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# Prosecuting Conduit Campaign Contributions - Hard Time for Soft Money

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# PROSECUTING CONDUIT CAMPAIGN CONTRIBUTIONS—HARD TIME FOR SOFT MONEY

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> There are two things that are important in politics. The first is money and I can't remember what the second one is.[1]

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1. Attributed to Mark Hanna, 1895, *quoted in* Helen Dewar, *For Campaign Reform, a Historically Uphill Fight*, WASH. POST, Oct. 7, 1997, at A5.

## I. INTRODUCTION

Campaign financing law receives substantial attention, both critical and supportive, from academic commentators[2] and the popular press[3] and was a prominent issue in the presidential primaries of 2000.[4] Discussions of campaign financing, however, largely concern whether to add or eliminate various restrictions on how funds can be raised and the effects of such changes on the political process.[5] The focus is almost entirely on the substantive provisions, rather than how violations are prosecuted and the associated criminal penalties.

It is in the latter area that a troubling application of the law has developed. In recent years, there have been several high-profile prosecutions for violations of the Federal Election Campaign Act ("FECA"),[6] involving contributions nominally by one individual but

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2. *See, e.g.*, Symposium, *The Law and Economics of Elections*, 85 VA. L. REV. 1533 (1999); Symposium, *Money, Politics, and Equality*, 77 TEX. L. REV. 1603 (1999); Symposium, *Law and the Political Process*, 50 STAN. L. REV. 605 (1998).

3. *See, e.g.*, Editorial, *It's Money, Not Speech*, WASH. POST, Jan. 25, 2000, at A18; George F. Will, *A 100 Percent Tax on Speech?*, NEWSWEEK, Oct. 11, 1999, at 96; Editorial, *Yes to Campaign Reform*, WASH. POST, Sep. 14, 1999, at A28; Sen. Mitch McConnell, *Why That McConnell Fellow Is So Adamant*, WASH. POST, Jun. 28, 1999, at A21 (all writing as political commentators).

4. *See, e.g.*, Ceci Connolly, *Gore Plan Would End 'Soft Money,' Endow Elections*, WASH. POST, Mar. 27, 2000, at A1; Editorial, *Campaign Reform Two-Step*, WASH. POST, Mar. 20, 2000, at A16; E.J. Dionne, Jr., *A Campaign on Big Issues*, WASH. POST, Dec. 21, 1999, at A41; Editorial, *Bipartisan Campaigning*, WASH. POST, Dec. 16, 1999, at A38; Howard Fineman, *Independents' Day*, NEWSWEEK, Nov. 8, 1999, at 32.

5. *See, e.g.*, Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761 (1999) (arguing that regulations on issue advocacy through restrictions on campaign finance are an unconstitutional infringement of the First Amendment); Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891 (1999) (arguing for removal of campaign finance restrictions; that immediate publication of campaign contributions on the Internet would work a more effective control of issue advocacy and would not infringe on First Amendment rights); Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837 (1998) (arguing that requiring anonymity in campaign contributions would make it more difficult for candidates to sell political influence and discourage quid pro quo corruption); Fred Wertheimer & Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 COLUM. L. REV. 1126 (1994) (arguing for campaign spending limits, restriction of contributions by political action committees, and additional regulations to close "bundling" and "soft money" loopholes). For examples of reform proposals introduced in Congress in recent years, see the Shays-Meehan Bill, H.R. 417, 106th Cong. (1999) and the McCain-Feingold Bill, S. 25, 105th Cong. (1997). A full consideration of campaign finance reform proposals is, of course, far beyond the scope of this article.

6. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–455 (1994 & Supp. 1998)). Except where evident from the context, FECA is used to refer to all of the provisions of 2 U.S.C. §§ 431–455,

funded or reimbursed by another individual deemed to be the true contributor.[7] Prosecutions of such "conduit contribution"[8] cases are surprising in at least three significant respects.

First, these prosecutions have not been based (at least technically) on violations of FECA's many *substantive* provisions, such as prohibitions of contributions by corporations or foreign entities, or statutory limitations on contribution amounts.[9] Most citizens would presumably consider violation of these provisions to be the most serious crimes related to campaign financing. Instead, the prosecutions essentially rely on violations of the FECA *reporting* requirement.[10] In these cases, the government was not required to prove a violation of *any* of the substantive provisions.[11] Prosecuting a technical violation when more serious violations cannot be proved, although somewhat troubling, is not uncommon in criminal law,[12] but some FECA cases carry the approach even further. In some cases, there *is* no other FECA violation, as the funds are arguably "soft money" not subject to most of the substantive restrictions of FECA.[13]

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whether originating in FECA itself, earlier attempts at regulation of election campaigns, or the subsequent amendments to the 1971 act. See *infra* Part II for an abbreviated history of campaign financing law.

7. United States v. Hsia, 176 F.3d 517, 520–21 (D.C. Cir. 1999) (use of straw contributors to funnel money from a tax exempt religious organization into various political campaigns); United States v. Kanchanalak, 192 F.3d 1037, 1038–39 (D.C. Cir. 1999) (source of funds for checks to political committee by lawful permanent resident was from foreign nationals); United States v. Curran, 20 F.3d 560, 563 (3d Cir. 1994) (employer having his employees write checks to political campaign and then reimbursing them); United States v. Hopkins, 916 F.2d 207, 211 (5th Cir. 1990) (disguising corporate contributions as individual contributions by reimbursing employees).

8. There is another, technical meaning of "conduit contribution" embedded in FECA and associated regulations, where "an individual gives a contribution to a national political committee for the committee to pass on to [a specified] candidate." Fed. Election Comm. v. Nat'l Republican Senatorial Comm., 966 F.2d 1471, 1472 (D.C. Cir. 1992). These are also often referred to as "earmarked" contributions. *See* 2 U.S.C. § 441a(a)(8) (1994); 11 C.F.R. § 110.6 (1998). For purposes of this Article, "conduit contribution" excludes these legal, above-board, and regulated contributions.

9. *See* 2 U.S.C. §§ 441a(a), 441b, 441e (1994); *see also supra* note 7.

10. *See supra* note 7. The reporting requirement is contained in 2 U.S.C. § 434 (1994).

11. *See supra* note 7.

12. The classic example is the conviction of "Scarface Al" Capone, not on racketeering, murder, or Prohibition charges, but for tax evasion. *See, e.g.*, KENNETH ALLSOP, THE BOOTLEGGERS: THE STORY OF CHICAGO'S PROHIBITION ERA 300–31 (1961).

13. "Soft money" is any campaign contribution that is "not subject to the contribution limits or source prohibitions" of FECA, as opposed to regulated "hard money." Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1324–25 (1998). The soft money loophole has been described as perhaps "the most egregious of the current abuses of the law." Editorial, *An 'Imperfect Messenger,'* WASH. POST, Mar. 28, 2000, at A22. See *infra* notes 77–94 and accompanying text for a

Second, the defendants have been not corrupt campaign officials, but the donors.[14] The prosecution theory in these cases has been that the donors, by concealing their identity, caused the campaigns to file false information with the Federal Election Commission ("FEC").[15] Indeed, in one instance, the government relied on an even more remote chain of causation, prosecuting an individual who arranged a fundraising event but was neither the "conduit donor" nor the true donor.[16] Although FECA reporting requirements were held constitutional largely because of fears of the potential corruption of politicians,[17] these cases have not relied on *any* culpability on the part of campaign officials. In fact, prosecutors often explicitly conclude that the campaign officials were unknowing victims, rather than co-conspirators, in the alleged scheme.[18] As such, the donations have no relation to the primary harm against which FECA protects, but the donors are prosecuted anyway.

Finally, although FECA contains a specific prohibition against making contributions under a false name[19] with associated criminal misdemeanor penalties,[20] many high-profile cases today are prosecuted as felonies under general criminal statutes.[21] Congress arguably did not intend the use of such harsh penalties, but that has not stopped very real effects on numerous defendants.

This article analyzes this phenomenon and advances three independent arguments[22] for the elimination or limitation of felony

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further discussion of "soft money," associated reporting requirements, and the impact on prosecutions of conduit contributions.

14. *See, e.g.*, United States v. Kanchanalak, 192 F.3d 1037, 1037 (D.C. Cir. 1999); United States v. Trie, 23 F. Supp. 2d 55 (D.D.C. 1998).

15. United States v. Hsia, 176 F.3d 517, 520–21 (D.C. Cir. 1999); *Trie*, 21 F. Supp. 2d at 13.

16. *See* United States v. Hsia, 24 F. Supp. 2d 33, 54 (D.D.C. 1998) ("Alice-in-Wonderland-like maze of logical leaps and tangled inferences"), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

17. *See* Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam). As discussed in greater detail below, the Court advanced other rationales, but prevention of corruption seems clearly the most significant state interest justifying the reporting requirements.

18. *See, e.g.*, Bill Miller, *Hsia Is Convicted of Illegal Donations: Gore Ally Aided '96 Fund-Raising*, WASH. POST, Mar. 3, 2000, at A14 ("According to prosecutors, the various campaign treasurers had no idea that the money they got through Hsia was coming from prohibited sources.").

19. 2 U.S.C. § 441f (1994).

20. *Id.* § 437g(d).

21. These include, as discussed in further detail below, the general prohibitions against making false statements to government agencies, 18 U.S.C. § 1001 (1994), and conspiracies to defraud the United States, 18 U.S.C. § 371 (1994).

22. Reported cases have also advanced other defense arguments that are beyond the scope of this Article, either because they address a question of fact, *see, e.g.*, United States

prosecutions for conduit campaign contributions. As background for these arguments, Part II provides a brief overview of campaign finance law, the *Buckley v. Valeo*[23] challenge, and the evolution of prosecutions under FECA. Part III advances the "mens rea argument": that prosecutions of this conduct under felony statutes should, at a minimum, require a showing that the defendant was aware of the prohibition she is charged with violating. The Supreme Court has not yet resolved this issue in the context of the federal campaign financing laws, and the courts of appeal have reached conflicting positions. However, analysis of the Supreme Court's mens rea jurisprudence strongly suggests that a culpability element *should* be implied for these prosecutions. There are strong reasons for not relying on prosecutorial discretion in determining whether to prosecute a particular violation as a felony or as a misdemeanor.

Part IV addresses a more ambitious argument against these felony prosecutions—that, by passage of the specific misdemeanor provisions for making campaign contributions in the name of another, Congress in effect has preempted the application to conduit contributions of the general criminal statutes for false statements, mail fraud, and conspiracy to defraud. Defendants routinely, and unsuccessfully, make such arguments. The Supreme Court has not ruled on this exact issue. Those courts that have dealt with the issue have generally limited their review to the statutory language and legislative history and brief citations to precedents without significant analysis. Although the preemption argument has been consistently rejected to date, this Part suggests that the courts' reliance on precedent is misplaced and their analysis of the issue is incomplete. A more nuanced approach supports a finding of preemption in this area. As part of the analysis, I introduce a new concept, "greater included offense," to help explain why preemption is appropriate for prosecutions of conduit contributions.

Part V introduces the third, and most ambitious, argument—that criminal felony (and possibly even misdemeanor) prosecutions of campaign contributions under a false name constitute a serious infringement of First Amendment rights of political speech and association. This argument was apparently rejected in *Buckley*, but a careful examination of the Court's opinion suggests that the *Buckley*

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v. Hsia, 24 F. Supp. 2d 33, 55 (D.D.C. 1998) (causation), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999); United States v. Trie, 23 F. Supp. 2d 55, 62–63 (D.D.C. 1998) (causation); or a question of law that is not generally applicable to all such cases, *see Hsia*, 24 F. Supp. 2d at 44–47 (First Amendment freedom of religion).

23. 424 U.S. 1 (1976) (per curiam).

rationales do not justify infringing on First Amendment rights in the specific context of conduit contributions. Accordingly, such prosecutions should be either prohibited or severely limited through the imposition of additional elements, narrowly tailored to meet a compelling government interest.

## II. OVERVIEW OF FEDERAL CAMPAIGN FINANCING RESTRICTIONS

### A. *FECA and* Buckley v. Valeo

Federal campaign financing restrictions are not a relatively new phenomenon.[24] Predecessors to FECA were enacted in 1907, 1925, 1943, and 1947.[25] These laws restricted the parties who could contribute to election campaigns, limited contributors to aggregate contributions of $5000, and limited to $3,000,000 the amount that political committees could receive in contributions and spend each year.[26] Political committees and others making expenditures to influence elections were also required to file periodic statements of contributions and expenditures.[27] These provisions, however, were not effectively enforced.[28]

In response to the perceived inadequacies of existing laws, Congress passed FECA in 1972, which actually added relatively little in the way of substantive provisions to deter corrupt campaign practices. In fact, in some respects, controls over campaign financing were loosened. Based on "almost unanimous testimony in opposition to any limit on political contributions" and concerns about the enforceability and constitutionality of contribution limits,[29] the $5000

24. The following discussion is only a brief review of legislative activity related to campaign financing. For more detail, see Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279 (1991).

25. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864; Foreign Corrupt Practices Act of 1925, ch. 368, tit. III, 43 Stat. 1070, 1072; Smith-Connally Act of 1943, ch. 144, 57 Stat. 163; Taft-Hartley Act of 1947, ch. 120, § 304, 61 Stat. 136, 159.

26. 18 U.S.C. §§ 608–613 (1970).

27. 2 U.S.C. §§ 244–246 (1970).

28. "At the time the Federal Election Campaign Act of 1971 was adopted, reporting and disclosure laws had been on the books for well over half a century. However, there was little or no enforcement of these laws, and little or no disclosure." John Warren McGarry, *Remarks Before Citizens Research Foundation Conference at Georgetown University Law School (April 2–3, 1981)*, *in* HERBERT ALEXANDER & BRIAN HAGGERTY, THE FEDERAL ELECTION CAMPAIGN ACT AFTER A DECADE OF POLITICAL REFORM 19 (1981).

29. S. REP. NO. 92-229, at 6 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1821, 1826. The Deputy Attorney General testified "that limits on contributions were unrealistic,

limitation on individual political contributions was repealed and replaced with a limit on expenditures from the personal funds of candidates and their immediate families.[30] The contribution limits, however, were restored (at $1000, lower than pre-FECA levels) by the 1974 amendments to FECA, which also established the FEC.[31]

Despite some concerns about the constitutionality of mandated disclosure of contributions,[32] Title III of FECA established "comprehensive requirements for detailed disclosures of contributions and expenditures on behalf of candidates for Federal elective office,"[33] replacing the earlier, ineffective reporting requirements.[34] FECA also for the first time, as part of Title III, specifically prohibited contributions in the name of another.[35] This last provision was specifically discussed in none of the Senate or House of Representatives committee reports on the bill, but presumably was intended to facilitate the disclosures mandated by Title III.

What the D.C. Circuit characterized as "by far the most comprehensive [campaign] reform legislation [ever] passed by Congress"[36] did not last long. A suit was filed almost immediately, seeking both a declaratory judgment that substantial portions of the law were unconstitutional and injunctive relief.[37] The 1974 amendments had provided for "fast track" review of challenges to the

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unenforceable, and probably unconstitutional as a restraint upon the right of a citizen to express himself under the First Amendment." *Id.* Professor Ralph Winter of Yale Law School came to similar conclusions. *See id.* at 39, *reprinted in* 1972 U.S.C.C.A.N. at 1859 (Supplemental Views of Messrs. Prouty, Cooper, and Scott).

30. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 201, 86 Stat. 3, 8–10 (1972).

31. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §§ 101(a), 208, 88 Stat. 1262, 1263, 1279–87 (1974) [hereinafter FECA 1974]. The need for further reform had been demonstrated "because the scramble to raise political funds prior to [the effective date of FECA], and thus to avoid the disclosure provisions of the law, resulted in broad and grave dissatisfaction with the Act and led to a demand for new and more comprehensive controls." S. REP. NO. 93-689, at 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5587, 5588.

32. *See* H.R. REP. NO. 92-564, at 32 (1971) (additional views of Mr. Frenzel) ("[T]he revelation of contributions as low as $25 may raise a constitutional question relative to 'personal spheres of privacy.' Publication of these minor amounts will undoubtedly discourage participation in political campaigns by many people.")

33. *Id.* at 1. The Senate described Title III as "a complete revision of the law governing public reporting of political finances." S. REP. NO. 92-229, at 3 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1821, 1823.

34. *See* Pub. L. No. 92-225, tit. III, 86 Stat. 3, at 11–19 (1972).

35. *See id.* § 310, 86 Stat. at 19 (codified as amended at 2 U.S.C. § 441f (1994)).

36. Buckley v. Valeo, 519 F.2d 821, 831 (D.C. Cir. 1975), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976).

37. *See Buckley*, 424 U.S. at 8–9.

constitutionality of the law: the district court was required to immediately certify any such questions to the court of appeals; the decision by the court of appeals was "reviewable by appeal directly to the Supreme Court;" and the court of appeals and Supreme Court were both directed to expedite disposition.[38] Thus, fifteen and one-half months passed from the passage of the 1974 amendments to the decision in *Buckley*.[39]

While the court of appeals upheld the constitutionality of substantially all of the law,[40] the Supreme Court was less supportive of Congress's efforts. In a per curiam opinion,[41] the Court upheld FECA's contribution limits, disclosure/recordkeeping requirements, and public financing scheme (through a tax return "checkoff" system); the expenditure limits were invalidated, and the Court held that the FEC, as then constituted, did not comply with the Appointments Clause of the Constitution.[42] Although much of the opinion has little relevance to the subject of this Article, the Court's analysis of the contribution and expenditure limits and the disclosure/recordkeeping

38. FECA 1974, *supra* note 31, § 315 (codified as amended at 2 U.S.C. § 437h (1994)).

39. The passage of the 1974 amendments occurred on October 15, 1974. *Id.* Pub. L. No. 93-334. The Supreme Court decided this opinion on January 30, 1976. *See Buckley*, 424 U.S. at 1. Thus, approximately 13 months passed from the passage of the 1974 amendments to the decision in *Buckley*.

40. *See Buckley*, 424 U.S. at 10.

41. The opinion was issued per curiam not because of any lack of importance, but to enable a quick response. When the Justices discussed the case in conference, the first scheduled disbursement of funds under the public financing provisions was less than two months away. *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 396 (1979). The opinion was divided between Chief Justice Warren Burger (preamble and statement of facts) and Justices Potter Stewart (contribution and expenditure limits), Lewis Powell (disclosure and record keeping requirements), William Brennan (public financing of campaigns), and William Rehnquist (constitutionality of the FEC). *See id.* Five additional opinions were issued in the case, by Burger, Byron White, Thurgood Marshall, Harry Blackmun, and Rehnquist, each concurring in part and dissenting in part. At least six of the eight Justices (Justice John Paul Stevens did not participate) supported every part of the opinion except the holding regarding contribution limits (which garnered five votes), but the only holding on which all eight Justices concurred was that the litigation constituted a "case or controversy" under Art. III of the Constitution. *See Buckley*, 424 U.S. at 5. The final published opinion, including an appendix of the relevant statutes, ran 294 pages in the U.S. Reports. It might have been even longer. Justice William Douglas, who had retired in 1975, wrote and attempted to publish a dissent. *See* WOODWARD & ARMSTRONG, *supra*, at 397–99.

42. *See Buckley*, 424 U.S. at 23–38 (contribution limits), 39–59 (expenditure limits), 60–84 (disclosure requirements), 85–109 (public financing), 109–43 (establishment of FEC). The basic holdings of *Buckley* were recently reaffirmed in *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377 (2000). The basic principles of *Buckley* were extended from campaigns for federal offices to campaigns for state offices, based on the state "interests of preventing corruption and the appearance of it that flows from munificent campaign contributions." *Id.* at 390–95.

requirements warrants further examination.

