow of soft money—would “tend[] to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors.”⁶⁶ In reality, by essentially eliminating the parties, candidates, and officeholder’s ability to collect soft money, the initial redirection of money into entities not regulated by source and amount limits occurred. Keep in mind that the *McConnell*⁶⁷ reinforcement of BCRA and the redirection of soft money

56. *Id.* at 153–54 (alteration in original).

57. *Id.* at 130.

58. *Id.*

59. *Id.* at 153.

60. *Id.*

61. *Id.*

62. *Id.*

63. *See generally* Thomas B. Edsall, *The Value of Political Corruption*, N.Y. TIMES (Aug. 5, 2014), http://www.nytimes.com/2014/08/06/opinion/thomas-edsall-the-value-of-political-corruption.html?_r=0 (“From 2006 to 2013, the percentage of Americans convinced that corruption was ‘widespread throughout the government in this country’ grew from 59 to 79 percent, according to Gallup.”).

64. *See McConnell v. FEC*, 540 U.S. 93 (2003).

65. *Id.* at 138.

66. *Id.* at 140.

67. *See McConnell v. FEC*, 540 U.S. 93 (2003).

was seven years before the most controversial, and in one Justice's opinion regrettable,⁶⁸ Supreme Court ruling, that deregulated campaign finance for the foreseeable future.

B. *Citizens United Unleashes the Corporate and Union Cash Flow to Independent Expenditures*

Just seven years following *McConnell*,⁶⁹ the Supreme Court delivered the most hotly debated ruling in recent history, *Citizens United v. FEC*.⁷⁰ In *Citizens United*,⁷¹ the court held: (1) “the Government [could] not suppress political speech on the basis of the speaker’s corporate identity”; (2) “no sufficient governmental interest justify[d] limits on the political speech of nonprofit or for-profit corporations”; and (3) overruled *Austin v. Michigan State Chamber of Commerce*,⁷² which upheld “a direct restriction on the independent expenditure of funds for political speech.”⁷³ The *Austin* Court stated there was “no basis for allowing the Government to limit corporate independent expenditures.”⁷⁴ The Court’s approach to the *quid pro quo* concern was simple and logical. It stated that “[t]he appearance of influence or access, [] will not cause the electorate to lose faith in our democracy” because our “democracy is premised on responsiveness” and a “substantial and legitimate reason . . . to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.”⁷⁵ What the Court highlighted was the idea that Americans would not sit back and tolerate living in total dissatisfaction of the country’s direction for long. To get change there must be action, which occurs at the polls.

It is a common misconception that one result of this ruling was the creation of Super PACs. The creation of Super PACs occurred months following

68. Jeffrey Rosen, *Ruth Bader Ginsburg Is an American Hero*, THE NEW REPUBLIC (Sept. 28, 2014), <http://www.newrepublic.com/article/119578/ruth-bader-ginsburg-interview-retirement-feminists-jazzercise> (stating in an interview published in THE NEW REPUBLIC in September 2014, Supreme Court Justice Ruth Bader Ginsburg expressed her extreme regret over several rulings by the current Court, the first decision she would overrule would be *Citizens United*, stating: “I think the notion that we have all the democracy that money can buy strays so far from what our democracy is supposed to be.”).

69. See *McConnell v. FEC*, 540 U.S. 93 (2003).

70. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

71. *Id.*

72. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990). It was overruled here because it “interferes with the ‘open marketplace’ of ideas protected by the *First Amendment*.” *Citizens United*, 558 U.S. at 354. It “permit[ted] the Government to ban the political speech of millions of associations of citizens” that best represent to most significant segments of the economy, all types of corporations. *Id.*

73. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

74. *Citizens United*, 558 U.S. at 347, 360, 365 (alteration in original) (“By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”).

75. *Id.* at 359–60.

Citizens United.⁷⁶ In *Speechnow.org v. FEC*, a federal court held “the government ha[d] no anti-corruption interest in limiting contributions to an independent group,” when a nonprofit group intended to expressly advocate the election or defeat of a federal candidate.⁷⁷ Additionally, the limit preventing a contributor from donating in excess and the group being unable to accept donations in excess of the limit is unconstitutional.⁷⁸ Thus, a new political action committee was born, known technically as an independent expenditure-only group.⁷⁹

C. *McCutcheon Attempts to Even the Score for Individuals, Candidates and National Parties*

A mere four years later, the Supreme Court found itself at another crossroads with campaign finance reform. This time, in *McCutcheon v. FEC*,⁸⁰ the Court was presented with the issue of whether or not the aggregate limits established in the FECA were restrictive on an individual’s First Amendment rights. The Court held, “[t]he aggregate limits on contributions do not further the only governmental interest this Court accepted as legitimate in *Buckley*.⁸¹ “They instead intrude[d] without justification on a citizen’s ability to exercise ‘the most fundamental *First Amendment* activities.’”⁸² The Court reasoned that the “limits den[ied] the individual all ability to exercise his expressive and associational rights by contributing to someone who will advocate for his policy preferences.”⁸³ Put simply, “[a] donor must limit the number of candidates he supports, and may have to choose which of several policy concerns he will advance” before he reaches the aggregate limit.⁸⁴ The actual effects of the *McCutcheon*⁸⁵ ruling cannot be determined just yet. It would take at least another midterm election to have a stronger sense of if, and how, donors’ contribution patterns will change without the restriction of aggregate limits. In perspective, it has been impossible for any effects to be directly attributed to *Citizens United*⁸⁶ in the five years since that ruling.

76. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

77. *Ongoing Litigation* *Speechnow.org v. FEC*, FED. ELECTION COMMITTEE, http://www.fec.gov/law/litigation/speechnow.shtml#sc_related_docs (last visited Oct. 11, 2015) (alteration in original).

78. *Id.*

79. See *infra* Part III.B.

80. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

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

82. *Id.* at 1462.

83. *Id.* at 1448.

84. *Id.*

85. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

86. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

D. *Contribution Limits—The Shield and Sword of Fundraising*

There are two distinct types of contribution limits. Aggregate limits restrict the total amount of money a donor may contribute to all candidates or committees, to the extent permitted by the base limits.⁸⁷ Base limits restrict how much money a donor can contribute to any particular candidate or committee.⁸⁸

Prior to 2014, an individual was limited in how much he or she may contribute to a candidate, national committee, state, or local committee. For the 2011–2012 election cycle, the contribution limits for an individual were: \$2,500 to each candidate committee per election; \$30,800 to a national party committee per calendar year; \$10,000 combined limit to a state, district, and local party per calendar year; and \$5,000 to any other political committee per calendar year.⁸⁹ The special limits in place were: \$117,000 overall biennial limit; \$46,200 to all candidates; and \$70,800 to all PACs and parties.⁹⁰ These limits have been raised during each election cycle since 2000, because every two years the FEC updates certain limits to account for inflation, such as those to candidates and party committees.⁹¹

For the 2013–2014 election cycle, the contribution limits for an individual were: \$2,600 to each candidate committee per election; \$32,400 to a national party committee per calendar year; \$10,000 combined limit to a state, district, and local party per calendar year; and \$5,000 to any other political committee per calendar year.⁹² The special limits were: \$123,200 overall biennial limit; \$48,600 to all candidates; and \$74,600 to all PACs and parties.⁹³ Those special limits were no longer in effect on April 2, 2014 when the Court ruled in the *McCutcheon* case that the aggregate limits were unconstitutional.⁹⁴ Therefore, individuals no longer had to abide by the overall cap on how much they could contribute in an election cycle. Now, contributors may give to as many candidates and committees as they wish within the merits.⁹⁵

One example of this scenario was in *McCutcheon*; the plaintiff Shaun McCutcheon was prohibited from contributing to all of the political entities he

87. 2 U.S.C. § 441a(a)(3); *McCutcheon*, 134 S. Ct. at 1442.

88. 2 U.S.C. § 441a(a)(1); *McCutcheon*, 134 S. Ct. at 1442.

89. *Campaign Contribution Limits*, OPENSECRETS.ORG, <https://www.opensecrets.org/bigpicture/limits.php> (last visited Oct. 8, 2015).

