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Put Your Mouth Where Your Money Is: How Political Organizations Profiteer Off the First Amendment and What Congress Should Do About It

*Philip A. Thompson**

INTRODUCTION

Political organizations, such as political actions committees (PAC), super PACs, and 501(c)s raise and spend money to advocate for or against issues and candidates. These organizations are regulated subject to the First Amendment's speech clause and certain tax laws. Recently, these organizations—especially super PACs and 501(c)s—have become significant outlets for core political speech. For instance, in the 2010 election cycle, “[seventy-nine] groups registered as super PACs spent a total of approximately \$90.4 million.”¹ In the 2012 election cycle, “1,310 groups organized as Super PACs have reported total receipts of \$828,224,700 and total independent expenditures of \$609,417,654”²

Americans remain divided over how these organizations influence elections. “For those advocating their use, super PACs represent freedom for individuals, corporations, and unions to contribute as much as they wish for independent expenditures that advocate election or defeat of federal candidates.”³ At the same time, a majority of Americans believe the amount of money spent on elections is not money well spent. According to a 2012 Reuters poll, “seventy-five percent of Americans feel there is too much money in politics.”⁴ Seventy-six

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1. R. Sam Garrett, CONG. RESEARCH SERV., R42042, SUPER PACS IN FEDERAL ELECTIONS: OVERVIEW AND ISSUES FOR CONGRESS 1, 13 (Apr. 4, 2013), *available at* <http://www.fas.org/sgp/crs/misc/R42042.pdf>.

2. *Super PACs*, OPENSECRETS.ORG (July 23, 2013), <http://www.opensecrets.org/pacs/superpacs.php>.

3. Garrett, *supra* note 1, at Summary.

4. Patricia Zengerle, *Most Americans Think Campaign Money Aids Rich*, REUTERS, (May 24, 2012, 7:54 PM), <http://www.reuters.com/article/2012/05/24/us-usa-campaign-spending-idUSBRE84N1RB20120524>.

percent of Americans think the amount of money in politics gives wealthy people a disproportionate influence.⁵ In a 2013 Huffington Post poll, sixty-six percent of those polled believed that the money independent groups, corporations, and unions spent on election advertising causes political corruption.⁶

As these groups have proliferated, much of the literature and calls for reform have focused on the ability of these groups to raise unlimited amounts of money. Generally, reformers emphasize corruption and coordination issues, the need for disclosure, and the disproportionate influence wealthy individuals and corporations have on the election system.⁷

This Note focuses on how these organizations spend the money they raise. Although some of the more successful super PACs, such as Restore Our Future,⁸ focus on keeping overhead and other indirectly speech-related aspects of their group to a minimum, a minority of groups have used the contributions they have raised irresponsibly or have shanghaied their donors altogether. Acting on their own self-interests at the expense of their donors, the leaders of these organizations have spent money raised for political purposes on excessive salaries, swanky travel expenditures, and self-dealing consulting schemes.⁹ This Note suggests legislation consistent with current Supreme Court jurisprudence to

5. *Id.*

6. Huffington Post & YouGov, *Omnibus Poll*, HUFFINGTON POST (Feb. 2013), http://big.assets.huffingtonpost.com/cftoplines_split1.pdf.

7. See, e.g., Lincoln Caplan, *Can State Laws Cohabit With Citizens United?*, N.Y. TIMES (May 26, 2012), <http://www.nytimes.com/2012/05/27/opinion/Sunday/can-state-laws-cohabit-with-citizens-united.html> (discussing arguments filed in litigation over state election law).

8. Restore Our Future backed Governor Mitt Romney's 2012 presidential bid. While he did not win the presidency, the PAC was successful because of the enormous amount of money it raised, the significance of the candidate it supported, and the influence it had on the 2012 presidential election. Restore Our Future spent just 6% of the \$153,645,270 it raised on operating expenses. See Candidate and Committee Viewer: Details for Committee ID : C00490045, http://fec.gov/finance/disclosure/candcmte_info.shtml (In "Partial Name, Partial ID or Complete Image Number" search box, search for "Restore Our Future"; then select the PAC's hyperlink; finally, in the "Two-Year Period" box select "2012.>").

9. See *infra* text accompanying notes 121–169.

combat the ability of the people who run political organizations to profit unjustly on individual donors' First Amendment activities.¹⁰

Analysis proceeds in three parts. Part I explains relevant campaign finance law, examines the lack of independent expenditure-only group regulation, and outlines the difficulty in regulating such organizations. Part II details how PAC executives have and, under current law, still can take advantage of donors, and examines why this is a bad thing. Part III suggests legislation consistent with current Supreme Court jurisprudence that Congress should adopt to prevent PAC executives from becoming First Amendment profiteers.

I. CAMPAIGN FINANCE LAWS, THE DIFFICULTY IN REGULATING PACS, AND WHAT WE CAN LEARN FROM CHARITY REGULATIONS

A. Campaign Finance and the First Amendment

“[M]oney, like water, will always find an outlet.”¹¹

—Justice Sandra Day O'Connor

1. *Buckley v. Valeo*, Money as Speech, and the Campaign Finance Framework

In 1974, Congress passed amendments to the Federal Election Campaign Act of 1971.¹² Among other provisions, the amendments capped: the amount of money an individual could contribute to a candidate or a political party; the amount of money a candidate could spend on a campaign; and the amount of money an individual could spend to influence the election or defeat of a specific candidate or to

10. I am not suggesting that such political organization activity is an unconstitutional infringement of donors' First Amendment guarantees. The political organizations detailed in this Note are not government entities. While most campaign reform literature focuses on how the government should be able to limit the money that goes into financing campaigns, this Note focuses on reforming how political organizations spend the money they do raise.

11. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 224 (2003).

12. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

advocate an issue.¹³ Candidates for federal office, political parties, and other organizations sought a declaratory judgment, arguing “that the major provisions of the Act were unconstitutional.” They also sought an injunction against enforcement of those provisions.¹⁴

On appeal, the Supreme Court did not explicitly determine that money *is* speech; however, it concluded that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money.”¹⁵ Limiting how much money “a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁶ Essentially, the Court established that money should be treated as core speech under the First Amendment because it is tied directly to fundamental First Amendment concerns: public political debate.

Further, the Court held that the government may not limit an individual’s independent political expenditures because they are equivalent to core political speech; however, it may limit how much an individual may contribute directly to a candidate’s campaign.¹⁷ The Court’s reasoning centered on two dichotomies. The first dichotomy

13. *Id.* at 7. 2 U.S.C. § 431(8)(A) (2002) states that “contribution” includes “(i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office”; or “(ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.” 2 U.S.C. § 431(9)(A) (2002) states that “expenditure” includes “(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”; and “(ii) a written contract, promise, or agreement to make an expenditure.”

14. *Buckley*, 424 U.S. at 8–9.

15. *Id.* at 19. The Supreme Court rejected the D.C. Circuit’s holding that spending money on elections is conduct. *Id.* at 17. The Court also rejected the argument that limiting campaign spending is a reasonable time, place, and manner restriction—that is, a restriction that does not discriminate among speakers or ideas and furthers “an important governmental interest unrelated to the restriction of communication.” *Id.* at 18 (citation omitted). The Court reasoned that in addition to a time, place, and manner regulation, the Act’s “contribution and expenditure limitations impose direct quantity restrictions on political communication and association . . .” *Id.*

16. *Id.* at 19.

17. *Id.* at 21.

differentiates contributions from expenditures. The second dichotomy distinguishes coordinated expenditures from uncoordinated expenditures.