The difficulty with many of the FECA provisions, of course, was that they "operate[d] in an area of the most fundamental First Amendment activities," encompassing both political association and political expression.[43] The protection provided by the First Amendment, however, is not absolute, and thus the provisions could be "sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms."[44] The Court distinguished between contribution limits (upheld) and expenditure limits (struck down) in two respects.[45] First, the two sets of provisions invaded the protected rights to a different extent—expenditure limits "represent[ed] substantial rather than merely theoretical restraints,"[46] and contribution limits "entail[ed] only a marginal restriction upon" freedom of speech and association.[47]

More importantly, the Court found that the state's interests in limiting contributions were more compelling than those in limiting expenditures.[48] Contribution limits were justified by their effect in preventing corruption, whether real or perceived, associated with large financial contributions exchanged for political quid pro quos.[49] The Court concluded that actual corruption undermined "the integrity of our system of representative democracy"[50] and that preventing "the appearance of improper influence 'is also critical . . . , if confidence in the system of representative Government is not to be eroded to a disastrous extent.'"[51] In its discussion of real or perceived corruption,

43. *Buckley*, 424 U.S. at 14–15. Appellants also challenged the contribution limits as "employ[ing] overbroad dollar limits, and discriminat[ing] against candidates opposing incumbent officeholders and against minor-party candidates in violation of the Fifth Amendment." *Id.* at 24. These aspects of the challenge were significant but are not relevant to the issue of this Article.

44. *Id.* at 25.

45. *Id.* at 18.

46. *Id.* at 19.

47. *Id.* at 20. For a contrary view, see Burt Neuborne, *The Supreme Court and Free Speech: Love and a Question*, 42 ST. LOUIS U. L.J. 789, 796 (1998) ("Analytically, there is no real difference between the First Amendment value of a contribution and an expenditure.").

48. *Buckley*, 424 U.S. at 29. The Court found that the First Amendment required invalidation of FECA's limitations on campaign expenditure provisions. *Id.* at 58.

49. *See id.* at 25–29. In its analysis, the Court found that "[i]t is unnecessary to look beyond the Act's primary purpose—to limit the actuality and appearance of corruption resulting from large individual financial contributions—in order to find a constitutionally sufficient justification for the $1,000 contribution limitation." *Id.* at 26.

50. *Id.* at 26–27.

51. *Id.* at 27 (quoting CSC v. Letter Carriers, 413 U.S. 548, 565 (1973)).

the Court referred to "improper influence" and "large contributions . . . given to secure a political *quid pro quo*,"[52] but was willing to assume that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action."[53] Nevertheless, the government's interest in preventing real and perceived corruption was sufficient to justify prohibiting contributions (in excess of $1000), even if most would not have involved corruption.[54]

The interests advanced in support of the *expenditure* limits were "alleviating the corrupting influence of large contributions,"[55] "equalizing the financial resources of candidates,"[56] and "reducing the allegedly skyrocketing costs of political campaigns."[57] The Court agreed that preventing real or perceived corruption arising from large contributions was an important government interest but concluded that it was best addressed by the contribution limits rather than the expenditure limits.[58] Equalizing candidate resources and reducing overall campaign costs, on the other hand, were insufficient rationales for a substantial infringement on First Amendment freedoms.[59]

Following the analysis of contribution and expenditure limits, the Court examined the reporting/disclosure requirements.[60] Here, the analysis was fairly straightforward. Although "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment,"[61] the disclosure requirements met the exacting scrutiny test of *NAACP v. Alabama*[62] because there were sufficiently important governmental interests.[63] The Court identified three categories of state interests which justified disclosure: (1) allowing voters to evaluate candidates by identifying "'where political campaign money comes from and how it is spent;'"[64] (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the

52. *Id.* at 26.
53. *Id.* at 29.
54. *See id.* at 30.
55. *Id.* at 55.
56. *Id.* at 56.
57. *Id.* at 57.
58. *Id.* at 55–56.
59. *See id.* at 56–57.
60. *See id.* at 60.
61. *Id.* at 64.
62. 357 U.S. 449, 463 (1958) (holding that such infringements were subject to exacting scrutiny).
63. *See Buckley*, 424 U.S. at 66.
64. *Id.* (quoting H.R. REP. NO. 92-564, at 4 (1971)).

light of publicity;"[65] and (3) "gathering the data necessary to detect violations" of contribution limits.[66] There was no discussion of whether each of these interests would be independently sufficient to justify the disclosure requirements or whether all three were required.

Congress's reaction to *Buckley* was swift. Just over three months after the opinion was announced, Congress passed the Federal Election Campaign Act Amendments of 1976.[67] For the subject of this Article, the most significant change in the 1976 amendments was the establishment of a two-track enforcement mechanism where knowing and willful violations were subject to the normal criminal sanctions,[68] while minor violations were subject to civil enforcement by the FEC.[69]

Neither *Buckley* nor FECA explicitly established the hard money/soft money dichotomy for campaign contributions. Indeed, the only relevant comment in *Buckley* (although dictum) suggests that the Court assumed there *is* no soft money loophole. After construing the definition of "independent expenditures" narrowly for purposes of expenditure limits, the Court pointed out that

> [u]nlike the contribution limitations' *total ban* on the giving of large amounts of money to candidates, § 608(e)(1) prevents only some large expenditures. So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views.[70]

The hard-soft distinction was apparently created by the FEC in 1978, in a letter to the Kansas Republican State Committee that allowed it to use funds from sources prohibited by FECA for "administrative expenses and get-out-the-vote . . . drives that would benefit both state and federal candidates."[71] Subsequent regulations required expenditures directly attributable to a specific campaign to be paid for with hard money.[72] Administrative expenses and other expenditures, such as issue ads, that do not contain explicit

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65. *Id.* at 67.

66. *Id.* at 67–68 (quoting H.R. REP. NO. 92-564, at 4 (1971)).

67. FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. at 475 (codified as amended at 2 U.S.C. § 437 (1994)).

68. *Id.* § 112.

69. *Id.* § 109.

70. *Buckley*, 424 U.S. at 45 (emphasis added).

71. Note, *Soft Money: The Current Rules and the Case for Reform*, 111 HARV. L. REV. 1323, 1325 (1998).

72. *See id.* at 1327 (stating that 11 C.F.R. § 106.5(a) requires that money spent in connection with a federal candidate must be in hard dollars).

electioneering messages could be paid for partly with soft money.[73] This is consistent with FECA's definition of "contribution," which is limited to "money or other valuable assets 'for the purpose of... influencing' the nomination or election of candidates for federal office."[74]

The district court in *United States v. Kanchanalak* concluded that the statutory reporting requirement itself applied only to hard money contributions.[75] As the court had earlier noted in *United States v. Trie*, however, a soft money conduit donation can still provide the basis for prosecution even if there are otherwise no restrictions on such donations.[76] "While FECA itself proscribes only conduct that relates to 'hard money' contributions, FEC *regulations* require political committees to report both hard money contributions and soft money donations."[77] The FEC is granted power to "prescribe rules, regulations and forms to carry out the provisions of this Act,"[78] and such a grant of power is generally acknowledged as sufficient to authorize a regulation that is "reasonably related to the purposes of the enabling legislation."[79] Gathering information concerning soft

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73. *See id.* at 1326–28.

74. *Buckley*, 424 U.S. at 77 (quoting 2 U.S.C. § 431(e), (f) (1976)). The actual scope of FECA's source prohibitions and contribution limits is not entirely clear. In *United States v. Trie*, the court concluded that the prohibition of contributions by foreign nationals applied only to hard money contributions, not soft money donations. *See* United States v. Trie, 23 F. Supp. 2d 55, 58 (D.D.C. 1998). The D.C. Circuit subsequently disagreed in *United States v. Kanchanalak*, holding that contributions by foreign nationals were also prohibited for use in state and local campaigns. *See* United States v. Kanchanalak, 192 F.3d 1037, 1048 (D.C. Cir. 1999). This left open the possibility that such monies could be used for other "soft money" activities such as issue advertising. For a cynical evaluation of the hard-soft distinction, *see* George F. Will, *A Soft-Money Sob Story*, WASH. POST, Nov. 29, 2001, at A33.

> Unlike hard money, which is given to a particular candidate's campaign, soft money is given to parties for issue advertising and other 'party-building' activities, and cannot be used to 'influence' any federal election. These distinctions are absurd and, like Prohibition, produce cynicism about the law. Trying to draw a bright line between hard and soft money is like trying to draw a line in a river. What is the point of issue advertising if not to influence elections?

*Id.*

75. *See* United States v. Kanchanalak, 41 F. Supp. 2d 1, 7 (D.D.C. 1998), *rev'd on other grounds*, 192 F.3d 1037 (D.C. Cir. 1999) The government had also conceded in *Trie* that "the statutory prohibition of making contributions in the name of another under 2 U.S.C. § 441(f) applies only to hard money contributions." *Trie*, 23 F. Supp. 2d at 59.

76. *Trie*, 23 F. Supp. 2d at 59 n.4 (citing 11 C.F.R. § 104.8(a), (e) (1998)).

77. *Id.* (emphasis added).

78. 2 U.S.C. § 438(a)(8) (1994) (emphasis added).

79. *See* Mourning v. Family Publ'ns Serv., Inc., 411 U.S. 356, 369 (1973) (detailing the Court's acceptance of the Federal Reserve Board's interpretation of the Truth in Lending Act as "reasonably related").

money receipts by national political committees, while not specifically mandated by FECA, bears a reasonable relation to the FEC's stated goal of "eliminat[ing] the perception that prohibited funds have been used to benefit federal candidates and elections."[80]

This creates an anomaly. If an individual donates soft money funds to a political campaign committee, the contribution *cannot* violate most of FECA's substantive provisions, including that provision against making a contribution in the name of another. Individuals providing the funds are not required by FECA to identify their names for soft money donations or hard money contributions.[81] Nevertheless, if the donor of soft money provided a false name to the campaign committee, the committee treasurer would report that false name to the FEC and subject the donor to felony prosecution under the false statements and general conspiracy statutes,[82] but the donor could *not* be prosecuted under the FECA misdemeanor provisions.[83] This is not merely a potential. In *Kanchanalak* and *Trie*, the courts upheld counts in indictments that may have involved only soft money.[84]

### *B. The Evolution of Prosecutorial Approach*

As noted above, FECA includes two distinct enforcement mechanisms—administrative conciliation and civil enforcement by the FEC[85] and criminal enforcement by the Department of Justice ("DOJ").[86] From all indications, for several years the DOJ was satisfied with the enforcement sanctions offered by FECA. For example, in 1984 the Public Integrity Section of the DOJ issued the fourth edition of their manual on prosecution of election offenses (the

80. Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26,058, 26,059 (June 26, 1990) (codified at 11 C.F.R. pt. 104.8).

81. *See* Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400, 406 (D.C. Cir. 1996).

82. United States v. Kanchanalak, 192 F.3d 1037, 1044–45 (D.C. Cir. 1999) (donor who gave false name would "be held responsible for causing the false statement").

83. CRAIG C. DONSANTO, U.S. DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 78 (5th ed. 1988) [hereinafter D.O.J. MANUAL, 5th ed.].

84. *See Kanchanalak*, 192 F.3d at 1039, 1050; United States v. Trie, 23 F. Supp. 2d 55, 58 (D.D.C. 1998). These soft money donations may have involved foreign source funds, which are prohibited by FECA. *See Kanchanalak*, 192 F.3d at 1047–50. However, that was not critical to permitting indictments based on soft money donations. *See id.* at 1050.

85. CRAIG C. DONSANTO, U.S. DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 53–54 (4th ed. 1984) (emphasis added) [hereinafter D.O.J. MANUAL, 4th ed.] (stating that non-criminal penalties are imposed by the FEC, while the DOJ prosecutes campaign finance crimes).

86. *Id.*

"Manual" or "DOJ Manual").[87] In it, the department's official policy was described as follows:

> It is the policy of the Criminal Division to prosecute campaign financing crimes *under the FECA's penal sanctions* only in cases where the offense was either committed secretly and involved a substantial sum of money, or where it was part of a larger and more aggravated crime. *All other campaign finance matters* are routinely referred to the Federal Election Commission for the imposition of appropriate noncriminal penalties pursuant to the Act's civil enforcement mechanisms.[88]

There was no hint of using other criminal statutes to stop campaign financing abuses.

Three and one-half years later, the DOJ adopted a much more aggressive stance. Now, it had determined that "[t]he criminal penalty provided in 2 U.S.C. § 437g(d) has many features that render it difficult to use in federal criminal prosecutions."[89] These features include a limitation to misdemeanor sanctions, a short statute of limitations, "complex and confusing venue rules," and a monetary jurisdictional floor.[90] In place of the FECA provisions, the DOJ developed "alternative prosecutive theories" under which a violation of FECA could be prosecuted under the federal false statements statute or as a "conspiracy to defraud the United States."[91] The primary example that it gave was of conduit contributions.[92]

The new department policy[93] essentially abandoned the FECA

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87. *Id.*

88. *Id.* at 54 (emphasis added).

89. D.O.J. MANUAL, 5th ed., *supra* note 83, at 75.

90. *Id.* To be a criminal violation of FECA, the amount of funds involved must total $2000. *Id.* at 74.

91. *Id.* at 75–76. The current federal false statements statute is 18 U.S.C. § 1001 (1994); conspiracy to defraud the United States is covered under 18 U.S.C. § 371 (1994). Both are felonies, subject to penalties of five years. In the case of conduit campaign contributions, the defendants normally do not directly violate the false statements statute. The current DOJ Manual provides that "[i]n most cases the [campaign committee] treasurer [responsible for reporting contributions] is not a participant in the illegal scheme. Hence these defendants are charged under 18 U.S.C. § 2(b), as 'willfully causing' the false FEC report." CRAIG C. DONSANTO & NANCY S. STEWART, U.S. DEPARTMENT OF JUSTICE, FEDERAL PROSECUTION OF ELECTION OFFENSES 110 n.40 (6th ed. 1995) [hereinafter D.O.J. MANUAL, 6th ed.].

92. *See* D.O.J. MANUAL, 5th ed., *supra* note 83, at 76.

93. This change in policy is corroborated by comparing articles, written seven years apart, by a former Associate General Counsel in charge of enforcement at the FEC. *Compare* Kenneth A. Gross & Ki P. Hong, *The Criminal and Civil Enforcement of Campaign Finance Laws*, 10 STAN. L. & POL'Y REV. 51, 55 (1998) ("[P]rosecutors can also bring felony charges for FECA violations under other criminal statutes, such as fraud, false statements, and conspiracy."), *with* Kenneth A. Gross, *The Enforcement of Campaign*

criminal sanctions. The DOJ considered "that most FECA violations are appropriately enforced through the imposition of noncriminal sanctions imposed administratively by the FEC,"[94] and would only consider criminal prosecution if the violation involved large sums of money if "clandestine means or subterfuge were used to *disguise the unlawful character of the underlying offense*"[95] and if inaccurate reports were filed with the FEC.[96] Any such criminal prosecutions should, if possible, be brought under general felony statutes rather than the FECA penal provisions:

> Where such aggravating factors are present, efforts should be made to posture the case as a felony under one or more of the alternative "fraud" theories of prosecution summarized above. Disposition under the FECA's own criminal penalty provision (2 U.S.C. 437g(d)), which provides for misdemeanor penalties, is generally less attractive, and tactically more difficult, than presenting the matter as a "fraud" case.[97]

Apparently, DOJ's justification for this policy was primarily a matter of prosecutorial convenience. Only one argument was advanced that went to the underlying merits of the higher punishment: "[FECA] purports to reach only malum in se activity, and yet it provides for only misdemeanor sanctions."[98]

The DOJ also clearly suggested that criminal prosecution of these contributions depended on a substantive violation of FECA separate from the incorrect reporting itself. For example, criminal violations requiring "knowing and willful" intent would be those situations where "surreptitious means (such as cash, *conduits*, or false documentation) are employed to conceal conduct that *itself* violates one or more of the FECA's *substantive* requirements,"[99] or "a substantive FECA violation takes place as a means to a felonious end."[100] The alternative prosecutive theories worked in part because "most criminally prosecutable FECA offenses involve some effort . . .

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*Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 294–300 (1991) (discussing the availability of other criminal statutes, but omitting the false statements statute, and implying that conspiracy to defraud the United States would be limited to specific quid pro quo arrangements rather than merely impeding the FEC's ability to identify the true source of contributed funds).

94. D.O.J. MANUAL, 5th ed., *supra* note 83, at 78.
95. *Id.* (emphasis added).
96. *Id.*
97. *Id.*
98. *Id.* at 75.
99. *Id.* (emphasis added).
100. *Id.* at 74.

to conceal the *illegal character* of the financial activity in question."[101] The concealment itself was identified not as a sufficient basis for criminal prosecutions, but as proof that "a defendant was actively aware he was violating one of FECA's regulatory prohibitions or duties."[102]

This last point had also been advanced in the previous edition of the Manual, under which criminal prosecutions were still limited to the FECA misdemeanor sanctions. The fourth edition of the DOJ Manual acknowledged that "willfulness" required "proof that the offender had an active awareness *that he was doing something wrong* when he committed the transgression in question,"[103] such as "evidence that the offender sought to cover up his conduct."[104] Thus, concealment was proof of willfulness rather than the underlying offense.[105]

The DOJ has subsequently backed off somewhat from this attitude that nearly all criminal prosecutions should be brought under the general felony statutes. The latest Manual still identifies felony prosecutions as applicable to violations of "one or more of the FECA's *core campaign financing prohibitions*"[106] or the use of "conduits or other means calculated to conceal the *illegal source* of the contribution."[107] In addition, it established guidelines as to choosing between felony or FECA misdemeanor prosecutions: felony charges should be brought where the illegal activity involved totaled over $10,000 or where "special circumstances" would warrant felony charges.[108] The dollar cut-off is, of course, not mentioned in the statutory scheme, and the "special circumstances" are not defined in the Manual.[109]

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101. *Id.* at 75 (emphasis added).
102. *Id.* at 74.
103. D.O.J. MANUAL, 4th ed., *supra* note 85, at 53–54 (emphasis added).
104. *Id.* at 54.
105. *Id.*
106. D.O.J. MANUAL, 6th ed., *supra* note 91, at 108 (emphasis added).
107. *Id.* at 109 (emphasis added).
108. *Id.* at 115.
109. *Cf.* Gross & Hong, *supra* note 93, at 53–55. Gross & Hong describe the aggravating factors used to justify criminal enforcement versus civil enforcement, but note that no such factors are used to distinguish between felony prosecution under general criminal statutes and misdemeanor prosecution under FECA. *Id.* The only reasons that the authors provide for felony prosecutions are that "prosecutors [may] have difficulties bringing a criminal charge under FECA," that "prosecutors generally prefer felony statutes with jail time," and that "the threat of a felony can be effective leverage in reaching a plea agreement on a misdemeanor." *Id.* at 55.

## III. THE MENS REA ARGUMENT

One of the key issues to arise in litigation of these conduit contribution cases is the appropriate mens rea standard.[110] Felony prosecutions under the false statements statute, in conjunction with the aiding and abetting statute, are subject to a "willfully" element in both statutes.[111] "Knowingly and willfully" in criminal law generally does not imply anything beyond the fact that the defendant was aware of her actions and took them deliberately.[112] In some federal criminal cases, however, the Supreme Court has interpreted "knowingly" and/or "willfully" to require that the defendant knew of the law she was violating, or at least was aware that her actions were unlawful.[113]

In the context of felony prosecutions of conduit contributions under the false statements and aiding and abetting statutes, the interpretation of "knowingly and willfully" is currently unsettled. The Court of Appeals for the Third Circuit has applied a higher standard—knowledge of the law being violated[114]—while the Courts of Appeals for the Second and D.C. Circuits have applied the traditional standard, requiring only knowledge of the information that makes the statements false.[115] The Supreme Court has not yet addressed the circuit split.