90. *Id.*

91. *2014 Campaign Contribution Limits*, OPENSECRETS.ORG, <https://www.opensecrets.org/overview/limits/php> (last visited Oct. 8, 2015).

92. *Id.*

93. Bob Biersack, *McCutcheon Decision: Add Some More Zeroes to That Check*, OPENSECRETS.ORG (Apr. 2, 2014), <https://www.opensecrets.org/news/2014/04/mccutcheon-decision-add-some-more-z>.

94. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014).

95. Biersack, *supra* note 93.

desired due to the aggregate limits.⁹⁶ McCutcheon contributed a total of \$33,088 to sixteen different federal candidates in the 2011–2012 cycle, complying with the base limits applicable to each.⁹⁷ McCutcheon wanted to contribute his standard donation of \$1,776 to twelve additional candidates each; however, he was prevented from doing so by the candidate aggregate limit.⁹⁸ He additionally contributed \$27,328 to several non-candidate political committees, again complying with the base limits. He further wished to contribute to additional political committees, including \$25,000 to each of the three Republican national party committees, but was again held back by the aggregate limits to political committees.⁹⁹ He intended to make his similar signature contributions in the future of at least \$60,000 to various candidates and \$75,000 to non-candidate political committees.¹⁰⁰

The most expensive midterm election in history was the 2014 cycle, costing \$3.77 billion.¹⁰¹ Comparatively, the 2010 midterm election cost \$3.63 billion—a margin of \$140 million.¹⁰² One of the most notable differences between these two midterms is the shift toward fewer identifiable¹⁰³ donors giving more money to candidates, parties, and outside groups.¹⁰⁴ In 2010, the Center for Responsive Politics (CRP) was able to identify 869,602 donors.¹⁰⁵ In 2014, CRP was only able to identify 773,582 donors, representing a decline of 96,020 or eleven percent.¹⁰⁶ As for the increase in contribution size, the 2010 average was \$1,936 versus the 2014 average of \$2,639. These figures may not be so startling because they are midterm elections and most Americans are more likely to recall the 2012 general election where the cost was \$6.28 billion.¹⁰⁷ The significance of these elections is the smaller amount of donors accounting for a larger percentage of the total contributions overall. Again using the 2012 general election for comparison, there were 1,255,354

96. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

97. *Id.* at 1443.

98. *Id.*

99. *Id.*

100. *Id.*

101. Russ Choma, *Final Tally: 2014's Midterm Was Most Expensive, with Fewer Donors*, OPEN SECRETS.ORG (Feb. 18, 2015), <https://www.opensecrets.org/news/2015/02/final-tally-2014s-midterm-was-most-expensive-with-fewer-donors> [hereinafter *Final Tally*].

102. *Overall Spending Inches Up in 2014: Megadonors Equip Outside Groups to Capture a Bigger Share of the Pie*, OPEN SECRETS.ORG (Oct. 29, 2014), <http://www.opensecrets.org/news/2014/10/overall-spending-inches-up-in-2014-megadonors-equip-outside-groups-to-capture-a-bigger-share-of-the-pie> [hereinafter *Overall Spending Inches Up in 2014*].

103. Identifiable are those donors who give more than \$200. The FEC does not require donors who give less than \$200 to be itemized on finance reports. *Id.*

104. *Final Tally*, *supra* note 101.

105. *Id.*

106. *Id.*

107. *The Money Behind the Elections*, OPEN SECRETS.ORG, <http://www.opensecrets.org/bigpicture> (last visited Oct. 12, 2015).

identifiable donors contributing to candidates, parties, and PACs.¹⁰⁸ By census data, the estimated United States population for 2011–2012 was 310,823,152, meaning that 0.4% of the population contributed over \$200, and of that 0.4%, 0.08% contributed amounts of \$2,500 or greater.¹⁰⁹ To put those figures into perspective, the 0.4% of the population who contributed over \$200 accounted for 63.5% of the total money contributed overall in 2012.¹¹⁰ These mega donors returned in 2014 with even more generous contributions. “Out of about 310 million Americans, . . . just 0.21% gave \$200 or more, and 0.04% gave \$2,600 or more.”¹¹¹ There were 31,976 identifiable donors, who by metric of the United States population are equal to about one percent of one percent of the total population, who were responsible for an unprecedented \$1.18 billion in disclosed federal contributions.¹¹²

III. THE METHODS AND IMPLICATIONS OF FUNDRAISING FOLLOWING *MCCUTCHEON*

There are various types of entities that exist to fundraise for elections, and most have been around for quite some time. However, the development of FECA, BCRA, and the *McConnell*,¹¹³ *Citizens United*,¹¹⁴ and *McCutcheon*¹¹⁵ decisions have shaped the circumstances surrounding legal fundraising. Below are the types of entities most affected by *McCutcheon*,¹¹⁶ a short description of their function, purpose, and finally, how they are a part of the overall system.

A. *Candidates and National Party Committees*

Following BCRA and *McConnell*,¹¹⁷ outside groups experienced a flood of money that enhanced their ability to run effective campaigns for and against candidates. The role of the parties, presence, and strength entered into a period

108. *Id.*

109. *Donor Demographics*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/donordemographics.php?cycle=2012> (last visited Oct. 12, 2015) (explaining that computing only donations through FEC reporting, excludes outside groups).

110. *Id.*

111. Russ Choma, *More Cash in More Party Pots? Senate Language Could Help Parties—and the Very Rich*, OPENSECRETS.ORG (Dec. 10, 2014), <http://www.opensecrets.org/news/2014/12/more-cash-in-more-party-pots-senate-language-could-help-parties-and-the-very-rich>.

112. Peter Olsen-Phillips, Russ Choma, Sarah Bryner & Doug Weber, *The Political One Percent of the One Percent in 2014: Mega Donors Fuel Rising Cost of Elections*, OPENSECRETS.ORG (Apr. 30, 2015), <https://www.opensecrets.org/news/2015/04/the-political-one-percent-of-the-one-percent-in-2014-mega-donors-fuel-rising-cost-of-elections>.

113. *See McConnell v. FEC*, 540 U.S. 93 (2003).

114. *See Citizens United v. FEC*, 558 U.S. 310 (2010).

115. *See McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

116. *Id.*

117. *See McConnell v. FEC*, 540 U.S. 93 (2003).

of decline. Even considering the variances between midterm and general elections, exact figures are rather impossible to trace because the majority of the money contributed was to outside groups who do not disclose such data. During the period between the enactment of BCRA and the decision in *McCutcheon*,¹¹⁸ the parties were not able to collect any soft money contributions like before but now had to make up that loss by collecting hard money contributions, subject to the aggregate limits.¹¹⁹ The 2004 election cycle proved successful for the parties when they raised \$1.5 billion in hard money, more than the \$1.1 billion they had raised in both hard and soft money combined before BCRA.¹²⁰ Despite that, the national parties watched their income fall from \$1.48 billion in the 2002 midterm to \$1.23 billion in the 2010 midterm, which is a seventeen percent decline.¹²¹ Unfortunately, the rapid pace of growth in outside-group spending was becoming more difficult for the parties to keep up with causing loss of ground. The non-party spending increase after *Citizens United*¹²² provided proof.¹²³

The result of a capped income stream to the parties was incremental “outsourcing” of traditional party functions to outside groups—such as advertising, get-out-the-vote, list management, etc. Prior to BCRA, in 2000, both national parties accounted for “two-thirds of all advertisements in the presidential general election.”¹²⁴ After BCRA, in 2004, that share of the market dropped to one-third and in 2008, less than one-fourth.¹²⁵ Finally, by 2012, a mere six percent of all advertisements were by the parties.¹²⁶ The redirection of these funds began to supply the outside groups with the infrastructure needed to amass the political power they wield today.