In the first dichotomy, the Court reasoned “that contributions proceed from a donor to a candidate, while expenditures involve direct efforts to influence the voters”¹⁸ The Court gave more deference to the legislature’s contribution limits because contribution limits impose only a marginal restriction on a contributor’s expressive ability: the expressive value of a contribution derives from the “undifferentiated, symbolic act of contributing.”¹⁹ Contributions implicate the First Amendment rights of association, not expression: “the transformation of contributions into political debate involves speech by someone other than the contributor.”²⁰ Expenditures, on the other hand, concern direct political advocacy.²¹

In addition, the Court determined that contributions pose the danger of corruption or the appearance of corruption.²² “Corruption” refers to quid pro quo bribery.²³ “[T]he appearance of corruption” refers to the inherent opportunities for abuse that large contributions present.²⁴ The Court held that, in order to promote confidence in the political system, the government may rid the appearance of what the people perceive as undue influence.²⁵ The Court noted that the expenditure limitations were vague and posed no such corruption issues because, by definition, they are not coordinated with a political candidate’s expenditures.²⁶ That leads to the second dichotomy.

18. Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 88 (2013).

19. *Buckley*, 424 U.S. at 21. Essentially, contributing \$10 to a campaign is equivalent to contributing \$1,000 to a campaign. Either contribution is equivalent to giving a candidate a public pat on the back.

20. *Id.*

21. *See id.* at 22.

22. *Id.* at 26–27.

23. *Id.* at 25–26.

24. *Id.* at 27.

25. *Id.* at 27. It is difficult to comprehend how the “appearance of corruption” could be a manageable standard: how something appears to the People as a whole is fairly impossible to gauge.

26. *Id.* at 46–47.

The second dichotomy distinguishes coordinated expenditures from independent expenditures.²⁷ “[P]ayment for a communication is ‘coordinated’ if it is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee or their agents, or a political party committee or its agents.”²⁸ The Court concluded that coordinated expenditures essentially are “disguised contributions” that pose the corruption danger.²⁹ However, “[t]he absence of prearrangement and coordination of an expenditure with the candidate or his agent . . . alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”³⁰ Hence, independent expenditures are highly protected under the First Amendment.

2. *Citizens United v. Federal Election Committee* and *SpeechNow.org v. Federal Election Commission*

Even after *Buckley*, corporations remained prohibited from using their general treasury funds to make independent expenditures. In *Austin v. Michigan Chamber of Commerce*,³¹ the Supreme Court held that a state has a compelling interest in limiting the “corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form” because they have “little or no correlation to the public’s support for the corporation’s political ideas.”³²

In 2010, *Citizens United v. Federal Election Committee*³³ overturned a section of the Bipartisan Campaign Reform Act that

27. Under 2 U.S.C. § 431(17) (2002), “independent expenditure” means an expenditure by a person “(A) expressly advocating the election or defeat of a clearly identified candidate” and “(B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.”

28. *Coordinated Communications and Independent Expenditures*, “*Coordinated Communications*,” FEDERAL ELECTION COMMISSION, <http://www.fec.gov/pages/brochures/indexp.shtml#anchor55092> (last updated January 2013) (citing 11 C.F.R. § 109.21 (2011)).

29. *Buckley*, 424 U.S. at 47.

30. *Id.*

31. 494 U.S. 652 (1990).

32. *Id.* at 660.

33. 558 U.S. 310 (2010).

prohibited corporations from spending money from their treasury funds for express political advocacy.³⁴ The Court rejected *Austin* and its anti-distortion rationale. Justice Kennedy determined that the First Amendment does not allow “restrictions distinguishing among different speakers, allowing speech by some but not others.”³⁵ Further, the Court held that as a matter of law, independent expenditures do not corrupt or create the appearance of corruption.³⁶ It explained that “[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.”³⁷

Shortly after the Supreme Court decided *Citizens United*, in *SpeechNow.org v. Federal Election Commission*,³⁸ the D.C. Circuit held that the government cannot cap contributions to groups that only advocate through independent expenditures, as opposed to a group that advocates through expenditures and contributions.³⁹ By definition, these groups do not coordinate with a candidate.⁴⁰ Because independent expenditures, as a matter of law, do not corrupt or create the appearance of corruption,⁴¹ the court held it follows that “the government has no anti-corruption interest in limiting contributions to an independent expenditure group”⁴²

As a result of *Citizens United* and *SpeechNow.org*, “corruption” or its appearance are the only recognized interests the government can put forth to justify a campaign finance regulation. In *Citizens United*, the Court severely restricted even this government interest: it found that corruption does not apply to groups that do not coordinate with a candidate.⁴³ As a result, so long as a political organization does not coordinate with a candidate, it can raise and spend as much money as it wants to advocate for or against a candidate or an issue (hence, the

34. *Id.* at 320.

35. *Id.* at 340.

36. *Id.* at 357.

37. *Id.* at 360.

38. 599 F.3d 686 (D.C. Cir. 2010).

39. *Id.* at 692–93.

40. *Id.* at 693.

41. *Id.* at 694.

42. *Id.* at 695.

43. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 360–61 (2010).

modifier, “super” in super PAC). A corporation can now donate unlimited amounts of money from their treasury funds to PACs, including its own non-connected PAC.

B. An Overview of Political Organizations

1. PACs in General

A political organization “is a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures”⁴⁴ to influence or attempt to influence “the selection, nomination, election, or appointment of any individual to public office or office in a political organization (the selection process).”⁴⁵ People, corporations, labor organizations, local and federal political parties, candidates, and incumbent politicians may all start PACs.⁴⁶ Among other distinctions, the Federal Election Commission (FEC) categorizes PACs into (1) authorized versus unauthorized PACs; (2) Separate Segregated Funds (SSFs) versus non-connected PACs; (2) and (3) independent expenditure-only groups versus groups that donate to candidates’ campaigns.

An “authorized committee” is a committee that a candidate allows to accept contributions and make expenditures on the candidate’s behalf.⁴⁷ An “unauthorized committee” is a committee that accepts contributions and makes expenditures on behalf of a candidate without the candidate’s rubber stamp of approval.⁴⁸

Corporations (profit or nonprofit), labor organizations, and incorporated membership organizations may sponsor an SSF.⁴⁹ An SSF is a PAC that may only solicit funds from a select class of individuals—those connected to the corporation or labor organization.⁵⁰ For example,

44. 26 C.F.R. § 1.527-2(a) (2012).

45. 26 C.F.R. § 1.527-2(c) (2012).

46. *See* 11 C.F.R. § 100.5 (2011).

47. 11 C.F.R. § 100.5(f)(1) (2011).

48. *Id.* at § 100.5(f)(2).

49. *Id.* at § 100.6.

50. *SSFs and Nonconnected PACs*, FEDERAL ELECTION COMMISSION, (May 2008), <http://www.fec.gov/pages/brochures/ssfvnonconnected.shtml>.

a corporate SSF only may solicit donations from shareholders, board members, etc.⁵¹ The connected corporation or organization may pay for all the SSF's administrative costs.⁵²

A non-connected PAC, on the other hand, may solicit funds from the general public, but must pay all of its administrative costs from the funds that the PAC raises.⁵³ The non-connected PAC must report these administrative costs to the FEC.⁵⁴

While the FEC does not limit how much a PAC can spend, it does limit how much money an individual can donate to a PAC that directly makes contributions to a candidate's campaign.⁵⁵ However, since 2010, organizations that only make expenditures independent of a candidate's campaign may accept unlimited contributions.⁵⁶ Such organizations are called independent expenditure-only groups. By definition, independent expenditure-only groups may not make contributions to a candidate's campaign, but they may raise and spend unlimited amounts of money.⁵⁷ Certain section 527 committees, certain 501(c) committees, and super PACs are independent-expenditure groups.