The appropriate mens rea standard, however, is relatively clear in the case of *misdemeanor* FECA prosecutions of conduit contributions. In that situation, there is clear indication in the legislative history of

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110. For simplicity, the following discussion focuses on prosecution under the false statements statute, but similar argument would apply, for example, to prosecutions for conspiracy to defraud the United States.

111. *See* 18 U.S.C. § 1001 (Supp. 1997) ("[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States *knowingly and willfully* . . . makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title or imprisoned not more than five years, or both.") (emphasis added); 18 U.S.C. § 2(b) (1994) ("Whoever *willfully* causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.") (emphasis added).

112. *See, e.g.*, United States v. Hopkins, 916 F.2d 207, 214 (5th Cir. 1990) ("The Government may prove that a false representation is made 'knowingly and willfully' by proof that the defendant acted deliberately and with knowledge that the representation was false.").

113. *See* United States v. Bryan, 524 U.S. 184 (1998); Ratzlaf v. United States, 510 U.S. 135 (1994); Liparota v. United States, 471 U.S. 419 (1985).

114. United States v. Curran, 20 F.2d 560, 569 (3d Cir. 1994) ("[T]he federal election law context requires the prosecution to prove that the defendant had knowledge of the treasurers' reporting obligations . . . .").

115. *See* United States v. Gabriel, 125 F.3d 89, 101 (2d Cir. 1997) (knowledge that acts violated the law not required); *see also* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999).

congressional intent for the higher standard, knowledge of the law being violated.[116] As the court noted in *United States v. Trie*:

> In establishing the civil and criminal liability penalty scheme for FECA, Congress expressly stated that the "knowing and willful" requirement was intended to limit liability to cases in which "the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law."
>
> Where FECA provides the underlying statutory scheme for a felony prosecution under the generally applicable false statements statute, it is at least as important to require the government to prove that the defendant knew of the statutory and regulatory requirements at issue as Congress concluded it was for a misdemeanor conviction under FECA itself.[117]

The legislative history cited was actually referring to the most severe level of *civil* penalties, but both civil penalties and criminal penalties use virtually identical mens rea language.[118]

Section A of this part addresses, in abbreviated form, the Supreme Court's recent jurisprudence regarding the application of mens rea standards in criminal law.[119] A full examination is well beyond the scope of this Article,[120] but a brief review is important for the evaluation of circuit court cases relating to conduit contributions. Section B reviews those circuit court cases in detail, while Section C analyzes them against the standards developed by the Supreme Court.[121] In doing so, I conclude that the position of the Third Circuit, requiring proof that the defendant knew of the reporting requirement,[122] is the appropriate application of Supreme Court precedent.

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116. *See* H.R. REP. NO. 94-917, at 3–4 (1976).

117. United States v. Trie, 21 F. Supp. 2d 7, 18–19 (D.D.C. 1998) (quoting H.R. REP. NO. 94-917, at 4 (1976)) (internal citation omitted).

118. *See* H.R. REP. NO. 94-917, at 3–4 (1976). *Compare* 2 U.S.C. § 437g(a)(6)(C) (1994) ("knowing and willful violation," provision for civil penalties), *with* 2 U.S.C. § 437g(d)(1)(A) (1994) ("who knowingly and willfully commits a violation," provision for criminal penalties).

119. *See* discussion *infra* Section II-A.

120. Those interested in a more in-depth discussion can refer to John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021 (1999). For another review of the issue, arguing against the trend, see Sharon L. Davies, *The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance*, 48 DUKE L.J. 341 (1998).

121. *See* discussion *infra*, Sections II-B and -C.

122. *See* United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994) (holding that willfulness requires knowledge of the wrongful act).

### A. *The Supreme Court's Mens Rea Jurisprudence*

The general standard that "ignorance of the law excuses no one"[123] has encountered various exceptions, such as *Lambert v. California*,[124] but is still the default rule.[125] In most cases, this raises no significant concern because the behavior in question is morally culpable whether the defendant knew of the specific legal prohibition or not, because of community consensus that the conduct is immoral.[126] A problem arises when the defendant violates a law which "embodies no moral norm" and about which the defendant did not know.[127] That problem has arguably gotten worse in recent years, especially since 1986, as "Congress has passed a host of new criminal prohibitions" which "carry heavy penalties and the potential for outlawing apparently innocent behavior."[128] "Ignorance of the law is no excuse" no longer works as well as it once did.[129]

In response to this problem, the Supreme Court has in recent years apparently developed a new approach to statutory construction of criminal statutes that is "subtle in form but sweeping in implication."[130] If a morally blameless person could *hypothetically* violate the statute, the Court formulates an additional mens rea element sufficient to prevent conviction of those who are not culpable.[131] As yet, the new rule has not been clearly stated by the Court,[132] and as will be seen in following sections, some observers (including some courts of appeal) have not fully understood the change that the Supreme Court has set in motion. Nevertheless, the new approach is evident from examination of three recent Supreme Court cases: *Liparota v. United States*,[133] *Ratzlaf v. United States*,[134] and

123. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 13.01[A], at 147 (2d ed., 1995).

124. 355 U.S. 225, 229–30 (1958) (holding that a defendant "wholly passive and unaware of any wrongdoing" cannot be convicted of violating a registration law in comport with due process).

125. *Id.* at 228. ("The rule that 'ignorance of the law will not excuse' is deep in our law.").

126. *See* Wiley, *supra* note 120, at 1027–28.

127. *Id.* at 1028.

128. *Id.* at 1061–62.

129. *Id.* at 1023.

130. *Id.*

131. *See id.*

132. *See id.* at 1162 ("The rule of mandatory culpability now is visible, yet inchoate. It is something the Supreme Court does but has not named.").

133. 471 U.S. 419 (1985).

134. 510 U.S. 135 (1994).

*Bryan v. United States*.[135]

*Liparota*, the first of the three cases, involved an indictment for buying federal food stamps at discounted prices.[136] The law in question prohibited the knowing but unauthorized transfer, acquisition, alteration, or possession of food stamp coupons.[137] The Court concluded that the statute must be interpreted to apply only when a defendant knew that his conduct was unauthorized or illegal.[138] The Court reached this conclusion largely by considering a range of "inventive and far-fetched" possible situations in which the hypothetical defendant would not be morally culpable—using stamps in a store which illegally charged higher prices to food stamp recipients than to other customers, or tearing up and throwing away food stamps received in error.[139] This demonstrated that the statute, if not narrowly construed to require knowledge of the law, would reach a "broad range of apparently innocent conduct."[140] The Court's interpretation was necessary to avoid abuse by prosecutors.[141]

The most prominent application of the rule was enunciated nine years later.[142] In *Ratzlaf* the defendant was charged with "structuring" cash transactions.[143] To fight money laundering, federal law required financial institutions to report all cash transactions greater than $10,000;[144] because of the potential for evasion of the reporting requirement, Congress later added a prohibition against structuring cash transactions, that is, breaking one large transaction into several smaller transactions, each less than $10,000, "for the purpose of

135. 524 U.S. 184 (1998).

136. *See Liparota*, 471 U.S. at 421.

137. *See id.* at 420 n.1.

138. *Id.* at 425.

139. Wiley, *supra* note 120, at 1039; *see also Liparota*, 471 U.S. at 426–27.

140. *Liparota*, 471 U.S. at 426. Whether the "inventive and far-fetched" examples cited actually demonstrated a *broad* range of apparently innocent conduct is arguable. Justice Byron White was not concerned by the breadth of *real* behavior that the statute would reach. *Id.* at 437 n.3 (White, J., dissenting) ("We should proceed on the assumption that Congress had in mind the run-of-the-mill situation, not its most bizarre mutation."). As the next case in this line demonstrated, however, the range of apparently innocent conduct subject to prosecution need not necessarily be "broad" to implicate concerns about culpability.

141. *Id.* at 427.

142. *Ratzlaf* was a central focus in the analysis by the circuit courts which have addressed the mens rea issue in the context of federal election law and/or prosecutions under 18 U.S.C. §§ 2(b), 1001, with little or no attention given to the other cases reviewed in this section. *See infra* Section III-B.

143. Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

144. 31 C.F.R. § 103.22(b) (1994).

evading the reporting requirements."[145] Another provision established stiff penalties for "willfully violating" provisions of the subchapter, including the anti-structuring provision.[146] The issue was not knowledge of the *reporting* requirements, which the defendant admitted; the issue was whether the government had to show knowledge of the anti-structuring provision.[147]

The Court noted some traditional statutory construction arguments supporting its interpretation of the mens rea requirement.[148] If the analysis had ended there, the opinion would have been unexceptional. The Court continued on, however, in response to the government's claim that violators of the anti-structuring provision "by their very conduct, exhibit a *purpose to do wrong*, which suffices to show 'willfulness.'"[149] This shifted the battle onto the *Liparota* battleground—was the prohibited conduct itself, without anything more, sufficient to demonstrate moral culpability?[150] The Court presented another hypothetical "parade of horribles"—individuals who structured cash transactions "to reduce the risk of an IRS audit," "to keep a former spouse unaware of his wealth," or due to fear "that the bank's reports would increase the likelihood of burglary"—and concluded that "currency structuring is not *inevitably nefarious*."[151] Arguably, it was this final part of the analysis that was primarily responsible for the Court's conclusion: "*In light of these examples*, we are unpersuaded by the argument that structuring is so obviously 'evil' or inherently 'bad' that the 'willfulness' requirement is satisfied irrespective of the defendant's knowledge of the illegality of structuring."[152]

Significantly, the Court still relied on a hypothetical "parade of horribles" that bore little resemblance to the actual defendant.[153] In addition, the Court moved toward a more expansive definition of the problem than the rule was designed to address. Instead of *Liparota's* concern about statutes that penalized a "broad range of apparently

145. *Ratzlaf*, 510 U.S. at 138–40 (quoting 31 U.S.C. § 5324).
146. *Id.* at 140 (citing 31 U.S.C. § 5322).
147. *See id.* at 137–38.
148. *See id.* at 140–43.
149. *Id.* at 143 (emphasis added).
150. Liparota v. United States, 471 U.S. 419, 423 (1985) (explaining that the controversy concerned whether the mental state of the defendant, if any, must be proven by the government).
151. *Ratzlaf*, 510 U.S. at 144–45 (emphasis added).
152. *Id.* at 146 (emphasis added).
153. *See id.* at 155 & n.6 (Blackmun, J., dissenting) (criticizing the majority's application of the restructuring law).

innocent conduct,"[154] the *Ratzlaf* Court would apply its rule to any statute that criminalized conduct that was not "*inevitably*" nefarious or "*invariably*" blameworthy.[155] If the Court could conceive of any (hypothetical) blameless defendant who might violate the terms of the statute, it would require that the government prove knowledge of the criminal prohibition.[156]

The Court cited its earlier decision in *Cheek v. United States*,[157] a tax evasion case, for "the venerable principle that ignorance of the law generally is no defense to a criminal charge."[158] That seems odd because *Cheek* was an *exception* to the "venerable principle."[159] In *Cheek*, the Court noted that "almost 60 years ago [we] interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."[160] The *Ratzlaf* Court reached the same result without relying on any conclusion as to—indeed, without discussing—the complexity of the anti-structuring provisions.[161] The dissent, in fact, pointed out that "the provisions involved are perhaps among the simplest in the United States Code" and, for that reason, concluded that the *Cheek* rule was inapplicable.[162] The rule in *Ratzlaf* was thus a general rule, based on whether innocent people could violate the statute regardless of the relative simplicity or complexity of the law.[163]

The latest Supreme Court pronouncement on this issue arose in *Bryan*, which concerned a prosecution for dealing in firearms without the required federal license.[164] That offense required the defendant to have acted "willfully."[165] On appeal, the defendant argued that "knowledge of the federal licensing requirement . . . was an essential

154. *Liparota*, 471 U.S. at 426.
155. *Ratzlaf*, 510 U.S. at 144–45 (emphasis added).
156. *See id.* at 146.
157. 498 U.S. 192 (1991).
158. *Ratzlaf*, 510 U.S. at 149 (quoting *Cheek*, 498 U.S. at 199).
159. *Cheek*, 498 U.S. at 200.
160. *Id.*
161. *See* Davies, *supra* note 120, at 375 (noting that Ratzlaf would have lost under earlier formulations of the rule, which were initially limited to tax statutes and then had been extended to "complex" statutes, since "the anti-structuring statute was not complex").
162. *Ratzlaf*, 510 U.S. at 156 (Blackmun, J., dissenting).
163. *See id.* (referring to the structuring statute as the "simplest in the United States Code").
164. *See* Bryan v. United States, 524 U.S. 184, 186 (1998).
165. *See id.* at 188–89. For the relevant statutory provisions, see *id.* at 187 n.2 (quoting 18 U.S.C. § 922(a)(1)(A) (1994)), at 188 n.6 (quoting 18 U.S.C. § 924(a)(1) (1994)).

element of the offense."[166] The Supreme Court agreed that

> in the criminal law [willfully] also typically refers to a culpable state of mind .... As a general matter, when used in the criminal context, a "willful" act is one undertaken with a "bad purpose." In other words, in order to establish a "willful" violation of a statute, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[167]

This statement affirmatively answered the Court's question of whether *some* degree of minimum culpability was necessary for a conviction under this "willfully" provision.[168] The answer was yes.[169] The remaining discussion addressed not whether the government needed to prove culpability, but rather exactly how much culpability had to be shown.[170]

When it moved on to that question, the Court brushed aside the defendant's argument for "a more particularized showing."[171] "Willfully" did indeed imply a higher burden than the "knowingly" standard that the statute used for some prohibitions.[172] Since the latter required only "knowledge of the facts that constitute the offense," the Court could interpret the "willfully" standard as imposing a higher level of culpability, but still less than knowledge of the specific law.[173] Further, the previous decisions in *Ratzlaf* and *Cheek*, interpreting "willfully" to require knowledge of the specific statutory provisions,[174] were distinguishable because they involved "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct."[175] The Court further noted that "there was a need for specificity" in such technical statutes "that is inapplicable when there is *no danger of conviction* of a defendant with

166. *Id.* at 190.

167. *Id.* at 191–92 (footnote omitted) (quoting *Ratzlaf*, 510 U.S. at 137).

168. *See id.* at 191 n.12 (noting that willful may be described as acting with a bad purpose, without ground for believing the act is lawful, or with careless disregard as to whether the act is lawful).

169. *See id.* at 196.

170. *See id.* at 192. *See also* Davies, *supra* note 120, at 382 n.166 (noting that the government did not even attempt to "argue that the willfulness genie be put back in the tax bottle").

171. *Bryan*, 524 U.S. at 192.

172. *See id.* (explaining that the defendant's argument "is not persuasive because the term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law").

173. *Id.* at 193.

174. Ratzlaf v. United States 510 U.S. 135, 136–37 (1994); Cheek v. United States, 498 U.S. 193, 200 (1991).

175. *Bryan*, 524 U.S. at 194.

an innocent state of mind."[176] There was no such danger here, as "the jury found that this petitioner knew that his conduct was unlawful."[177] The evidence of such knowledge—using straw purchasers, promising to file off serial numbers, and reselling the guns in areas where drugs were sold—was "unquestionably adequate."[178]

The decision in *Bryan* was remarkable. It seemed to imply that "willfully" *always* required a showing that a defendant knew his conduct was "unlawful."[179] There was still the question of whether knowledge of the specific statutory provision need be shown, but the government would always have to show some minimum degree of culpability. "[T]he traditional rule that ignorance of the law is no excuse," however, still stood.[180] This interpretation, unlike *Ratzlaf* and *Cheek*, was not an exception to that rule because this interpretation required knowledge of *unlawfulness* but not of the specific *law*.[181] Both sides lost in *Bryan*—its culpability rule set a lower threshold than had *Liparota*, *Ratzlaf*, and *Cheek* but would cover a wider range of statutes.[182] Apparently, the higher threshold (requiring a showing that the defendant had knowledge of the specific law being violated) still applies to "highly technical" statutes with either "complex (*Cheek*) or relatively unknown (*Ratzlaf*) provisions."[183]

Based on an examination of these Supreme Court cases, there is indeed a new rule in criminal jurisprudence. Generally, "willfully" will be interpreted to require a showing of some degree of culpability—at least, the defendant's general knowledge that what he was doing was unlawful. Under some circumstances, such as complex statutes or relatively unknown prohibitions that could criminalize a broad range of "apparently innocent conduct," that culpability requirement may extend to a showing that the defendant was aware of the specific legal duty he or she is charged with violating.[184]

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176. *Id.* at 195 n.22 (emphasis added).
177. *Id.* at 195.
178. *Id.* at 189.
179. This is strikingly different than the view codified in the Model Penal Code, under which "willfully" does not require knowledge of the law being violated. *See* MODEL PENAL CODE § 2.02(9) (1985).
180. *Bryan*, 524 U.S. at 196.
181. *Id.* The dissent criticized this lack of specificity, interpreting the Court's opinion to allow conviction for unlicensed dealing in firearms if the defendant merely knew that he was violating some law, even one totally unrelated to the conduct in question. *See id.* at 201–03 (Scalia, J., dissenting).
182. *See* Davies, *supra* note 120, at 383–87.
183. *Id.* at 384.
184. *Id.* at 386 & n.182.