Reince Priebus, Chairman of the Republican National Committee, stated, “[W]hat the campaign finance laws have done is put party committees in a place where we have the most restriction, the most disclosure, and we can raise the least amount. . . . Whereas after all these laws . . . what[] [has] happened

118. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

119. Eliza Newlin Carney, *Did Soft Money Ban Kill Political Parties?*, ROLL CALL (May 6, 2014, 12:03PM), <http://blogs.rollcall.com/beltway-insiders/did-soft-money-ban-kill-political-parties/?dcz=> (noting the parties raised \$591 million in soft money during the 2002 election).

120. *Id.*

121. All dollar values are adjusted to 2012 dollars. Robert Kelner & Raymond La Raja, *McCain-Feingold's Devastating Legacy*, WASH. POST: OPINIONS (Apr. 11, 2014), https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-cl8f-lle3-bcec-b71ee10e9bc3_story.html.

122. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

123. *Id.* Carney, *supra* note 119.

124. See *Citizens United v. FEC*, 558 U.S. 310 (2010). Kelner, *supra* note 121.

125. Kelner, *supra* note 121.

126. *Id.*

is the groups that can raise the most disclose the least.”¹²⁷ *McCutcheon*¹²⁸ allows candidates and national party committees to position themselves to where they were before BCRA caused a substantial blow to their funding. Donors are able to “contribute more to the party organizations at the national, state and local levels.”¹²⁹ Candidates and party committees are now going to be able to compete with outside groups for greater contributions from mega-donors. Since donors are no longer restricted by an aggregate total, candidates and parties will likely see growth in the number of base limit donations. Thus, attributable growth is coming from an increase in the number of donors giving a flat amount, not the number of donors giving more money. Additionally, these funds are subject to disclosure through the FEC.

B. *Super Political Action Committees (PACs)*

The Super PAC is considered an independent expenditure-only committee. Essentially, they “raise unlimited sums of money from corporations, unions, associations and individuals,” and “then spend unlimited sums to overtly advocate for or against political candidates.”¹³⁰ The goals of most Super PACs are very distinguishable from the traditional PACs. Common goals include: “win the close races,” “win control of the majority,” and “help set a basic frame for the public agenda.”¹³¹ Additionally, there is “rarely any concern for maintaining a relationship with the other side.”¹³² These groups “are prohibited from donating money directly to political candidates” but are required to report their donors to the FEC monthly or semiannually during non-election years, and monthly during election years.¹³³

Due to such negative public discourse regarding Super PACs and the exposure to an overwhelming amount of negative television commercials and radio spots, Americans likely misidentify these types of groups more easily than others. Rather than pay attention to the actual self-identification at the end of each commercial (or attack ad if you will), people largely focus on the type of content and automatically assume it is a Super PAC.

127. Eliza Newlin Carney, *Will McCutcheon Ruling Boost Political Parties?*, ROLL CALL (Apr. 2, 2014), [http://blogs.rollcall.com/beltway-insiders/will-mccutcheon-ruling-boost-political-parties/?dcz=\(alteration in original\)](http://blogs.rollcall.com/beltway-insiders/will-mccutcheon-ruling-boost-political-parties/?dcz=(alteration%20in%20original)).

128. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

129. Ray La Raja, *The Supreme Court Might Strike Down Overall Contribution Limits. And That's Okay*, WASH. POST: THE MONKEY CAGE (Oct. 9, 2013), <https://www.washingtonpost.com/news/monkey-cage/wp/2013/10/09/the-supreme-court-might-strike-down-overall-contribution-limits-and-thats-okay>.

130. *Super PACs*, OPENSECRETS.ORG, <https://www.opensecrets.org/pacs/superpacs.php?cycle=2014> (last visited Dec. 12, 2015).

131. Michael J. Malbin, *PACs in an Age of Super PACs*, THE CAMPAIGN FIN. INST. (Mar. 6, 2013), http://cfinst.org/pdf/presentations/Malbin_PACs_in_an_Age_of_Super_PACs.pdf.

132. *Id.*

133. *Super PACs*, *supra* note 130.

Super PACs receive the most criticism because they are one of the most powerful groups of all entities available to support campaign fundraising. The access to virtually unlimited financing and spending allowances makes for a very powerful, effective, and results-oriented campaign. Outside groups (excluding party committees) have spent \$561.1 million in the 2014 election cycle,¹³⁴ \$548.9 million of which was spent on independent expenditures.¹³⁵ Based on FEC data, as of December 3, 2015, 1,360 groups organized as Super PACs have reported total receipts of \$696,011,919 and total independent expenditures of \$345,117,042 as of December 3, 2015.¹³⁶

The most significant impact *McCutcheon*¹³⁷ will have on Super PACs is that it will open up the playing field for other groups to emerge and attempt to compete in the money race. The elimination of the aggregate limits allows donors to cut larger checks to other groups, such as JFCs, to disperse and support their beneficiaries, but still subject to the base limits of each participant. While more money is now able to enter the system, giving the impression of greater abuse and risk for corruption, the consolation is disclosure of the donors' identification.

C. 501(c) Organizations—“Dark Money”

Nonprofit 501(c) organizations have provided wealthy donors, with few exceptions, a safe haven for maintaining their anonymity when making political contributions. Among these nonprofit groups, certain types are sheltered by “the inherent limitations of the tax law” and have “led to an unprecedented lack of political transparency” following *Citizens United*.¹³⁸ These groups include those organized under § 501(c)(4) as social welfare organizations (e.g., NRA, Crossroads GPS), § 501(c)(5) unions, and § 501(c)(6) trade associations (e.g., United States Chamber of Commerce).¹³⁹ These organizations have been heavily criticized as “fake nonprofit

134. *Outside Spending*, OPENSECRETS.ORG, <https://www.opensecrets.org/outsidespending> (last visited Oct. 12, 2015) (“The term ‘outside spending’ refers to political expenditures made by groups or individuals independently of, and not coordinated with, candidates’ committees. Groups in this category range from conventional party committees to the more controversial super PACs and 501(c) ‘dark money’ organizations.”).

135. *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/cycle_tots.php (last visited Dec. 12, 2015).

136. *Super PACs*, *supra* note 130.

137. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

138. *The Campaign Legal Center Guide to the Current Rules For Federal Elections: What Has Changed in the 2012 Election Cycle*, THE CAMPAIGN LEGAL CTR. (Oct. 25, 2012), <http://www.campaigncenter.org/document/campaign-legal-center-guide-current-rules-federal-elections-what-has-changed-2012-election> [hereinafter *What Has Changed in the 2012 Election Cycle*].

139. *Outside Group Chart*, THE CAMPAIGN LEGAL CTR., http://www.campaignlegalcenter.org/sites/default/files/CLC_501c_disclosure_chart.pdf (last visited Oct. 12, 2015).

organizations whose only purpose is to influence elections.”¹⁴⁰ Political groups claiming this status have been spending hundreds of millions of dollars to influence elections, when the primary purpose of 501(c)(4) groups is to promote social welfare.¹⁴¹ In the grand scheme of things, donors to these groups¹⁴²—those who collect “dark money”—are not disclosed, regardless of the amount of their contribution. These groups will remain anonymous as long as they do not have as their “primary activity” (up to forty-nine percent of all activity), participation/expenditures for “political campaigns on behalf of or in opposition to any candidate for public office.”¹⁴³

These organizations receive unlimited amounts of money from corporations, individuals, and unions and are all subject to different disclosure requirements. The spending by these organizations, funded most often by anonymous donors, has “increased from less than \$5.2 million in 2006 to well over \$300 million in the 2012 presidential cycle.”¹⁴⁴ In the 2014 midterm elections, these organizations spent more than \$174 million.¹⁴⁵ The disclosure figures break down to the following: 30.8% undisclosed, 9.4% partially disclosed, and 59.8% fully disclosed.¹⁴⁶

The problem with these organizations existed prior to the *McCutcheon*¹⁴⁷ decision. Since the organizations are established in tax law, they are subject to regulation by the Internal Revenue Service (IRS), not the FEC.¹⁴⁸ To correct the inherent flaws within the language regulating these organizations, an overhaul to the relevant section of the Internal Revenue Code would be required. Either a bright-line rule could be established or the 501(c)(4) language may be re-written to distinguish a true nonprofit acting with the primary purpose of social welfare, from a nonprofit running as a front conducting primarily political activity. Until the IRS is able to establish and implement better procedures and rules to conduct oversight of these groups, the “dark money” will continue to pour in anonymously. Prior to the IRS’ brazen attempt to investigate nonprofit groups¹⁴⁹ seeking tax-exempt status

140. Lisa Rosenberg, *The IRS Should Stop Ignoring Dark Money*, SUNLIGHT FOUND. (Oct. 17, 2012, 12:24 PM), <https://sunlightfoundation.com/blog/2012/10/17/the-irs-should-stop-ignoring-dark-money>.