2. 527s, Certain 501(c)s, and Super PACs

Technically, all political committees are 527s for tax purposes.⁵⁸ However, 527s generally refer to outside spending groups that need not register with the FEC because, although they are electoral organizations, they do not engage in express advocacy.⁵⁹ That is, these organizations do

51. 11 C.F.R. § 114.5(g)(1) (2012).

52. *See id.* at § 114.1(a)(2)(iii) (2012) (exempting administrative expenses as a PAC "expenditure," and thus allowing connected organizations to pay for SSF administrative costs).

53. *See SSFs and Nonconnected PACs*, *supra* note 50.

54. *Id.*

55. *See Quick Answers to General Questions: How much can I contribute?*, FEDERAL ELECTION COMMISSION, http://www.fec.gov/ans/answers_general.shtml (last visited Nov. 22, 2013).

56. *See supra* text accompanying note 39.

57. *See Coordinated Communications and Independent Expenditures*, *supra* note 28.

58. Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1648 (2012). "527" refers to a provision in the Internal Revenue Code. *Id.*

59. *Id.* Although they have been around for much longer, 527 groups became a much bigger player in campaign finance after the Bipartisan Campaign Reform Act

not expressly call for the election or defeat of a clearly identified federal candidate.⁶⁰ Donors can give 527s unlimited amounts of money, but 527s must disclose to the IRS those donors who give more than \$200.⁶¹

501(c)⁶² organizations—in particular, 501(c)(4), 501(c)(5), and 501(c)(6)⁶³ organizations—include civic leagues, social welfare organizations, labor unions, trade associations, and chambers of commerce that may raise and spend unlimited amounts of money on elections provided that (1) raising and spending electoral funds is not their primary purpose and (2) political spending is not their primary expense.⁶⁴ These organizations must disclose to the IRS those donors who give more than \$5,000 in a year, but that information is not made public.⁶⁵

Super PACs are organizations that can raise and spend unlimited amounts of money to advocate for candidates or issues.⁶⁶ Super PACs may engage in electioneering, as opposed to 527 groups; however, super

of 2002 (BCRA). Richard Briffault, *The 527 Problem . . . And the Buckley Problem*, 73 GEO. WASH. L. REV. 949, 950 (2005). The BCRA prohibited national parties from raising “soft money.” See *id.* Soft money is money used for “party building activities,” such as get-out-the-vote drives and generic advertising. CAMPAIGN FINANCE: OVERVIEW, PART 4: SOFT MONEY—A LOOK AT THE LOOPHOLES, <http://www.washingtonpost.com/wp-srv/politics/special/campfin/intro4.htm> (last visited Feb. 22, 2014).

60. Calling for the election or defeat of a clearly identified candidate refers only “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003) (calling for the election or defeat of a clearly identified candidate refers only “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”).

61. See Briffault, *supra* note 58, at 1648.

62. “501(c)” refers to a provision in the Internal Revenue Code.

63. Not all 501(c) organizations may raise and spend money on elections. See 26 U.S.C. § 501(c) (2012). For example, 501(c)(3) organizations are barred from such political activity. *Id.*

64. See Briffault, *supra* note 58, at 1648–49.

65. *Id.* at 1649 (citing I.R.C. §§ 6033, 6104 (2006)).

66. See *id.* at 1646–47.

PACs must register with the FEC and disclose to the FEC their donors and expenditures.⁶⁷

To avoid having to disclose its donors 501(c) organizations have worked in tandem with super PACs.⁶⁸ For instance, a donor can contribute money to a 501(c) organization and the 501(c) organization can then contribute money to a super PAC.⁶⁹

C. The Particular Lack of Super PAC Regulations

Despite the continued call for campaign finance reform, this area of law remains fairly unregulated. Congress has not enacted any legislation explicitly concerning super PACs,⁷⁰ and the FEC has not approved any new regulations concerning super PACs.⁷¹

The laws that do exist in this area apply to all PACs, not super PACs alone. For instance, under the current statutes, a PAC must file a statement of organization with the FEC.⁷² It must appoint a treasurer.⁷³ The treasurer must keep the PAC's funds separate from the treasurer's personal accounts.⁷⁴ The treasurer must also track and report each individual who donates more than \$50 at a time or \$200 in a calendar year.⁷⁵ The PAC must report each disbursement over \$200 that it makes in certain categories,⁷⁶ along with the purpose of each disbursement. Lastly, a PAC must report each of its independent expenditures.⁷⁷

The FEC's guidance regarding super PACs is limited to six advisory opinions.⁷⁸ In July 2010, the FEC issued AO 2010-09 and AO

67. *Id.* at 1649.

68. *See, e.g.,* Dan Glaun, *Super PACs Utilize Secretive Nonprofits to Hide Funding in Pennsylvania, Utah*, <http://www.opensecrets.org/news/2012/08/super-pacs-funneling-money-through.html> (Aug. 13, 2012).

69. *See id.*

70. *See* Garrett, *supra* note 1, at 7.

71. *Id.*

72. 2 U.S.C. § 433(a) (2012).

73. *Id.* at § 432(a).

74. *Id.* at § 432(b)(3).

75. *Id.* at §§ 432(c)(2), 432(c)(3) (tracking); § 434(a)(1) (reporting).

76. *Id.* at § 434(b)(4), 434(b)(5).

77. 11 C.F.R. § 104.4 (2011).

78. Advisory opinions do not bear the authority of laws: they are mere guidelines.

2010-11, which determined that a group could solicit unlimited individual contributions for independent expenditures.⁷⁹ In June 2011, the FEC determined in AO 2011-12 that federal candidates could solicit contributions for super PACs within the regular PAC restrictions.⁸⁰ AO 2011-11 further announced the determination that Comedy Central's Colbert Report host Stephen Colbert could promote his super PAC on his television show without treating its distributor, Viacom, as a contributor.⁸¹ In AO 2011-23, the FEC failed to answer the question whether super PACs could air ads containing candidates only advocating for issues, as opposed to advocating for the election or defeat of a candidate.⁸² Finally, in AO 2011-21, the FEC determined that leadership PACs⁸³ may not function as super PACs.⁸⁴

Regulations on how political organizations spend money are also lacking. Political organizations spend money to influence or attempt to influence "the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed."⁸⁵ Money spent in this manner is exempt from taxation if it is considered a deduction under 26 U.S.C. § 162(a).⁸⁶ Section 162(a) deductions encompass "a reasonable allowance for salaries or other compensation for personal services actually rendered;"⁸⁷ "traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business;"⁸⁸ and "rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or

79. *Advisory Opinions*, 36(8) FED. ELECTION COMM'N RECORD 1, 1-2, 4 (Aug. 2010), available at <http://www.fec.gov/pdf/record/2010/aug10.pdf>.

80. *Advisory Opinions*, 37(8) FED. ELECTION COMM'N RECORD 1, 3-4 (Aug. 2011), available at <http://www.fec.gov/pdf/record/2011/Aug11.pdf>.

81. Garrett, *supra* note 1, at 9.

82. *Id.* at 9-10.

83. *See infra* note 121.

84. *Id.* at 10.

85. 26 U.S.C. § 527(e)(2) (2012).

86. *Id.*

87. 26 U.S.C. § 162(a)(1) (2012).