### B. *The Current Circuit Split*

The Third Circuit was the first to address the mens rea issue in the context of federal election law in *United States v. Curran*.[185] That case involved a typical conduit contribution scheme.[186] The Court found that "knowing and willful" in the false statements statute required only proof that "a defendant 'acted deliberately and with knowledge that the representation was false.'"[187] "[T]he government used section 2(b) in conjunction with section 1001," because the conduct in question "did not fall directly within the scope of section 1001."[188] Therefore, it was necessary to determine the "proper construction of 'willfulness' required for a charge under section 2(b) linked with section 1001 in an Election Campaign Act case."[189] In this respect, the court turned to the interpretation of "willfully" in *Ratzlaf*.[190]

The *Curran* court noted that "the defendant in *Ratzlaf* was not charged with violations of sections 2(b) and 1001," but, nonetheless, found "nothing in the Court's discussion of willfulness that would confine the rationale to the currency reporting statute."[191] In this respect, the court drew a sharp contrast between *Cheek*, which had been limited to violations of complex provisions of the Internal Revenue Code, and *Ratzlaf*.[192] Three similarities between *Curran* and *Ratzlaf* persuaded the court to apply the *Ratzlaf* standard: 1) the underlying statutes (currency reporting and FECA reporting obligations) were similar in that prosecution was based in part on a third party's obligation to provide information to the government; 2) the defendants' conduct was not "obviously 'evil' or inherently 'bad'"; and 3) the underlying statutes were regulatory schemes, malum prohibitum rather than malum in se.[193] With regard to the second similarity, arguably the primary driver behind *Ratzlaf*, the court in *Curran* noted that "[w]e see little difference between breaking a cash transaction into segments of less than $10,000 and making a contribution in the name of another."[194] Consequently, the court

185. 20 F.3d 560 (3d Cir. 1994).
186. *Id.* at 566.
187. *Id.* at 567 (quoting United States v. Hopkins, 916 F.2d 207, 214 (5th Cir. 1990)).
188. *Id.*
189. *Id.* at 568.
190. *See id.* (citing Ratzlaf v. United States, 510 U.S. 135, 141 (1994)).
191. *Id.*
192. *Id.* at 568–69.
193. *See id.* at 569.
194. *Id.*

concluded that "willfulness in cases brought under sections 2(b) and 1001 *in the federal election law context* requires the prosecution to prove that defendant *knew of the treasurers' reporting obligations*, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful."[195]

The Second Circuit disagreed in *United States v. Gabriel*.[196] That case actually arose outside the campaign financing context but again involved prosecution under sections 2(b) and 1001.[197] The defendants were executives of Chromalloy Research and Technology ("CRT"), a division of Chromalloy Gas Turbine Corporation; CRT allegedly "misrepresent[ed] the nature of some of its jet engine repairs."[198] The government charged the defendants with causing other employees of CRT to make false statements on company documents relating to repairs for Air India and Qantas Airlines because the documents, maintained in CRT's files, were subject to Federal Aviation Administration ("FAA") inspection and thus constituted false statements to a federal agency.[199] The court's analysis, in concluding that the prosecution need not show that the defendant was aware of the law she violated, first rejected the *Curran* approach and then concluded that the factors on which the Supreme Court based the *Ratzlaf* decision did not apply to prosecutions under sections 2(b) and 1001.[200]

The primary problem that the *Gabriel* court had with *Curran* was its indeterminate, contextual approach.[201] That is, "willfully" in a prosecution under sections 2(b) and 1001 might or might not "require[] a knowing violation of the law [depending] on the context in which the statement was made."[202] The court thought that such a contextual approach not only would create "obvious interpretative difficulties," but also was directly foreclosed by *Ratzlaf*.[203] Specifically, *Ratzlaf* stated that "[a] term appearing in several places in a statutory text is generally read the same way each time it appears. We have even stronger cause to construe a *single* formulation . . . the same way

195. *Id.* (emphasis added).
196. 125 F.3d 89 (2d Cir. 1997).
197. *Id.* at 99 (noting defendant was convicted of making a false statement to the FAA).
198. *Id.* at 92.
199. *Id.* at 92–93.
200. *See id.* at 101–02.
201. *Id.* at 101.
202. *Id.*
203. *Id.*

each time it is called into play."[204] Thus, a single, consistent interpretation of "willfully" in section 2(b) was necessary.[205]

Moving on, the court proceeded to provide its own interpretation of the section 2(b) requirement and concluded that "the government need not prove a knowing violation of the law under that section."[206] The court's analysis began by stating that "[t]he general rule in criminal cases is that the government need not prove a knowing violation of the law"[207] and by citing precedents where section 2(b) *itself* had been interpreted as not requiring a knowing violation of the law.[208] The only information outside of section 2(b) that was relevant to the analysis was the underlying criminal provision, in this case, section 1001.[209] Conviction under section 2(b) required that the defendant satisfied two mens rea requirements: a) "intentionally caus[ing] another to commit the requisite act"; and b) "the mental state necessary to violate the underlying section."[210]

Before concluding that section 2(b) did not require proof of a knowing violation of the law, the *Gabriel* court applied, and found inapposite, four factors that had been discussed in *Ratzlaf*.[211] First, while *Ratzlaf* had concluded that "willfully" in the statute in question would be "mere surplusage" if not interpreted to require a knowing violation of the law,[212] Gabriel concluded that "willfully" had a role to fill in section 2(b)—that "the government must prove that defendant intentionally caused another to act."[213] Second, *Ratzlaf* (and *Cheek*) involved very complex law, but the *Gabriel* court noted that "section 2(b) is quite uncomplicated."[214] Third, the *Ratzlaf* court found that previous interpretations of the statutory term, in other contexts,

204. Ratzlaf v. United States, 510 U.S. 135, 143 (1994) (citations omitted) (quoted in *Gabriel*, 125 F.3d at 101).

205. *See Gabriel*, 125 F.3d at 101.

206. *Id.*

207. *Id.*

208. *Id.* The Court cites United States v. Hollis, 971 F.2d 1441, 1451–52 (10th Cir. 1992) (section 2(b) does not require a knowing violation of the law). *Cf.* United States v. Jordan, 927 F.2d 53, 55 (2d Cir. 1991) (under section 2(b), a defendant is "as liable for [a crime] as she would have been if she had physically [committed it herself]"); American Surety Co. of New York v. Sullivan, 7 F.2d 605, 606 (2d Cir. 1925) (L. Hand, J.) ("The word 'willful' . . . means no more than that the person charged with the duty knows what he is doing. It does not mean that, in addition, he must suppose that he is breaking the law.").

209. *Gabriel*, 125 F.3d at 101.

210. *Id.* (emphasis omitted).

211. *Id.* at 101–02.

212. *Id.* at 102.

213. *Id.*

214. *Id.*

required a knowing violation of the law,[215] whereas the *Gabriel* court found no similar precedents concerning section 2(b).[216] Finally, the *Ratzlaf* court "stated that the conduct at issue was not '*inevitably nefarious.*'"[217] In a prosecution under section 2(b), the government would have to prove the "mental state necessary to violate the underlying criminal statute, [and thus,] it is inevitable that the defendant had *criminal intent.*"[218]

As discussed in the next section, the court's analysis in *Gabriel* is arguably wrong even before adding the complexities that arise in the election law context. Nevertheless, when the issue came up again in a prosecution for conduit contributions, the D.C. Circuit in *United States v. Hsia*[219] agreed with *Gabriel* rather than *Curran.*[220] Rather than following *Gabriel*'s questionable analysis, the court relied on a "natural reading" of sections 2(b) and 1001 and found that the government would have to prove that the defendant both knew the statements were false (the mens rea for section 1001) and intended to cause the statements (the mens rea for section 2(b)).[221] It decided that "the general rule that ignorance of the law is no excuse" was the appropriate rule in the context of a prosecution under sections 2(b) and 1001, not "*Ratzlaf*'s narrow exception"[222] The court's brief analysis of *Ratzlaf* focused only on the "surplusage" argument and not on the other three arguments that *Gabriel* had reviewed.[223] Interestingly, there was no citation to *Bryan*, decided almost a year earlier. The court seemed unaware that, even if *Ratzlaf*'s narrow exception did not apply to this situation, *Bryan* provided a broader exception to the rule that ignorance of the law is no excuse.

To make matters even more confusing, the DOJ position on the

215. Ratzlaf v. United States, 510 U.S. 135, 142–43 (1994).
216. *Gabriel*, 125 F.3d at 102.
217. *Id.* (quoting *Ratzlaf*, 510 U.S. at 144) (emphasis added).
218. *Id.* (emphasis added).
219. 176 F.3d 517 (D.C. Cir. 1999).
220. Before *Hsia* the district court in D.C. had reached the opposite conclusion. *See* United States v. Trie, 21 F. Supp. 2d 7, 15–16 (D.D.C. 1998). The court concluded that FECA satisfied both reasons for requiring proof of knowledge of the law being violated, noting Congress's awareness of "the combination of the nature of the statute, which criminalizes activity that is not inherently evil, and the complexity of the statute, which imposes highly technical reporting requirements, present[ing] the risk that non-culpable people might be prosecuted." *Id.* at 15 (citing 122 CONG. REC. 8577 (1976) (statement of Rep. Rostenkowski) ("provisions in the [pre-1976] law that provide harsh penalties for what may be innocent and often unknowing violations of its more technical requirements")).
221. *Hsia*, 176 F.3d at 522.
222. *Id.*
223. *Id.*

necessary mens rea is unclear. In 1984, before DOJ had decided to attempt to prosecute conduit contributions under general felony statutes, the Manual on election offenses interpreted the FECA misdemeanor provisions to require knowledge that the conduct was culpable:

> Criminal violations of the FECA differ from noncriminal violations of it principally in the degree of criminal intent involved. For an FECA offense to rise to a level that is cognizable under 2 U.S.C. 437g(d), it must have been committed with "knowing and willful" intent. However, the substantive provisions of the Act are largely regulatory *malum prohibitum* prohibitions and duties. As such, the existence of a statutory specific intent element requires proof either that a would-be FECA defendant had an active awareness that he was violating the law when he committed the transgression in question, or that he was otherwise acting with "evil" motive or purpose.[224]

However, the Manual also concluded that use of "surreptitious means (such as cash, conduits, or false documentation)" proves that "a defendant was actively aware he was violating one of the FECA's regulatory prohibitions or duties."[225] "Regulatory prohibitions or duties" evidently meant the prohibited sources or contribution limits, rather than the prohibition against making a contribution in the name of another.[226] Similar comments about the mens rea standard for FECA misdemeanors were included in the 1988 edition of the Manual, with no corresponding discussion for the "alternative prosecutive theories" involving the general felony statutes.[227]

In its latest edition, the DOJ Manual mentioned *Curran* as "demonstrat[ing] that satisfying these scienter requirements can prove challenging."[228] *Gabriel*, of course, had not yet been decided, let alone *Hsia*.[229] However, even after *Gabriel* had come down, a former Associate General Counsel in charge of enforcement at the FEC

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224. D.O.J. MANUAL, 4th ed., *supra* note 85, at 41 (emphasis supplied).

225. *Id.*

226. *See* D.O.J. MANUAL, 5th ed., *supra* note 83, at 74. The example given concerns the "use of conduits to conceal the fact that corporate funds were being infused into a political campaign." *Id. See also* D.O.J. MANUAL, 4th ed., *supra* note 85, at 41.

227. *See* D.O.J. MANUAL, 5th ed., *supra* note 83, at 73–74 ("There is nothing inherently wrongful or 'evil' about the vast majority of the conduct covered by the campaign finance laws.").

228. D.O.J. MANUAL, 6th ed., *supra* note 91, at 110.

229. The *Curran* decision was decided on March 30, 1994, while *Gabriel* was not decided until September 23, 1997; and *Hsia* was decided still later on May 18, 1999. United States v. Curran, 20 F.3d 560 (3d Cir. 1994); United States v. Gabriel, 125 F.3d 89 (2d Cir. 1997); United States v. Hsia, 176 F.3d 517 (D.C. Cir. 1999).

noted that "the specific intent requirement of *Ratzlaf* and *Curran* appears to be the prevailing standard."[230] DOJ apparently agreed,[231] although they continued to challenge the *Curran* standard and were successful in that challenge in *Hsia*.[232]

### C. *Why the Third Circuit Is Right, and Why It Matters*

In retrospect, one of the most surprising aspects of the Circuit Courts' analysis of the issue is their focus on *Ratzlaf* and, to a lesser extent, on *Cheek*, to the exclusion of the other cases.[233] *Curran* and *Gabriel* came down before *Bryan*, but *Hsia* was decided after *Bryan*; and all three of the Circuit Court cases were decided after *Liparota*. The Circuit Courts' focus on *Ratzlaf* perhaps contributed to its opinion being interpreted in *Hsia* and *Gabriel* as a "narrow exception," rather than part of a more universal rule.[234] *Curran*, on the other hand, considered the rule in *Ratzlaf* to be rather broad and specifically noted that *Cheek* had limited its rule to complex tax code provisions,[235] while *Ratzlaf* was not similarly confined.[236] Similarly, the dissent in *Ratzlaf* pointed out that the majority opinion announced a general rule, applicable to simple rather than complex statutory prohibitions and therefore extending well beyond the holding in *Cheek*.[237] When these observations are added to similar results in *Liparota* and *Bryan*, the characterization of *Ratzlaf* as a narrow holding that should be confined to its facts appears untenable.

In this context, *Gabriel* contrasted *Ratzlaf*, where the Court "was influenced by the 'complex of provisions in which [section 5322 is] embedded'" with the "quite uncomplicated" section 2(b).[238] But this was clearly a misinterpretation of *Ratzlaf*. In its discussion of the "complex of provisions," the *Ratzlaf* court was doing nothing more

230. Gross & Hong, *supra* note 93, at 53.

231. Craig Donsanto, Address at the Practicing Law Institute Corporate Political Activities 1997 Program (Oct. 31, 1997) ("We have to show specifically [that defendants] knew what the law was and that they flouted the law, that knowledge notwithstanding.") (quoted in Gross & Hong, *supra* note 93, at 53).

232. This may have been due in part to intra-departmental disagreements. Mr. Donsanto was head of the Public Integrity Section at D.O.J., while the prosecution in *Hsia* was brought by the Campaign Financing Task Force. *See* United States v. Hsia, 24 F. Supp. 2d 33, 49 (D.D.C. 1998), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

233. *Curran*, 20 F.3d at 568–69.

234. *Hsia*, 176 F.3d at 522; *Gabriel*, 125 F.3d at 102.

235. *Curran*, 20 F.3d at 569.

236. *See id.* at 568–69.

237. *See* Ratzlaf v. United States, 510 U.S. 135, 156 (1994).

238. *Gabriel*, 125 F.3d at 102 (quoting *Ratzlaf*, 510 U.S. at 141).

than construing one section of a statute in light of the entire statute.[239] In that respect, *Gabriel* appears to have interpreted *Ratzlaf's* "complex of provisions" as equivalent to "complex provisions," which of course it was not.[240] This interpretation is supported by the *Ratzlaf* dissent, which, in contrasting that decision with *Cheek*, stated that "the provisions involved are perhaps among the simplest in the United States Code."[241]

Similarly, the focus on the statutory construction arguments in *Ratzlaf* appears misplaced. In context, and considering the other Supreme Court cases in this area, the rationale for *Ratzlaf* is clearly the culpability argument rather than the standard tools of statutory construction.[242] Yet *Hsia* entirely ignored the culpability argument.[243] *Gabriel* addressed it but demonstrated a fundamental misunderstanding of the nature of the culpability rule.[244] As noted in the preceding section, *Gabriel* said that the "inevitably nefarious" standard would always be met: "[B]ecause a defendant will be convicted through section 2(b) only if the defendant had the mental state necessary to violate the underlying criminal statute, it is inevitable that the defendant had *criminal intent*."[245] But the "criminal intent" of the underlying criminal statute (section 1001) is merely *knowledge* that the statements were false, whereas the *Ratzlaf* standard required conduct that was "obviously 'evil' or inherently 'bad.'"[246] Conduct that is performed knowingly is not the same as conduct that is morally blameworthy—that is the whole point of *Ratzlaf*.[247] If making a false statement, under any circumstances, is inherently morally blameworthy, only then can knowledge that the statements were false be sufficient to satisfy the culpability rule of *Ratzlaf*. Such an evaluation, however, is part of the application of the culpability rule of *Ratzlaf*, not the determination of whether or not to apply the rule.[248] *Gabriel* made no real attempt to determine whether making false statements to the government is inevitably

239. *Ratzlaf*, 510 U.S. at 141.
240. *See Gabriel*, 125 F.3d at 102.
241. *Ratzlaf*, 510 U.S. at 156 (Blackmun, J., dissenting).
242. *Id.* at 147.
243. *See* United States v. Hsia, 176 F.3d 517, 517–28 (D.C. Cir. 1999).
244. *See Gabriel*, 125 F.3d at 102
245. *Id.* (emphasis added).
246. *Ratzlaf*, 510 U.S. at 146.
247. *See id.* at 144–46. The court noted several examples of knowing acts, apparently deceptive in nature, that would not necessarily be blameworthy. *Id.*
248. *Id.*

blameworthy.[249] *Curran*, on the other hand, stated that "[w]e see little difference between breaking a cash transaction into segments of less than $10,000 and making a contribution in the name of another."[250] As discussed below, I conclude that, at least in the context of federal election law, causing false statements by hiding the source of a contribution is not always culpable.

The argument in *Gabriel* for consistent interpretation of "willfully" in section 2(b) carries the most weight but is also ultimately unpersuasive.[251] A requirement that prosecutions under sections 2(b) and 1001 always apply the same mens rea standard does avoid some difficulty in administration. Such an approach, however, ignores a substantial difference between the situation in *Gabriel* and conduit contributions[252] and demonstrates the difficulties with extending the decision in *Gabriel* to the federal election law context. The statements at issue in *Gabriel* were obviously false based on objective and easily understandable facts, such as packing slips that misstated the nature of repairs and falsely indicated that a turbine had been adequately repaired.[253] The court in *Gabriel* actually could have reached the same result by applying the *Ratzlaf* rule because it is difficult, if not impossible, to characterize deliberately false statements about the quality of repairs made to crucial jet engine parts as other than culpable.

This demonstrates why the *Ratzlaf* culpability rule should overcome the desirability of consistent interpretation of mens rea required for sections 2(b) and 1001. The scope of these sections is so broad[254] that it can include statements (such as those in *Gabriel*) that are obviously false, as well as statements (such as those in the case of conduit contributions) that are only recognizable as "false" by reference to complex statutory and regulatory provisions. Consistent interpretation of such extremely broad statutes creates problems

249. *See Gabriel*, 125 F.3d at 100–02.

250. United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994).

251. *Gabriel*, 125 F.3d at 100–02.

252. *See id.* at 92. The defendant was charged with wire fraud, making false statements to the FAA, and witness tampering stemming from his misrepresentations to the government of the nature of jet engine repairs. *Id.*

253. *See id.* at 92–93.

254. *See* 18 U.S.C. § 2(b) (1994) ("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense . . . ."); 18 U.S.C. § 1001 (1994) ("Whoever . . . knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry . . . .")

because similar treatment is often afforded to types of conduct that are very different. Indeed, the consistent interpretation of these sections that *Gabriel* seems to demand could easily have allowed the government in *Cheek* to have prosecuted the defendant under section 1001 rather than tax code provisions that were interpreted to require knowledge of a violation of the specific provisions of the tax code.[255] Although some counts of the indictment against Cheek were based on failure to file tax returns, other counts were based on his W-4 forms, which claimed excessive withholding allowances or indicated that he was exempt from taxes.[256] These statements on W-4 forms would clearly be subject to prosecution under section 1001 in addition to the tax code provision utilized in *Cheek*.[257]

The broad scope of sections 2(b) and 1001 essentially presents us with two choices. We can interpret the mens rea standard on a context-specific basis for prosecutions under these provisions. In that case, we will be faced with the difficulty and cost of administering the standard but will gain more accurate results in terms of prosecuting the appropriate conduct. Or we can interpret the mens rea standard consistently for prosecutions under these provisions, and thereby reduce administrative difficulty. A consistent interpretation will result in either an overprotective standard requiring knowledge that one's conduct is violating a specific legal duty even in those contexts where the false statements are "inevitably nefarious"[258] or an underprotective standard allowing prosecution that could reach a "broad range of apparently innocent conduct."[259]

The easy answer would be to settle on a consistent, underprotective interpretation. The risks associated with an underprotective standard could, in theory, be addressed by prosecutorial discretion.[260] This solution, however, is not as attractive as it appears and is fundamentally inconsistent with the culpability rule in *Ratzlaf*.[261] In the earlier part of the twentieth century, the

255. *See* Cheek v. United States, 498 U.S. 192, 201 (1991) (finding that the standard for statutory willfulness is the "voluntary, intentional violation of a known legal duty") (quoting United States v. Bishop, 412 U.S. 346, 360 (1973)).

256. *See id.* at 194.

257. *Id.* (submitting falsified W-4 forms).

258. Ratzlaf v. United States, 510 U.S. 135, 136–37, 144 (1994).

259. Liparota v. United States, 471 U.S. 419, 426 (1985) (discussing how a strict reading of a statute without a mens rea standard would "criminalize a broad range of apparently innocent conduct").

260. *Id.* at 427.

