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Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?

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Plan B for Campaign-Finance Reform: Can the FCC Help Save American Politics After Citizens United?

Cover Page Footnote

Professor of Law, University of Miami School of Law. I owe a great debt of gratitude to Glen Robinson for extremely detailed and helpful comments. Many thanks are also due to Tom Krattenmaker for close reading on short notice. Conversations with Steve Schnably and Ralph Shalom were, as ever, very useful. Brittany Panter, Kara Romagnino, and Annabelle Torgman provided able research assistance. I also thank Pam Lucken and Robin Schard of the University of Miami Law Library for their help with legislative history. A version of this Article was selected as a poster presentation at the 2011 annual meeting of the Midwest Political Science Association. All errors are my own.

PLAN B FOR CAMPAIGN-FINANCE REFORM: CAN THE FCC HELP SAVE AMERICAN POLITICS AFTER *CITIZENS UNITED*?

Lili Levi⁺

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Campaign-finance reform is currently stalled. A series of recent Supreme Court decisions culminating in *Citizens United v. FEC*, which rejected limits on corporate and union spending on electioneering communications,¹ undermined the bipartisan campaign-finance-reform legislation that the Court largely approved less than a decade ago in *McConnell v. FCC*.² Both public³ and scholarly⁴ reaction to *Citizens United* has been sharply negative, with critics viewing the decision as an invitation to electoral domination by corporate money and special interests.⁵ For many, *Citizens United* has become a worrisome symbol of the Court's overall turn toward deregulation of campaign finance.⁶ Although the 2010 midterm elections—the most expensive

1. See 130 S. Ct. 876, 913 (2010).

2. Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81 (codified as amended at 2 U.S.C. §§ 431–456 (2006)); *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (upholding most of the 2002 BCRA's provisions, including the “electioneering communication” provisions and the “soft money” ban), *overruled in part by Citizens United*, 130 S. Ct. at 913.

3. See, e.g., PUB. CITIZEN, 12 MONTHS AFTER: THE EFFECTS OF CITIZENS UNITED ON ELECTIONS AND THE INTEGRITY OF THE LEGISLATIVE PROCESS 17–22 (2011), available at <http://www.citizen.org/documents/citizens-united-20110113.pdf>; Dan Eggen, *Corporate Sponsorship Is a Campaign Issue on Which Both Parties Can Agree*, WASH. POST, Feb. 18, 2010, at A15; Barry Friedman & Dahlia Lithwick, *Speeding Locomotive: Did the Roberts Court Misjudge the Public Mood on Campaign Finance Reform?*, SLATE (Jan. 25, 2010, 2:09 PM), <http://www.slate.com/id/2242557>.

4. See, e.g., Ronald Dworkin, *The Decision that Threatens Democracy*, 57 N.Y. REV. BOOKS 63, 63 (2010).

5. See, e.g., Randall P. Bezanson, *No Middle Ground? Reflections on the Citizens United Decision*, 96 IOWA L. REV. 649, 650 (2011); Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1025 (2011); Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 660–61 (2011); Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581, 582–83 (2011); Deborah Hellman, *Money Talks but It Isn't Speech*, 95 MINN. L. REV. 953, 954–55 (2011); Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. (forthcoming Mar. 2012), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=1829474; Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 176 (2010); Justin J. Wert, Ronald Keith Gaddie & Charles S. Bullock, III, *Of Benedick and Beatrice: Citizens United and the Reign of the Laggard Court*, 20 CORNELL J.L. & PUB. POL'Y 719, 719–20 (2011); Molly J. Walker Wilson, *Too Much of a Good Thing: Campaign Speech After Citizens United*, 31 CARDOZO. L. REV. 2365, 2368–69 (2010). But see Joel M. Gora, *The First Amendment . . . United*, 27 GA. ST. U. L. REV. 935, 935 (2011) (arguing that the Supreme Court properly protected citizens' civil liberties in *Citizens United*).

6. See, e.g., Briffault, *supra* note 5, at 643–44 (stating the decision “crystallized for many people the concern that corporate money dominates American politics”).

in recent history⁷—do not appear to have confirmed critics’ most hyperbolic predictions about corporate domination of political advertising,⁸ the data do suggest a striking post-*Citizens United* political picture.⁹ Many of the independent political ads that aired after *Citizens United* did not include any meaningful donor identification, and there is little reason to believe this will change.¹⁰ Simply put, the 2012 presidential election season will likely feature extensive and largely negative “independent” advertising, sponsored by shadowy third-party organizations sporting identity-concealing names and funded by undisclosed partisan donors.¹¹

This is the feared “*Citizens United* effect”: Non-candidate groups, carefully structured to take advantage of the limits to election-law disclosure requirements, spending potentially unlimited funds to air veiled partisan political ads without accountability to voters.¹²

This environment of disguised advertising is at odds with Justice Anthony Kennedy’s political vision in *Citizens United* itself—a vision of balance, in which the accountability promoted by effective public disclosure would neutralize the potential electoral harms of unlimited corporate expenditures.¹³ However, according to election-law authority Professor Richard Hasen, “Justice Kennedy’s utopian information-flowing vision of the U.S. campaign-finance system is now no more than a dream.”¹⁴

7. See Paul Blumenthal, *The Citizens United Effect: 40 Percent of Outside Money Made Possible by Supreme Court Ruling*, SUNLIGHT FOUND. (Nov. 4, 2010, 1:43 PM), <http://sunlightfoundation.com/blog/2010/11/04/the-citizens-united-effect-40-percent-of-outside-money-made-possible-by-supreme-court-ruling/>; Kathleen Ronayne, *OpenSecrets.org Unveils 2010 ‘Big Picture’ Analysis*, OPENSECRETS.ORG (July 26, 2011, 7:20 PM), <http://www.opensecrets.org/news/2011/07/2010-election-big-picture.html>.

8. See, e.g., Briffault, *supra* note 5, at 643–44 (noting the satirical aftereffect of corporations running in a congressional election); Walker Wilson, *supra* note 5, at 2366–67 & nn.8, 12 (identifying the critical prediction that *Citizens United* will lead to foreign entities bankrolling elections and will have a destructive effect on the system).

9. See *infra* Part I.B.

10. See *infra* notes 107–22 and accompanying text.

11. See *infra* Part I.C; see also Kim Barker & Marian Wang, *Super PACs and Dark Money: ProPublica’s Guide to the New World of Campaign Finance*, PROPUBLICA (July 11, 2011, 1:38 PM), <http://www.propublica.org/blog/item/super-PACs-propublicas-guide-to-the-new-world-of-campaign-finance> (predicting that the 2012 election season will set a new record for election spending due to a wide array of organizations capable of hiding funding sources).

12. See, e.g., BILL DE BLASIO, THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, *CITIZENS UNITED AND THE 2010 MIDTERM ELECTIONS* 26 (2010), available at <http://advocate.nyc.gov/files/12-06-10CitizensUnitedReport.pdf>; see also CIARA TORRES-SPELLISCY, BRENNAN CTR. FOR JUSTICE, *TRANSPARENT ELECTIONS AFTER CITIZENS UNITED* 3 (2011), available at <http://ssrn.com/abstract=1776482> (discussing corporations’ and unions’ ability to be involved in elections by spending through intermediaries, which does not require disclosure following *Citizens United*).

13. See *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

14. Richard L. Hasen, *Justice Kennedy’s Mistaken Citizens United Vision and the Lurch Toward Campaign Finance Deregulation*, ACSBLOG (Jan. 21, 2011), <http://www.acslaw.org/acs>

The fear of a political landscape distorted by massive amounts of veiled advertising has led opponents of *Citizens United* to seek help from Congress, the states, the Federal Election Commission (FEC), the Internal Revenue Service (IRS), the courts, and the White House.¹⁵ Abandoning efforts to achieve wide-ranging reform of the electoral system, many campaign reformers have shifted their focus to the mitigating effects of mandated disclosure requirements.¹⁶ The remainder has turned its attention away from traditional campaign-finance regulation to alternative reformist strategies, such as lobbying regulation.¹⁷

Yet, the efforts of post-*Citizens United* reformers, which thus far have been directed toward influencing a predictable group of decision makers,¹⁸ have either failed or are still pending, subject to delay.¹⁹ In the meantime, the 2012 presidential election season is already in full swing.²⁰ American politics has switched to an electoral mode of “permanent campaign,”²¹ and money is already flowing into third-party political advertisements.²² Therefore, policymakers should aggressively explore alternative avenues to mitigate the negative consequences of *Citizens United*.

Because expenditures for political advertising are still principally focused on television and cable,²³ Federal Communications Commission (FCC) regulation could help realize the speech-and-disclosure-based vision of electoral democracy in *Citizens United*.²⁴ Indeed, having recognized this possibility, the

blog/justice-kennedy’s-mistaken-citizens-united-vision-and-the-lurch-toward-campaign-finance-dere.

15. See *infra* Part I.C.

16. See *infra* Part I.C. Congress considered legislation that required increased donor disclosure, and state legislators passed similar statutes. See *infra* notes 181–89.

17. See Heather Gerken, *Keynote Address: Lobbying as the New Campaign Finance*, 27 GA. ST. U. L. REV. 1155, 1155, 1159, 1161–65 (2011); Kang, *supra* note 5 (manuscript at 4, 43–45); see also Michael S. Kang, *The Campaign Finance Debated After Citizens United*, 27 GA. ST. U. L. REV. 1142, 1153 (2011) (“*Citizens United* . . . leaves no promising avenue to reform for those concerned about the influence of money in politics.”).

18. See *infra* Part I.C.

19. Gerken, *supra* note 17, at 1155 (“*Citizens United* . . . cut off most of the traditional pathways for campaign finance reform.”); see *infra* notes 190–97 and accompanying text.

20. See Matea Gold & Melanie Mason, *Independent Groups Getting a Head Start on 2012 Campaign*, L.A. TIMES, July 17, 2011, <http://articles.latimes.com/2011/jul/17/nation/la-na-outside-spending-20110717>.

21. See Jeanne Cummings, *Don’t Adjust Your Set: Now Campaign Ads Never End*, POLITICO (Mar. 18, 2011, 4:38 AM), www.politico.com/news/stories/0311/51535.html (internal quotation marks omitted). For arguments that a clear distinction between governance and campaigning no longer exists, see generally THE PERMANENT CAMPAIGN AND ITS FUTURE (Norman J. Ornstein & Thomas E. Mann eds., 2000).