141. *Id.*

142. *Political Nonprofits*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/nonprof_summ.php (last visited Oct. 12, 2015).

143. *Outside Group Chart*, *supra* note 139.

144. *Political Nonprofits*, *supra* note 142.

145. *Id.*

146. *Outside Spending by Disclosure, Excluding Party Committees*, *supra* note 134.

147. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

148. See generally Lisa Rosenberg, *As IRS Takes Aim at Fake Social Welfare Organizations, Will Some in Congress Take Aim at the IRS?*, SUNLIGHT FOUND. (Nov. 27, 2013, 9:39 AM), <https://sunlightfoundation.com/blog/2013/11/27/as-irs-takes-aim-at-fake-social-welfare-organizations-will-some-in-congress-take-aim-at-the-irs>.

149. *IRS Scandal Fast Facts*, CNN LIBRARY, <http://www.cnn.com/2014/07/18/politics/irs-scandal-fast-facts> (last updated Sept. 18, 2015, 6:26 PM) (discussing that the IRS scandal involving the targeting of certain groups filing for tax-exempt status and delaying processing applications by certain conservative

using inappropriate criteria that type of reform may have been possible. Following the Be On The Lookout (BOLO) list scandal and reorganization of the IRS Exempt Organizations division, it is unlikely that there will be a change to the tax code anytime soon. The implementation of new tax-exempt determination criteria for applicants that proves successful would likely alleviate some of the public distrust, but ultimately will not resolve the existing dark money scheme.

*McCutcheon*¹⁵⁰ will have very little—or potentially no—impact on 501(c) organizations. The elimination of aggregate limits will not allow individual donors, nor other fundraising entities, to even come close to competing with these organizations monetarily. Critics of *McCutcheon*¹⁵¹ are worried about a donor cutting a check to an entity like a JFC (hypothetically when all parties and candidates are combined in one and allowing a \$3.6 million contribution¹⁵²) that has full disclosure requirements and is calculated by all of those base limits added together. Whereas here, a single donor could give tens or a hundred million dollars to a 501(c)(4) and no one would ever know.

D. Joint Fundraising Committees (JFCs)

JFCs were used as a fundraising vehicle prior to the *McCutcheon*¹⁵³ decision; however, they were not very popular due to the aggregate limits that capped donor contributions and the number of recipients to just seven.¹⁵⁴ Following *McCutcheon*'s¹⁵⁵ elimination of those aggregate limits, JFCs have re-emerged in the fundraising scene as potentially the most competitive machine available to candidates and parties for battling outside spending (Super PACs) and nonprofit (501(c)) groups to date.

One way a JFC can be created is by having two or more candidates, PACs, or party committees join to create one entity, subject to regulation by the FEC and disclosure requirements.¹⁵⁶ The group must then select a representative for itself.¹⁵⁷ This can either be a new or existing committee. Within that entity, all

groups and requesting unnecessary information, along with Lois Lerner and her over 50,000 missing e-mails).

150. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

151. *Id.*

152. See generally Ruth Marcus, *Ruth Marcus: The Real Danger Behind the 'McCutcheon' Ruling*, WASH. POST: OPINIONS (Apr. 4, 2014), https://www.washingtonpost.com/opinions/ruth-marcus-the-real-danger-behind-the-mccutcheon-ruling/2014/04/022dded4-bc32-11e3-9a05-c739f29ccb08_story.html.

153. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

154. Peter Olsen-Phillips, *Joint Fundraisers Ballooning After McCutcheon Decision*, SUNLIGHT FOUND (Oct. 29, 2014, 3:12 PM), <https://sunlightfoundation.com/blog/2014/10/29/joint-fundraisers-ballooning-after-mccutcheon-decision>.

155. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

156. *Joint Fundraising*, FED. ELECTION COMMISSION (Feb. 2013), <http://www.fec.gov/pages/brochures/jointfundraising.shtml>.

157. *Id.*

members agree to share the costs of fundraising and split the proceeds.¹⁵⁸ Each member of the JFC must create and sign an allocation agreement that is kept between the parties and includes a formula on how to split the proceeds and costs, which is either by a stated amount or a percentage of contributions and fundraising events.¹⁵⁹ The limit contributors may give to a JFC is the “combined total of limits that apply to each JFC participant.”¹⁶⁰

For example, based on a report released by the FEC on December 31, 2014, the “Boehner for Speaker Committee” has been the largest grossing JFC for the 2014 cycle, with receipts of \$35,382,857; it raises money for three PACs, two leadership PACs, two party committees, the JFC itself, and one candidate.¹⁶¹ The maximum check that the JFC may receive would be the per-PAC, per-party committee, and per-candidate base limits combined. Therefore, in this example, the JFC could accept checks of \$72,600 per donor: one national party committee at \$32,400, plus one state party at \$10,000, plus one candidate at \$5,200, plus five PACs at \$25,000 each. To put that figure into perspective, the top individual donor to JFCs for 2014 contributed \$340,200, only \$72,600 of that could go to Boehner’s JFC. It would take five individual checks from five separate donors to top that highest single donor amount and get that amount to Boehner’s JFC.

The number of active JFCs has grown exponentially over the recent years, from 270 in the 2008 cycle to 523 in 2014.¹⁶² The amount of money raised varies from higher amounts in presidential election years (\$509.5 million and \$1.1 billion, in 2008 and 2012, respectively) and lower amounts in midterm election years (\$92.5 million and \$191.2 million, in 2010 and 2014, respectively) but still show exceptional growth among all election cycle series.¹⁶³ With the aggregate limits struck down, it is highly likely this platform of fundraising will increase in size and frequency of use. Whether it will develop into the next Super PAC as hypothesized by critics remains to be seen, but Justice Alito dismissed the idea of Super JFCs as “wild hypotheticals.”¹⁶⁴ One supporter of the Super JFC, Dan Backer, agrees. Backer, the lead attorney for Shaun McCutcheon, believes it is highly unlikely

158. *Id.*

159. *Id.*

160. Kirk L. Jowers & Matthew T. Sanderson, *The Next “Super PAC”? All You Ever Wanted to Know About Joint Fundraising Committees*, CAPLIN & DRYSDALE ATT’YS (Apr. 11, 2014) (alteration in original), http://www.capdale.com/files/10751_The%20New%20Super%20PAC%20All%20You%20Ever%20Wanted%20to%20Know%20About%20Joint%20Fundraising%20Committees.pdf.

161. *Boehner for Speaker Committee*, OPENSECRETS.ORG, <http://www.opensecrets.org/jfc/summary.php?id=C00478354&cycle=2014> (last visited Oct. 12, 2015).

162. *Joint Fundraising Committees*, OPENSECRETS.ORG, <http://www.opensecrets.org/jfc/index.php> (last visited Oct. 12, 2015).

163. *Id.*

164. Michael Beckel, *‘Jumbo Joints’: How Big Will the Newest Political Animals Get?*, THE CTR. FOR PUB. INTEGRITY: POL., <http://www.publicintegrity.org/2014/04/22/14612/jumbo-joints-how-big-will-newest-political-animals-get> (last updated May 27, 2014, 11:23 AM).

that a Super JFC will be created. Backer noted that due to the FEC's regulation of this entity, the amount of "legal paperwork and reporting requirements to link enough candidate[s] and party committees together," it is far too burdensome for many groups to take advantage of this vehicle.¹⁶⁵ Backer sets up and works with different types of fundraising entities. He suggests that many fundraisers will not be interested in establishing these Super JFCs due to a "layer of complexity that is astronomical"¹⁶⁶ and all of "[t]he burdens involved and the technical problems"¹⁶⁷ to correctly operate such an entity. Aside from the hassle of organizing and maintaining a Super JFC, it is unlikely that fundraisers will be able to entice donors to contribute to these entities over others.