261. *See* Wiley, *supra* note 120, at 1065. Wiley finds that increased prosecutorial discretion will give more power to prosecutors to convict the morally innocent. *Id.* This

Supreme Court routinely relied on "reliable prosecutorial discretion as a complete answer to strict liability worries."[262] That is no longer the case. Indeed, the culpability rule applied in *Liparota*, *Ratzlaf*, and *Bryan* would be wholly unnecessary if the Court could depend on prosecutors not to bring cases resembling the parade of horribles the courts imagined.[263]

There are a number of possible reasons that courts should rely less on prosecutorial discretion.[264] The best explanation is that prosecutorial discretion "gives prosecutors the power to convict the morally innocent—*and no one else can do anything about it.* This power is fundamentally different than a prosecutor's usual and necessary power of deciding *which* culpable people to prosecute."[265] The latter decision cannot be made effectively by anyone other than the prosecutor, but "unreviewable power to imprison the innocent" is not something that is properly delegable to prosecutors.[266] The courts can effectively prevent that by the use of the culpability rule.[267] There are plausible arguments for not applying the rule to petty cases, such as prosecutions for FECA misdemeanors, but strict liability is inappropriate for serious crimes, such as prosecution of conduit contributions under general felony statutes.[268]

Fundamentally, the culpability rule *matters*. Inconsistent interpretations and increased difficulty in administration seems a small price to pay. In any event, it is unclear exactly how serious the problem that *Gabriel* raised would truly be. It may well be that the mens rea standard for prosecutions under sections 2(b) and 1001

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would be inconsistent with the *Ratzlaf* decision, which held that a defendant would not be culpable of the violation where he did not have knowledge of the violation and was, in essence, morally innocent. *Ratzlaf*, 510 U.S. at 149.

262. Wiley, *supra* note 120, at 1058.

263. *See id.* at 1066–67 (discussing fear that too much prosecutorial discretion would be a "recipe for tyranny" and lead to an "efficient strict liability" system that would make everyone a criminal).

264. *See id.* at 1061–65. The possible reasons cited by Wiley include the "traditional judicial concern that prosecutors may 'pursue their personal predilections' at the expense of justice." *Id.* at 1062 (quoting Smith v. Goguen, 415 U.S. 566, 575 (1974)). Also, prosecutors are often inexperienced, leading many judges to see them as "unworthy competitors" rather than trustworthy partners. *Id.* at 1064. Another fear is that increased prosecutorial power could result in a tipping of the scales of justice. *Id.* at 1065.

265. *Id.* at 1065.

266. *See id.* at 1065–66.

267. *See id.* at 1068.

268. *See id.* at 1098–1108. Wiley argues that, although the Supreme Court has been willing to compromise Constitutional safeguards in the case of petty crimes by creating exceptions to the culpability rule, apart from traffic offenses, there is no "crime—petty or otherwise—for which proof problems convincingly warrant strict liability." *Id.* at 1107.

would only have to be split into two different contexts: those involving a complex underlying regulatory scheme and everything else. That division hardly seems to present an insurmountable difficulty. Without any specific indications that "inconsistent" interpretations of these sections would cause significant difficulties, inconsistency seems a better solution than either an overprotective standard, deterring effective law enforcement, or an underprotective standard, inappropriately relying on prosecutorial discretion.

As noted previously, the culpability rule in *Bryan* would require a minimum showing that the defendant in a campaign contribution case knew her conduct was unlawful.[269] The real question is whether the higher threshold of *Ratzlaf* and *Liparota* applies in the federal election law context. There are two potential bases for requiring the government to show that the defendant knew of the specific legal requirement: the first is the complexity of the underlying regulatory scheme, and the second is the "range of apparently innocent conduct"[270] that would be subject to prosecution without such a requirement.[271] The first basis seems particularly apt here. FECA is obviously less complex than the Internal Revenue Code, but it also seems considerably more complex than the currency reporting and anti-structuring provisions at issue in *Ratzlaf* and the food stamp regulations in *Liparota*. Even the courts have expressed some degree of difficulty in determining exactly what FECA prohibits and exactly what constitutes a "false statement" in that respect.[272]

The "range of apparently innocent conduct" aspect also argues for adding a culpability element to sections 2(b) and 1001 when used to prosecute conduit contributions. There may be an argument for interpreting such false statements under a perspective of moral rigor, in which even minor white lies would constitute culpable conduct. Such a rigorous approach to defining culpability, however, proves too much—it would conclude that some of the "parade of horribles" in *Ratzlaf*, such as structuring cash transactions "to reduce the risk of an

269. Bryan v. United States, 524 U.S. 184, 196 (1998).

270. Liparota v. United States, 471 U.S. 419, 426 (1985).

271. For other potential reasons for requiring proof that the defendant knew of the specific law being violated, including that the criminal statute is malum prohibitum rather than malum in se, see Davies, *supra* note 120, at 362, 390–96. The author generally disapproves of these justifications for deviating from the "ignorance of the law is no excuse" general rule. *See id.* at 396.

272. *See, e.g.*, United States v. Hsia, 24 F. Supp. 2d 33, 58 (D.D.C. 1998) ("For starters, it is a battle to find the false statements in the indictment."), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

IRS audit"[273] or "to keep a former spouse unaware of his wealth,"[274] also constituted culpable conduct. The *Ratzlaf* court, however, clearly concluded that such conduct was not inherently blameworthy.[275]

Campaign contributions might be made through a conduit for equally blameless reasons. For example, the true donor might wish to avoid solicitations for future donations or publicity about her ability to make substantial donations. It should be noted that such publicity could lead to some of the same concerns that led to some of the parade of horribles cited by *Ratzlaf*.[276] It could alert a former spouse or a potential burglar to the donor's wealth even more effectively than a bank reporting a currency transaction greater than $10,000 because bank currency reports are less likely to become available to the general public than FEC contribution reports. If structuring cash transactions can be innocent for such reasons, why not conduit campaign contributions? Finally, a donor who is publicly connected with Candidate A might wish to make a donation to Candidate B without the "symbolic expression of support evidenced by a contribution"[277] becoming public knowledge and causing embarrassment to A.[278]

In connection with this, it is worth noting that making a campaign contribution while maintaining anonymity is difficult to do *without* using a conduit. The conduit contribution cases have relied on the signer's name on the check as the "cause" of the false statement, rather than some affirmative statement by the straw donor that she was the actual source of the donation.[279] Thus, to maintain anonymity while avoiding use of a conduit, the donor would have to make the donation in cash (not something most reformers want to encourage), by a cashier's check (on which the issuing bank usually notes the source's name), or by money order.[280] The easiest solution, and one

273. Ratzlaf v. United States, 510 U.S. 135, 144 (1994).

274. *Id.* at 145 (1994).

275. *Id.* at 145–46 (reasoning that such conduct is not necessarily motivated by criminal intent and may be conducted for legitimate reasons).

276. *See supra* notes 151–52, and accompanying text.

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

278. Then again, this might not be a concern. In 1999 former Senator Bob Dole, while his wife Elizabeth was campaigning for the presidency, publicly discussed the possibility that he might give a campaign donation to Sen. John McCain. *See* Richard L. Berke, *As Political Spouse, Bob Dole Strays from Campaign Script*, N.Y. TIMES, May 17, 1999, at A1; *see also Perspectives*, NEWSWEEK, May 31, 1999, at 24 (reporting Mrs. Dole's reaction as "I told him I loved him. I told him he was in the woodshed.").

279. *See, e.g.*, United States v. Hsia, 24 F. Supp. 2d 33, 54 (D.D.C. 1998), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

280. *Cf.* Ayres & Bulow, *supra* note 5, at 852–53. Such anonymous donations could be

that could easily be blameless, would be to maintain anonymity by having a friend or relative write a check for the donation and then reimbursing them. That, however, is exactly the conduct that the government can characterize as causing a false statement to be made by campaign officials, subjecting the donor to prosecution under sections 2(b) and 1001.[281]

Based on these factors, an evaluation of felony prosecution of conduit contributions under the culpability rule of *Liparota* and *Ratzlaf* would support the addition of an implied mens rea standard to sections 2(b) and 1001 in the federal election law context.[282] The Third Circuit, in *Curran*, got it right;[283] however, the D.C. Circuit's decision in *Hsia* was wrong.[284] In felony prosecutions of conduit contributions, the government should be required to prove that the defendant knew of the specific legal requirement she is charged with violating. This is not to say that any specific case should not have been prosecuted—prosecutors may have concluded that the defendants had such knowledge before initiating prosecution. In our judicial system, however, this determination should be made by the jury, not the prosecutor.[285]

## IV. THE PREEMPTION ARGUMENT

The preemption argument, that passage of FECA impliedly repealed *pro tanto* the provisions of general criminal statutes such as

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made in a "donation booth," whereby the contributor's donation would be dropped in the "slot" of his candidate. *Id.* Ayres & Bulow reject such an approach as unworkable and instead favor a system of blind trusts. *Id.* at 853. The blind trusts would thus ensure donor anonymity, no matter the form in which the donation was made. *See id.* at 838.

281. By having a friend or relative write a check for the donation, the donor, in effect, has created a scheme or demise to conceal his name, which is a material fact. Creating this sort of scheme or demise is prohibited under the statutes. *See* 18 U.S.C. §§ 2(b), 1001(a)(1) (1994).

282. Under both opinions, the defendant must know his actions are unauthorized by statute or regulation. This requirement denotes an implied mens rea standard, which is used by the courts. *See* Liparota v. United States, 471 U.S. 419, 433 (1985); Ratzlaf v. United States, 510 U.S. 135, 149 (1994).

283. United States v. Curran, 20 F.3d 560, 569 (3d Cir. 1994).

284. United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999), *cert denied*, 528 U.S. 1136 (2000). The D.C. Circuit's analysis did not require that the government have proof that a defendant was aware of the legal requirement with which that defendant was charged in order to obtain a conviction. *Id.*

285. *Cf.* United States v. Hsia, 24 F. Supp. 2d 33, 48 (D.D.C. 1998), *rev'd in part on other grounds*, 176 F.3d 517 (D.C. Cir. 1999), *cert denied*, 528 U.S. 1136 (2000). Although recognizing the "strong presumption that prosecutors are properly discharging their official duties," the court noted that prosecutorial discretion is subject to limitations and constraints. *Id.*

false statements and conspiracy to defraud the United States, is harder to support than the mens rea argument of Part III. While there was at least one circuit court supporting the position I advance on the mens rea issue,[286] *all* the courts that have addressed the preemption argument in the context of federal election law have agreed that FECA did not impliedly repeal the general criminal statutes.[287] Nevertheless, this unanimous conclusion is wrong.

This Part begins, in Section A, with a brief discussion of a special case of the preemption argument for the federal conspiracy statute, often argued but ultimately unpersuasive. Section B then addresses the general preemption argument, with a review of the cases that have rejected such an argument. The courts have primarily relied on a review of statutory language, legislative history, and brief citations to precedent with minimal analysis. A closer review of the cases, however, reveals that the courts' reliance on precedent is misplaced and their analysis of the issue is incomplete. This section also addresses defense efforts to rely on the one instance in which FECA has been held to have impliedly preempted another law.[288] Those efforts, however, have been unsuccessful. The courts have rejected the application of the reasoning in *Galliano* to prosecutions under general criminal statutes.[289]

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286. *See generally Curran*, 20 F.3d at 560 (requiring proof that a defendant was aware of the existence of a reporting requirement).

287. *See, e.g., Hsia*, 24 F. Supp. 2d at 38–44 (where, in a prosecution under 18 U.S.C. §§ 371 and 1001, the defendant unsuccessfully argued that the more particular provisions of FECA should preempt the more general statutes); *Curran*, 20 F.3d at 564–66 (where in a prosecution brought under 18 U.S.C. §§ 2(b), 371, and 1001, the defendant unsuccessfully argued that the five-year statute of limitations is preempted by FECA's three-year statute of limitations, the court found that "FECA was not intended to preempt the general criminal provisions"); United States v. Trie, 21 F. Supp. 2d 7, 18–19 (D.D.C. 1998) (rejecting the defendant's argument that the general felony statute was preempted by the misdemeanor provisions of the more particular FECA statute "[b]ecause congress did not express an intent that the misdemeanor sanctions of FECA be a substitute for all other possible criminal sanctions"); United States v. Oakar, 924 F. Supp. 232, 245 (D.D.C. 1996) (finding that the government may lawfully prosecute under the more general provisions of 18 U.S.C. § 1001, rather than the more specific provisions in FECA), *aff'd in part and rev'd in part*, 111 F.3d 146 (D.C. Cir. 1997); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990) (stating that absent congressional intent, when an act violates more than one statute, the government can choose to prosecute under either, and "the fact that one statute prescribes a felony and the other prescribes a misdemeanor [does not] affect the prosecutors authority to choose among statutes").

288. The court in *United States v. Galliano* held that the FECA qualifies or controls, in part, the provisions of the postal fraud proscriptions contained in 39 U.S.C. § 3005. 836 F.2d 1362, 1363–64 (D.C. Cir. 1988).

289. *Id*; *See Hsia*, 24 F. Supp. 2d at 44 (noting defendant's *Galliano* preemption argument as intriguing, but then holding that there was no legislative intent that FECA

Although the courts have not accepted the defense arguments for preemption,[290] better arguments are available. Section C advances an innovative approach to analyzing repeal by implication in the criminal law context through an analogy to the "lesser included offense" doctrine. Felony prosecution of conduit contributions demonstrates a variant of that doctrine—what I describe as a theory of the "greater included offense." Section D builds on the earlier sections to propose a framework for analysis of implied repeal of the general criminal statutes in 18 U.S.C. sections 2(b), 371, and 1001. Based on that framework, this article concludes that the FECA provisions that criminalize conduit contributions have repealed the general criminal statutes by implication.

### *A. The Federal Conspiracy Statute—A Case of Self-Preemption?*

Some observers and at least one court have raised an interesting preemption argument about the federal conspiracy statute[291]—that the statute preempts itself.[292] The basic provision of the statute establishes "one crime that may be committed in one of two [alternate] ways:"[293]

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.[294]

Defendants can be prosecuted under either the "defraud" clause, for a conspiracy to interfere with government functions, or the "offense" clause.[295] A violation of the "defraud" clause is "a felony offense punishable by up to five years imprisonment."[296] The

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displace any of the general criminal statutes).

290. *See supra* note 287.

291. 18 U.S.C. § 371 (1994).

292. *See* Lance Cole & Ross Nabatoff, *Prosecutorial Misuse of the Federal Conspiracy Statute in Election Law Cases*, 18 YALE L. & POL'Y REV. 225, 236–38 (2000) (presenting the self-preemption argument in depth).

293. United States v. Trie, 21 F. Supp. 2d 7, 16 n.6 (D.D.C. 1998) (paraphrasing United States v. Minarik, 875 F.2d 1186, 1193 (6th Cir. 1989)).

294. 18 U.S.C. § 371 (1994). The division into "offense" and "defraud" clauses dates back to the origins of the conspiracy statute. *See* Act of March 2, 1867, ch. 169, § 30, 14 Stat. 484. (providing "[t]hat if two or more persons conspire *either* to commit any offense against the laws of the United States, *or* to defraud the United States in any manner whatsoever" (emphasis added)).

295. Cole & Nabatoff, *supra* note 292, at 236–37.

296. *Id.* at 237.

maximum punishment for a violation of the "offense" clause, however, depends on the underlying offense. In 1948 Congress yielded to judicial criticism and amended the statute to add a key limitation: "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."[297]

Lance Cole and Ross Nabatoff argue that the language of section 371 "indicates that Congress intended that a conspiracy to commit an election law offense, which is a misdemeanor, should be punished as a misdemeanor conspiracy offense."[298] This argument is normatively appealing but analytically suspect. Congress's 1948 change clearly limits the punishment for convictions under the "offense" clause, when the underlying offense, the object of the conspiracy, is a misdemeanor.[299] At this point, a key question must be asked: does the limitation also apply when the object of the conspiracy would be a misdemeanor but the conspiracy is charged under the "defraud" clause?

To answer this question affirmatively as a *necessary* conclusion from the 1948 statutory change, as Cole and Nabatoff do,[300] seems to require another premise, for which there are at least two obvious candidates. One can argue that Congress intended the limitation to apply to both the "offense" clause and the "defraud" clause. Alternatively, one can argue that the "offense" clause and the "defraud" clause are mutually exclusive: if the object of the conspiracy *can* be classified as a misdemeanor, the conspiracy *must* be charged under the "offense" clause and thus is subject to the limitation. Cole and Nabatoff are not entirely clear about which of these premises underlies their conclusion, although their article shows traces of both.[301] Unfortunately, neither is as impregnable as they seem to

297. 18 U.S.C. § 371 (1994) (added by amendments of June 25, 1948, ch. 645, 62 Stat. 701; Sept. 13, 1994, Pub. L. 103-3222, title XXXIII, § 330016(1)(L), 108 Stat. 2147).

298. Cole & Nabatoff, *supra* note 292, at 238.

299. *See id.* This is supported by both the legislative history and the judicial criticism that precipitated the amendment. *Id.* at 236.

300. *Id.* at 259 (concluding that Congress did not intend for prosecutors to use the defraud clause to obtain felony convictions for misdemeanor election law violations).

301. As to the first potential premise, that Congress intended the 1948 limitation to apply to both clauses, see *id.* at 238, 243 (discussing Congressional intent). As to the second potential premise, that the "offense" and "defraud" clauses are mutually exclusive, see *id.* at 247–48 (discussing a Sixth Circuit case which reached that conclusion). Cole and Nabatoff, however, do not explicitly adopt either of these premises. Their final conclusion is that the 1948 statutory change (which by its literal terms limits only prosecutions under the "offense" clause) prohibits the transformation of a misdemeanor conspiracy charge

assume.

By its terms alone, the limitation would seem to apply only to convictions under the "offense" clause. After all, section 371 refers to "the *offense*, the commission of which is the object of the conspiracy."[302] Certainly, Congress could have drafted this provision more clearly if its intent was to apply to the "defraud" clause as well. Cole and Nabatoff point to instances where prosecutors turned misdemeanors into felonies through use of the conspiracy statute and argue that frustration with these results led to the 1948 change.[303] That history, however, is not inconsistent with a remedy, the 1948 amendment, applied only to the "offense" clause. The problem that existed in 1948 arose not from the existence of dual clauses in the statute, but from the single, excessive penalty.[304] Indeed, the cases that Cole and Nabatoff cite all seem to have been charged under the "offense" clause.[305]

This analysis may seem like a narrow reading of the cases. Certainly, the fact that courts criticized charging these conspiracies as felonies[306] does not mean that the courts would not have *also* criticized charging conspiracies brought under the "defraud" clause as felonies. On the other hand, it is also plausible that Congress would have consciously decided that a lighter penalty should be available only for conspiracies brought under the "offense" clause. Objects of conspiracies, under the framework of section 371, can be divided into three categories: 1) criminal offenses which do not defraud the United States; 2) actions which defraud the United States but are not criminal offenses; and 3) criminal offenses which also defraud the United States. There is no intrinsic reason that Congress could not have decided to treat the third category as more like the second category

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into a felony by using the "defraud" clause, but it is not entirely clear how they reach that conclusion. *Id.* at 238. As discussed in the text, their conclusion is normatively attractively but does not seem to be a logical necessity.

302. *Id.* (emphasis added).

303. *Id.* at 231–36 (discussing misuse of the conspiracy statute during prohibition and the judiciary's growing discomfort with increasing conspiracy prosecutions).

304. *See id.* at 232 ("Subsequent courts inferred that Congress's silence concerning the punishment for a conspiracy conviction meant that a conspiracy to commit any offense against the United States, whether misdemeanor or felony, could be punished as a felony.")

305. *See, e.g.*, Krulewitch v. United States, 336 U.S. 440, 441 (1949); Pinkerton v. United States, 151 F.2d 499, 500–01 (5th Cir. 1945), *aff'd*, 328 U.S. 640 (1946); United States *ex rel.* Mayer v. Glass, 25 F.2d 941, 942 (3d Cir. 1928); United States v. Motlow, 10 F.2d 657, 658 (7th Cir. 1926); Welter v. United States, 4 F.2d 342, 342 (8th Cir. 1925); Murry v. United States, 282 F. 617, 617 (8th Cir. 1922).