22. See Gold & Mason, *supra* note 20 (noting the early start of independent-group political ads for the 2012 presidential election).

23. See, e.g., *id.*

24. See *infra* Parts II–III.

advocacy group Media Access Project (MAP) recently filed a petition with the FCC requesting that the agency expand its current sponsorship disclosure rules for political ads to include the disclosure of funding sources for independent electoral advertisements.²⁵

This Article argues that the FCC can use communications law to regulate electoral advertising by independent advocacy groups. First, the FCC has the statutory authority to require third-party purchasers of airtime for political and advocacy advertising to disclose their major direct and indirect funding sources and principal directors, officers, or operators.²⁶ Extra-governmental approaches can also be developed to promote voluntary adoption of disclosure rules by electronic media.²⁷

Second, the FCC can adopt a rule grounded on a dormant FCC doctrine—colloquially known as the “*Zapple* doctrine” or the “quasi-public opportunities rule”²⁸—to constrain broadcaster partisanship in airtime sales to third-party advocacy groups.²⁹ Thus, the FCC can deploy regulatory precedent to mandate overall broadcaster evenhandedness in airing non-candidate political advertising.³⁰ Moreover, if the FCC reaffirms its prior view that broadcasters airing political advertisements by supporters or opponents of candidates are not immune from liability for defamation, as they would be with respect to ads by candidates themselves, broadcasters might voluntarily engage in more searching review of non-candidate political ads.

Although the *Zapple* doctrine has been associated with the now-defunct fairness doctrine,³¹ the legitimacy of such a quasi-equal opportunities regulation does not depend on the fairness doctrine.³² Nor must the equal opportunities provision under section 315 of the Communications Act of

25. Petition for Rulemaking at 1, Amendment of 47 C.F.R. § 73.1212 (Fed. Comm’n Comm’n filed Mar. 12, 2011), available at <http://ecfsdocs.fcc.gov/filings/2011/03/22/6016374308.html> (hereinafter MAP Petition); see also Paul Blumenthal, *Super PACs and Secret Money: The Unregulated Shadow Campaign*, HUFFINGTON POST (Sept. 27, 2011, 1:49 AM), <http://www.huffingtonpost.com/2011/09/26>.

/super PACs-secret-money-campaign-finance_n_977699.html; John Yoo & David W. Marston, *Overruling Citizens United with Chicago-Style Politics: Federal Contract Bidders Must Disclose Political Giving*, LEGAL OUTLOOK (Am. Enter. Inst. for Pub. Pol’y Res., Wash., D.C.), July 2011, at 1, 4, available at <http://www.aei.org/docLib/LO-2011-07-No-2-g.pdf> (noting the significance of the proposed rule change and positing that its implementation would unduly expand current FEC disclosure requirements, chill political speech, and provide a powerful new tool for the FCC).

26. See *infra* Part II.A.1.

27. See *infra* Part II.B.4.

28. See *infra* note 214 and accompanying text.

29. See *infra* Part II.B.2.

30. See *infra* Part II.B.

31. LaVonda N. Reed-Huff, *Political Advertisements in the Era of Fleeting Indecent Images and Utterances*, 84 ST. JOHNS L. REV. 199, 212 (2010) (noting the survival of the *Zapple* doctrine).

32. See *infra* Part II.

1934³³ be read to incorporate ads by independent third-party groups. Rather, the FCC can adapt *Zapple* to the modern electoral picture under its ancillary authority.³⁴ Particularly when exercise of ancillary authority would specifically promote the congressional values behind the political-advertising provisions of the Communications Act of 1934, an FCC revival and adaptation of the *Zapple* principle would avoid the critiques of ancillary authority that the agency has encountered in the past.

This is not to say, as some skeptics of disclosure might contend, that the FCC should affirmatively require broadcasters and perhaps even cable companies to air a rich array of political programming choices to mitigate the purported ill effects of manipulative advocacy advertising. It would be both unwise and constitutionally questionable for the FCC to adopt affirmative programming obligations to induce enhanced commitments to political programming by broadcasters and cable operators, regardless of the repeated trope of television as a “vast wasteland.”³⁵

Part I.A provides an overview of *Citizens United* and its legal context. Part I.B discusses attempts to cabin campaign reform after *Citizens United*. Part I.C describes the “*Citizens United* effect” in election contests, summarizing current empirical findings about the 2010 elections and describing several harms (other than electoral outcomes) that can be attributed to the Court’s campaign-finance deregulation, and addressing the 2012 presidential contest. Part I.D reviews the various approaches proposed by campaign-finance-reform advocates in response to the *Citizens United* line of campaign-finance cases.

Part II describes the statutes and FCC regulations applicable to political advertising, addressing both legislative history and the policy question raised by further involving the FCC in campaign-finance matters. Part II.A describes the FCC’s political advertising rules. Part II.B focuses on the sponsorship-identification requirement of 47 U.S.C. § 317. It addresses what an FCC-based disclosure regime might look like, tackles the desirability of an FCC-based donor-disclosure regime from constitutional and policy standpoints, and discusses the arguments to induce broadcasters’ voluntary adoption of donor disclosure rules. Part II.C looks at the possible revival of an antidiscrimination rule like the FCC’s *Zapple* doctrine as a way of ensuring roughly equal airtime opportunities to supporters and opponents of candidates. It also explores whether FCC action should be grounded in § 315 itself or under the FCC’s ancillary authority.

Part III.A raises the question of institutional choice, concluding that the Commission is an appropriate participant in the attempt to improve campaigns.

33. Communications Act of 1934, Pub. L. No. 73-416, § 315, 48 Stat. 1064, 1089 (codified as amended at 47 U.S.C. § 315 (2006)).

34. See *infra* Part II.

35. See James Warren, *Never Mind the ‘Vast Wasteland.’ Minow Has More to Say*, N.Y. TIMES, May 7, 2011, www.nytimes.com/2011/05/08/us/08cncwarren.html (referring to former FCC Chairman Newton Minow’s now-iconic description of television).

Finally, Part III.B discusses the limits of FCC intervention, concluding that it would be unwise for the agency to impose an affirmative political-programming obligation on broadcasters or cable operators to mitigate the potential skewing effects of *Citizens United* and the judicial rejection of campaign-finance reform.

I. *CITIZENS UNITED* AND ITS AFTERMATH

Citizens United unleashed a passionate debate and apocalyptic predictions about the future of American politics and democracy.³⁶ In response to the decision, critics predicted the expenditure of vast sums of corporate money that would dominate political debate and steamroll electoral outcomes.³⁷ Many scholars worried that *Citizens United* and other developments in election law would result in various democratic harms arising from the hidden uses of concentrated wealth for partisan political purposes.³⁸ Although some commentators see *Citizens United* as simply an incremental element in the Court's dismantling of campaign-finance reform,³⁹ most recognize that "[e]ven if *Citizens United*'s incremental impact is mild, it nevertheless has the feel of a final straw."⁴⁰ As summarized by election-law expert Professor Michael Kang, "*Citizens United* marks the end of campaign-finance law as we knew it."⁴¹

36. See, e.g., Donna F. Edwards, *A Call to Bold Action*, BOS. REV., Sept./Oct. 2010, at 23–24 (“The *Citizens United* ruling will go down in history as one of the Supreme Court’s worst decisions—the *Dred Scott* of our time.”); see also Briffault, *supra* note 5, at 643 (characterizing most of the popular and academic commentary on *Citizens United* as “critical”).

37. See *supra* note 5 and accompanying text; see, e.g., Lyle Denniston, *Analysis: A New Law to Offset Citizens United?*, SCOTUSBLOG (Jan. 21, 2010, 4:00 PM), <http://www.scotusblog.com/2010/01/analysis-a-new-law-to-offset-citizens-united/> (quoting President Barack Obama’s assertion that *Citizens United* “has given a green light to a new stampede of special interest money in our politics”); see also Michael Malone, *Report: O & Os Big Beneficiaries of ‘10 Political Cash*, BROADCASTING & CABLE (Jan. 26, 2010), http://www.broadcastingcable.com/article/445944-Report_O_Os_Big_Beneficiaries_of_10_Political_Cash.php (quoting the comment that “[a]fter *Citizens United*, [2010] will be a highly-caffeinated political season” that is expected to generate as much as \$3 billion in political spending).

38. See *supra* notes 3, 5 and accompanying text.

39. See, e.g., Briffault, *supra* note 5, at 644 (“[T]he impact of *Citizens United* may ultimately have less to do with corporate spending and more with the changes the decision could lead to in other areas of campaign finance . . .”).

40. See Justin Levitt, *Confronting the Impact of Citizens United*, 29 YALE L. & POL’Y REV. 217, 217 (2010); cf. Kang, *supra* note 5 (manuscript at 14) (observing that the consequences of the decision reach beyond the protection of corporate speech and have resulted in a new campaign-finance landscape).

41. Kang, *supra* note 5 (manuscript at 14).

A. Citizens United in Its Legal Context

Federal law has regulated campaign finance in American elections since the early twentieth century.⁴² Since the 1970s, campaign finance has received particularly intense congressional attention,⁴³ which resulted in two major statutes: the Federal Election Campaign Act of 1971 (FECA)⁴⁴ and the Bipartisan Campaign Reform Act of 2002 (BCRA), which significantly amended the FECA.⁴⁵ The BCRA, principally designed to close perceived gaps in the FECA,⁴⁶ banned soft money fund-raising by national parties, federal candidates, and officeholders in federal elections, and also restricted issue advocacy before elections.⁴⁷ A sharply divided Supreme Court upheld most of the BCRA's provisions against a facial constitutional challenge in its 2003 *McConnell v. FEC* decision.⁴⁸

Soon after, in a series of decisions preceding *Citizens United*, the Supreme Court began striking down various aspects of the BCRA as applied.⁴⁹ In 2006, the Court struck down the expenditure and contribution limits in Vermont's campaign-finance system in *Randall v. Sorrell*.⁵⁰ One year later, in *FEC v. Wisconsin Right to Life, Inc. (WRTL)*, the Court reviewed an as-applied challenge to the BCRA's electioneering-communication ban and issued a plurality opinion, which held that corporations could spend money to air pre-election advertisements if the ads could be interpreted as something other than "express advocacy" to vote for or against candidates.⁵¹ *WRTL* "effectively eviscerated *McConnell*" and subverted the BCRA's ban on electioneering communications.⁵² In the 2008 decision in *Davis v. FEC*, the

42. See R. SAM GARRETT, CONG. RESEARCH SERV., R 41542, THE STATE OF CAMPAIGN FINANCE POLICY: RECENT DEVELOPMENTS AND ISSUES FOR CONGRESS 1 & n.1 (2011) (describing the 1907 Tillman Act, which Congress enacted to prohibit federally created campaign contributions from banks and corporations).