IV. DO NOT PUSH DISCLOSURE . . . YET

"Thomas Jefferson wrote, 'Whenever the people are well-informed, they can be trusted with their own government . . . whenever things get so far wrong as to attract their notice, they may be relied on to set them to rights.'"¹⁶⁸ While public opinion may strongly favor full, across the board disclosure of who is financing candidates, the public cannot ignore the limits both Congress and the courts have in making such things happen. Justice Roberts said in *McCutcheon* that the Court has made clear "Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others."¹⁶⁹ Proponents of reform may have lost sight of such a foundational understanding of the limits of the legislative branch, and in most cases that may be attributed to the fact that their preferred party/candidate/organizations are on the losing end of the money battle in the election cycles.

A. *The Dot-Com, Dot-Org, and Dot-Gov Search for Dollars*

Spending "dark money" raises concerns because of the non-disclosure as to the source of a majority of these funds. The Court in *McCutcheon* reiterated that "disclosure of contributions minimizes the potential for abuse of the campaign finance system," and they "are in part 'justified based on a

165. Paul Blumenthal, *McCutcheon v. FEC's Other Threat: Case Could Super-Size Joint Fundraising Committees*, THE HUFFINGTON POST (Oct. 7, 2013, 2:33 PM), http://www.huffingtonpost.com/2013/10/07/mccutcheon-joint-fundraising-committees_n_4057547.html.

166. Russ Choma, *Consequences of McCutcheon: Dan Backer Version*, OPENSECRETS.ORG (Apr. 9, 2014), <https://www.opensecrets.org/news/2014/04/consequences-of-mccutcheon-dan-backer-version>.

167. *Id.*

168. Lisa Rosenberg, *2014 Midterms: Transparency of Money in Politics Means Trust in Government, Trust in Citizens*, BROOKINGS (Oct. 22, 2014, 9:22 AM), <http://www.brookings.edu/blogs/fixgov/posts/2014/10/22-2014-midterms-transparency-money-in-politics-rosenberg>.

169. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014).

governmental interest in “provid[ing] the electorate with information” about the sources of election-related spending.”¹⁷⁰ The Court even recognized disclosure as “a less restrictive alternative to flat bans on certain types or quantities of speech.”¹⁷¹ In *McCutcheon*, Justice Roberts suggested that accessing websites like FEC.gov, OpenSecrets.org, and FollowTheMoney.org offer great protection against corruption because these websites have databases and reports, which are available almost immediately after filing.¹⁷² While Justice Roberts’s suggestion may be the only practical and expedient method currently available to the public, not all FEC regulated political committee activity must be reported in the same manner. There may be room for improvement on the speed and style of such disclosure for all FEC-regulated committee activities, not just electioneering communication and independent expenditures. Most of the monetary and entity information in this paper was found using the FEC’s, OpenSecrets’, and Sunlight Foundation’s websites.¹⁷³ Even though not all types of reports are required to be promptly filed, there is an abundance of information available on these websites. Critics of disclosure should delve into these websites.

The Real Time Transparency Act of 2014¹⁷⁴ is the most recent attempt to obtain some type of disclosure of political committees’ finances in the most immediate fashion to date. The Act states it was created “[t]o amend the Federal Election Campaign Act of 1971 to require all political committees to notify the Federal Election Commission within [forty-eight] hours of receiving cumulative contributions of \$1,000 or more from any contributor during a calendar year, and for other purposes.”¹⁷⁵ Additionally, it “ensure[s] that contributions of \$1,000 or more to candidates, parties and PACs, including Super PACs, are disclosed within [forty-eight] hours.”¹⁷⁶ This is a good approach for many reasons. The Act, which was introduced by Senator Angus King,¹⁷⁷ embraces rapid transparency following a midterm election. Americans have access to a multitude of information thanks to the breakthroughs in technology and real time accessibility. There is no lack of infrastructure or knowledge to develop a system that shines light on a greater amount of donor contributions in political fundraising. However, the likelihood of this proposal making it past the committee and to the floor in any

170. *Id.* at 1459 (alteration adopted).

171. *Id.* at 1460.

172. *Id.*

173. *See generally* FED. ELECTION COMMISSION, <http://www.fec.gov> (last visited Oct. 12, 2015); OPENSECRETS.ORG, <http://www.opensecrets.org> (last visited Oct. 12, 2015); *see also* SUNLIGHT FOUND., <http://www.sunlightfoundation.com> (last visited Oct. 12, 2015).

174. Real Time Transparency Act of 2014, H.R. 4442, 113th Cong. (2014).

175. *Id.* (alteration in brackets).

176. Rosenberg, *supra* note 140168 (alteration in brackets).

177. S. 2212: *Real Time Transparency Act*, CONGRESS.GOV, <http://www.congress.gov/bill/114th-congress/senate-bill/2212/realtd-bills>.

chamber anytime soon is unlikely. With a new Congress in control of Washington and a rough-agenda in place, there is limited room (and likely unwillingness) for waging debate on the very campaign finance system that just got, or kept, these elected officials in office.

The time between the 2016 and 2020 election cycle would be long enough for legislators to amend the language of the Real Time Transparency Act of 2014, to develop a more concise disclosure method, and to avoid losing a seat in an election year. By that time, the FEC would know what type of system of reporting and releasing that information should be most effective and secure to implement. On that end, the bulk of the work would be put on the FEC to prepare for a change in its FECFile software and networks to support a database of instantly accessible information compared to the traditional viewing of filed reports. The reporting requirements for entities would need to be changed so that all contributions are processed within the forty-eight hour timeframe, compared to the currently quarterly, monthly, and semi-annual reporting.¹⁷⁸ Electronic filing by all committees and individuals, including Senate candidate committees,¹⁷⁹ would be required to ensure that the report clears the FEC and is released to the public on time. The \$50,000 threshold¹⁸⁰ for mandatory electronic filing will no longer be necessary and all filing should become electronic without a threshold. These changes, accompanied with a more user-friendly website design and easily accessible information, will be necessary to accommodate the Real Time Transparency Act of 2014.

The FEC should take care in creating and implementing website changes with taxpayer money. The public confidence in the FEC would fall even more if a similar instance like that of the Affordable Care Act Marketplace Exchange disaster¹⁸¹ were the end result. The real pressure would then fall on campaigns to adjust processing the contributions intake with a turnaround in forty-eight hours. Furthermore, there would likely be little opposition to the Act because it only requires the FEC to release information on organizations which are already required to disclose amounts and sources more quickly, not on the outside spending or dark money groups. Since officeholders likely receive more money from outside groups, they are not putting themselves at risk of losing that greater support by enacting legislation to report FEC groups.

178. See *2015 Reporting Dates*, FED. ELECTION COMMISSION, http://www.fec.gov/info/report_dates_2015.shtml#frequency (last visited July 7, 2016) (reporting frequency is different per entity, whether candidate, party committee, or PAC).

179. *Electronic Filing Overview*, FED. ELECTION COMMISSION, http://www.fec.gov/electfil/ef_overview.shtml (last visited Oct. 9, 2015) (discussing how Senate candidate committees currently are not required to file electronically).

180. See *id.* (citing 11 CFR 104.18 (a)(3)(i), federal election commission's mandatory electronic filing rules).

181. See generally Sam Baker, *Obamacare Website Has Cost \$840 Million*, NAT'L J. (July 30, 2014), <http://www.nationaljournal.com/health-care/obamacare-website-has-cost-840-million-20140730>.