88. § 162(a)(2).

business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.”⁸⁹

The Code of Federal Regulations provides some examples of how these statutes are applied.⁹⁰ However, none of them addresses what, for instance, a “reasonable” allowance for salary is, what constitutes a “lavish” travel expense, or how political organizations can use consulting companies to profiteer off the First Amendment. The lack of guidance of how expense regulations should be applied makes it easier for PACs to spend money on frivolous things.

D. We Can Learn from Charities

The history of charity law provides further examples of how the First Amendment bars the government from regulating similar organizations. While charities are governed differently from political organizations such as super PACs, they are also nonprofit organizations that receive tax exemptions.⁹¹

*Village of Schaumburg v. Citizens for a Better Environment*⁹² and subsequent cases⁹³ demonstrate both the significance of administrative and overhead costs to charitable organizations similar to political organizations and the difficulty in regulating such costs. In *Schaumburg*, on First Amendment grounds, the Supreme Court struck down a town ordinance that required charitable institutions to use 75% of the funds they solicit “directly for the charitable purpose of the organization” as opposed to administrative and overhead costs.⁹⁴ The

89. § 162(a)(3).

90. *See, e.g.*, 26 C.F.R. § 1.527-2(c)(5) (i-viii).

91. Charities are tax-exempt under § 501(c)(3) of the Internal Revenue Code. 26 U.S.C. § 501(c)(3) (2012). Super PACs and other 527 organizations are not tax exempt. Section 527 of the Internal Revenue Code governs the taxation of these organizations. *See* Briffault, *supra* note 58 and accompanying text. However, § 527 provides several exemptions for these organizations. *See* 26 U.S.C. § 527. Section 501(c) organizations are also tax-exempt under the Internal Revenue Code. § 501(c).

92. 444 U.S. 620 (1980).

93. Subsequent cases include: *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781 (1988); and *United Cancer Council, Inc. v. Comm’r of Internal Revenue*, 165 F.3d 1173 (7th Cir. 1999). These cases are discussed below.

94. 444 U.S. at 622.

Court concluded that such a restriction on protected activity “cannot be sustained unless it serves a sufficiently strong, subordinating interest that the [government] is entitled to protect.”⁹⁵

The Village argued that “any organization using more than 25% of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for profit enterprise and that to permit it to represent itself as a charity is fraudulent.”⁹⁶ The Court rejected the Village’s argument. It held that “charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information . . . of goods and services.”⁹⁷ Therefore, it cannot be regulated as purely commercial speech.⁹⁸

Furthermore, the Court found that the purpose of the Citizens for a Better Environment was to “gather and disseminate information about and advocate positions on matters of public concern.”⁹⁹ Such an organization pays its employees to process information and to arrive at suitable positions to advance the organization’s goals.¹⁰⁰ Such an organization is likely to spend more than 25% of its budgets on salaries and administrative costs even if such items were modest.¹⁰¹ The Court held that the Village’s interest of reducing fraud was “only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.”¹⁰² The Court suggested that “[f]raudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly.”¹⁰³ Further, the Court added that “[e]fforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.”¹⁰⁴ Hence, to combat fraud within organizations that raise money, the Supreme Court favors well-targeted ordinances and regulations—notably disclosure—as

95. *Id.* at 636.

96. *Id.*

97. *Id.* at 632.

98. *Id.*

99. *Id.* at 635.

100. *Id.*

101. *Id.*

102. *Id.* at 636.

103. *Id.* at 637.

104. *Id.* at 637–38.

opposed to laws that could potentially abridge First Amendment freedoms.

After *Shaumburg* and under the First Amendment, the Court overturned two state statutes that regulated how much a charity can pay its solicitors. In *Secretary of State of Maryland v. Joseph H. Munson Co.*,¹⁰⁵ the Court overturned a Maryland statute that forbade contracts between a solicitor and a charity if, after allowing for a deduction of many of the costs associated with the solicitation, the fundraiser retained more than twenty-five percent of the money collected.¹⁰⁶ Then, in *Riley v. National Federation of the Blind of North Carolina*,¹⁰⁷ the Court overturned a North Carolina statute that prohibited a professional fundraiser from retaining excessive fees.¹⁰⁸ Excessive fees were determined on a three-tiered schedule.¹⁰⁹ Under the statute a fundraiser could keep fees that totaled twenty percent of the gross receipts collected.¹¹⁰ If the fundraiser retained between 20 and 35%, the Act deemed it “unreasonable upon a showing that the solicitation at issue did not involve the ‘dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation.’”¹¹¹ A fee over 35% was considered unreasonable, but the fundraiser could rebut the presumption.¹¹² The Court held that “the solicitation of charitable contributions is protected speech, and that using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s interest in preventing fraud.”¹¹³

In 1996, in response to calls for reform, Congress enacted 26 U.S.C. § 4958. The statute imposes a tax on disqualified persons who received excess benefits from charities.¹¹⁴ The statute was “designed to prevent the siphoning of charitable receipts to insiders of the charity . . .

105. 467 U.S. 947 (1984).

106. *See id.* at 969–70.

107. 487 U.S. 781 (1988).

108. *Id.* at 781.

109. *Id.* at 784.

110. *Id.* at 784–85.

111. *Id.* at 785.

112. *Id.*

113. *Id.* at 789.

114. *See* 26 U.S.C. § 4958 (2012).

.”¹¹⁵ “Insiders” include a charity’s founder, board members, family members of the board, or anyone else who is in a position to exercise substantial control of the organization.¹¹⁶ Essentially, the purpose of the Act was to make sure charities were used as charities and did not exist to benefit professional fundraisers and other insiders of a charity. The statute proved difficult to apply.¹¹⁷ In *United Cancer Council*, the Seventh Circuit held that a professional fundraising firm that raised \$28.8 million for a charity and was reimbursed \$26.5 million by the charity was not an insider under this law.¹¹⁸ Despite contract terms that overwhelmingly favored the fundraising firm, the fundraising firm was not an insider and the § 501(c)(3) inurement clause was not triggered.¹¹⁹

II. HOW A MINORITY OF POLITICAL ORGANIZATIONS TAKES ADVANTAGE OF THE LACK OF REGULATIONS

A. *Livin’ Large Off the First Amendment*

“My standard sound-bite advice is ‘donor beware,’
when giving to any political action committee . . .
”¹²⁰

—Paul S. Ryan, Campaign Legal Center

Candidates must abide by strict regulations on how to use the money they raise for their own political campaigns.¹²¹ For instance, they

115. *United Cancer Council, Inc. v. Comm’r of Internal Revenue*, 165 F.3d 1173, 1176 (7th Cir. 1999).

116. *Id.*

117. *Id.*

118. *Id.* at 1175–76.

119. *Id.*

120. Kim Barker & Al Shaw, *Campaign Spending Shows Political Ties, Self-Dealing*, PROPUBLICA (Mar. 28, 2012), <http://www.propublica.org/article/campaign-spending-shows-political-ties-self-dealing>.