43. *Id.* at 3 ("[A]pproximately 900 campaign finance measures have been introduced since the 93[rd] Congress . . .").

44. Federal Election Campaign Act of 1971 (FECA), Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-435 (2006)).

45. BCRA, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended at 2 U.S.C. §§ 431-456 (2006)); GARRETT, *supra* note 42, at 3.

46. S. REP. NO. 105-167, at 4468 (1998) ("[S]oft money spending by political party committees eviscerates the ability of the FECA to limit the funds contributed by individuals, corporations, or unions for the defect or benefit of specific candidates.").

47. BCRA, sec. 101, § 323, 116 Stat. at 82-84; *id.* § 201, 116 Stat. at 88-90.

48. 540 U.S. 93, 224 (2003) ("In the main we uphold BCRA's two principal, complementary features: the control of soft money and the regulation of electioneering communications."), *overruled in part by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

49. See Levitt, *supra* note 40, at 219-20 (discussing cases leading up to *Citizens United*).

50. 548 U.S. 230, 262 (2006).

51. 551 U.S. 449, 456, 476 (2007).

52. Briffault, *supra* note 5, at 649-50 ("So long as they paid a little attention to the wording of their messages, corporations and unions were once again free to spend as much as they wanted on broadcast ads intended to help or harm candidates in the pre-election period.").

Court rejected the BCRA's "Millionaire's Amendment," which had permitted additional fundraising for congressional candidates competing against self-financed opponents to help level the financial playing field.⁵³

Citizens United, the fourth case in this series,⁵⁴ concerned section 203 of the BCRA, which prohibited corporations and unions from making independent expenditures of general treasury funds for broadcast, cable, and satellite "electioneering communications"⁵⁵ that explicitly mentioned candidates for federal office and aired within thirty days of a primary election or caucus or within sixty days of a general election or caucus.⁵⁶ In an opinion filled with sweeping constitutional pronouncements,⁵⁷ Justice Kennedy, speaking for the eight-person majority, found that the BCRA's restrictions on such independent

53. 554 U.S. 724, 729, 744–49 (2008).

54. For the fifth decision in this series, see *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down the matching-funds provision in Arizona's Citizens Clean Elections Act on First Amendment grounds).

55. *Citizens United v. FEC*, 130 S. Ct. 876, 886 (2010) (citing 2 U.S.C. § 441b (2006)). The BCRA defines an "independent expenditure" as an expenditure "expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidates, the candidate's authorized political committee, as their agents, or a political party committee or its agents." BCRA, Pub. L. No. 107-155, sec. 211, § 301(17), 116 Stat. 81, 92–93 (2002) (codified as amended at 2 U.S.C. § 431 (2006)).

The facts of *Citizens United* are as follows. *Citizens United*, an ideological nonprofit group, produced a feature-length film called *Hillary: The Movie* criticizing Hillary Clinton, which the group sought to show in theaters during the 2008 primaries and on cable, specifically video-on-demand. *Citizens United*, 130 S. Ct. at 886–87. Although the movie did not explicitly advocate voting against Senator Clinton, it contained many negative statements, which the FEC considered, and the Court later held, to be the functional equivalent of express advocacy. *Id.* at 890. In *Citizens United's* ensuing suit against the FEC, the district court sided with the FEC and held that the statements triggered the BCRA electioneering-communication limits on express advocacy. *Citizens United v. FEC*, 530 F. Supp. 2d 274, 275, 279–80 (D.D.C. 2008) (per curiam), *aff'd in part, rev'd in part*, 130 S. Ct. 876 (2010). The Supreme Court dismissed *Citizens United's* appeal of the district court's denial of its motion for a preliminary injunction. *Citizens United v. FEC*, 552 U.S. 1278, 1278 (2008). Thereafter, the district court granted summary judgment for the FEC based on the same reasoning used to denying the preliminary injunction. *Citizens United v. FEC*, No. 07-2240, 2008 WL 2788753, at *1 (D.D.C. July 18, 2008), *aff'd in part, rev'd in part*, 130 S. Ct. 876 (2010). The case returned to the Supreme Court in 2008. *Citizens United v. FEC*, 555 U.S. 1028, 1028 (2008). In 2009, the Court requested supplemental briefing on whether the disposition of the case would require overruling *Austin v. Michigan Chamber of Commerce*, which held that Michigan could ban the use of corporate funds for independent political expenditures, or *McConnell* to the extent that it upheld the facial validity of BCRA's section 203. *Citizens United v. FEC*, 129 S. Ct. 2893, 2893 (2009); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 654, 660 (1990), *overruled by Citizens United*, 130 S. Ct. at 876. The Court issued its final decision on the issue in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

56. BCRA, sec. 201, § 304(f)(3)(A), 116 Stat. at 88–89 (codified as amended at 2 U.S.C. § 434 (2006)).

57. See Bezanson, *supra* note 5, at 649–51 (arguing that Justice Kennedy's sweeping pronouncements about the First Amendment were unnecessary to the result).

expenditures violated corporations' First Amendment rights.⁵⁸ Nevertheless, the Court concluded, using "exacting" scrutiny, that the BCRA's disclaimer and disclosure provisions passed constitutional muster as applied because "disclosure is a less restrictive alternative to more comprehensive regulations of speech."⁵⁹ Justice Kennedy's opinion envisioned a marketplace of political information in which anyone—corporation or individual—might speak, and everyone listening would have efficient access to sufficient information to weigh the credibility of what was said.⁶⁰

The Supreme Court reaffirmed its view, previously articulated in the iconic *Buckley v. Valeo*, that "disclosure could be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending."⁶¹ Such information "would help citizens 'make

58. *Citizens United*, 130 S. Ct. at 917. The majority declared that, "[w]e return to the principle . . . that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations." *Id.* at 913. In reaching its conclusion, the majority overruled *Austin* and partially overruled *McConnell*, which had permitted limits on corporate independent expenditures. *Id.*

59. *Id.* at 915. Justices John Paul Stevens, Ruth Bader Ginsburg, Stephen Breyer, and Sonia Sotomayor concurred with the majority in sustaining the disclosure provisions. *Id.* at 931 (Stevens, J., concurring). Although "[d]isclaimer and disclosure requirements may burden the ability to speak, . . . they 'impose no ceiling on campaign-related activities,' or 'prevent anyone from speaking.'" *Id.* at 914 (majority opinion) (citations omitted).

BCRA section 311 requires televised electioneering communications that are not funded by candidates to include a disclaimer identifying the person or entity "responsible for the content of this advertising." BCRA, sec. 311, § 318(d)(2), 116 Stat. at 106 (codified as amended at 2 U.S.C. § 411d (2006)). The required disclaimer must be made "in a clearly spoken manner," displayed in a "clearly readable manner" for at least four seconds, and state that a candidate or a candidate's committee has not authorized the ad. *Id.* Such disclaimers must be made by any person spending more than \$10,000 on electioneering communications within a calendar year, and they must identify the person making the expenditure, the expenditure amount, the election in question, and the names of certain contributors. BCRA, sec. 207, § 304(f), 116 Stat. at 88 (codified as amended at 2 U.S.C. § 434(f)). The Court rejected *Citizens United's* claim that the disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy," thereby seeking to exclude issue ads, which do not necessarily advocate for a candidate, from the requirements. *Citizens United*, 130 S. Ct. at 915.

60. *Citizens United*, 130 S. Ct. at 916 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). Shortly after *Citizens United*, the Court reaffirmed its endorsement of disclosure in *Doe v. Reed*, in which it upheld a state law allowing public disclosure of the names of those who signed a petition in favor of Proposition 8, a referendum concerning gay marriage. 130 S. Ct. 2811, 2821 (2010). The Court reiterated the importance of the state's interest in "protect[ing] the integrity and reliability of the initiative process . . ." *Id.* at 2819 (quoting *Buckley v. Am. Constitutional Law Fund, Inc.*, 525 U.S. 182, 191 (1999)).

61. *Citizens United*, 130 S. Ct. at 914 (alteration in original) (quoting *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam)). In *Buckley*, the Supreme Court upheld the Federal Election Campaign Act's disclosure rules regarding express advocacy on the grounds that disclosure deters

informed choices in the political marketplace.”⁶² The Court concluded that disclosure would be particularly effective at informing the electorate today because modern technology increases the speed and accessibility of disclosure.⁶³

B. Post-Citizens United: Attempts to Cabin Campaign Reform

Lower court decisions after *Citizens United* continued the trend toward cabining campaign-finance reform,⁶⁴ and later developments cast doubt on the viability of Justice Kennedy’s political vision “of a free exchange of ideas in a democratic marketplace, coupled with complete and instantaneous disclosure of campaign contributions and expenditures over the Internet.”⁶⁵

On the state front, opponents of campaign-finance reform began to target and challenge state disclosure laws.⁶⁶ On the administrative front, the FEC

corruption, provides information to voters, and aids in the enforcement of other campaign-finance laws. *Buckley*, 424 U.S. at 18–76.

62. *Citizens United*, 130 S. Ct. at 914 (citations omitted) (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003), *overruled in part by Citizens United*, 130 S. Ct. at 913). This informational interest permits disclosure requirements even if the advertisement merely contains a request to perform a commercial transaction because “the public has an interest in knowing who is speaking about a candidate shortly before an election.” *Id.* at 915.

63. For the Court’s discussion of the role of modern technology, see *id.* at 916 (“With the advent of the Internet, prompt disclosure . . . can provide . . . the information needed to hold corporations and elected officials accountable Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.” (quoting *McConnell*, 540 U.S. at 259)).

64. See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding that contributions to PACs that themselves only make independent expenditures to advocate or oppose the election of federal candidates cannot be limited on an anti-corruption rationale because *Citizens United* established that “independent expenditures do not corrupt or give the appearance of corruption as a matter of law,” to entities that only engage in independent expenditures). The contributions permitted under *SpeechNow* “will greatly expand the resources available to [such political committees] and is likely to result in an increased role for them in elections.” Briffault, *supra* note 5, at 660–61. Notably, however, the D.C. Circuit rejected *SpeechNow*’s challenge to the reporting requirements at issue. *SpeechNow.org*, 599 F.3d at 697. The FEC codified *SpeechNow.org* by sanctioning the super PAC, which can raise funds without constraint from contribution limits because it is an independent-expenditure entity. See Kang, *supra* note 5 (manuscript at 24) (citing FEC Advisory Opinion No. 2010-09 (July 22, 2010)).