306. Cole & Nabatoff, *supra* note 292, at 234.

rather than the first. Conduct that interferes with a governmental function has often been seen as more serious than comparable conduct that harms only private citizens.[307] That distinction might be more significant to Congress than whether the activity had been specifically prohibited in the criminal code. This is not to argue that the 1948 amendment was definitely *not* intended to cover both clauses of the conspiracy statute, but, clearly, an implied premise that the amendment definitely *was* intended to cover both clauses is far from certain.

The second alternative argument, that the "offense" clause and "defraud" clause are mutually exclusive, is equally problematic. There is, in its favor, one case that seems to have accepted this argument. In *United States v. Minarik*, the court concluded that "the 'offense' and 'defraud' clauses *as applied to the facts of this case* are mutually exclusive."[308] Thus, prosecutors must "treat[] conspiracies to commit specific offenses (which are also arguably general frauds) exclusively under the offense clause of § 371."[309]

The *Minarik* court, and an article by Professor Abraham Goldstein[310] that influenced it, identifies three reasons for treating the clauses as mutually exclusive. First, it is necessary to avoid "multiple convictions and unnecessary confusion" in cases of "conspiracies to commit specific offenses."[311] Second, the "defraud" clause was

307. *See, e.g.*, U.S.S.G. § 5K2.7 (1998) (providing for an upward departure from sentencing guidelines for conduct that "resulted in a significant disruption of a governmental function").

308. 875 F.2d 1186, 1187 (6th Cir. 1989) (emphasis added). The portion of the court's conclusion that has been emphasized here, as discussed below, has been seen by other courts as critical.

309. *Id.* at 1194.

310. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405 (1959). Goldstein argues that a more "far reaching solution may be found" to the problem of multiple offenses by reading both the "offense" and "defraud" portions of the statute as it has in fact been applied in the courts—as mutually exclusive. *Id.* at 448–50. He points out that courts have read the conspiracy statute as creating a single offense (which can be committed two different ways) rather than two offenses; thus, a single agreement with multiple objects is only a single offense and cannot be punished by multiple sentences. *Id.* at 449. He argues that this reading of the conspiracy statute inferentially supports an interpretation that the two clauses are mutually exclusive, although courts have not adopted such an interpretation. *Id.* at 449–50. Under his proposed reading, prosecutions could be brought for either a conspiracy to commit an offense or a conspiracy to defraud, with the latter available only where the object of the conspiracy does not constitute some other "offense." *Id.* at 449. This "alternative structure" would provide the "means [to] check[] the growth of the 'defraud' portion." *Id.* at 450.

311. *Id.* This, in turn, is the result of two fundamental interpretations of the conspiracy statute: that the two clauses create one offense, not two, but are nonetheless disjunctive. "Thus an individual whose alleged wrongful agreement is covered by the offense clause

established when the criminal code "had not elaborated specific fraud offenses."[312] "In light of later legislation creating numerous specific fraud statutes, the 'defraud' portion of the statute should be viewed 'as an interim measure protecting the [g]overment until such time as Congress has been able to deal more specifically with a given problem.'"[313] Finally, "[c]ongressional intent [in passing the 1948 amendment] will be defeated if the government can prosecute under the defraud clause conduct which Congress has isolated and defined as a misdemeanor."[314]

These arguments are not as powerful as the *Minarik* court imagined. The "multiple convictions and unnecessary confusion" argument requires additional justification. To enforce the rule against convicting a defendant under both clauses for a single conspiracy, thus avoiding "multiple convictions and unnecessary confusion," the courts might simply leave the choice of which offense to pursue to the prosecutor. Thus, this argument must, in the end, rely on concerns about prosecutorial abuse.[315] The argument that the "defraud" clause will swallow the entire conspiracy statute ignores the fact that not all "conduct which Congress has isolated and defined as a misdemeanor"[316] can necessarily be construed as interfering with a governmental function. There will always be some conspiracies to commit misdemeanors that cannot be charged under the "defraud" clause.

Despite these questions, the argument that the two clauses of the conspiracy statute are mutually exclusive is still normatively attractive. Unfortunately, it is also contrary to common and well-established themes in American criminal law—that criminal statutes often overlap, that such overlap is insufficient by itself to demonstrate implied repeal, and that when conduct violates more than one criminal statute the prosecutor has discretion to choose which to

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(because covered by a specific offense defined by Congress), as well as arguably by the broad defraud clause, cannot be convicted or punished for both." *Minarik*, 875 F.2d at 1194.

312. *Minarik*, 875 F.2d at 1194.

313. *Id.* (quoting Goldstein, *supra* note 310, at 450) (relying on Goldstein's "interim measure" argument in viewing the "defraud" porting of § 371 as a gap filling provision). *Cf.* Ted E. Molz, Comment, *The Mail Fraud Statute: An Argument for Repeal by Implication*, 64 U. CHI. L. REV. 983 (1997) (making a "gapfilling" argument with respect to the mail fraud statute).

314. *Minarik*, 875 F.2d at 1194.

315. *See supra* section III.C (discussing prosecutorial abuse).

316. *See Minarik*, 875 F.2d at 1194. The court stated that "[c]ongressional intent will be defeated if the government can prosecute under the defraud clause conduct which Congress has isolated and defined as a misdemeanor." *Id.*

charge.[317] Perhaps for that reason, the *Minarik* argument has been almost universally rejected, or more precisely, severely limited.[318] Courts dealing with conspiracy prosecutions under the "defraud" clause have routinely limited the dicta in *Minarik* to situations satisfying three characteristics: 1) shifting theories of prosecution by the government; 2) narrow scope of activity; and 3) technical requirements for which more specific notice is needed.[319] The *Minarik* argument, that a conspiracy charge for defrauding the United States must be reconstituted as a conspiracy to violate the misdemeanor provisions of FECA, has been frequently raised in prosecutions of conduit contributions in recent years—and just as frequently rejected.[320]

The argument that the "offense" clause of the conspiracy statute preempts the "defraud" clause is a difficult one to make. Even if successful, though, it would have little practical effect on prosecutions of conduit contributions, since these also frequently include charges under the false statements statute,[321] which also carries a five year maximum penalty.[322] It is therefore necessary to look for a preemption argument that will be both stronger and broader than *Minarik*. Such

317. The most prominent, and most often cited, statement of these themes is probably United States v. Batchelder, 442 U.S. 114, 118–22 (1979).

318. *See, e.g.*, United States v. Trie, 23 F. Supp. 2d 55, 61 n.8 (D.D.C. 1998); United States v. Hsia, 24 F. Supp. 2d 33, 53 n.21 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999).

319. *See, e.g.*, United States v. Khalife, 106 F.3d 1300, 1304 (6th Cir. 1997); United States v. Hurley, 957 F.2d 1, 3–4 (1st Cir. 1992); United States v. Derezinski, 945 F.2d 1006, 1010 (8th Cir. 1991); *see also* Todd R. Russell & O. Carter Snead, *Federal Criminal Conspiracy*, 35 AM. CRIM. L. REV. 739, 747 & n.47 (1998).

320. *See, e.g.*, *Trie*, 23 F. Supp. 2d at 61 n.8; *Hsia*, 24 F. Supp. 2d at 53 n.21. Cole & Nabatoff contend that *Minarik* has been "neglected." *See* Cole & Nabatoff, *supra* note 292, at 247. Cole and Nabatoff imply that the *Minarik* argument has been rejected only when the conduct alleged consists of more than "garden-variety election law violation cases." *Id.* at 244 & n.136. However, *Minarik* has not been "neglected," so much as rejected. *Hsia* clearly based its rejection of *Minarik* in part not only on the breadth of conduct alleged, but also on the fact that the government had not repeatedly changed its theory of the case without clearly alleging the specific functions impeded, thus prejudicing the defendant. *Hsia*, 24 F. Supp. 2d at 53 n.21. Further, *Trie*, which rejected the *Minarik* argument "[f]or the reasons discussed in" *Hsia*, (*see Trie*, 23 F. Supp. 2d at 61 n.8), did not involve the same interference with the functions of the Immigration and Naturalization Service that Cole and Nabatoff see as the distinguishing characteristic of *Hsia*. *See* Cole & Nabatoff, *supra* note 292, at 244 n.136.

321. FECA conduit contribution cases that also included charges under 18 U.S.C. § 1001 include United States v. Curran, 20 F.3d 560, 562 (3d Cir. 1994); *Hsia*, 24 F. Supp. 2d at 36; *Trie*, 23 F. Supp. 2d at 57; United States v. Oakar, 924 F. Supp. 232, 237 (D.D.C. 1996), *aff'd in part and rev'd in part*, 111 F.3d 146 (D.C. Cir. 1997); United States v. Hopkins, 916 F.2d 207, 214 (5th Cir. 1990).

322. *See* 18 U.S.C. § 1001 (1994).

general preemption arguments have been advanced in the conduit contribution cases, although unsuccessfully.[323] The remainder of this Part looks at those arguments and demonstrates why the courts should accept them.

### B. *The Current State of Case Law*

Defendants have raised the preemption argument in at least five prosecutions of conduit contributions,[324] but, despite sympathy from some of the courts for these arguments,[325] the defense lost every time.[326] The court's analysis of implied repeal in *United States v. Hsia* was more thorough than in other cases.[327] There, the court started with a general framework for preemption analysis:

> Ordinarily, general criminal provisions remain available to supplement a specific statutory scheme unless there is evidence either (1) that Congress expressly intended to preempt a general statute with the more specific statutory scheme, or (2) that there is what the Supreme Court has labeled "a positive repugnancy" between the provisions of the specific statutory scheme and the more general statutes such that Congress must have intended to repeal the more general provisions by implication. The parties here agree that when Congress enacted FECA it did not expressly repeal the more general criminal provisions and that repeal by implication is not favored.[328]

The defendant's arguments for, and thus the court's analysis of, implied repeal were limited to "the pervasive First Amendment implications of federal election regulation"[329] and, specifically, an analysis of *Galliano*.[330] There was no discussion of or speculation

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323. *See supra* note 286.

324. *Id.*

325. *See Curran*, 20 F.3d at 565 ("[D]efendant's position has a certain logic and sense of fairness to it."); *Hsia*, 24 F. Supp. 2d at 44 ("[T]he defendant's preemption argument is intriguing."); United States v. Trie, 21 F. Supp. 2d 7, 18 (D.D.C. 1998) ("[T]here may be some intuitive force to Mr. Trie's argument.").

326. *See Curran*, 20 F.3d at 564–66; *Hopkins*, 916 F.2d at 218–19; *Hsia*, 24 F. Supp. 2d at 38–44; *Trie*, 21 F. Supp. 2d at 18–19; *Oakar*, 924 F. Supp. at 245.

327. The court devoted nearly six full pages of the opinion to discussing the preemption argument. *Hsia*, 24 F. Supp. 2d at 38–44. In contrast, the depth of analysis given in the other conduit cases range from as little as a two-paragraph summary dismissal (*Trie*, 21 F. Supp. 2d at 18–19; *Okar*, 924 F. Supp. 2d at 245), to approximately one-half page (*Hopkins*, 916 F.2d at 218–19), to approximately two and one-half pages (*Curran*, 20 F.3d at 563–66).

328. *Hsia*, 24 F. Supp. 2d at 38–39 (citations omitted).

329. *Id.* at 39.

330. *See id.* at 42–44.

about what factors, other than those addressed in *Galliano*, might lead to "positive repugnancy" and, therefore, implied repeal.[331]

*Galliano* involved a statute that allowed the Postal Service, if it concluded a person was "obtaining money or property through the mail by means of false representations,"[332] to issue an order that would: 1) direct the postmaster to return undelivered any mail addressed to the person; and 2) require the person to cease and desist from the solicitation.[333] The Postal Service had applied the statute against mailings by an independent political action committee ("PAC") soliciting contributions, concluding that the organization name used for the mailings and the absence of certain disclaimers were misleading; it was, as far as anyone involved knew, the first case "applying section 3005 to solicitations for political contributions."[334] After the federal district court upheld the agency's determination, the PAC appealed to the D.C. Circuit, which held that "the Postal Service, in its enforcement of 39 U.S.C. § 3005, may not impose constraints upon the names or disclaimers of organizations mailing solicitations for political contributions beyond those imposed by FECA."[335]

Then-Judge Ruth Bader Ginsburg carefully tied her finding of preemption to specific factors.[336] First, the FEC was "the exclusive administrative arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions," which were requirements specifically addressed by FECA.[337] Second, the Postal Service procedures provided less protection for First Amendment concerns than did the FEC's, as the Postal Service had no provision for conciliation or judicial determination of sanctions.[338] Implied preemption "reconcile[d] the two statutes in a manner that reduces constitutional doubt."[339] Third, the FECA name and disclaimer requirements represented "[a] fine balance of interests [including the First Amendment] . . . deliberately struck by Congress" and any further requirements imposed by the Postal Service would invade "a safe haven [for] candidates and

331. *See id.* at 39–44.
332. 39 U.S.C. § 3005(a) (1994).
333. *Id.*
334. United States v. Galliano, 836 F.2d 1362, 1366 (D.C. Cir. 1988).
335. *Id.* at 1367.
336. *See id.* at 1369–70.
337. *Id.* at 1370.
338. *See id.*
339. *See id.* at 1369.

political organizations."[340]

As pointed out in *Hsia*, these factors do not apply well to conduit contribution cases.[341] The FEC's exclusive authority applies to the civil administration of FECA, not criminal penalties.[342] The DOJ has the authority for criminal prosecution, whether under FECA or the general criminal statutes.[343] The constitutional problem associated with different levels of procedural protection disappears—a criminal prosecution of these cases, whether misdemeanor or felony, will always be a judicial proceeding.[344] Finally, the FEC and Postal Service regulations were inconsistent regarding *what was prohibited*, but the general criminal statutes and FECA provisions both prohibited conduit contributions.[345]

Other than *Hsia*'s review of *Galliano*, the courts rejecting the preemption argument have generally limited their analysis of the issue to examinations of FECA's statutory language and legislative history.[346] The courts have never found clear evidence of Congressional intent that FECA preempt Title 18 of the United States Code.[347] The conclusion in *United States v. Curran* was typical:

> In sum, an examination of the legislative history of the Election Campaign Act and its amendments uncovers no *express evidence* that the Act was intended to preempt the general criminal provisions under 18 U.S.C. §§ 2(b), 371, or 1001. Finding therefore that *neither statutory language nor history* support the defendant's arguments . . . .[348]

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340. *Id.* at 1370.

341. *See* United States v. Hsia, 24 F. Supp. 2d 33, 43 (D.D.C. 1998), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

342. *See id.*

343. *See id.*

344. *See id.*

345. *See id.*

346. The courts' analyses also often addressed the broad discretion afforded prosecutors to choose under which of two or more available statutes to prosecute a defendant. This topic is, of course, beyond the scope of this Article, which addresses only the issue of whether two or more statutes (*i.e.*, FECA as well as the general criminal statutes) *are* available, or whether the general criminal statutes have been preempted in this context.

347. *See Hsia*, 24 F. Supp. 2d at 44; *see also* United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990); United States v. Trie, 21 F. Supp. 2d 7, 19 (D.D.C. 1998).

348. *Curran*, 20 F.3d at 566 (emphasis added); *see also Hopkins*, 916 F.2d at 218 ("There is no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18."); *Trie*, 21 F. Supp. 2d at 19 (the court found no "evidence that Congress expressly intended to preempt a general statute with a more specific statutory scheme"). Furthermore, "Congress did not express an intent that the misdemeanor sanctions of FECA be a substitute for all other possible criminal

That essentially ended the argument, although in some instances the court also cited to precedent that supported their "no preemption" conclusion.[349] A brief review of one of those precedents is instructive.

In *United States v. Hansen*, the D.C. Circuit concluded that the Ethics in Government Act ("EIGA")[350] does not preempt the false statements statute.[351] *Curran* and the court of appeals in *Hsia* both cited this decision, apparently reasoning that EIGA was sufficiently like FECA that *Hansen* had significant persuasive value.[352] On closer examination, however, that reliance appears misplaced. The court in *Hansen* relied at least in part on factors that are distinguishable from prosecutions of conduit contributions. Then-Judge Antonin Scalia began by noting the "venerable rule, frequently reaffirmed by the Supreme Court, that repeals by implication are not favored."[353] Because of the assumption that Congress "will expressly designate the provisions whose application it wishes to suspend . . . , [the court] will not readily conclude that it did so by implication."[354] Express repeal, however, was not required, as long as there was "some indication of implicit repeal strong enough to overcome the contrary presumption."[355]

The court discussed a variety of potential indications of implicit repeal, finding none persuasive.[356] Most relevant to the topic of this Article was the implication from the mere existence of a specific remedy in EIGA for the alleged conduct, which, the defendant argued, "'appears, on its face, to contain the complete sanction that Congress has prescribed for any knowing and willful falsification.'"[357] That argument also was insufficient. For one thing, the court noted that EIGA and the false statements statute "combine to produce a natural progression in penalties."[358] Failure to file an EIGA form

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sanctions." *Id.* "Nor is there any indication in the language or legislative history of FECA to indicate that Congress intended the criminal provisions of the Act to displace any of the more general federal criminal provisions in Title 18 of the United States Code." *Hsia*, 24 F. Supp. 2d at 44.

349. *See* United States v. Hansen, 772 F.2d 940, 945–48 (D.C. Cir. 1985); *see also* United States v. Hsia, 176 F.3d 517, 525 (D.D.C. 1998); *Curran*, 20 F.3d at 565–66.

350. Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of Titles 2, 5, 18, 16, and 28).

351. *See Hansen*, 772 F.2d at 945–48.

352. *See Curran*, 20 F.3d at 565; *Hsia*, 176 F.3d at 525.

353. *Hansen*, 772 F.2d at 944 (citations and internal quotation marks omitted).

354. *Id.* at 945.

355. *Id.*

356. *See id.* at 945–49.

357. *Id.* at 945 (quoting the appellant's brief).

358. *Id.*

would be punishable only under EIGA itself, while lying on the form would also be punishable under the false statements statute.[359] The court also relied on the fact that EIGA provided only a civil sanction, which was "less suggestive of an intent to displace § 1001 than the attachment of a criminal sanction would be."[360] In the context of conduit contributions, of course, there are not two analogous ways to violate the law. Since the only action the defendant need take involves the issuance of a check (for which there is no affirmative duty), prosecution can only be based on "lying" on the check, not on "failing to issue a check." Thus, there is no "natural progression of penalties" between FECA and the general criminal statutes. Further, FECA provides not only a civil sanction as in EIGA but also a criminal misdemeanor sanction. Although the existence of a criminal sanction is not necessarily sufficient for a finding of implied repeal,[361] it is at least more suggestive of such. Therefore, the analysis in *Hansen* is less persuasive in this context than the citations by the courts indicate.