121. On the other hand, Congressmen may spend the money they raise through leadership PACs however they want. The Code of Federal Regulations defines a leadership PAC as “[A] political committee that is directly or indirectly established, financed, maintained or controlled by a candidate for Federal office or an individual holding Federal office but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that leadership PAC does not include a political committee of a

may not use campaign funds for personal use.¹²² If candidates wish to hire companies run by their relatives or other insiders, they must pay fair market value for their services.¹²³ These rules do not apply to PACs.¹²⁴

While most PACs spend most of the contributions they raise on efforts clearly aimed at electing specific candidates,¹²⁵ the lack of regulation opens the door for irresponsible and sometimes suspect spending and self-dealing. PAC executives have spent an incredible amount of money on overhead and operational expenses. Through such

political party.” 11 C.F.R. § 100.5(e)(6) (2012). Congressmen create these non-connected leadership PACs ostensibly to solicit contributions to support other candidates for election. Often, lobbyists and corporations donate large sums to these PACs and congressmen spend the money on travel expenses, golf, etc. *60 Minutes: Washington's Open Secret: Profitable PACs*, CBSNEWS.COM (Oct. 20, 2013), available at <http://www.cbsnews.com/news/washingtons-open-secret-profitable-pacs/>. Ron Paul even has six family members on his leadership PAC's payroll. *Id.* Because these PACs primarily exist to fund Congressmen's lifestyles, they have been dubbed slush funds. *Id.* Each of the last three times it has suggested legislation to Congress, the FEC has suggested Congress should amend FECA's prohibition of the personal use of campaign funds to extend its reach to all political committees. See Legislative Recommendations of the Federal Election Commission 2009, FED. ELECTION COMM'N 4 (Mar. 19, 2009), <http://www.fec.gov/law/legrec2009.pdf>; Legislative Recommendations of the Federal Election Commission 2011, FED. ELECTION COMM'N 4 (March 16, 2011), <http://www.fec.gov/law/legrec2011.pdf>; Legislative Recommendations of the Federal Election Commission 2012, FED. ELECTION COMM'N 7 (May 10, 2012), <http://www.fec.gov/law/legrec2012.pdf>. In response to a “60 Minutes” segment on these slush funds, North Carolina congressmen Walter Jones and David Price have teamed up to close the FECA's loopholes. Rob Christensen, *Jones, Price Team Up to Bar Personal Use of PAC Money*, NEWS & OBSERVER (Nov. 14, 2014), <http://www.newsobserver.com/2013/11/14/3371251/jones-price-team-up-to-bar-personal.html>.

122. “Personal use” does not include haircuts. See 11 C.F.R. § 113.2(e). John Edwards and Hilary Clinton's campaigns have spent thousands of dollars on haircuts throughout their presidential and senatorial bids. John Solomon, *Splitting Hairs, Edwards's Stylist Tells His Side of Story*, WASHINGTON POST (July 5, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/07/04/AR2007070401258_2.html.

123. Barker & Shaw, *supra* note 120.

124. *Id.*

125. Kim Barker, *Inside Game: Creating PACs and then Spending Their Money*, PROPUBLICA (Mar. 15, 2013), <http://www.propublica.org/article/inside-game-creating-pacs-and-then-spending-their-money>.

spending, some executives have steered donations into their pockets or their friends' pockets at the expense of the donors' desire to be heard.

Super PACs can run a large operational expenses tab. In the 2012 election cycle, 420 super PACs spent over \$104 million on operational expenses alone, such as salaries and travel.¹²⁶ Bloomberg News reported that "167 of the 782 registered super-PACs . . . spent nothing supporting candidates with [independent expenditures] while burning through donor money to pay for things like rent, salaries and travel."¹²⁷ For example, during the 2012 elections, ChristinePAC¹²⁸ "used up \$469,425 on consulting, travel, marketing, and other administrative costs without spending anything to support or oppose 2012 candidates . . ."¹²⁹ Revolution PAC, a super PAC supporting Ron Paul's 2012 presidential bid, raised \$1.2 million and spent 85% of its donations on overhead, "including \$30,000 for hotel stays, plane tickets and car rentals."¹³⁰ Revolution PAC also spent \$25,000 on Ron Paul action figures and wound up over \$65,000 in debt by the time the presidential election rolled around.¹³¹

The most concerning operational costs include salaries, travel expenses, and consulting services. Each of these costs is discussed below in further detail.

1. PAC Executive Salaries

Super PAC executives set their own salaries. Unsurprisingly, PAC executives may over-compensate themselves at the cost of the PAC's donors' speech. The executives of Winning Our Future, a super PAC supporting Newt Gingrich's 2012 presidential bid, made a

126. Julie Bykowicz, *Super PACs Are Cushy Jobs*, BLOOMBERG BUSINESSWEEK (Dec. 13, 2012), <http://www.businessweek.com/articles/2012-12-13/super-pacs-are-cushy-jobs>.

127. Julie Bykowicz, *Have Super-PAC, Will Travel*, BLOOMBERG (Dec. 4, 2012), <http://go.bloomberg.com/political-capital/2012-12-04/have-super-pac-will-travel/>.

128. ChristinePAC is run by Christine O'Donnell, a former U.S. Senate candidate from Delaware. See CHRISTINEPAC, <http://christinepac.com> (last visited Jan. 26, 2014).

129. Bykowicz, *Super PACs Are Cushy Jobs*, *supra* note 126.

130. Bykowicz, *Have Super-PAC, Will Travel*, *supra* note 127.

131. Bykowicz, *Super PACs Are Cushy Jobs*, *supra* note 126.

handsome sum, especially after the candidate it solely supported dropped out of the primaries.¹³² Rebecca Burkett, founder of Winning Our Future, paid herself nearly half of the \$480,000 she made as the PAC's executive after Gingrich dropped out of the 2012 GOP primaries in late April.¹³³ She then turned the group over to "her No. 2, Gregg Phillips," who earned a total of \$271,702 by mid-December 2012¹³⁴—eight months after Gingrich dropped out.¹³⁵

2. Travel Expenses

Travel expenses also are a cause for concern. PAC executives are not exactly staying at motels, riding Greyhounds, and flying economy class, or even commercial airlines for that matter. For example, in 2012, Priorities USA, a pro-Barack Obama super PAC, reimbursed one of its executives \$20,000 for travel expenses.¹³⁶ Those expenses included plane tickets and stays at Seattle's Four Seasons and San Francisco's W Hotel.¹³⁷ Majority PAC, a pro-Democrat super PAC, paid an Arizona company over \$12,000 to charter a jet.¹³⁸ The FEC report mentioned nothing about the charter other than it was used for travel.¹³⁹

3. Consulting

Of the various operational expenses, consulting costs are the most alarming. PACs pay consultants for, among other services, buying advertisement space, researching, and strategizing.¹⁴⁰ Nevertheless, this

132. Julie Bykowicz, *Post-Campaign Super-PAC Cash Still Flowing to Consultants*, BLOOMBERG (Dec. 3. 2012), <http://www.bloomberg.com/news/2012-12-04/post-campaign-super-pac-cash-still-flowing-to-consultants.html>.

133. *Id.*

134. Bykowicz, *Super PACs Are Cushy Jobs*, *supra* note 126.

135. See Ginger Gibson, *Newt Gingrich Drops Out: 'Truly Wild Ride' Is Over*, POLITICO (May 2, 2012), <http://www.politico.com/news/stories/0512/75838.html#ixzz2l39BmFQQ>.

136. Bykowicz, *Have Super-PAC, Will Travel*, *supra* note 127.

137. *Id.*

138. *Id.*

139. *Id.*

140. See, e.g., Will Dooling, *Where Did All Those Super PAC Dollars Go? 1/3 of All Outside Money Moved Through Handful of Media Firms*, PRWATCH (Dec. 4,

area of campaign law is rife with problems. Some super PACs employ the same consulting companies used by the candidates for which they campaign.¹⁴¹ This raises coordination concerns and demonstrates the weakness of the coordination rule.¹⁴² Beyond this troubling problem, the consulting-PAC system has led to self-dealing and other questionable tactics.