More recently, the U.S. District Court for the Eastern District of Virginia, upon a motion for reconsideration of its previous ruling dismissing a charge for violating the ban on direct contributions of corporate money to candidates, relied on *Citizens United* to find the ban unconstitutional as applied under the facts. *United States v. Danielczyk*, No. 1:11cr85(JCC), 2011 WL 2268063, at *2–6 (E.D. Va. June 7, 2011) (extending the *Citizens United*’s holding—that independent expenditures do not corrupt—to direct contributions to candidates).

65. Hasen, *supra* note 14.

66. See PR Watcher, *Center for Media and Democracy Submits Amicus Brief Defending Campaign Disclosure Rules*, PRWATCH (Mar. 9, 2011), <http://www.prwatch.org/news/2011/03/10325/center-media-and-democracy-submits-amicus-brief-defending-campaign-disclosure-rul> (noting a Koch-funded group’s challenge, brought in the Wisconsin Supreme Court, to new

deadlocked along partisan lines in response to an attempt by the three Democratic commissioners to adopt stricter disclosure rules.⁶⁷ The agency—once criticized as “the most dysfunctional and inoperative agency in Washington”⁶⁸—even interpreted existing disclosure rules narrowly.⁶⁹

As for outside groups, loopholes and limitations in existing election disclosure rules enabled strategic institutional arrangements resulting in a patchwork of political groups that were able to campaign and advertise with “dark money.”⁷⁰

disclosure rules Wisconsin passed in the wake of *Citizens United*); *Washington Post*: *Citizens United Decision Reverberates in Courts Across Country*, DEMOCRACY 21 (May 22, 2011), http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7BAC81D4FF-0476-4E28-B9B1-7619D271A334%7D&DE=%7BCEAE65A4-BE66-40C3-A92F-CD54BAA4F7D6%7D (reporting that James Bopp, the legal architect of the *Citizens United* challenge, and his colleagues are litigating between twenty-five and thirty cases across the country, including challenges to state disclosure rules); see also David D. Kirkpatrick, *A Quest to End Spending Rules for Campaigns*, N.Y. TIMES, Jan. 24, 2010, at A11 (noting Bopp’s explicit acknowledgement of his goal to dismantle disclosure rules). But see Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GA. ST. U. L. REV. 1057, 1084 (2011) (“Overwhelmingly, lower courts are upholding state disclosure laws [so long as] the laws capture more than tiny spenders and . . . parties can assert an as-applied harassment exception to otherwise applauded disclosure laws.” (footnote omitted)); Adam Liptak, *A Blockbuster Case Yields an Unexpected Result*, N.Y. TIMES, Sept. 19, 2011, <http://www.nytimes.com/2011/09/20/us/disclosure-may-be-real-legacy-of-citizens-united-case.html> (noting that lower courts “embraced the ruling” in *Citizens United* and relied on it when rebutting attacks against disclosure laws).

67. David G. Savage & Kim Geiger, *Secret Campaign Ad Financing in Offing as FEC Is Deadlocked*, L.A. TIMES, Feb. 28, 2011, <http://articles.latimes.com/2011/feb/28/nation/la-na-election-commission-deadlock-20110228>; Richard L. Hasen, *The FEC Is As Good As Dead*, SLATE (Jan. 25, 2011, 10:13 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/01/the_fec_is_as_good_as_dead.html.

68. Savage & Geiger, *supra* note 67 (quoting Fred Wertheimer, who was involved in the creation of the FEC); see also Hasen, *supra* note 67 (referring to the FEC “as good as dead” in light of the deadlock, which is “business as usual” for the agency).

69. See Kang, *supra* note 5 (manuscript at 24–25 & n.128); see also TAYLOR LINCOLN & CRAIG HOLMAN, PUB. CITIZEN, FADING DISCLOSURE: INCREASING NUMBER OF ELECTIONEERING GROUPS KEEP DONORS’ IDENTITIES SECRET 4–5 (2010), available at <http://www.citizen.org/documents/Disclosure-report-final.pdf> (discussing the FEC’s disclosure exceptions, including the agency’s interpretation of its rules to require disclosure only if donors earmarked their money for specific electioneering communications at the time of contribution). Recently, the FEC unanimously approved federal-candidate and officeholder solicitations for independent, expenditure-only Political Action Committees (PACs). See Lisa Rosenberg, *Semi-Soft Money Prevails at the FEC*, SUNLIGHT FOUND. (June 30, 2011, 2:55 PM), <http://sunlightfoundation.com/blog/2011/06/30/semi-soft-money-prevails-at-the-fec/> (“[C]andidates and elected officials may only ask for contributions of \$5,000 or less from individuals, but the Super PACs are free to take unlimited contributions from individuals, corporations and labor unions.”).

70. See, e.g., Andy Kroll, *Unmasking Dark Money Is Good for Democracy—and for the Bottom Line*, MOTHER JONES (Sept. 7, 2011, 9:35 AM), <http://motherjones.com/mojo/2011/09/citizens-united-dark-money-corporations-disclosure> (defining “dark money” as money from anonymous fundraisers). For a description of “campaign finance disclosure in a nutshell,” see

C. *The Citizens United Effect(s)*

Although the *Citizens United* decision is important standing alone, the case also served as a catalyst for increased public attention to the broader issue of campaign-finance deregulation and corporate campaign involvement.⁷¹ Professor Richard Hasen pointed to several of its troublesome factors in summing up the current landscape of campaign-finance reform: “*Citizens United* has not only unleashed new money into the election process; actions by lower courts and the FEC, combined with an inadequate disclosure regime, have led to a system of largely undisclosed corporate, union, and individual campaign contributions flooding into elections.”⁷²

TORRES-SPELLISCY, *supra* note 12, at 4–5 (describing some of the confusion about loopholes in campaign-finance disclosure).

Existing campaign-finance disclosure rules are limited in both comprehensiveness and effectiveness. Even entities clearly subject to reporting and disclosure requirements need not provide timely information; often, they do not provide details of last-minute pre-election spending until thirty days post-election. GARRETT, *supra* note 42, at 18. FEC analysis often causes significant subsequent delays to public disclosure, meaning that sometimes “final” data are not publicly available for some time after elections. *Id.* Moreover, because there are exemptions to electronic filing requirements, the public does not have convenient digital access to the full scope of historically filed information. *Id.*

There are also loopholes in the FECA disclosure requirements that enable groups to be exempt. See Barker & Wang, *supra* note 11 (describing the categories of groups to which the disclosure requirements do not apply). Some organizations registered under § 501(c)(4) through (6) of the Internal Revenue Code are not subject to campaign-finance disclosure requirements, so long as their primary purpose is not politics. *Id.*; see also I.R.C. § 501(c) (2006). However, this limitation does not prohibit all political activities. Despite the primary-purpose limit, for example, the IRS has permitted 501(c)(4) social-service organizations to make political expenditures. See Kang, *supra* note 5 (manuscript at 24–25) (citing Donald B. Tobin, *Political Advocacy and Taxable Entities: Are They the Next “Loophole?”*, 6 FIRST AMENDMENT L. REV. 41 (2007)). Similarly, trade associations registered under § 501(c)(6), such as the U.S. Chamber of Commerce, are not prohibited from political activities, and such trade associations have spent significant amounts of money on issue advertising during political campaigns. See *infra* notes 157–58 and accompanying text.

71. See Briffault, *supra* note 5, at 643, 650 (noting that although “WRTL did much of the real work of legally enabling corporate electioneering,” “*Citizens United* has gotten the public’s attention as the decision that opened up federal and many state elections to corporate ads concerning candidates”); Marian Wang, *As Political Groups Push Envelope, FEC Gridlock Gives ‘De Facto Green Light,’* PROPUBLICA (Nov. 7, 2011, 12:16 PM), <http://www.propublica.org/article/as-political-donors-push-envelope-fec-gridlock-gives-de-facto-green-light/single> (discussing the polarization between Republican and Democratic groups).

72. See Hasen, *supra* note 14; see also, *supra* note 5 (manuscript at 25) (“[P]ost-*Citizens United*, these outside groups that engage in forthright and extensive campaigning, in the form of independent expenditures, operate entirely outside campaign finance regulation as it had existed for more than thirty years since *Buckley*.”); Richard L. Hasen, *After the Other Shoe Drops*, AM. INT. (Oct. 12, 2010), <http://www.the-american-interest.com/article.cfm?piece=1141> (discussing three post-*Citizens United* rulings that “have contributed to the precipitous decline in our campaign finance laws”).

In his first State of the Union address, President Obama spoke for many when he criticized the Supreme Court's *Citizens United* decision and predicted a tsunami of electioneering expenditures by corporate and special interests:

With all due deference to separation of powers, last week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign corporations—to spend without limit in our elections. . . . I don't think American elections should be bankrolled by America's most powerful interests, or worse, by foreign entities. . . . They should be decided by the American people. And I'd urge Democrats and Republicans to pass a bill that helps to correct some of these problems.⁷³

Academics, too, expressed concern that *Citizens United* would not only lead to corporate dominance of political discourse,⁷⁴ but also to an increase in quid pro quo corruption.⁷⁵ These arguments all raise the empirical question of what effect *Citizens United* has had and will continue to have on elections.⁷⁶

1. Data Regarding, and Notable Aspects of, the 2010 Elections

Any attempt to describe the *Citizens United* effect empirically is limited by the scarcity of data.⁷⁷ Because only one election cycle has passed since *Citizens United*, and a non-presidential contest at that, empirical predictions are risky. Nevertheless, at least five aspects of the 2010 elections are notable.

First, each 2010 election study shows that campaign advertising as a whole significantly increased, making 2010 a “record-breaking” year.⁷⁸ Roughly

73. Barack Obama, President of the United States, State of the Union Address (Jan. 27, 2010), available at www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

74. See *supra* note 5 and accompanying text.

75. See, e.g., Hasen, *supra* note 5, at 596; Kang, *supra* note 5 (manuscript at 11) (explaining corporate support for restrictions on corporate electioneering as resulting from a concern about “a form of extortion against deep-pocket corporations by . . . legislators”); Timothy Werner, *The Sound, the Fury, and the Nonevent: Business Power and Market Reactions to the Citizens United Decision*, 39 AM. POL. RES. 118, 124–25 (2011).