Another instructive case on the implied repeal of statutes is *United States v. Borden Co.*,[362] cited by *Hsia* for its statement of the standards.[363] Although *Hsia* did no more than briefly cite *Borden*,[364] a brief look at that case is illuminating. Although the *Borden* opinion did not clearly define standards for "positive repugnancy," it did more than simply state the principle and conclude that there had been no implied repeal or established *de facto* per se rule against repeal by implication.[365] Instead, the *Borden* court analyzed the two overlapping statutes in some detail to find that there has been no implied repeal.[366]

*Borden* was a prosecution under the Sherman Anti-Trust Act for combination in restraint of commerce involving the transportation and distribution of fluid milk.[367] The defendants claimed that the Sherman Act did not apply to the milk industry as a result of the Agricultural Marketing Agreement Act of 1937 ("AMAA").[368] The Court's analysis focused on the fact that the AMAA provided for marketing agreements and orders entered into by the Secretary of

359. *Id.*
360. *Id.*
361. *Hansen* cited four cases where the existence of criminal sanctions had been rejected as a basis for implied repeal. *See id.* at 945–46.
362. 308 U.S. 188 (1939).
363. *See Hsia*, 24 F. Supp. 2d at 38–39.
364. *Id.* at 39.
365. *Borden*, 308 U.S. at 196–203.
366. *Id.* at 199–202.
367. *Id.* at 190–91 (citing 15 U.S.C. § 1 (1997)).
368. 50 Stat. 246, 7 U.S.C. §§ 671–674 (1999).

Agriculture, and that any such marketing agreements were expressly deemed lawful and not in violation of the antitrust laws.[369] However, "the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act."[370] When the Secretary participated in a marketing agreement, his involvement would provide protection against any restraint on commerce; if there were no marketing agreement and thus no involvement by the Secretary, no protection would be afforded by the AMAA.[371] In finding erroneous the district court's conclusion that the Secretary's unexercised discretion under the AMAA "wholly destroys the operation of . . . the Sherman Act," the Court stated that it "[could] not believe that Congress intended to create 'so great a breach in historic remedies and sanctions'" by also stripping the milk industry of the protection afforded by the Sherman Act.[372]

Although the Court did not clearly say so, this analysis suggests that in a specific instance where the AMAA *did* provide protection because of a marketing agreement, the Sherman Act might indeed have been impliedly repealed *pro tanto*, even if the AMAA had not expressly provided for such repeal. The Court noted that

> *[a]s to agreements and arrangements not thus agreed upon or directed by the Secretary*, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.[373]

The express limitations upon the Sherman Act in the AMAA were confirmation of this analysis,[374] as well as additional evidence that broader limitations were not intended.[375] While the Court did not explicitly say that its conclusion (that the AMAA did not repeal the Sherman Act *pro tanto*) would flow from the structure of the statutes alone, it is at least plausible that the Court would have reached the

369. *See Borden*, 308 U.S. at 199–201.

370. *Id.* at 200.

371. *See id.* at 199–200.

372. *Id.* at 198 (quoting General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61 (1932)).

373. *Id.* at 200 (emphasis added).

374. *See id.* ("*It is not necessary to labor the point*, for the Agricultural Act itself expressly defines the extent to which its provisions make the antitrust laws inapplicable.") (emphasis added).

375. *See id.* at 201 ("If Congress had desired to grant any further immunity, Congress doubtless would have said so.").

same result even without the express limitations in the AMAA.[376]

While the discussion in this Section does not alone answer the question of whether FECA impliedly repealed the general criminal statutes, the "repeal by implication" cases such as *Hansen*, *Borden*, and *Galliano*, (relied on by the "conduit contribution" cases) suggest some things about the proper approach to the analysis. First, the analysis should extend beyond a mere search of the statutory language and legislative history for explicit indications—express repeal is not required. Second, various structural considerations are relevant to the determination. For example, if the specific statute prohibits no conduct that would not also be prohibited by the general statute, or if both statutes provided the same type of penalties (criminal versus civil), the likelihood that Congress intended the specific statute to repeal the general statute *pro tanto* is greater. However, the vast majority of courts that have considered the implied repeal argument in conduit contribution cases have neither undertaken detailed analysis and comparison of the respective statutes nor offered a framework for such.[377]

### C. *The Greater Included Offense Theory*

Prosecutors and criminal defense attorneys are well familiar with the doctrine of the "lesser included offense."[378] Although some aspects of the doctrine are subject to dispute, the fundamentals are clear. Under appropriate circumstances, the judge instructs the jury that they may consider, as an alternative to the offense specified in the indictment, "a less serious, but uncharged offense" which is a component part of the charged offense.[379] For example, depending on the jurisdiction and the facts of the case, either side might ask that the jury be given the choice of conviction of manslaughter, although the only charge in the indictment was for murder. Such a lesser included offense charge may have tactical advantages for either side—to avoid

376. *See id.* at 203–06. The Court turns its discussion to whether the provisions of the Capper-Volstead Act repeal the Sherman Act with respect to dairy cooperatives. *Id.* at 203. The Court found that Capper-Volstead Act allows farmers to act cooperatively in getting goods to market but "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise." *Id.* at 204–05. As such, the Court held that it "cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment." *Id.* at 204.

377. *See supra* notes 286–90.

378. For background on this doctrine, see generally Janis L. Ettinger, *In Search of a Reasoned Approach to the Lesser Included Offense*, 50 BROOK. L. REV. 191 (1984).

379. *Id.* at 192.

the risk to the government of complete acquittal or the risk to the defendant of a murder conviction.[380]

Neither commentators nor judges tend to give much attention to the fact that "lesser included" has two parts—that the offense must be both "included" (satisfied by a subset of the elements of the offense charged) and "lesser" (providing a less severe penalty).[381] In discussions of the doctrine, virtually all of the attention is devoted to "included," and virtually none is devoted to "lesser."[382] The reason for this seems obvious—we naturally assume that any "included" offense will also be "lesser." If crime A includes the same elements as crime B plus an *additional* (aggravating) element, normally crime A will carry a more severe penalty. If the penalty for crime B is more severe, why would prosecutors charge anyone under crime A, requiring themselves to prove an additional element in order to lower the penalty?[383]

That underlying assumption, that a crime with added elements will normally have a more severe penalty, is the basis for what I propose—in the context of preemption analysis—as the doctrine of the "greater included offense." Under certain circumstances, we should recognize that a criminal provision was, more likely than not, intended to preempt a greater included offense—an "included" offense that carries a more severe penalty—that was enacted earlier than the preempting statute. This assumption should, at a minimum, be considered substantial evidence weighing against the normal presumption against repeal-by-implication and perhaps sufficient by

380. *See. id.* at 192–93.

381. *See id.* at 196.

382. For example, the discussion in Ettinger focuses almost entirely on the meaning (and implications for other doctrines) of "included" with virtually no discussion of "lesser." *See* Ettinger, *supra* note 378, at 198–209. For rare acknowledgements of both elements of the standard, see United States v. Cady, 495 F.2d 742, 747 (8th Cir. 1974) and Walker W. Jones, Jr., Annotation, *What Constitutes Lesser Offenses "Necessarily Included" in Offense Charged, Under Rule 13 (c) of Federal Rules of Criminal Procedure*, 11 A.L.R. FED. 173 § 3(b) (1972).

383. A prosecutor might charge the defendant with crime A to avoid imposing an unfair penalty (assuming that prosecutors think in these terms). However, until recently that was not necessary. The prosecutor could simply charge the defendant with crime B but avoid an unfair penalty by reliance on her discretion in recommending, and the judge's discretion in imposing, a lower sentence, comparable to that established for crime A. This may no longer be a feasible approach, as a result of the development in 1987 of the Federal Sentencing Guidelines, which have reduced a prosecutor's and judge's discretion in sentencing. Since the FECA provisions were enacted before the Federal Sentencing Guidelines, however, the lower penalty for violating FECA cannot be explained as a decision to provide prosecutors with a way around the harsh implications of the sentencing guidelines.

itself to rebut that presumption.

One condition precedent for invoking "greater included offense" doctrine should be that the criminal statute in question must be a broad provision "covering a more generalized spectrum."[384] This is an indication that the original statute may have been intended as a "gapfilling" statute broadly drawn to cover a wide range of behavior until Congress had considered the appropriate penalties for specific subsets of the behavior. Subsequent particularized statutes then fill in the interstices with Congress's particularized judgment.[385] Thus, if a subsequent statute either adds elements to the original offense or restricts operation to a small portion of the original offense while at the same time providing for a less severe penalty, an intent to preempt the original statute is the most logical explanation.

This perspective may help explain why, in preemption arguments, courts and commentators have occasionally been at pains to explain that it was harder to prove a violation of the general criminal statutes than of FECA. For example, in *United States v. Hopkins*, the court noted that

> the defendants in this case violated not only the election laws but also committed acts that constituted independent violations of the more general criminal statutes of Title 18. Conviction under those sections requires proof of elements not required to prove a violation of the election laws. The offenses under Title 18 thus stand wholly apart and separate from any violation of the federal election laws.[386]

However, the court never explained exactly what additional elements would be needed for the general criminal statutes. While additional elements might be necessary for the charges under sections 657 and 1006,[387] that would almost certainly not be the case for the charges under sections 371 and 1001.[388]

The DOJ Manual also alludes to additional elements required for conviction under the general criminal statutes:

> While there are several advantages to using these felony theories, it is important to emphasize that their use requires proof of additional elements beyond those required by FECA's misdemeanor provision. Proving these additional elements may be difficult in campaign financing cases.

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384. Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976).
385. *See* Molz, *supra* note 313, at 985.
386. United States v. Hopkins, 916 F.2d 207, 218–19 (5th Cir. 1990).
387. *See id.* at 211 & nn.4–5.
388. *See id.* at 211 & nn.2–3.

* * *

> [W]hen the conduct is charged under section 371 or 1001, the proof must also show that the defendant intended to disrupt and impede the lawful functioning of the FEC (section 371), or that the defendant willfully made, or caused another to make, a false statement regarding the illegal donation to the FEC (sections 1001, 2(b)).[389]

However, the discussion that follows that statement focuses on *Curran* as demonstrating that "satisfying these scienter requirements can prove challenging."[390] The Manual makes no attempt to show that any requirement *other* than mens rea will be difficult to prove.[391] As discussed below, other requirements of the general criminal statutes are almost inevitably satisfied.[392] As discussed in Part III, the law is not clear on whether the false statements statute requires anything more than knowledge of the facts that make the statement false. The mens rea required by the FECA misdemeanor statute, however, clearly seems to require knowledge of the law being violated.[393] Since even *Curran* only interpreted the required mens rea for the false statements statute as extending to knowledge of the reporting requirements of FECA,[394] it is difficult to see how this constitutes a "challenging" addition to the proof requirements.

The FECA prohibition of contributing in the name of another in comparison with the false statements and conspiracy to defraud the United States statutes provides a clear example of the greater included offense doctrine. Both of the general statutes have an extremely broad reach, satisfying the precondition for the doctrine. Within the context of conduit contribution prosecutions, these offenses have the following elements:

- *False statements*: 1) "in any matter within the jurisdiction of any department or agency of the United States;" 2) "knowingly and willfully;" 3) "makes any false . . . statements;" 4) that are material.[395]

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389. D.O.J. MANUAL, 6th ed., *supra* note 91, at 109–10.
390. *Id.* at 110.
391. *Id.*
392. *See infra* notes 395–97 and accompanying text.
393. *See supra* Part III.
394. United States v. Curran, 20 F.3d 560, 567 (3d Cir. 1994).
395. *See* 18 U.S.C. § 1001 (1994).
> Although materiality is explicitly stated as an element of those violations of 18 U.S.C. § 1001 proscribed only by the first clause of that statute, the [courts] have held that the falsehood in question in a charge brought under the second or third clause of § 1001 must also relate to a material fact. Thus, the test of

- *Conspiracy to defraud the United States*: 1) "two or more persons conspire;" 2) "to defraud the United States, or any agency thereof in any manner or for any purpose;" and 3) commit "any act to effect the object of the conspiracy."[396]
- *FECA misdemeanor*: 1) "make a contribution in the name of another person;" 2) "knowingly and willfully," 3) involving "contribution[s] . . . aggregating $2,000 or more during a calendar year."[397]

The elements of these three offenses are quite different, but on examination it is clear that a violation of the FECA misdemeanor will almost inevitably result in violations of the other two.

Start with a comparison of the FECA misdemeanor to the false statements statute. When someone makes a contribution through a conduit, the campaign will list the conduit's name on reports to the FEC.[398] That name itself constitutes a false statement.[399] The fact that the statement is on a report filed with the FEC means that it is "within the jurisdiction of any department or agency of the United States."[400] As discussed above, "knowingly and willfully" under the FECA misdemeanor statute will be at least as high a standard of culpability as "knowingly and willfully" under the false statements statute.[401]

The materiality requirement of section 1001 will also be met. In interpreting section 1001, many courts have defined materiality in a manner that can be summarized as having "a natural tendency to influence or be capable of influencing the government agency or department in question."[402] Actual reliance by the agency is, therefore, not required.[403] The names of contributors (as opposed to, say, their addresses) are clearly significant facts that would influence the FEC's

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materiality . . . has been held applicable to every violation of 18 U.S.C. § 1001 regardless of the clause involved.

Lewis J. Heisman, Annotation, *What Constitutes a 'Material' Fact for Purposes of 18 USCS § 1001, Relating to Falsifying or Concealing Facts in Matter Within Jurisdiction of United States Department or Agency*, 49 A.L.R. FED. 622 § 4 (1980).

396. 18 U.S.C. § 371 (1994).

397. The first element comes from 2 U.S.C. § 441f (1994), the actual prohibition. The last two elements come from § 437g(d)(1)(A) (1994), which provides criminal penalties for violating "any provision of this Act," including § 441f.

398. *See* United States v. Hsia, 176 F.3d 517, 522 (D.C. Cir. 1999) (explaining that a political campaign listed names of conduits, rather than true donors, on reports as a result of an alleged conduit contribution scheme).

399. *See id.* ("The false statements here are the political committees' reports identifying certain listed names as sources of specific contributions . . . .").

400. *See* 18 U.S.C. § 1001 (1994).

401. *See supra* notes 426–28 and accompanying text.

402. Heisman, *supra* note 395, at § 3.

403. *See id.*

actions. How else could the campaign reports be used to prevent corruption, help voters identify the sources of contributions, and detect violations of contribution limits/prohibitions—the very government interests which *Buckley* said justify the disclosure requirements?[404]

Materiality in this sense is quite distinct from the $2000 monetary floor associated with the FECA misdemeanor.[405] This, in fact, indicates an anomaly. In FECA Congress decided that violations involving contributions totaling less than $2000 should not be subject to criminal prosecution as misdemeanors.[406] However, if FECA has not preempted section 1001, a conduit contribution for $500 could not be prosecuted as a misdemeanor but could be prosecuted as a felony—clearly an absurd result and a further argument for preemption.

A comparison of the FECA misdemeanor with conspiracy to defraud the United States reaches the same results.[407] A conspiracy to defraud the United States means simply a conspiracy "having as [its] purpose impairing, obstructing, or defeating the lawful function of any department of government."[408] Since the lawful functions of the FEC include the government interests that justify disclosure requirements,[409] it is difficult to see how making a contribution through a conduit would not impede those functions. Of course, making the contribution itself is an overt act. Finally, there is almost surely an agreement between the conduit and the true donor (or the arranger of the conduit contribution) that the conduit will write the check and that she will subsequently be reimbursed. The true donor

404. *See* Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam).

405. *See* 2 U.S.C. § 437(h)(1)(A) (1994) (stating that one commits a misdemeanor offense only if the action involves "the making, receiving, or reporting of any contribution or expenditure aggregating $2,000").

406. *Id.*

407. *Compare* 2 U.S.C. § 437g(d)(1) (1994) ("Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both."), *with* 18 U.S.C. § 371 (1994) ("If two or more persons conspire . . . to defraud the United States, or any agency thereof . . . each shall be fined under this title or imprisoned not more than five years, or both.").

408. United States v. Levinson, 405 F.2d 971, 977 (6th Cir. 1968) (citing Haas v. Henkel, 216 U.S. 462, 479–80 (1910), *cert. denied*, 395 U.S. 958 (1969)); *see also* United States v. Tuohey, 867 F.2d 534, 537 (9th Cir. 1989) (noting that § 371 criminalizes "*any* willful impairment of a legitimate function of government, whether or not the improper acts or objective are criminal under another statute").

409. Buckley v. Valeo, 424 U.S. 1, 68 (1976) (per curiam) (identifying preventing corruption, helping voters identify the sources of contributions, and detecting violations of contributions limits/prohibitions as state interests justifying disclosure requirements).

must know of the reporting requirements and that misleading information is being given to a government agency in order to satisfy the "knowingly and willfully" requirement of the FECA misdemeanor.[410] Only if the conduit, unlike the true donor, were unaware of the involvement of a government agency, as a result of a plausible explanation of the conduit arrangement from the true donor, would a violation of the FECA prohibition arguably not also violate section 371.[411] While this could occur, it does not appear to be very likely; conduits are usually aware that the true donor is trying to avoid governmental scrutiny and/or make an illegal contribution.[412]

Thus, it appears that if a defendant has violated the FECA prohibition against making a contribution in the name of another by means of a conduit contribution, she will almost inevitably also be guilty under sections 1001 (in connection with 2(b)) and 371.[413] It is possible to hypothesize situations in which such would not be the case. For example, the campaign treasurer might inadvertently fail to submit the required reports or accidentally omit the conduit contribution. The "true source" of the funds might reimburse the conduit without the latter's knowledge. Such examples, however, are not at all likely.

Under the lesser included offense doctrine, the determination of whether the second offense is "included" may be made, depending on the jurisdiction, using a "strict" standard (based solely on the statutory definitions of the crimes), an "intermediate" standard (based on the facts alleged in the indictment), or a "lenient factual" standard (based

410. United States v. Trie, 21 F. Supp. 2d 7, 16 (D.D.C. 1998).

411. If the conduit was totally unaware of the true donor's intentions, there would be no *conspiracy* to defraud the United States. *See* 18 U.S.C. § 371 (1994).

412. United States v. Curran, 20 F.3d 560, 563 (3d Cir. 1994). *But see* Miller, *supra* note 18, at A15. In reporting on the *Hsia* case, Miller notes that the prosecutor said, "[M]any of the straw donors were 'dupes' who had no idea what they were doing. One woman, for example, testified that she thought the check she wrote to the 'DNC' might be going to a security company that worked for the temple, not the Democratic National Committee." *Id.* Miller further reports that the *Hsia* case involved "[Vice President Al] Gore's controversial appearance at a Buddhist temple" which raised "over $65,000 in illegal contributions" from, among others, Buddhist nuns and monks. *Id.* at A1, A15.

413. This is not necessarily the case for other types of violations of FECA, or other general felony criminal statutes available to the prosecutors. "Prosecutors cannot charge these felony offenses in every election law case, however, because they require the government to prove additional elements beyond the core conduct that constitutes an election law violation." Cole & Nabatoff, *supra* note 292, at 243 (footnote omitted) (discussing, *inter alia*, misapplication of bank funds, money laundering, bank fraud, and mail fraud). But for violations of the specific election law 2 U.S.C. § 441f, making contributions in the name of another, the false statements and conspiracy statutes do not appear to involve any additional elements.

on the facts produced at trial).[414] There are strong arguments in favor of the lenient standard as best supporting the purpose of the lesser included offense doctrine.[415] Similarly, the standard for application of the greater included offense doctrine should settle for a high degree of congruence under which the vast majority of violations of the benchmark offense will also be violations of the "included" offense. That approach best serves the purpose of the doctrine—identifying those situations where Congress probably intended that the benchmark offense prohibit conduct that is already prohibited by the "included" offense. Under this approach, it seems very clear that the scope of the FECA prohibition against making contributions in the name of another was intended to cover only conduct that would also violate the general criminal statutes.[416] Yet Congress made a violation of the former a misdemeanor, while a violation of the latter is a felony.[417] This is a peculiar result, which one would expect Congress to have mentioned if it intended both the FECA misdemeanor and sections 1001 and 317 be available in this context, but there is no such mention or explanation in FECA or its legislative history.[418] These circumstances suggest strongly that if Congress *had* specifically considered conduit contributions when enacting FECA, it would have intended that only the provisions of FECA and not the general criminal statutes apply to such conduct.