PACs are legally allowed to steer PAC donations into their executives' pockets. One way PACs do this is by employing their executives' consulting, ad purchasing, or production companies. In 2010, Bishop E.W. Jackson created STAND America PAC to advocate for the election of conservative African American candidates.¹⁴³ The group raised \$130,000 from individual donors.¹⁴⁴ It spent \$6,500 on elections and paid Jackson \$20,000 for consulting his own PAC.¹⁴⁵ Larry McCarthy, Mitt Romney's former media director, founded his own production company and sat on the board of Restore Our Future, the primary super PAC that supported Romney's 2012 presidential run.¹⁴⁶ During the 2012 presidential race, Restore Our Future paid McCarthy's production company \$1 million.¹⁴⁷ On an even grander scale, Nick Ryan, a former Rick Santorum aide, launched both a pro-Santorum super PAC in 2012 and a direct-mail and telemarketing firm.¹⁴⁸ As of March 2012, the super PAC had paid the direct-mail and telemarketing firm \$1.9 million for its services.¹⁴⁹ The leader of the aforementioned Revolution

2012), <http://www.prwatch.org/news/2012/12/11868/where-did-all-those-super-pac-dollars-go-13-all-outside-money-moved-through-handf>.

141. Barker & Shaw, *supra* note 120; Anupama Narayanswamy, *Political War Profiteers: 20 Consulting Firms Churn 80 Percent of Super PAC Cash*, SUNLIGHT FOUNDATION (Jan. 17, 2013), <http://reporting.sunlightfoundation.com/2013/super-pac-consultants/>.

142. For a discussion on the weakness of the coordination standard, see Briffault, *supra* note 18 (discussing the weakness of the coordination standard).

143. Josh Israel, *Virginia GOP Nominee's PAC Used Donations On Himself, Overhead*, THINK PROGRESS (May 20, 2013), <http://thinkprogress.org/election/2013/05/20/2037891/virginia-gop-nominee-pac-used-donations-on-himself/>.

144. *Id.*

145. It also spent \$53,000 on other consulting firms and about \$7,500 on travel and meals. *Id.*

146. Dooling, *supra* note 140.

147. *Id.*

148. Barker & Shaw, *supra* note 120.

149. *Id.*

PAC owns two social media companies.¹⁵⁰ His social media companies charged his super PAC “\$153,000 for media consulting, rent for office space, and other expenses from August 2011 to June 2012.”¹⁵¹ The rent for office space cost more than \$1,700 a month.¹⁵² The “office space” was a UPS store box in Northbrook, Illinois.¹⁵³

PAC executives are not the only ones greatly profiting on elections. Consulting and media firms, often run by super PAC executives’ friends and candidates’ former aides and staffers, are making millions. Mitt Romney’s own 2012 presidential campaign illustrates how personal ties can lead to profits at the expense of donors’ voices being heard. The Romney campaign spent tens of millions of dollars—twice as much as the Obama campaign—on telemarketing and direct-mail.¹⁵⁴ The telemarketing and direct-mail firms have been tied to Romney’s aides.¹⁵⁵ SCM Associates, Inc., a company led by a close Romney associate, billed the campaign \$48 million for direct mail.¹⁵⁶ FLS Connect, a company partly led by Romney’s political director, billed the campaign \$36 million for telemarketing and robocalls.¹⁵⁷ “The campaign heavily utilized SCM and FLS Connect’s offerings despite evidence that the tactics are increasingly ineffective”¹⁵⁸ Andrew Boucher, a Republican consultant, said, “No one has figured out how to make a fifteen percent commission when they hire a field representative to line up county commissioners and precinct captains and, shockingly, we do too little of it”¹⁵⁹ This type of activity suggests that consultants and PACs may trade proven election techniques for less effective ones if it means larger profits for them.

150. See Bykowicz, *Super PACs Are Cushy Jobs*, *supra* note 126. Revolution PAC supported Ron Paul’s presidential run in 2012. See *supra* text accompanying note 130.

151. *Id.*

152. See Barker & Shaw, *supra* note 120.

153. *Id.*

154. See Luke Rosiak, *Romney Loss: Big Bucks, But Less Bang*, WASHINGTON TIMES (Nov. 26, 2012), <http://www.washingtontimes.com/news/2012/nov/26/romney-loss-big-bucks-but-less-bang/?page=1>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

Lastly, consulting firms can create their own PACs, which essentially can act as the firm's own for-profit company. Between 2008 and 2012, Russo, Marsh and Associates, a California-based Republican consulting firm, established three PACs: Our Country Deserves Better, the Campaign to Defeat Barack Obama, and Move America Forward Freedom PAC.¹⁶⁰ The firm likely created these PACs to capitalize on the popularity of the Tea Party movement.¹⁶¹ Of the \$9.3 million spent by Our Country Deserves Better, over \$3.8 million went to Russo, Marsh and Associates and others connected to the firm.¹⁶² Of the \$3.9 million spent by Campaign to Defeat Barack Obama, \$2.4 million went to the firm and its associates.¹⁶³ Finally, of the \$143,000 spent by Move America Forward Freedom PAC, \$92,000 went to the firm and people connected to the firm.¹⁶⁴

Our Country Deserves Better PAC spent only ten percent of its total contributions and expenditures directly on elections.¹⁶⁵ The contributions and expenditures it did spend directly on elections were funneled through the Russo, Marsh and Associates firm. PACs typically pay consultants a commission for handling ad buys, ad production, mailers, etc.¹⁶⁶ Our Country Deserves Better spent half its money on fundraising¹⁶⁷—spending money to make more money—all the while paying its executives hundreds of thousands of dollars in salary and compensating employees for travel expenses.¹⁶⁸ Some of the travel expenses included \$50,000 for consultants and staff to stay at a Lake Michigan golf resort and assorted restaurant tabs over \$1,000.¹⁶⁹

160. Barker, *Inside Game: Creating PACs and then Spending Their Money*, *supra* note 125 (The Campaign to Defeat Barack Obama is now called the Conservative Campaign Committee).

161. *See id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. Dooling, *supra* note 140.

167. Barker, *Inside Game: Creating PACs and then Spending Their Money*, *supra* note 125.

168. *See id.*

169. *Id.*

B. Why Political Organization Executives Should Not Be Permitted to Profiteer

“Every great cause begins as a movement, becomes a business, and eventually degenerates into a racket.”¹⁷⁰

—Eric Hoffer

The problem here is not that what these political organization executives are doing is an unconstitutional infringement of their donors’ First Amendment guarantees. It is not that political organization executives do business with friends—people they trust. It is not that political organization executives should not get compensated for their work. It is not that political organizations should not spend any money on operational expenses. Political organizations are not easy to run. Plenty of these organizations never manage to get off the ground. Often, they have to spend money to raise more money before they are able to convey the ideas for which they exist.¹⁷¹

The problem with the current campaign finance dynamic stems from the fact that, despite campaigning for specific candidates and issues, unauthorized PACs are not responsible for winning or losing elections.¹⁷² They are accountable to no one. Instead of making good faith efforts to advocate for or against political candidates, these groups

170. John Avlon, *Palin’s SarahPAC Embarrassment: Consultants Are Cashing In*, THE DAILY BEAST (Mar. 29, 2013), <http://www.thedailybeast.com/articles/2013/03/29/palin-s-sarahpac-embarrassment-consultants-are-cashing-in.html>.

171. Having a wealthy donor, corporation, or bundle of donors helps. For instance, Sheldon Adelson, a Las Vegas casino bigwig along with his wife, more or less kept Newt Gingrich’s campaign alive—contributing \$20 million to Restore Our Future—before Gingrich dropped out. *Details for Committee ID: C00507525*, FED. ELECTION COMM’N, http://fec.gov/finance/disclosure/candcmte_info.shtml (search Winning Our Future under the Two Year Summary link; switch year to 2012 in drop down menu; click on “Itemized Individual Contributions”).