76. This Part focuses only on the question of *Citizens United*'s effect on elections. It does not situate the decision in the jurisprudence of the First Amendment. Although campaign-finance-reform proponents concluded that *Citizens United* tilts the balance between free expression and electoral integrity too far in the direction of the former, free speech and media interests celebrated the Court's strong affirmation of a libertarian interpretation of the First Amendment. See Sullivan, *supra* note 5, at 143–45 (explaining that the *Citizens United* opinions reflected a division in the Court between those who view the First Amendment as primarily endorsing speech as liberty and those who see it as primarily promoting speech as equality).

77. GARRETT, *supra* note 42, at 17–18 (discussing current availability of campaign-funding data).

78. See Erika Franklin Fowler & Travis N. Ridout, *Advertising Trends in 2010*, 8 FORUM, 2010, at 2. According to Professors Erika Franklin Fowler and Travis Ridout, congressional battles led to a more than thirty-percent increase in television ad airings at an estimated cost of \$735 million, which constitutes a sixty-one-percent increase over 2008 spending. *Id.* Gubernatorial advertising was also “intense”; in thirty-seven gubernatorial races, 1.3 million ads

\$4 billion was spent on federal races in 2010, which amounts to almost twice the cost of the 2006 midterm elections.⁷⁹ Local television in 2010, a midterm election, garnered between \$2 billion and \$3 billion from political advertisers, approaching twice the amount spent on adds during 2008, a presidential election year.⁸⁰ Political advertising “is soaring and is expected to grow in the future.”⁸¹ In fact, political advertising may be one of the few remaining sources that still generate significant profits for local broadcasters.⁸² Following *Citizens United*, an estimated \$400 million in additional political advertising was generated in 2010.⁸³ This is not, of course, proof that *Citizens United* caused the increased spending,⁸⁴ rather, it is important as a measure of the size of the problem to be addressed.

Second, the evidence indicates that the number of new advocacy groups, such as super political action committees (super PACs), has mushroomed since 2010.⁸⁵ Although nominally independent from candidates, many of these

aired at an estimated cost of \$697 million. *Id.* The total volume and cost of advertising for House and Senate races each increased by about fifty percent. *Id.* at 3; *Election Stats: 2010*, OPENSECRETS, http://www.opensecrets.org/bigpicture/elec_stats.php?cycle=2010 (last visited Oct. 5, 2011).

79. Kang, *supra* note 5 (manuscript at 26–27).

80. STEVEN WALDMAN, WORKING GRP. ON INFO. NEEDS OF CMTYS., THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 75–76 (2011), available at http://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf; see also Joel Connelly, *Karl Rove, Koch Brothers—on Your TV, in Your Mailbox*, SEATTLEPI (Mar. 6, 2011), <http://www.seattlepi.com/local/connelly/article/Karl-Rove-Koch-Brothers-on-your-TV-in-your-1045421.php> (reporting that “\$47 million worth of TV spots aired on local TV stations in the 2010 ‘off-year’ election”).

81. WALDMAN, *supra* note 80, at 75.

82. See Michael Malone, *PEJ Study: 2010 Was a Good Year for Stations, Grim Trends and All*, BROADCASTING & CABLE (Mar. 14, 2011, 10:31 AM), http://www.broadcastingcable.com/article/465205-PEJ_Study_2010_Was_a_Good_Year_For_Stations_Grim_Trends_and_All.php (noting that the increase in total revenue for stations in 2010 was driven by “around \$2.2 billion in political [with] 73% of the political spend [going to] TV stations”).

83. WALDMAN, *supra* note 80, at 75 (citing a Borrell Associates estimate).

84. The literature does not appear to contain a careful statistical analysis of the many variables that would have to be addressed to make a persuasive causation claim. Because the data discussed represent all broadcast advertising during the election, including ads aired during periods outside the BCRA regulatory framework, determining causation would require, at a minimum, disaggregating and refining the data for comparative purposes. Moreover, important developments other than *Citizens United* occurred around the 2010 elections. A study of the increased spending would have to address whether some of the hike was driven by the Tea Party, which became a new and vocal electoral participant during this period. The spending increase could also have been due to the breakdown in disclosure requirements rather than the *Citizens United* decision. I am very grateful to Professor Robinson for these points.

85. See Dan Eggen, *New Breed of ‘Super PACs,’ Other Independent Groups Could Define 2012 Campaign*, WASH. POST, July 4, 2011, http://www.washingtonpost.com/politics/new-breed-of-super-pacs-other-independent-groups-could-define-2012-ampaign/2011/06/29/gHQAo47FyH_story.html (“Dozens of super PACs and nonprofit groups have sprung up over the past year . . .”); Dave Levinthal, *2011 Sees Super PAC Explosion*, POLITICO (Oct. 6, 2011, 11:26

groups are able to coordinate informally and signal their campaign strategies.⁸⁶ They are also becoming more professional than ever before.⁸⁷ Not to be outdone by influential Republican advocacy groups like American Crossroads and Crossroads GPS, both associated with Karl Rove, Democrats also began generating entities to support Democratic candidates.⁸⁸ Reportedly, although Democrats had widely criticized *Citizens United* when the decision was issued, Democratic activists now agree that Democratic advocacy groups must be more involved in the 2012 elections.⁸⁹ Despite President Obama's criticism of

AM), <http://www.politico.com/news/stories/1011/65310.html> (noting that super PACs have been "forming at a rate of about one per day"); see also Kang, *supra* note 5 (manuscript at 27) ("The biggest change in campaign finance in 2010 was the involvement of outside groups."); Barker & Wang, *supra* note 11 (discussing the various types of groups, such as 501(c)(4) tax-exempt organizations, 527 groups, and super PACs).

86. See Kang, *supra* note 5 (manuscript at 25–26) (questioning the independence of such groups); Blumenthal, *supra* note 25 (noting that super PACs backing specific candidates are "routinely run by former staffers or close associates of the candidates," and that although they are "technically not allowed to coordinate with campaigns or parties, . . . candidates can get involved in the fundraising"); Dan Froomkin, *Candidate-Specific Super PACs Offer End Run For Maxed-Out Donors: Study*, HUFFINGTON POST (Oct. 4, 2011, 11:22 PM), http://www.huffingtonpost.com/2011/10/04/candidate-specific-super-pacs-donors_n_994260.html (noting that "candidate-specific super PACs are being used to end-run traditional campaign contribution limits" and quoting the view of the president of Democracy 21 that "[t]he presidential candidate super PAC exists for one reason: to serve as an arm of the presidential campaign for big-money donors to launder unlimited contributions").

87. Reid Wilson, *Outside Groups Deflate Obama's Bully Pulpit*, ATLANTIC, July 7, 2011, <http://www.theatlantic.com/politics/archive/2011/07/outside-groups-deflate-obamas-bullypulpit/241569/#>.

88. See Barker & Wang, *supra* note 11; see also Jack Gillum, *Democratic Group Founded by Former Obama Aides Raises \$5 Million to Counter GOP-Leaning Ads*, STAR TRIB., July 31, 2011, <http://www.startribune.com/politics/national/126485298.html> (discussing the creation of a Democratic outside group to parry Republican groups); Eduardo Porter, Editorial, *How the Big Money Finds a Way In*, N.Y. TIMES, Sept. 17, 2011, <http://www.nytimes.com/2011/09/18/opinion/sunday/how-the-big-money-finds-a-way-in.html> (discussing Democrats' donations to an independent group called Priorities USA Action).

89. Michael Luo, *Effort to Set Up Liberal Counterweight to G.O.P. Groups Begins*, N.Y. TIMES, Nov. 23, 2010, at A18–19 (describing "prominent Democratic political operative" David Brock's attempts to "raise money for Democratic-oriented media efforts" through a new organization, American Bridge, as well as Media Matters Action Network, Brock's other nonprofit organization, "which tracks conservative politicians and advocacy organizations"); see also Gerken, *supra* note 17, at 1157 ("[T]he parties will find a way to even things out. I would be stunned if the Democrats don't catch up substantially on this front [corporate independent spending] next year."); Jim Rutenberg, *New Liberals Offer Donors a Cash Cloak*, N.Y. TIMES, Apr. 30, 2011, at A3 (discussing the importance of liberal groups' involvement in coordinating an attack against conservative groups); Julian Brookes, *Why the 2012 Election Will Be the Most Expensive Ever*, ROLLING STONE (June 7, 2011, 6:05 AM), <http://www.rollingstone.com/politics/blogs/national-affairs/why-the-2012-election-will-be-the-most-expensive-ever-20110607> (identifying new Democratic political groups and discussing outside groups' potential impact on the high anticipated expenses of the 2012 election); Steven Greenhouse, *A Campaign Finance Ruling Turned to Labor's Advantage*, N.Y. TIMES, Sept. 25, 2011, <http://www.nytimes.com>

Citizens United and outside support groups in the 2008 election campaign, even the White House has signaled a change in the administration's position,⁹⁰ and conservative groups have attacked this "about-face."⁹¹

Third, although some researchers suggest that the overall increase in 2010 campaign expenditures may be the most significant result of *Citizens United*,⁹² other observers have concluded baldly that "*Citizens United* led to even greater spending by corporate-funded outside groups than political observers expected."⁹³ A Congressional Research Service report suggests that "new donors and groups with access to previously restricted funds may be a potent force in future campaigns."⁹⁴ Although overall independent-group advertising in the 2010 elections might not have been unprecedented in the history of television politics, it was certainly extensive, with one source asserting that outside groups spent almost \$300 million.⁹⁵ Empirical studies from the independent Wesleyan Media Project reveal significant increases in interest-group advertising, particularly in House races.⁹⁶ Moreover, the most expensive and most competitive races experienced extensive increases in

/2011/09/26/us/politics/a-campaign-finance-ruling-turned-to-laborsadvantage.html?ref=campaign-finance (describing labor unions' response to *Citizens United*).

90. Luo, *supra* note 89, at A19 ("White House officials have signaled in recent weeks that the Obama administration would not object to Democratic-leaning outside groups getting involved in the 2012 elections. . . . But they have also indicated that they would prefer that the names of donors be disclosed.").