Essentially, the Real Time Transparency Act of 2014 dictates that the already-required donor disclosures be filed, reported, and accessible much sooner. Is there really a difference in being able to see the source and dollar amount before an election compared to after? Maybe in the case of a brand new candidate running, but more often there are powerful incumbents to overcome with greater war chests. Anyone who would like to know who contributed to a candidate can log on to the FEC website now and see a list of names and a dollar amount (\$250 or greater) with a quick search. Applying some simple logic here, if officeholders like Nancy Pelosi or John Boehner are running for reelection, all of the information reformers would demand access to is already readily available on the FEC. Since Nancy Pelosi and John Boehner have been in office for quite some time, they have been able to develop an extensive and well-connected network of donors. They are big-name politicians who attract big dollar donations. One can run searches on both of them and see who has contributed to them. It is highly likely that those donors and their contribution amounts have not changed very much from one election to the next. If the decision to vote for Nancy Pelosi or John Boehner depends on the contributions they have received, what more is needed beyond the contribution history available online?

B. *JFCs versus Non-Disclosure Groups*

The use of the JFCs proves that there are wealthy donors willing to contribute the maximum at the risk of exposing their identity and donation amount. In comparing the JFCs with non-disclosure groups, by way of choosing the highest recipient of funds in each group, there is not a large difference in totals for the 2014 cycle. Coming in first for the JFCs is Boehner for Speaker Committee¹⁸² that raised a total of \$35,382,857 this cycle.¹⁸³ Coming in first for the non-disclosing outside groups was the United States Chamber of Commerce, which raised a total of \$35,464,243.¹⁸⁴ The difference is a mere \$81,486. On a larger scale, the 2014 cycle totals for all social welfare 501(c)(4) groups was approximately \$118.2 million¹⁸⁵ and the JFCs total was approximately \$191.2 million.¹⁸⁶ While this only represents a \$73 million dollar difference, it may be of concern to donors without anonymity concerns. Additionally, considering that this was only a midterm election year and not a general election year, the values for each are likely less than what can be expected in the future.

182. See *supra* Part III.D.

183. *Boehner for Speaker Committee*, *supra* note 161.

184. *2014 Outside Spending, by Group*, OPENSECRETS.ORG, http://www.opensecrets.org/outside_spending/summ.php?cycle=2014&chrt=V&disp=O&type=U (last visited Oct. 9, 2015).

185. *Outside Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/outsidespending/fes_summ.php (last visited Oct. 9, 2015).

186. *Joint Fundraising Committees*, *supra* note 162.

This approach to bringing fundraising power back to the candidates and parties has support from both sides of the aisle. Two relevant examples of this strategy include the JFCs of Senator Kay Hagan (D-NC) and Majority Leader Mitch McConnell (R-KY). Sadie Weiner, spokeswoman for Senator Kay Hagan, said, “To fight back against the record amount of outside spending against Kay, strong fundraising will be key to getting her message out to voters across North Carolina.”¹⁸⁷ As for the convenience factor of the JFCs, they are “a simple way to split the money raised from fundraisers with other members of Congress.”¹⁸⁸ Senator Hagan was up against a “\$12 million ad blitz leveled by GOP outside groups”¹⁸⁹ for the midterm elections. She helped launch seventeen JFCs “that have collectively netted more than \$1 million.”¹⁹⁰ Across the aisle, Senator Majority Leader Mitch McConnell, is a beneficiary in four JFCs “that have raised \$3.4 million between them.”¹⁹¹ The partisan line is blurring on this issue, as more candidates and incumbents from both sides see the necessity of the JFC to combat outside groups waging an information war against them, and projecting it toward constituents.

These outside groups are leveraging well-built campaigns around issues and engaging with voters. Consider, for example, Americans for Prosperity (AFP),¹⁹² an outside group that is competing against candidates and other outside groups for voter’s attention. The AFP’s make-up is similar to the national party’s. However, they differ in spending. “The organization has more than 500 paid workers in [thirty-five] states” making it one of the most sophisticated and powerful outside groups.¹⁹³ In comparison, the Republican Party had roughly 250 people in the field and 150 people in the D.C. headquarters.¹⁹⁴ The spending power by AFP far surpasses the Republican Party as well. In 2014, AFP spent over \$25 million dollars just on television ads, not including any of the other voter outreach initiatives the group uses.¹⁹⁵

187. Eliza Newlin Carney, *Costly Midterms Fuel Hundreds of Joint Fundraising Committees*, ROLL CALL (May 28, 2014, 1:59 PM), <http://blogs.rollcall.com/beltway-insiders/fundraising-campaign-committee-kay-hagan-mitch-mcconnell>.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Michael Mishak & Philip Elliott, *Americans for Prosperity Builds Political Machine*, ASSOCIATED PRESS (Oct. 11, 2014, 1:12 PM), <http://bigstory.ap.org/article/ed4b35e543da424f88dd53cbf7a6490b/americans-prosperity-builds-political-machine> (defining Americans for Prosperity as a subgroup of David and Charles Koch’s network used to advocate on issues with a focus on voter outreach and research).

193. *Id.* (alteration in brackets).

194. Philip Bump, *Americans for Prosperity May be America’s Third-Biggest Political Party*, WASH. POST (June 19, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/19/americans-for-prosperity-is-americas-third-biggest-political-party> (these numbers reflect the paid workers only, not the additional hundreds of volunteers in the field).

195. Mishak & Elliott, *supra* note 192.

Comparing figures like that, it is easy to see how parties and candidates are disadvantaged.

C. *McCutcheon Can Lead by Example Via JFCs*

The largest criticism of *McCutcheon*¹⁹⁶ is that it opens the doors for more money from wealthy donors. The concern with JFCs gaining such enormous funds is the potential for additional concentrated influence and access for mega-donors to Washington.¹⁹⁷ The second largest criticism is that JFCs will evolve into political money machines similar to the Super PAC in the form of “Super JFCs” or “Jumbo Joints.”¹⁹⁸ The reality of funding posed in *McCutcheon*’s case was, following *Citizens United* “individuals, corporations and other entities may give unlimited sums to outside groups that can spend without restriction in support of (or against) a candidate.” So why not remove the cap on overall direct contributions to candidates and committees?¹⁹⁹ Donors “of all political persuasions” are now able to “provide support to a slate of preferred candidates” through contributions to both the candidate and the national party.²⁰⁰ Essentially, this means that there will be a “larger portion of political giving by way of transparent, fully disclosed contributions” rather than via “an outside 501(c)(4) organization [that] might never be disclosed—neither the amount nor the donor.”²⁰¹

The FEC published a notice following the *McCutcheon* decision and asked whether the Commission can or should change its joint fundraising rules to avoid the formation of Super JFCs.²⁰² The rules regarding circumvention of funds between JFC members do not need to be changed in response to *McCutcheon*. As written, the current rules well regulate the contributions to JFCs. Once a donor contributes to the JFC, the funds are separated between members based on the allocation agreement, and the rules ensure that the base limits are not exceeded per member. The ability to transfer those funds between committees is essential to the strength of the party committees and candidates. Taking a step back from all of this, hypothetically, partisan donors could battle disclosure without any action by Congress by simply deciding to make their large donation to a party committee, candidate, or JFC. Essentially,

196. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

197. See generally Lee Drutman, *What the McCutcheon Decision Means*, WASH. POST (Apr. 2, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/02/what-the-mccutcheon-decision-means>.

198. Beckel, *supra* note 164.

199. Bob Biersack, *McCutcheon’s Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS.ORG (Sept. 17, 2013), <http://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why>.

200. Tim Peckinpugh & Steve Roberts, *Commentary, McCutcheon Restores Power to Congressional Campaigns*, ROLL CALL (Apr. 24, 2014, 12:27 PM), http://www.rollcall.com/news/mccutcheon_restores_power_to_congressional_campaigns_commentary-232380-1.html.

201. *Id.*

202. Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62361, 63 (proposed Oct. 17, 2014).

the JFC mechanism will become the self-correcting remedy to a portion of the disclosure problem in the current system. Encouraging fully transparent contributions in a billion-dollar industry should be embraced and not limited by any means.