172. By definition, candidates do not authorize outside groups to campaign on their behalf and outside groups may not coordinate with a candidate’s campaign. See *supra* text accompanying notes 47–57.

have instead sought larger profits and swankier perks.¹⁷³ PAC executives influence American politics; they make money off American politics; and they are free to do so at the cost of the American people. These organizations promise that they will turn a donor's contribution into a political message. People take it on faith that PACs will follow through on that promise instead of paying its executives to stay at the W Hotel or rent a private jet.

The era of *caveat dator*¹⁷⁴ must end. While certainly one can spend money on an election alone, for non-millionaires and unincorporated individuals, pooling money with those who have a common sentiment is the most effective way to be heard. In *Buckley*, the Court upheld the FECA's cap on direct contributions to candidates.¹⁷⁵ In part, the Court justified the contribution caps to individual candidates because this limit still left open other channels through which individuals could communicate core First Amendment speech.¹⁷⁶ Donating to a PAC has become one of the more effective channels through which to communicate. For instance, a television ad generally will reach more people than leafleting on a street corner. When the executives who run PACs try to profit off PACs at the expense of their donors' core political speech, the campaign finance system becomes even more flawed than some would argue it already was.¹⁷⁷

173. See *supra* text accompanying notes 121–169 for a discussion on how PAC executives use First Amendment activity on salaries, travel expenses, and consulting schemes.

174. “Caveat dator” is Latin for “donor beware.”

175. *Buckley v. Valeo*, 424 U.S. 1, 21 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, as recognized in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

176. *Id.* at 22.

177. For instance, some would argue that there is no meaningful difference between contributions and expenditures. See, e.g., *Colo. Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring). Some would argue the limit on contributions is not narrowly tailored to its purpose. See, e.g., Reply Brief for Appellant Shaun McCutcheon at 20–25, *McCutcheon v. Fed. Election Comm'n*, __U.S.__, 133 S. Ct. 1747 (2013) (No. 12–536). Some would argue that the amount of money in politics corrupts government. See, e.g., *Omnibus Poll*, *supra* note 6. Some would argue the amount of money in politics, especially corporate money, distorts the marketplace of ideas. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

III. REFORM FOR THE FUTURE

A. Framing the Suggested Legislation

Campaign finance is exceedingly difficult to reform. Efforts to reform campaign finance generally center on money entering the political arena.¹⁷⁸ Supreme Court decisions have deregulated some aspects of campaign finance,¹⁷⁹ and crafty political operatives have exploited loopholes in tax law and FEC regulations.¹⁸⁰ The purpose of this Note, however, is not to challenge past Supreme Court decisions or tax and FEC loopholes. This Note instead advocates for legislation that is consistent with current laws.

The government should regulate campaign finance to promote the premise elaborated in *Buckley*. The *Buckley* Court determined that limiting the amount of money a person or group can spend on political communication during a campaign “reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁸¹ It follows that the government could find a legitimate interest in ensuring that political organizations translate the money they raise into political discussion instead of higher salaries, personal use, absurd travel expenses, and self-dealing. Wasting contributions on such expenses reduces political expression. The government interest in preventing such waste of political

178. For instance, amendments to the Federal Election Campaign Act of 1971 capped contributions and expenditures. See *supra* text accompanying note 13. The Bipartisan Campaign Reform Act of 2002 was designed, in part, to curb the use of soft money. See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155.

179. See, e.g., *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (overturning a Bipartisan Campaign Reform Act (BCRA) law related to electioneering). The Court later struck down a BCRA provision concerned with leveling the playing field for opponents of wealthy candidates. See *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 726–27 (2008). In 2010, the Court handed down *Citizens United v. Federal Election Committee*, 558 U.S. 310 (2010), which is detailed in Part I of this note. The Court just handed down *McCutcheon v. Federal Election Commission*, ___ U.S. ___, 133 S.Ct. 1747 (2014), which struck down the FECA’s two-year aggregate contribution limit.

180. See e.g., *supra* text accompanying notes 126–168 for a discussion on how PAC executives convert donors’ First Amendment activities into salaries, travel expenses, and consulting schemes.

181. *Buckley*, 424 U.S. at 19.

speech dollars is compelling: it goes to the core of the First Amendment's goal of promoting political speech. This interest is unrelated to the suppression of speech. In fact, legislation based upon this interest would promote more speech, not less.

To promote this interest, courts should envision political organizations as speech trusts. In such a trust, the donor is the settlor and beneficiary, contributions constitute the res, and political organization executives are the trustees. When a PAC accepts a donor's contribution, it owes the donor a fiduciary duty to convert that contribution from money into speech.¹⁸² Envisioning political organizations this way (1) will allow courts to consider contributions to political organizations as core political speech; and (2) will provide a level of fairness for donors because political organization executives will be unable to rob donors of their core political speech. Instead, a political organization will have to put its mouth where its money is. It will have to use the contributions it secures for the ostensible reason it solicited the contributions: to advocate for or against an issue or a candidate.

The notion of the speech trust is consistent with the three most significant theories developed by First Amendment scholars to explain the First Amendment. Those theories are (1) the marketplace of ideas rationale; (2) the self-governance rationale; and (3) the self-fulfillment rationale.

1. The Marketplace of Ideas Rationale

The marketplace of ideas rationale, sometimes called the search-for-truth rationale, centers on the concept that true statements will find favor and prevail over falsities in a free market. Justice Holmes articulated this theory in his dissenting opinion in *Abrams v. United States*,¹⁸³ writing, "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only

182. The government already recognizes a fiduciary relationship between a political committee and a donor: when a political committee executive converts campaign funds into personal use, the executive breaches that duty. CRAIG C. DONSANTO ET AL., *FEDERAL PROSECUTION OF ELECTION OFFENSES* 197 (7th ed. 2007), available at <http://www.justice.gov/criminal/pin/docs/electbook-0507.pdf>.

183. 250 U.S. 616 (1919).

ground upon which their wishes safely can be carried out.”¹⁸⁴ In *On Liberty*, John Stuart Mill, who first articulated this theory, wrote that the “peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it.”¹⁸⁵

This theory requires a free flow of ideas. Although the political organizations detailed in this Note are not government entities, their failure to translate donor contributions into actual direct speech takes speech out of the marketplace. It obstructs a particular individual from voicing an opinion and obstructs others from hearing that opinion. If an individual agrees with the speech, it may reaffirm his or her perception of the truth. If an individual initially disagrees with the speech, that individual may be swayed by the speech and accept it as truth. If an individual ultimately disagrees with the speech, he or she may reaffirm his or her original belief and develop counterarguments to dissuade others of the speech’s veracity.

2. The Self-Governance Rationale

The self-governance rationale centers on the idea that, in a democracy, the government has an interest in having an informed electorate. Alexander Meiklejohn, the leading proponent of this theory, wrote that having an informed electorate requires that “all facts and interests relevant to [the public policy issue at hand] shall be fully and fairly presented to [the People so] that all alternative lines of action can be wisely measured in relation to one another.”¹⁸⁶ Under this theory, if a political organization does not translate contributions into speech, it reduces the People’s collective sagacity by reducing the number of issues in public debate and the depth in which they are discussed.

3. The Self-Fulfillment Rationale

The self-fulfillment rationale focuses on the idea that “the significance of free expression rests on the central human capacity to

184. *Id.* at 630.

185. GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 9 (4th ed. 2012).

186. *Id.* at 11.

create and express symbolic systems, such as speech, writing, pictures, and [music].”¹⁸⁷ Freedom of expression, while permitting and encouraging the exercise of these capacities, “nurtures and sustains the self-respect of the mature person.”¹⁸⁸ The value of free expression “rests on its deep relation to self-respect arising from autonomous self-determination without which the life of the spirit is meager and slavish.”¹⁸⁹ Thus, under this theory, if a political organization robs an individual of speech, it also robs the individual’s capacity to write his or her own life story.

B. Suggested Legislation

1. Maintaining a Website and Emailing Donors

Congress should require that each political organization (1) maintain a website where the organization discloses in categorized lists all of its expenditures, including salary disbursements, total salaries, administrative expenses, fundraising expenses, travel expenses, and consulting fees; (2) disclose to its donors whether it employs a consulting firm that either registered the political organization or is owned by one of the political organizations’ executives; and (3) regularly notify its donors of these disclosures.¹⁹⁰ Such legislation would make political organizations more transparent. Transparency supports the goals of the speech trust. Although PACs must report most of these items to the FEC already,¹⁹¹ donors are unlikely to sift through the incredible amount of FEC data on fec.gov to find out how the PAC spends the money it raises. Some older donors may not even be capable of navigating the FEC’s website. This suggested legislation would allow a donor to determine whether a political organization, in the donor’s view, spends its money efficiently. The consulting firm disclosure rule in particular places a spotlight on the self-dealing issue highlighted in Part II. Furthermore, these suggestions give an individual the information necessary to determine whether a political organization is fulfilling its fiduciary duty

187. *Id.* at 14.

188. *Id.*

189. *Id.*

190. A donor, of course, must be willing to provide an email address.

191. *See supra* text accompanying notes 75–77.

without having to analyze Sections 527 or 162(a) of the tax code or the restrictions set forth in the *Shaumburg* line of cases.¹⁹²

Legislation that mandates maintaining a website with these lists and sending these lists to donors would likely survive a strict scrutiny test. It is narrowly tailored and it does not restrict a political organization's ability to function. It directly addresses the government interest—facilitating political speech—without restricting speech. In addition, most political organizations already have websites, and websites are fairly inexpensive to maintain. Listing these items on a website and emailing them out to donors would not overly burden political organizations. Furthermore, PACs already report most of these items to the FEC. The suggested legislation would not require much additional effort.

If such legislation were to have passed prior to the 2012 election, a donor would have had the PAC information at hand to determine if a political organization abused its fiduciary duty. A donor to Priority USA would have known that his contribution helped to reimburse an executive for \$20,000 in travel expenses.¹⁹³ A donor to Majority PAC would have known that his contribution helped charter a private jet.¹⁹⁴ A donor to STAND America PAC would have known that Bishop E.W. Jackson paid himself three times what the PAC spent on elections for consulting his own PAC.¹⁹⁵ A donor to Mitt Romney's presidential campaign might have been able to determine, with some additional digging, that the campaign spent money not on the most effective campaigning tactics, but on those tactics that put the most possible money in the pockets of his former aides.¹⁹⁶ A donor to any of the Russo, Marsh and Associates' PACs might have noticed that the firm pocketed 40 to 64% of the contributions its individual PACs raised.¹⁹⁷

192. *See supra* text accompanying notes 86–90 for a discussion of requirements under § 527 and § 162(a) and text accompanying notes 92–119 for a discussion of how the First Amendment limits the extent the government can regulate charitable organizations.

193. *See supra* text accompanying note 136.

194. *See supra* text accompanying notes 138–139.

195. *See supra* text accompanying note 143–144.

196. *See supra* text accompanying notes 154–158.

197. *See supra* text accompanying notes 160–169.

Having this data at hand allows a donor to evaluate whether the political organization to which he donated looks out for its executives' own interests or instead advocates as advertised. It could prompt a donor to inquire further into the matter or to elect to take his core political speech somewhere else.

2. Mandating PACs to Decline Donations if the Candidate or Candidates It Supports Drops out of the Election

Congress should require PACs to refuse to accept funds if the candidate or set of candidates supported by the PAC drops out of the election. The exception to this legislation would be that a donor could still contribute money to defray the PAC's debt or to support ongoing operational expenses if the donor knew the candidate the PAC supported had dropped out of the election. Obviously, if a PAC accepts funds for a cause that has essentially ceased to exist, the PAC should not be able to profit off people who missed a candidate's concession speech. Of course, PACs may attempt to circumvent such legislation by ostensibly advocating for a political issue in addition to the candidates it supports.¹⁹⁸ Nevertheless, notifying donors that a candidate it supported has dropped out of an election informs donors that the PAC's cause has changed or no longer exists.

Such legislation is narrowly tailored and is unrestrictive. It only affects a very specific group of PACs that continues to accept donations, knowing full well that it will not use those donations for their intended purpose. The exception to the rule—allowing donations from those who explicitly wish to support the PAC's operating expenses or debt relief efforts—protects this legislation from being overbroad.

Were this legislation to have been in place in 2012, Winning Our Future would not have been able to accept donations after Newt Gingrich dropped out of the presidential race.¹⁹⁹ Consequently, its executives would not have been able to cut themselves salary checks totaling three-

198. PACs would be able to tack on a related issue to the candidate or set of candidates it supports so that if all the candidates it supports drop out, it could still accept donations and "advocate" for an issue.

199. *See supra* text accompanying note 132–35.

quarters of a million dollars during the months following Gingrich's withdrawal from the race.²⁰⁰

CONCLUSION

The amount of money in the political system makes a lot of Americans skeptical about how the government works. Over the years and to its credit, Congress has responded to calls for campaign finance reform. Congress passed the Tillman Act in 1907, which banned corporate contributions.²⁰¹ In 1971, Congress passed the Federal Election Campaign Act.²⁰² In 1974, in response to the Watergate Scandal, Congress amended the FECA to restrict an individual's contributions and expenditures.²⁰³ In 2002, Congress passed the Bipartisan Campaign Reform Act, in part, to reduce electioneering and the distorting effect of large contributions.²⁰⁴ However, over the past decade, the Supreme Court, under the First Amendment, has overturned attempts to limit the amount of money individuals, corporations, and other organizations can spend on elections.²⁰⁵

Some political organizations spend donor contributions for purposes inconsistent with the donors' desire to express political speech. Although these political organizations are not infringing upon their donors' First Amendment guarantees, political organizations should spend the money they raise more responsibly. The *Buckley* Court held that limiting how much money "a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."²⁰⁶ Based on how much money these organizations have spent in the past two election cycles, the political organizations detailed in this Note have become a

200. See *supra* text accompanying note 132–35.

201. Tony Mauro, *Campaign Finance Overview*, FIRST AMENDMENT CENTER (Jan. 30, 2010), <http://www.firstamendmentcenter.org/campaign-finance-overview>.

202. See *supra* text accompanying note 12.

203. Mauro, *supra* note 201.

204. See *supra* text accompanying 59.

205. See *supra* note 12–43.

206. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

prominent channel for the American people to express their core First Amendment speech, despite the fact that unauthorized PACs are not responsible for winning or losing elections. Nevertheless, the executives of these groups have acted in their own self-interests, diluting the American people's core political speech in exchange for golf outings and extra profits.

Modest legislation could combat this First Amendment profiteering. Legislation could include mandating these political organizations (1) to maintain a website and email service that discloses certain information to donors, and (2) to decline donations if the candidates supported by the organization drop out of the election. Such legislation would be narrowly tailored, would not restrict an organization's ability to function, and would promote the underlying premise in *Buckley*.

It is time for the era of *caveat dator* to end. Political donors should not have to worry whether their dollar is going into a consultant's pocket instead of being translated into core political speech. Political organizations should put their mouth where their money is.