91. Paul Blumenthal, *Citizens United Knocks Obama for Campaign Finance Hypocrisy*, HUFFINGTON POST (June 30, 2010, 9:06 AM), http://www.huffingtonpost.com/2011/06/30/citizens-united-knocks-obama-campaign-finance_n_887557.html?new=screen.html.

92. Raymond J. La Raja, *Will Citizens United v. FEC Give More Political Power to Corporations?* 3 (Sept. 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642175 (concluding that although *Citizens United* will likely increase business-group independent spending, particularly on behalf of Republican candidates, it will also create a spending "arms race" and increase election-related spending by all groups).

93. PUB. CITIZEN, *supra* note 3, at 1; see also Steven L. Winter, *Citizens Disunited*, 27 GA. ST. U. L. REV. 1133, 1134 (2011) (asserting that money spent by Republican outside groups "yielded" success). But see Gerken, *supra* note 17, at 1157 ("[W]e don't really know whether *Citizens United* has opened the corporate floodgates.").

94. GARRETT, *supra* note 42, at 15.

95. See Kang, *supra* note 5 (manuscript at 27) (citing *Congressional Campaigns: Half of Outside Spending in Campaigns Came from Groups Not Revealing Donors*, BNA MONEY & POL. REP., Nov. 12, 2010); see also Press Release, Campaign Fin. Inst., Non-Party Spending Doubled in 2010 But Did Not Dictate the Results (Nov. 5, 2010) [hereinafter CFI Press Release], available at http://www.cfinst.org/Press/PReleases/10-11-05/Non-Party_Spending_Doubled_But_Did_Not_Dictate_Results.aspx (discussing the increase in independent expenditures).

96. Fowler & Ridout, *supra* note 78, at 2–3 ("Independent groups saw the biggest jump in both the volume of ads paid for and the estimated cost of such advertising . . . increas[ing] their share of total advertising in House races from around 5 percent in 2008 to over 13 percent in 2010, while the share of ads sponsored by candidates declined by almost 7 percentage points."). Although the "jump [was] not as dramatic" for Senate as for House races, both the volume and cost of independent-sponsored ads noticeably increased. *Id.* at 3.

independent-ad spending.⁹⁷ The extent of independent spending varied depending on the race; however, it exceeded twenty-three percent in several media markets, and in at least one instance in a gubernatorial fight, interest groups sponsored more ads than either of the candidates.⁹⁸ Additionally, outside interest groups' participation was largely concentrated, according to some.⁹⁹ Public Citizen pointed out that only ten groups were responsible for more than forty-seven percent of the outside money spent on advertising in 2010.¹⁰⁰ Despite all the data on increased independent spending, determining the effect of third-party group advertising on electoral results in the 2010 elections has been difficult.¹⁰¹

Fourth, Wesleyan Media Project researchers found a shift in the character of independent political ads. Notably, overall political advertising in the 2010 midterm elections was generally much more negative in tone than in the recent past, and independent ads were extensively negative.¹⁰² This stands in marked contrast to the history of independent ads in the late 1980s and early 1990s, "when about three quarters of ads from interest groups were positive."¹⁰³ In sum, negativity has been on the rise this decade, and the evidence points toward an electoral environment dominated by interest groups with negative messages in the future.¹⁰⁴

97. *Id.* at 7 (noting that ads from independent groups accounted for over twenty percent of the ads in the post-September 1st period in the four most expensive House races and ranged greatly—from three to forty percent—in the most expensive Senate races).

98. *Id.* In Wisconsin, interest groups accounted for forty-three percent of ads, which is more than either candidate for governor. *Id.* at 8; see also Michael M. Franz, Erika Franklin Fowler & Travis N. Ridout, *Citizens United and Campaign Advertising in 2010*, at 6 (2011) (unpublished manuscript) (on file with authors).

99. See PUB. CITIZEN, *supra* note 3, at 9–10.

100. *Id.* (cataloguing, in order of decreasing expenditures, the U.S. Chamber of Commerce, American Crossroads, American Action Network, Inc., Crossroads Grassroots Policy Strategies, American Future Fund, Americans for Job Security (AJS), SEIU COPE, American Federation of State County and Municipal Employees AFL-CIO, 60 Plus Association, and the National Rifle Association of America Political Victory Fund).

101. See Michael Luo & Griff Palmer, *Outside Groups on the Right Flexed Muscles in House Races*, N.Y. TIMES, Nov. 3, 2010, at P6; see also Michael M. Franz, *The Citizens United Election? Or Same As It Ever Was?*, 8 FORUM, 2010, at 1, 16; La Raja, *supra* note 92, at 23–25.

102. Fowler & Ridout, *supra* note 78, at 10–11. In 2010, 53.5% of ads aired after August were "purely" negative, with another 20.5% consisting of "contrast ads" comparing the opponents, and only 26% being "purely positive." *Id.* at 10. In addition, there was "a dramatic difference in ad tone depending on sponsor." *Id.* at 11 (finding party-sponsored ads to be the most negative (at ninety-six percent) and independent-group ads to be eighty-seven percent "pure attack ads").

103. *Id.*

104. *Id.*; Nicholas Confessore, *Without 'Super PAC' Numbers, Campaign Filings Present an Incomplete Picture*, N.Y. TIMES, Oct. 20, 2011, <http://www.nytimes.com/2011/10/21/us/politics/campaign-finance-filings-present-an-incomplete-picture.html> (discussing strategic uses of super PACs that support individual candidates to run negative ads while the candidates themselves focus on positive messages).

Fifth, these empirical findings, although significant in themselves, are even more consequential given the rampant non-disclosure of donors by independent outside groups. Some groups structured under the Internal Revenue Code can participate in politics so long as such participation is not their primary purpose, but are not required to reveal their donors.¹⁰⁵ According to one source, groups that do not disclose their contributors spent an estimated \$138 million of the \$300 million total spent in 2010.¹⁰⁶ The Center for Responsive Politics reports that over forty-five percent of outside spending, not including party committee spending, did not disclose donors.¹⁰⁷ Of the top ten outside spending groups identified by Public Citizen, seven, which accounted for almost seventy-four percent of the total expenditures, did not disclose their donors.¹⁰⁸ With respect to PACs, which are formally required to disclose their donors, some fail to comply, presumably because they are confident that the FEC's enforcement efforts will be inefficient, ineffective, and ultimately just a cost of doing business.¹⁰⁹ Furthermore, even with groups that do comply, disclosures generally are not publicly available without some significant time lags.¹¹⁰ The usefulness of these disclosures, even if timely, is undermined when the donors are structured as nonprofit organizations exempt from disclosure, such as 501(c)(4)s, which leads to the mere illusion of disclosure and informational dead ends.¹¹¹ Presumably, numerous practical reasons exist for electioneering groups not to disclose their donors, including privacy and the desire to keep their political commitments secret.¹¹² In addition, however, concealed donations allow groups to “make corporate-funded effort appear to be grassroots.”¹¹³

105. See Barker & Wang, *supra* note 11 (describing and highlighting certain 501(c) organizations as “[t]he invisibles,” such as Americans for Prosperity, a supporter of the Tea Party whose cofounder is one of the billionaire Koch brothers, who are “credited with pioneering some of the bolder new campaign fundraising tactics”).

106. See Kang, *supra* note 5 (manuscript at 27); see also PUB. CITIZEN, *supra* note 3, at 9 (claiming that over forty percent of the money spent by outside groups came from ten entities).

107. See *Outside Spending*, OPENSECRETS.ORG, http://www.opensecrets.org/outside_spending/index.php?cycle=2010&view=A&chart=N (last visited Aug. 24, 2011).

108. PUB. CITIZEN, *supra* note 3, at 10.

109. See Barker & Wang, *supra* note 11 (describing fines paid by 527 groups (PACs) for sham issue ads after the 2004 election); cf. Michael Luo & Stephanie Strom, *Donor Names Remain Secret as Rules Shift*, N.Y. TIMES, Sept. 21, 2010, at A1, A19 (describing FEC's and IRS's lack of enforcement).

110. See Barker & Wang, *supra* note 11 (“[B]ecause of time lags in reporting, months can go by before the identities of million-dollar donors are revealed; some weren't disclosed until after the 2010 midterm elections.”).

111. *Id.*

112. *Id.* (describing why groups prefer to donate anonymously—sometimes to “shield corporations from blowback when supporting controversial causes”).

113. *Id.*; see also Confessore, *supra* note 104 (explaining that because most super PACs will be required to disclose their contribution and expenditure reports for the first time only on

Notably, undisclosed donor spending by outside groups greatly increased in the 2010 elections, with one study showing that the percentage of such spending rose from one percent to forty-seven percent since the 2006 midterm elections.¹¹⁴ Nearly all groups making electioneering communications in the 2004 and 2006 elections disclosed the identities of their donors.¹¹⁵ By contrast, the percentage of groups disclosing their electioneering communications dropped to 49.3% in the 2008 election cycle and 31.8% in the 2010 cycle, as of September 2nd.¹¹⁶ Groups that failed to disclose any donor information in the 2010 election cycle collectively spent roughly double the grand total spent by outside groups in the 2006 cycle.¹¹⁷ The apparent trend shows increases both in spending and non-disclosure.

Tracking down outside groups' donor lists becomes difficult if they do not disclose the information adequately.¹¹⁸ Although "enterprising journalists" have "tried to fulfill the role of following the money when possible,"¹¹⁹ their efforts to unearth information have been unable to substitute reliably for information fully disclosed by the groups themselves.¹²⁰

January 31, 2012, a complete picture of the spending on the presidential race will not be available until after the election).

114. Spencer MacColl, *Citizens United Decision Profoundly Affects Political Landscape*, OPENSECRETS.ORG (May 5, 2011, 11:16 AM), <http://www.opensecrets.org/news/2011/05/citizens-united-decision-profoundly-affects-political-landscape.html> (reporting on a Center for Responsive Politics study).

115. LINCOLN & HOLMAN, *supra* note 69, at 1.

116. *Id.* Although groups making independent expenditures made more disclosures in 2010, the percentage was still much lower compared to past elections. TAYLOR LINCOLN, PUB. CITIZEN, DISCLOSURE ECLIPSE: NEARLY HALF OF OUTSIDE GROUPS KEPT DONORS SECRET IN 2010; TOP 10 GROUPS REVEALED SOURCES OF ONLY ONE IN FOUR DOLLARS SPENT 4 (2010), *available at* <http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf>; *see also* PUB. CITIZEN, *supra* note 3, at 10–11 (noting the significant decrease in disclosure by groups making electioneering communications in 2008 after the decision in *WRTL*).