To illustrate, imagine that in the next election Cody Candidate is up for re-election in Pennsylvania. He decides to set up a JFC to assist his campaign efforts, the Cody Victory Fund. The members include his campaign, the National Republican Congressional Committee, the Republican Party of Pennsylvania, South Carolina, Kentucky, and North Dakota, along with his leadership PAC, and five additional PACs. In total, that JFC can raise \$107,600 from a single donor. The representative is the Cody Victory Fund committee. Each member creates an allocation agreement with the representative, according to an agreed upon formula for the distribution of the funds and costs. Dee Donor is a mega-donor who contributes to Republicans and various issue oriented groups. Dee Donor likes what Cody Candidate has done so far in office. He supports many of the issues she cares about, has a voting record to match what his constituents want, and he faces a tough race ahead against his challenger. Dee Donor cuts a check for \$107,600 to the Cody Victory Fund. That check is then distributed between each of the members according to the allocation agreement.

By contributing the total amount possible, Dee Donor has met her base limit contribution to each of those committee members and cannot contribute any additional money to those committees. She may still contribute more money in the election, but it will have to be to other entities. The Cody Victory Fund will submit its report to the FEC and include that Dee Donor was a contributor who gave \$107,600. From there, the party committees that are in the JFC are permitted to transfer funds between each other. With no major races occurring in South Carolina, Kentucky, or North Dakota, those state parties do not need all the money they have received from being a part of the Cody Victory Fund. Depending on the allocation agreement between these members, they may transfer the funds distributed to the Republican Party of Pennsylvania, that supports Cody Candidate. This will assist the party committee with advertising and get-out-the-vote initiatives to combat with the many Super PACs and dark money groups, which spend millions of dollars in attack ads against Cody Candidate.

Critics and the Supreme Court have raised the issue of this type of circumvention of funds between the party committees.²⁰³ Once Dee Donor gives her check to the Cody Victory Fund, her association with her contribution ends. What those members do with the distribution they receive from the JFC is up to them. The transfer of funds from members to other political entities is not a circumvention of base limits, because the source of

203. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1457–58 (2014).

the funds is from the member and not traceable back to each individual donor. Dee Donor does not know where her contribution goes after the check is given to the Cody Victory Fund—unless she specifically indicates what members are allowed to receive a portion of the funds. It is impossible to track that type of information, and a transfer hardly creates the appearance of corruption because the initial source has been identified and the money (subject to regulations requiring the most transparency) has since been diluted to various groups. Alternatively, without the Cody Victory Fund, Dee Donor would have been able to contribute to Cody Candidate alone, each party alone, and to outside groups. The \$107,400 that she contributed could have gone to a 501(c)(4) organization and never have been disclosed. If there were a larger JFC offered for Dee Donor to contribute to, she would have likely given a larger check. If there were a JFC with all candidates and parties linked together, Dee Donor could have given a check for \$3.6 million, which would have put her at her base limit for each member, and her contribution subject to full disclosure and dilution. A donation of \$3.6 million is rather sizeable. This would leave Dee Donor willing to contribute less and would put less money into an unaccounted 501(c)(4) dark money scheme.

In theory, there may be mega-donors who are willing to contribute to the party committees and candidates at the cost of full disclosure. They are likely supporting a party because of the ideas and platform central to the party's existence. If a donor is willing to contribute to a JFC at that risk, and other donors begin to take notice and flock towards making JFC contributions, they could set the tone that anonymity is neither necessary nor desirable to hide behind anymore. In time, the case for disclosure could be made, but not now. After another election cycle, another push for the Real Time Transparency Act could be made, likely with amended language. Why wait? The more time the idea of fellow mega-donors willingly disclosing themselves through JFCs has to spread, the more bearable removing non-disclosure from other groups will be for other mega-donors.

As for outside spending groups, specifically the 501(c)(4) groups, which remain completely undisclosed and do not advocate for or against a specific candidate, do not expect a change soon. Donors and mega-donors have given these groups unprecedented amounts of money, for the most part due to shared personal beliefs and values. The cloak of confidentiality, that comes with choosing to put your money behind one of these groups, is an additional perk and benefit of advocating for issues dear to the contributor.

For the proponents of reform who demand disclosure so that the American citizens can arm themselves with all the information needed to cast a vote, donors are merely hiding behind issues and supporting candidates who value the same ideals. If the donor identity is revealed and known, is the proponent casting his vote based on the candidate and issue or the donor? The voter can be influenced on an issue, and the voter should be exposed to advocacy for that issue, in an attempt to persuade the voter to choose a candidate who is or is not

on the same page as them for that issue. By throwing the identity of the donors into the mix, voters will then know that Person X contributed, \$150,000 to this candidate, and the issue becomes more complex. The voter will no longer simply be voting based on the issues or the candidate, but also on the third parties making this possible. The appearance of corruption, on its face, is greater if we associate a candidate with his donor, rather than associating a candidate with an advocacy group for issues the candidate supports. The value of a donor's anonymity is priceless. The association with a party and candidate could be more detrimental than association with a group that supports free markets for mega-donors concerned about privacy and backlash toward themselves, their families, or their companies. Allowing the JFC model of fundraising to work itself out in the next cycle, namely, one that is a general election, will not only provide indicators of what mega-donors are willing to do but also indicate the effect of the *McCutcheon* decision and proving whether or not some degree of power has been restored to the parties.

D. *Voluntary Disclosure—Why Donors Do It*

A relevant example to support the theory of voluntary self-disclosure that is likely to occur under *McCutcheon*²⁰⁴ is United States companies who have taken the lead in creating greater transparency and accountability about their influence on the American political system. The Center for Political Accountability-Zicklin Index (CPA-Zicklin Index) profiles the top companies in the S&P 500 Index and their policies on political spending disclosure.²⁰⁵ These businesses have increasingly shown “they want to conduct political activity in the open, where shareholders, directors and managers all can assess the risks and benefits of a company’s political spending.”²⁰⁶ These companies are among those “leading the way in adopting disclosure voluntarily because they understand the perils of secret political money.”²⁰⁷ Companies have weighed the risk of providing such transparency to the public versus the potential damage to their reputation; for politicians to shake down a company; and potential chance that a company will lose control over an “outsourced” payment that ends up supporting political activity in conflict with the company’s values or business objectives.²⁰⁸ Hardly dismissive is the fact that

204. See *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

205. *The 2014 CPA-Zicklin Index of Corporate Political Disclosure and Accountability*, CTR. FOR POL. ACCOUNTABILITY, 4 (Sept. 24, 2014), <http://www.politicalaccountability.net/index.php?ht=a/GetDocumentAction/i/8642> [hereinafter *The 2014 CPA-Zicklin Index*].

206. Bruce F. Freed & Charles E.M. Kolb, *Bruce F. Freed and Charles E.M. Kolb: U.S. Companies Shine Sunlight On ‘Dark Money’*, WASH. POST (Dec. 29, 2014), http://www.washingtonpost.com/opinions/bruce-f-freed-and-charles-em-kolb-us-companies-shine-sunlight-on-dark-money/2014/12/29/f46da0508d25-11e4-9e8d-0c687bc18da4_story.html.

207. *Id.*

208. *The 2014 CPA-Zicklin Index*, *supra* note 205, at 12.

all of the undisclosed political funding by companies “threatens market openness,” which, those disciplined in economics know, is a “prerequisite for a dynamic growing economy.”²⁰⁹

Of the companies included in the CPA-Zicklin Index, 128 have adopted “the political disclosure and accountability model proposed by the CPA and its shareholder partners.”²¹⁰ Many other companies have adopted similar policies voluntarily, without being engaged by their shareholders or shareholder agreements.²¹¹ Of the 299 companies surveyed in the 2014 CPA-Zicklin Index, forty-four percent disclosed some information about contributions to candidates, parties, and committees; almost forty-three percent disclosed some information about contributions to 527 organizations; forty-three percent disclosed information about payments to trade associations; forty percent disclosed “information about their payments to intervene in ballot measures”; twenty-seven percent disclosed information about independent expenditures; and twenty-four percent disclosed some information about payments to 501(c)(4) organizations.²¹² These leading companies have “expanded the scope of their political spending disclosure and accountability” over the years since the CPA-Zicklin Index began collecting data in 2003.²¹³ Now, these leading companies are putting pressure on and thus incentivising other companies to follow suit. The 2014 CPA-Zicklin Index has shown “a significant [increase in the] number of publicly held companies voluntarily turning to transparency and accountability practices for their political spending without shareholder engagement or shareholder agreements.”²¹⁴

The effect of *McCutcheon*²¹⁵ will not influence companies and their contributions to political organizations. It was *Citizens United*²¹⁶ that brought on the steady increase of corporate money and allowed corporations to decide what to do with their treasury funds to influence federal elections.²¹⁷ However, the CPA-Zicklin Index provides an analysis of companies, and based on the recent campaign finance climate of “hidden spending” and “secret conduits” for contributions, how they respond to the need for disclosure.²¹⁸ The willingness of these companies to voluntarily disclose their policies on political spending is one way to ease individuals into the idea of disclosing themselves as well. Companies would be more likely to disclose their

209. *Id.*

210. *Id.* at 23.