### *D. A Framework for Preemption Analysis*

A determination of whether an existing statute was implicitly repealed *pro tanto* must go beyond the language of the statute or the legislative history.[419] Rarely will Congress expressly indicate its

414. *See* Ettinger, *supra* note 378, at 195–209.

415. *See id.* at 225–28.

416. Along this line of reasoning, at least one court acknowledged that there is no inconsistency between FECA and the general criminal provisions. *See* United States v. Hsia, 24 F. Supp. 2d 33, 44 (D.D.C. 1998), *rev'd in part*, 176 F.3d 517 (D.C. Cir. 1999).

417. *See* 2 U.S.C. § 437g(d)(1)(A) (1994); 18 U.S.C. §§ 371, 1001 (1994).

418. *See, e.g.*, United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994); *see also Hsia*, 24 F. Supp. 2d at 36; United States v. Trie, 23 F. Supp. 2d 55 (D.D.C. 1998); United States v. Oakar, 924 F. Supp. 232 (D.D.C. 1996), *aff'd in part and rev'd in part*, 111 F.3d 146 (D.C. Cir. 1997); United States v. Hopkins, 916 F.2d 207 (5th Cir. 1990).

419. *See* Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 438–39 (1982). Sunstein's thesis is that where enforcement schemes are "manifestly inconsistent one another," per se rules of interpreting legislative intent are unacceptable because they ignore statutory goals. *Id.* at 439. Instead, Sunstein calls for an "unstructured judicial inquiry" to "determine what sorts of regulatory enforcement schemes are likely to be inconsistent with [the statute]." *Id.* Only through such a "relatively independent judicial assessment" can it be determined whether preemption has occurred.

intent—indeed, it will rarely have thought about all the possibilities.[420] A limitation of the inquiry to statutory language and legislative history thus amounts to little more than a per se rule, rather than a presumption against repeals by implication.[421] But neither a per se rule against nor a per se rule in favor of repeals by implication in such circumstances is optimal.[422] Instead, the court should identify factors that might contribute to a finding of "positive repugnancy." The framework I propose is based on factors suggested in *Galliano*: "context, structure, [and] specificity."[423] None of the factors are necessarily dispositive, but combined, point toward a conclusion that the general criminal statutes were repealed *pro tanto* by FECA.

### *1. Specificity*

In *Brown v. General Services Administration*, the Supreme Court noted that "a precisely drawn, detailed statute pre-empts more general remedies."[424] The basis for such a general rule is that when passing the narrowly drawn statute, "the mind of the legislator has been turned to the details of a subject, and he has acted upon it," whereas the precise situations may well not have even been considered when enacting the more general statute.[425] Giving effect to

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*Id.*

420. *See id.* at 418 (noting that in "almost all cases there will be virtually no evidence of [congressional] intent"); *see also* United States v. Hansen, 772 F.2d 940, 944 (D.C. Cir. 1985), *cert denied*, 475 U.S. 1045 (1986) (noting that the impossibility of determining whether Congress thought through the effects of a new law on existing laws requires strict adherence to a rule requiring "clear and manifest" evidence of legislative intent).

421. Sunstein, *supra* note 419, at 436–38 (making similar argument in the context of preemption analysis for § 1983).

422. *Cf. id.* at 437–38. Sunstein argues that a per se rule against presumption "could frustrate the statutory plan by leading to disruption of regulatory enforcement mechanisms; overenforcement of the law; inconsistency and confusion; resolution of politically sensitive, technically complex issues by politically unaccountable, generalist judges, and potential liability for engaging in conduct that Congress did not intend to make unlawful." *Id.* at 437. A per se rule favoring preemption, on the other hand, "might produce under-enforcement of unlawful activity, sanction conduct that Congress intended to prevent, and cause an increase in the pressures on already overloaded federal enforcement schemes." *Id.* at 438. Such a rule, he argues, is not a suitable solution unless there were assurances that Congress did indeed intend for preemption. *Id.*

423. United States v. Galliano, 836 F.2d 1362, 1369 (D.C. Cir. 1988).

424. 425 U.S. 820, 834 (1976). The case addressed the question whether "the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of discrimination in federal employment." *Id.* at 821.

425. *See* Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976). The Court concluded that "the narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act." *Id.* at 158.

the more general statute would, "by perverse operation of a type of Gresham's law,"[426] drive the more narrowly drawn statute out of operation. This reasoning could support a conclusion that FECA preempts the general criminal statutes. FECA was addressed to the specific, narrow issue of campaign funding. However, it is implausible, absent any evidence from the legislative history, that the Congresses that passed the false statements and conspiracy to defraud statutes were considering campaign financing issues.

*2. Structure*

Similarly, *Brown* implied that a statute that comprehensively addressed its subject in great detail is more likely to be considered as having preempted more general statutes: "The balance, completeness, and structural integrity of [the narrowly drawn statute] are inconsistent with the petitioner's contention that the judicial remedy afforded by [that statute] was designed merely to supplement other putative judicial relief."[427] This is essentially the argument that *Hansen* and *Borden* recognized but rejected as not applicable in these fact situations and that *Galliano* accepted.[428] In a comparison of FECA and the general criminal statutes concerning conduit contributions, however, the argument carries more weight than it did in *Hansen* and *Borden*.[429] FECA has a better claim to being a comprehensive scheme than does EIGA or the AMAA. Thus, this factor also favors a finding of repeal by implication.

*3. Context*

The most significant argument based on context is that described in section C as the "greater included offense" theory, which seems to

426. *Brown*, 425 U.S. at 833. "Gresham's Law" was named after Sir Thomas Gresham (1519–79), who was the master of the mint in England during Queen Elizabeth's reign in the 16th Century. *See* http://xrefer.com/entry/344050.html (last visited Aug. 15, 2001); http://xrefer.com/entry/445409.html (last visited Aug. 15, 2001). The law states that "bad money drives out good," where between two coins of equal face value, the coin which is worth less than face value will remain in circulation, whereas the "dearer" coin, whose bullion value is worth more than its face value, will be extracted from circulation and melted down because it is worth more as bullion than as legal tender. *Id.*

427. *Brown*, 425 U.S. at 832.

428. *See supra* notes 350–76 and accompanying text.

429. *See* United States v. Hansen, 772 F.2d 940, 944–49 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1045 (1986) (holding that the EIGA does not preempt the false statements statute); United States v. Borden Co., 308 U.S. 188, 194–206 (1939) (holding that Congress did not intend for the Agricultural Marketing Agreement Act to strip the milk industry of the protection afforded by the Sherman Act).

also be implied in comments in *Hopkins* and the DOJ Manual.[430] If statute A is a "greater included offense" of statute B, the most logical interpretation is to treat statute B (here FECA) as having preempted statute A (here the false statements and conspiracy to defraud the United States statutes) *pro tanto*. As discussed above with respect to conduit contributions, because the false statements and conspiracy to defraud the United States statutes clearly qualify as "greater included offenses" of the FECA prohibition against contributions in the name of another, they provide further support for repeal by implication.

Taken together, these three factors present a powerful argument that there is a "positive repugnancy" between FECA and the general criminal statutes sufficient to justify a finding of repeal by implication. The courts that have addressed the preemption argument have limited their analyses, perhaps in response to limited arguments by defendants, largely to statutory language and legislative history. When they have ventured beyond these to review of precedents cited by the government, they have failed to distinguish the precedents adequately from the specific issue of FECA and conduit contributions. A more thorough analysis, using the framework proposed above, supports a different conclusion—that the general criminal statutes are not available for prosecutions of conduit contributions.

## V. THE FIRST AMENDMENT ARGUMENT

The final argument—that the First Amendment[431] prohibits felony (and possibly misdemeanor) prosecutions of conduit contributions absent additional elements that the government should be required to prove—is the most ambitious argument I advance. It is also the most straightforward. Defendants generally do not raise and courts do not address this argument, apparently under the impression that *Buckley* has settled the issue.[432] The Supreme Court, however, did not address this precise issue, and the rationales advanced to justify disclosure requirements apply with little force to conduit contributions.

*Buckley* identified three government interests sufficient to justify "infring[ing the] privacy of association and belief guaranteed by the

430. *See supra* notes 386–89 and accompanying text.

431. U.S. CONST. amend. I.

432. Buckley v. Valeo, 424 U.S. 1, 66–68 (1976) (per curiam) (holding that the First Amendment did not invalidate FECA's disclosure requirements because disclosures "directly serve substantial governmental interests").

First Amendment":[433] preventing corruption, helping voters identify the sources of contributions, and detecting violations of contribution limits/prohibitions.[434] The appropriate test for interfering with these rights, however, is "if the State demonstrates a sufficiently important interest *and employs means closely drawn* to avoid unnecessary abridgment . . . ."[435] Prosecutions for conduit contributions constitute a far greater "deterrent effect on the exercise of First Amendment rights"[436] than the disclosure requirements themselves and, arguably, should be justified by a stronger government interest or more narrowly tailored means.[437] The government interests recognized in *Buckley*, however, look significantly different when discussing prosecutions of conduit contributions, at least without qualifications to more narrowly tailor the intrusion.[438]

The first *Buckley* justification, helping voters identify the sources of contributions,[439] is clearly the weakest of the three. The justification logically should not distinguish between requirements aimed at the campaign committees or requirements aimed at the donors themselves. If enhanced voter information justifies disclosure requirements imposed on the campaign committees,[440] it should also justify disclosure requirements imposed on the donors themselves. The Supreme Court, however, has ruled that campaign committees cannot require that donors disclose information about themselves in order to include it on reports to the FEC.[441] Thus, the chilling effect created by prosecutions for conduit contributions must be justified, if at all, by the other two *Buckley* rationales.

The corruption justification may be the strongest that *Buckley* advanced. It is worth noting that the prevention of corruption was also

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433. *Id.* at 64.
434. *See id.* at 68.
435. *Id.* at 25 (emphasis added).
436. *Id.* at 65.
437. United States v. Hsia, 24 F. Supp. 2d 33, 55–56 (D.D.C. 1998).
438. *Id.* at 57.
439. *Buckley*, 424 U.S. at 68.
440. *Id.* Disclosure

> allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

*Id.*

441. *See* Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400, 406 (D.C. Cir. 1996) ("The law only requires political committees to ask donors for the information; no federal law requires donors to report their *name*, address, occupation, and employer as a condition of supporting the political party of their choice.") (emphasis added).

a crucial factor advanced to support the contribution and expenditure limits.[442] In many respects, prevention of corruption might be considered the primary purpose of FECA.[443] Corruption prevention is relevant to prohibitions against conduit contributions only with an added qualification that the candidate or campaign committee knows the true source of the funds.[444] The primary danger at which contribution limits were aimed was the prospect of a quid pro quo for the contribution or some other form of improper influence.[445] If the candidate does not know that the contribution really comes from X, it is difficult to see how X can extract a quid pro quo or exert improper influence. This is the very insight that underlies the proposal by Professors Ian Ayres and Jeremy Bulow of a system of mandated *anonymity*, rather than mandated disclosure.[446]

Clearly, it is possible to construct hypothetical situations where a candidate knows the identity of the true donor behind a conduit contribution, introducing the opportunity for quid pro quo corruption or improper influence. For example, the donor might arrange the contribution and tell the candidate privately that the check from A is really from B. This, however, raises a significant issue of causation. If the candidate knows the true source of the contribution but allows the campaign treasurer to file a report identifying the conduit instead, who causes the false statement? Since the candidate is responsible for the accuracy of the FEC reports, the candidate seems clearly the more culpable.[447]

The third justification noted in *Buckley* was to facilitate the identification of FECA violations, such as contributions from prohibited sources or those exceeding the contribution limits.[448] Accurate contribution reports, disclosing the true sources of funds, are obviously of value in this respect. The prohibition against contributions in the name of another, enforced by threats of

442. *Buckley*, 424 U.S. at 55.

443. *Id.* at 25–26.

444. *See* Ayres & Bulow, *supra* note 5, at 838.

445. *Id.*

446. *See id.* at 838–40.

447. *See, e.g.*, Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400, 403 (D.C. Cir. 1996) (stating that FECA "requires the treasurer of a political committee to report . . . the name, address, occupation, and employer of donors giving more than $200 in a single year[, but] [n]either the Act nor any other law . . . requires donors to disclose this information").

448. *Buckley* actually expressed this as only "an essential means of gathering the data necessary to detect violations of the *contribution limitations* described above." *Buckley*, 424 U.S. at 68 (emphasis added). It is reasonable, though, to include within this justification the detection of contributions from prohibited sources as well.

prosecution, serves the goal of accurate contribution reports.[449] There is still a question, however, as to whether this constitutes "means closely drawn to avoid unnecessary abridgment of associational freedoms."[450] The prohibition as enforced today, whether prosecuted under FECA or the general criminal statutes, is not limited to conduit contribution schemes that are used to hide violations of other FECA provisions.[451] A contribution that is neither from a prohibited source nor in excess of the prescribed limits, if made through a conduit, is still subject to prosecution.[452]

As currently implemented, prosecutions for contributions in the name of another seem excessively broad compared to the government interests of preventing corruption and identifying violations of other FECA provisions. The enforcement scheme thus seems to create excessive infringement on protected First Amendment rights.[453] Prosecution under the FECA misdemeanor provision and the general criminal statutes is arguably unconstitutional as those statutes are currently interpreted.

This does not necessarily mean that the government should be absolutely prohibited from such prosecutions. Another more narrowly-tailored alternative might be to require the government in such prosecutions to prove that the contribution violated another FECA provision, whether because it is from a prohibited source or because it is in excess of the contribution limits.[454] This would transform the prohibition against contributions in the name of another into a punishment "enhancer" rather than an independent culpable act intrinsically worthy of punishment. Such a change would protect

449. *Id.* at 83–84.

450. *Id.* at 25.

451. *See supra* notes 430–32 and accompanying text. A prosecution under the general criminal statutes need not prove *any* violation of FECA, and a FECA misdemeanor prosecution for making a contribution in the name of another need not prove an attempt to circumvent other provisions, for example, contribution limits or prohibitions on contributions from certain sources.

452. Both *Trie* and *Kanchanalak* involved indictments for soft money donations, which are not subject to most FECA prohibitions. *See supra* notes 89–92 and accompanying text.

453. For a discussion of how courts are concerned with First Amendment rights, *see, e.g.*, *Buckley*, 424 U.S. at 14–35; Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385 (2000). *See also* Ayres & Bulow, *supra* note 5, at 867, 883–86 (discussing the difficulty of designing campaign restrictions that are constitutional and proposing a mandated anonymity program).

454. An alternative would be to permit prosecution when the candidate (or appropriate official in the campaign committee) was aware of the true source of the funds, since that would involve potential quid pro quo corruption. However, as noted previously, this raises a serious causation issue.

this "area of the most fundamental First Amendment activities."[455]

## VI. CONCLUSION

The number of these prosecutions in recent years require rethinking and resolution of the issues raised above. If the First Amendment does not absolutely bar such prosecutions, the government should at least be required to prove that the conduct in question violated other FECA prohibitions in order to avoid excessive intrusion into this protected area of political speech. Prosecutions also should be limited to the FECA misdemeanor provisions, recognizing that Congress has developed a comprehensive regulatory scheme that conflicts with the general criminal statutes. Finally, if felony prosecutions under the general criminal statutes continue, the Supreme Court should resolve the disagreement between *Curran* and *Gabriel/Hsia* in favor of requiring proof that defendants know about FECA reporting requirements and deliberately act to circumvent them.

Proponents of campaign finance reform are likely to react negatively to these suggestions. Anything that weakens enforcement of FECA, which proponents of reform already consider inadequate, would only appear to exacerbate the problem. However, this concern is misplaced. The suggested changes should have very little effect on enforcement and to the extent that the changes do, the consequences would not be as serious as reform advocates may anticipate.

Enforcement is unlikely to be hampered substantially. Proof of conduct that violates other FECA provisions actually will often be readily available. Many of the recent prosecutions of conduit contributions have involved either corporate or foreign funds.[456] Similarly, proof of knowledge of reporting requirements could be readily developed. The FEC or DOJ could readily "publicize the law to the target audience to eliminate the possibility that defendants can claim ignorance of it," and "[s]igns, brochures, and individualized warnings"[457] by campaign committees and fundraisers could be required. Further, the reduction of penalties from a felony to a misdemeanor may have relatively little effect on deterrence. Similarly-situated individuals who are worried about a possible sentence of

455. *Buckley*, 424 U.S. at 14.

456. *See, e.g.*, United States v. Trie, 21 F. Supp. 2d 7, 13 (D.D.C. 1998) (foreign sources); United States v. Kanchanalak, 41 F. Supp. 2d 1, 3 (D.D.C. 1999) (corporate funds); United States v. Curran, 20 F.3d 560, 563 (3d Cir. 1994) (contribution limits).

457. Wiley, *supra* note 120, at 1093.

twenty-five years in prison[458] may be substantially deterred even by the prospect of imprisonment of five years. Long potential sentences might logically be justified as leverage to extract cooperation from defendants, in an attempt to gather evidence against more campaign officials, whose conduct would be more culpable if they were knowing participants in the scheme. As noted above, however, in such cases, campaign officials are often victims of the scheme, rather than mere participants.

In many cases, the changes I propose would not prevent prosecution and conviction of the same individuals who have been successfully prosecuted for conduit contributions. These proposed changes would ensure that juries, not prosecutors, make the determination that the conduct in question is sufficiently culpable to warrant substantial punishment. Relying on "the unreviewable discretion of one individual [is] . . . wholly incompatible with our system of justice"[459] and these proposed changes would reduce that problem.

Even if prosecutions of this type of conduct decline, that is not as large a price to pay as it may seem. The typical defendant in these cases poses far from the greatest threat that our electoral system faces. As pointed out by a former FEC associate general counsel:

> What we have now is a paradox of campaign finance law enforcement. Infrequent contributors outside the Washington system are the targets of enforcement action by the FEC and the DOJ, while regular and influential participants such as issue advocacy groups spend money through legal channels but have a greater impact on the political process . . . .
>
> Thus, the process is not abused most severely by those who violate the law, but by those who navigate through the law.[460]

Any minor reduction in the aggressive enforcement of campaign financing law will have little adverse effect if enforcement currently provides little benefit because aimed at the wrong targets.

Campaign financing abuses are very real and can pose very serious threats to our system. The conduct alleged in conduit contribution cases should not be dismissed lightly. [461] The DOJ's

458. *See* Miller, *supra* note 18 (reporting on the conviction of Maria Hsia).

459. Berra v. United States, 351 U.S. 131, 138 (1956) (Black, J., dissenting).

460. Gross & Hong, *supra* note 93, at 55–56.

461. These cases often involve attempts by the defendants to use conduit contributions to circumvent other limitations or prohibitions. *See, e.g.*, United States v. Kanchanalak, 192 F.3d 1037, 1038 (D.C. Cir. 1999) (contributions from foreign nationals and corporations); *Curran*, 20 F.3d at 563 (contributions in excess of limits and/or from corporate source);

current aggressive approach to these cases, however, goes far beyond effective law enforcement and is incompatible with Congress' design in FECA, as well as fundamental notions of justice. It is time for the courts to put an end to this approach.

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United States v. Hopkins, 916 F.2d 207, 211 (5th Cir. 1990) (illegal corporate contributions). These other limitations and prohibitions are important, and conduit contributions to avoid detection should be deterred. The point of this Article is not that "innocent" people *are* being prosecuted, but that they *could be* under current interpretations of the law and the DOJ's current prosecutive approach.