117. LINCOLN, *supra* note 116, at 3.

118. Hasen, *supra* note 14 (highlighting one investigator's experience looking into an outside group's donors, which led him to "P.O. boxes and unanswered emails"); *see also* Barker & Wang, *supra* note 11 (discussing the practice of hiding true donors by funneling contributions to super PACS through 501(c)(4)s, which are not required to disclose their donors).

119. Hasen, *supra* note 14; *see also* Mike McIntyre, *The Secret Sponsors*, N.Y. TIMES, Oct. 2, 2010, at 1, 6 (describing a reporter's attempt to track down the members of the "Coalition to Protect Seniors"); Liz Cox Barrett, *NYT Noses Around, Still Knows Nothing*, COLUM. JOURNALISM REV. (Oct. 4, 2010), http://www.cjr.org/campaign_desk/nyt_noses_around_still_knows_n.php.

120. *See, e.g.*, McIntyre, *supra* note 119, at 1, 6 ("At any rate, it is clearly going to take a lot more [for journalists] to see through an organization that is about as transparent as a dirty diaper.").

2. Drawing Conclusions About the Citizens United Effect on the 2010 Elections

The data from the 2010 election cycle raise questions as to the effect of *Citizens United* on electoral results and expenditure patterns. The first question is whether the expenditure patterns post-*Citizens United* had direct effects on electoral outcomes. Some observers concluded that outside groups' spending had a significant impact on election results.¹²¹ However, others have found to the contrary.¹²² Because the current political science literature fails to provide definitive answers, determining the influence of interest-group ads on voters choice is very tricky.¹²³ One political scientist concluded that “[e]mpirical evidence of any systematic impact of corporate campaign spending on electoral outcomes is weak or mixed at best.”¹²⁴ Yet others in the field observed a shift “toward the position that there are moderate campaign effects on voter knowledge, preference, and even behavior.”¹²⁵

A Wesleyan Media Project study shows that Republicans in the 2010 midterm elections “outperformed most of the election forecasting models built on factors external to campaigns.”¹²⁶ Political scientists attempting to isolate

121. See, e.g., PUB. CITIZEN, *supra* note 3, at 12 (basing this conclusion on the fact that, in sixty of the seventy-five congressional contests involving a change in partisan power, outside group spending favored the victor, and in the six such Senate races, supporters of the victors outspent the loser by an average of \$2.7 million).

122. See, e.g., CFI Press Release, *supra* note 95 (examining House and Senate races before concluding that “non-party spending doubled in 2010 but did not dictate the results”).

123. See Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 154–55 (2010) (noting the dearth of understanding about the relationships among campaign financing, campaign activities, and political outcomes in the legal literature).

124. Susan Clark Muntean, *Corporate Independent Spending in the Post-BCRA to Pre-Citizens United Era*, 13 BUS. & POL., no. 1, 2010 at 1. The complexity of connection between campaign contributions and political influence does not preclude the possibility that political advertising messages have at least some influence on voter decisions. See Sheff, *supra* note 123, at 154–54 (discussing the potential effect of political advertising).

125. Sheff, *supra* note 123, at 152 (footnote omitted). Professor Jeremy Sheff recounts that Campaign messages do appear to increase voter information, particularly among voters with the least background political knowledge—the “civic slackers” benefit most in informational terms. Campaign ads also appear to affect voter attitudes toward candidates. In particular, political advertising appears to have the ability to implant emotional or affective attitudes toward its sponsors and subjects, though the positive or negative tenor of the ads can determine the polarity of these attitudes. Significantly, repeated exposure to a candidate’s campaign advertisements appears to moderately but consistently strengthen positive attitudes toward the candidate, though the tone of the advertisement may influence its effects. . . . [I]t is far less clear whether or how these effects translate into different voting behaviors or political outcomes. . . . [Nevertheless,] empirical research . . . is moving . . . toward a more rigorous demonstration of aggregate spending effects. However, it should be noted that the size of these effects, while statistically significant, is relatively small

Id. at 152–55 (footnotes omitted).

126. Fowler & Ridout, *supra* note 78, at 1.

the effect of independent-group ad spending in 2010 suggest “the potential for interest group advertising to have been decisive in several races across the country, shifting the balance from one in which viewers saw more pro-Democratic ads on their television screens to one in which viewers saw more pro-Republican ads aired.”¹²⁷

It might be concluded, from the overall data, that the *Citizens United* effect, although measurable, was not of overwhelming significance. However, that view would not adequately account for the broader consequences of independent-expenditure deregulation. Although disagreement exists concerning the effect of the decision on electoral outcomes, *Citizens United* “has profoundly affected the nation’s political landscape.”¹²⁸

With regard to the overall increase in campaign ad spending, for example, there is a question whether such spending by third-party groups led to message-repetition effects on voters’ political views.¹²⁹ In light of 2010’s rise in political advertising, it is likely that “many voters, whether they liked it or not, were undoubtedly exposed to more campaign information than in previous election cycles.”¹³⁰ Although some political scientists draw the conclusion that such voters were “more likely to make informed choices at the ballot box,”¹³¹ others emphasize the degree to which the great majority of voters rely on heuristic cues to prompt their votes rather than absorbing and analyzing substantive issue information.¹³² Repetition enhances voter responses to heuristic cues, which permits groups with the ability to repeat campaign messages to influence elections regardless of the truthfulness of their messages.¹³³ Failure to disclose ad sponsorships and sponsor groups’ ideological affiliations may further exacerbate the cognitive problem for voters.¹³⁴ Furthermore, because repetition of messages apparently leads people

127. Franz, Fowler & Ridout, *supra* note 98, at 8.

128. MacColl, *supra* note 114.

129. See Sheff, *supra* note 123, at 160–61.

130. Fowler & Ridout, *supra* note 78, at 14.

131. *Id.*

132. See, e.g., Sheff, *supra* note 123, at 158–60; Molly J. Walker Wilson, *Behavioral Decision Theory and Implications for the Supreme Court’s Campaign Finance Jurisprudence*, 31 CARDOZO L. REV. 679, 687–91 (2010) (using behavioral science to address the impact of campaign messages on voters); see also Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1157–58 (2003) (explaining that voters use interest-group endorsements as heuristic cues in issue elections).

133. Sheff, *supra* note 123, at 160–63 (explaining that repetition of campaign messages has been found to increase the susceptibility of uninformed voters to believing false information, a phenomenon experimental psychologists have found to be an “illusory truth effect,” where repetition of a proposition strengthens the impression that it is true and widely believed to be true, regardless of its actual truth).

134. See Kang, *supra* note 132, at 1158–59 (describing the impact of difficulties voters encounter when trying to discern the political affiliations of interest groups with purposefully obscure names); see also PUB. CITIZEN, *supra* note 3, at 9 (contending that almost eighty percent

to believe in the credibility of their source, voters may be more likely to attribute veiled ads to credible sources if the ads are repeated.¹³⁵ Therefore, voters might assume the credibility of the nominal sponsor and all of its ads, and have no reason to assess the credibility of the ad's true sponsor.¹³⁶ This misdirected assumption of credibility can have significant consequences in today's recommendation-based Facebook culture, in which a single voter's views can be greatly amplified by repetition across many affinity networks.

By allowing corporations to advocate expressly for or against particular candidates, rather than masking such advocacy in issue-oriented language, *Citizens United* may have enhanced the effectiveness of political messages by making them easier to decode.¹³⁷ Although one could argue that voters are able to discern which candidates are being implicitly recommended even in "sham" issue ads—those communications purporting merely to ask voters to contact a candidate about an issue¹³⁸—the voting cue is nevertheless easier to pick up when it is explicit.¹³⁹

As demonstrated in the midterm elections, interest groups were able to get involved early and "shape the playing field."¹⁴⁰ Whatever the reality, the

of the outside-group spending in the 2010 elections "was spent by groups that accepted contributions larger than \$5000 . . . or that did not reveal any information about the sources of their money").

135. Sheff, *supra* note 123, at 161–62; *see also* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 831–32 (describing the "availability heuristic," which "means that individuals are likely to believe something if it is repeated often enough").

136. *See* Lidsky, *supra* note 135, at 828–33 (internal quotation marks omitted) (describing the findings of cognitive psychology and behavioral economics, which explain that people make decisions with bounded rationality and rely on heuristics or "mental shortcuts"); Sheff, *supra* note 123, at 161–162; *cf.* Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 997–98 (2005) ("[M]essages derive their persuasive powers not only from their content and the quality of their supporting argumentation. . . . Individuals process persuasive messages by taking into account a variety of factors, including source, message, recipient, and context. The degree to which a message, or the beliefs or attitudes expressed therein, finds acceptance will vary significantly depending on who delivers the message, who receives it, and the context in which the communication occurs." (footnotes omitted)).

137. Marisa Guthrie, *Campaign Finance Ruling Could Spell Political-Ad Windfall*, BROADCASTING & CABLE (Jan. 22, 2010, 8:58 PM), http://www.broadcastingcable.com/article/445390-Campaign_Finance_Ruling_Could_Spell_Political_Ad_Windfall.php?rssid=20069.

138. Ciara Torres-Spelliscy, *Hiding Behind the Tax Code, The Dark Election of 2010 and Why Tax-Exempt Entities Should Be Subject to Robust Federal Campaign Disclosure Laws*, 16 CHAP. J.L. & POL'Y 59, 66 (2011) (distinguishing "sham issue ads (ads that avoid[] the[] magic words [of vote for or against], but were nonetheless intended to influence the election) from genuine issue ads (ads that express no opinion on a public issue)" (internal quotation marks omitted)).

139. *See* Franz, Fowler & Ridout, *supra* note 98, at 8; *see also* Walker Wilson, *supra* note 132, at 689 (describing how many voters tend to rely on scant information and cursory analysis of that information).