211. *Id.*

212. *Id.* at 16–17.

213. *Id.* at 10, 14.

214. *Id.* at 14, 23.

215. *See* *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

216. *See* *Citizens United v. FEC*, 558 U.S. 310 (2010).

217. *The 2014 CPA-Zicklin Index*, *supra* note 205, at 11.

218. *Id.* at 12.

information, in order to avoid any backlash and to maintain a positive image. More companies should provide more transparency in such political contributions. However, the benefit here is that there is a functional model developing that provides “the kind of governance mechanism that the Supreme Court has suggested as an antidote to political corruption.”²¹⁹ As evidenced by the increasing number of companies added to the CPA-Zicklin Index each year, the number of improved rankings, and the voluntary participation of these companies, this model works.²²⁰

As they flood the campaign system with millions of dollars, mega-donor individuals become less willing to disclose their identities.²²¹ That is not to say that they will forever remain hidden behind their ‘dark money’ scheme. The Koch brothers, Charles and David, possibly the most well-known figures in the campaign finance world, have amassed a political network essentially capable of raising and funneling money through just about every type of organization available to contributors.²²² For the first time, the Koch brothers have created a Super PAC capable of generating specific political ads supporting particular candidates rather than their typical issue-oriented ads used in prior years.²²³ The creation of this Super PAC, the Freedom Partners Action Fund, has been successful with donors and quickly surpassed its fundraising goals for the 2014-midterm elections.²²⁴ The catch with setting up this type of organization within the Koch network is that all donors would be publicly identified as contributors to the Super PAC. It is a common misconception that the Koch brothers are the sole financiers of their network, yet there are hundreds of donors involved in the organization.²²⁵ From the Freedom Partners Action Fund’s establishment in June through the end of September in 2014, “roughly 650 donors combined to contribute [] more than \$15 million” to the Super PAC.²²⁶ Donors to this Super PAC have even come

219. *Id.* at 12–13.

220. *Id.* at 14.

221. See generally Kenneth P. Vogel, *Big Money Breaks Out*, POLITICO (Dec. 29, 2014, 5:32 AM), <http://www.politico.com/story/2014/12/top-political-donors-113833>.

222. See Communications, *The Koch Network: A Cartological Guide*, OPENSECRETS.ORG (Jan. 7, 2014), <http://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide>; see also Matea Gold, *Koch-Backed Political Network, Built to Shield Donors, Raised \$400 Million in 2012 Elections*, WASH. POST (Jan. 5, 2014), http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html.

223. Darren Goode & Kenneth P. Vogel, *Kochs Launch New Super PAC*, POLITICO (June 16, 2014, 8:20 PM), <http://www.politico.com/story/2014/06/2014-elections-koch-brothers-super-pac-107926>.

224. Kenneth P. Vogel & Mike Allen, *Koch Donors Uncloaked*, POLITICO (Oct. 14, 2014, 5:04 AM), <http://www.politico.com/story/2014/10/koch-donors-111846.html>.

225. See generally Nicholas Confessore, *Koch Brothers’ Budget of \$889 Million for 2016 Is On Par With Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>.

226. Vogel & Allen, *supra* note 224.

forward in support of the Koch brothers and explained why they contributed to the Super PAC risking disclosure of their identity.

Stanley Hubbard, a billionaire Minnesota media mogul, urged fellow donors, including the Koch brothers “to become more open with their views and political spending.”²²⁷ He stated, “[Y]ou should stand up for what you believe in and hope that others will follow, or [they will] at least talk to you about it. . . . We have never been people who are afraid to say here [is] what we believe in.”²²⁸ Ronnie Cameron, donated \$1 million to the Freedom Partners Action Fund.²²⁹ Why? He “decided that it was more important to support it than it was to maintain [his] privacy.”²³⁰ Although, he did admit to carefully considering the effects of the publicity balanced with his desire to keep his name out of things.²³¹ To show solidarity with the Koch brothers, Cameron said, “[t]here are hundreds of people like me that are joining what they do. And their part is a great part but the biggest part they play is kind of bringing the people together and educating them as to [what is] going on and what the need is.”²³² This strategic, yet open, allocation of funds has proven to effectuate key political wins. These donors support and are genuinely engaged in the cause wholeheartedly. These mega donors are rich, but, contrary to popular belief, they are not stupid. “They will not irrationally give money to candidates they [do not] know, or [do not] agree with or who [do not] have a chance of winning or who [do not] need the money or who may not even be in contested races.”²³³

CONCLUSION

Money will never part from elections and will remain the primary vehicle required for any successful campaign. Campaign finance reform efforts will never end. America will eventually enter a juncture where any further reform would be so detrimental that it is better to propose and pass legislation in Congress that has effective and fair substance, rather than taking another stab at what remains of the system. A Super JFC could, in the not so distant future, make the case for dismantling anti-disclosure in campaign finance. Congress could start slow and pass the Real Time Transparency Act without much opposition. Once the party committees and candidates experienced greater cash flow to their individual efforts, Congress would likely be less deterred to

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Jan Baran, *Symposium: McCutcheon and the Future of Campaign Finance Regulation*, SCOTUS BLOG (Apr. 4, 2014, 2:59 PM), <http://www.scotusblog.com/2014/04/symposium-mccutcheon-and-the-future-of-campaign-finance-regulation>.

expose dark money because of the lightened dependency factor. Allowing JFCs to expand and transfer money between committees, subject to the most transparency and regulation, is essential to restoring the public's trust in our political system—bringing constituents to the center, promoting moderate and electable candidates with high accountability to the party values.

It is also worth mentioning that, based on party lines, Republicans typically favor deregulating campaign finance for the sake of freedom of political speech. Conversely, Democrats typically favor attempting to restore rules to protect the people. In the 2012 general election, candidate Mitt Romney's overall spending tab was \$1,238,097,161 and President Barack Obama's overall spending tab was \$1,107,114,702; the difference, \$130,982,459.²³⁴ The end result was the candidate with the larger war chest of money at his disposal was the losing candidate. So, does more money really mean success in campaigns? It is hard to tell. However, what does guarantee success in a bid for office is voter turnout.

One of the most logical sentences in the *Citizens United* opinion was “[t]he fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials.”²³⁵ This underscored the premise that the power of vote is greater than the power of contribution money. Clearly, the Supreme Court has acknowledged that the original, most powerful, and essential way to get results in an election is getting voters to the polls. Would it really matter if voters knew the identity of the candidate's sugar daddy? More importantly, if a voter should have instant access to the identities of those who are financing these campaigns, he should equally have the audacity to research his candidates before voting to know what he really stands for, disclosure or not, instead of relying on advertisements to bear the truth. America does not have a “Koch Problem.” In typical American fashion, it is easier for voters to blame their ignorance on having that “problem” rather than actually being responsible and informed voters above the fray. The bottom line is that candidates win when citizens vote, while money only gets the horse to the race.

234. 2012 Presidential Race, OPENSECRETS.ORG, <http://www.opensecrets.org/pres12> (last visited Oct. 11, 2015).

235. *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).