140. Luo & Palmer, *supra* note 101, at P6 (quoting a strategist for a Republican-oriented group); *see also* PUB. CITIZEN, *supra* note 3, at 2 ("[W]inning candidates were helped more (or

publicity given *Citizens United* may have led to a public perception that “interest group ads were a decisive factor in the overall outcome.”¹⁴¹ Researchers with the Wesleyan Media Project conclude, very preliminarily and with methodological caveats, that “interest group advertising may be influential both by influencing the overall outcome but also in shaping perceptions of the race.”¹⁴² Perhaps the most telling evidence of the *Citizens United* effect is that some Republicans ironically agreed with reformist critics that the ability to raise unlimited contributions, coupled with early involvement, proved to be quite influential.¹⁴³ The influence on people’s perceptions is significant not only for its possible effects on voters’ future electoral decisions, but because it is likely to increase the power of interest groups and lobbyists in Congress.¹⁴⁴

The inflated spending for negative ads by outside groups in 2010 may have yet another effect.¹⁴⁵ Research shows that attack ads generate voter disaffection, even as they provide policy information.¹⁴⁶ Negativity of political ads is apparently likely to increase cynicism, especially among the non-aligned voters whom both sides aim to persuade.¹⁴⁷

harmed less) by outside spending than their opponents in 80 percent of the congressional races in which power changed hands from Democratic to Republican control or vice versa.”).

141. Franz, Fowler & Ridout, *supra* note 98, at 8.

142. *Id.* at 17.

143. See, e.g., Luo & Palmer, *supra* note 101, at P6 (quoting advocate groups).

144. See PUB. CITIZEN, *supra* note 3, at 12–16; see also Ronald Dworkin, *The “Devastating” Decision*, N.Y. REV. BOOKS, Feb. 25, 2010, at 39 (“The Court has given lobbyists . . . a nuclear weapon.”); David D. Kirkpatrick, *Lobbyists Get Potent Weapon in Campaign Ruling*, N.Y. TIMES, Jan. 22, 2010, <http://www.nytimes.com/2010/01/22/us/politics/22donate.html> (“A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election. . . . The decision seeks to let voters choose for themselves among a multitude of voices and ideas when they go to the polls, but it will also increase the power of organized interest groups at the expense of candidates and political parties.”); cf. PUB. CITIZEN, CAUSE FOR CONCERN: MORE THAN 40% OF HILL STAFFERS RESPONDING TO PUBLIC CITIZEN SURVEY SAY LOBBYISTS WIELD MORE POWER BECAUSE OF CITIZENS UNITED 3 (2011), available at <http://www.citizen.org/documents/Cause-for-Concern.pdf> (discussing congressional staffers’ fear of retaliation against politicians who displease lobbyists); Gerken, *supra* note 17, at 1165–68 (suggesting that the next front for campaign-finance reform focus on lobbying).

145. Fowler & Ridout, *supra* note 78, at 14.

146. *Id.*

147. *Id.* Admittedly, there is disagreement in the empirical literature regarding the precise effects of negative advertising. See Luciana Carraro & Luigi Castelli, *The Implicit and Explicit Effects of Negative Political Campaigns: Is the Source Really Blamed?*, 31 POL. PSYCHOL. 617, 618–19 (2010) (discussing some of the different views).

If the 2010 election cycle simply had reflected an increase in the number of negative ads in the wake of *Citizens United*, without material change in the ratio of positive to negative ads, then the increased negativity could have been attributed to increased spending for ads overall, rather than any additional *Citizens United* effect. Cf. Fowler & Ridout, *supra* note 78, at 10 (observing that claims of increased negativity follow every election). Notably, however, the Wesleyan Media

3. Corporate Interest (or Disinterest) in Excessive Political Spending

Supporters of *Citizens United* and campaign-finance deregulation in general use the 2010 election data to argue that corporate money did not “flood” the election and that the hysterical predictions of corporate electoral speech causing harm were proven wrong.¹⁴⁸ Analysts have explained that corporations lack incentives to engage in large-scale, one-sided political advertising as a result of *Citizens United* because such efforts would risk alienating their customers and other constituencies.¹⁴⁹ Instead, these analysts expect corporations to follow “prudentially pusillanimous policies,”¹⁵⁰ thereby shying away from political statements through hefty contributions.¹⁵¹ The additional fear of sparking a “spending arms race,” in which competing

Project’s empirical evidence suggests that increased spending resulted in an increase in the relative percentage of negative to positive ads after *Citizens United*. *Id.*

148. See, e.g., Fowler & Ridout, *supra* note 78, at 5.

149. See, e.g., Richard A. Epstein, *Citizens United v. FEC: The Constitutional Right that Big Corporations Should Have But Do Not Want*, 34 HARV. J.L. & PUB. POL’Y 639, 655–59 (2011); see also Kang, *supra* note 5 (noting that “corporate money, as far as we can tell, accounted for only a small percentage of federal campaign spending in 2010”); Kirkpatrick, *supra* note 144 (“In practice, major publicly held corporations like Microsoft or General Electric are unlikely to spend large sums of money on campaign commercials, for fear of alienating investors, customers and other public officials.”). But see Daniel Winik, Note, *Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of Citizens United*, 120 YALE L.J. 622, 633–34 (2010) (noting uncertainty in whether corporations will use their rights under *Citizens United* to “flood the airwaves,” but commenting that the prospect is troubling).

During the 2010 election season, New York City’s public advocate reportedly elicited promises from a significant number of major corporations that they would publicly pledge “campaign-finance austerity” and not ramp up their political spending. Suzy Khimm, *Bill de Blasio: Citizens United Avenger*, MOTHER JONES (Sept. 22, 2010, 3:00 AM PDT), <http://motherjones.com/politics/2010/09/bill-de-blasio-citizens-united-avenger>.

150. Epstein, *supra* note 149, at 653; Wert, Gaddie & Bullock, *supra* note 5, at 726–27 (noting the risks involved in undertaking political action); Guthrie, *supra* note 137 (quoting a media analyst questioning whether “you’re going to see big corporations plunking down a bunch of money for political advertising”).

Target, for example, contributed to an independent group that aired ads in support of an anti-gay gubernatorial candidate, inciting a call to boycott its stores and precipitating a public apology by the firm’s CEO. Epstein, *supra* note 149, at 657–68. Many point to Target’s story as evidence that a corporation’s potentially controversial political spending could be inhibited even in the post-*Citizens United* environment. *Id.* Indeed, at least one source suggests that Target did not immediately recover from the political-donation scandal. Suzy Khimm, *Is Target Still Paying the Price for Citizens United?*, MOTHER JONES (Sept. 7, 2010, 7:56 AM PDT), <http://motherjones.com/mojo/2010/09/target-paying-price-citizens-united>.

To the extent that corporations’ likely approaches to ad expenditures can be predicted from their political-contribution histories, it is notable that for-profit corporations typically contribute to both Democrats and Republicans. See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 324 (describing the corporate “hedging” strategy of contributing money to both sides).

151. Epstein, *supra* note 149, at 657 (“[C]orporations want to spend their money where it matters to them: on particular legislation where they hope to gain influence while flying below the radar.”).

advocacy groups would arguably lobby corporations for funding, might also discourage corporations from ramping up their political spending.¹⁵² Indeed, according to some public-choice theorists, corporations might prefer campaign-finance regulation to a deregulated environment, in which legislators might extort their financial participation.¹⁵³

Although these generalizations are plausible, in reality, corporations have long spent money on political races, and increases in corporate political expenditures are expected in the post-*Citizens United* era.¹⁵⁴ Moreover, the spending behavior of family-owned or founder-led private companies may differ from the expected behavior of widely held public firms.¹⁵⁵ Even if

152. See Khimm, *supra* note 150. But see MONICA YOUN, AM. CONST. SOC'Y L. & POL'Y, *CITIZENS UNITED: THE AFTERMATH* 3–7 (2010), available at http://www.acslaw.org/sites/default/files/ACS_Issue_Brief_Youn_Citizens_United.pdf (arguing that *Citizens United* encourages corporations to engage in a corporate influence-bidding arms race, in which reluctant corporations involve themselves in electoral politics “to maintain access to and avoid retribution from elected officials” by contributing more than competing corporations).

153. Cf. FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* 46–59 (1997) (discussing the potential for political extortion of corporations).

154. See Briffault, *supra* note 5, at 647–50 (noting the ways in which corporations “deploy[ed] considerable amounts of money in elections” even before *Citizens United*). For example, although many political contests involve large amounts of money, there are many congressional races that are neither highly publicized nor heavily funded. See *Congressional Elections*, OPENSECRETS.ORG, <http://www.opensecrets.org/races/index.php> (last visited Oct. 20, 2011). There are also local and state elections, in which corporations with particular legislative agendas could expect their expenditures to have more effect than on the national stage. Additionally, although corporations may be more likely to spend their money lobbying for or against legislation of particular relevance to their corporate interests, rather than spending significant capital on elections concerned with issues in which they do not have a “distinctive position,” Epstein, *supra* note 149, at 657, those two categories are not always distinct. In addition, a recent application of game theory to corporate political expenditures supports the intuitive sense that corporations will spend more money on independent expenditures post-*Citizens United*. See Anne Tucker, *Rational Coercion: Citizens United and a Modern Day Prisoner’s Dilemma*, 27 GA. ST. U. L. REV. 1105, 1127–32 (2011) (concluding, based on an application of the classic game-theory prisoner’s dilemma scenario, that “*Citizens United* has established an environment that exacerbates the pressure on corporations to participate politically through independent expenditures” by effectively coercing rational corporations into making political expenditures so that they maintain a comparative advantage in political influence over other corporations). This conclusion, of course, is predicated on a number of assumptions, including the premise that corporations all compete, and do not collude, for political influence.

155. See Luo & Strom, *supra* note 109, at A19 (noting that in contrast to “the big name companies remaining” on the sidelines, small- to medium-size, privately held companies “are jumping in,” albeit mostly through 501(c) organizations). Scholarship concerning corporate political donations has largely focused on publicly held companies, thereby neglecting some of the largest political contributors. Muntean, *supra* note 124, at 2. A recent study of pre-*Citizens United* corporate contributions to political organizations, not limited to publicly held firms, found a “robust relationship between principal-owner presence and political activity,” suggesting that family or founder-controlled firms are more likely to make political contributions. *Id.* at 5. Professor Susan Muntean identifies multiple private entities making political contributions, such as Koch Industries, Marmon Group, United Dairy Farmers, A.G. Spanos, Avalon Capital Group,

corporations ultimately decline to air political ads, the mere ability to do so is undoubtedly a powerful weapon, the use of which would be virtually impossible to discover.¹⁵⁶

Most importantly, corporations are likely to contribute money indirectly for political advertising through trade associations, such as the Chamber of Commerce, so long as their contributions are not publicly disclosed.¹⁵⁷ This anonymity helps to neutralize corporate concerns about alienating not only their customers, but also shareholders who might object to the contributions.¹⁵⁸ Thus, data suggesting that corporations reported only a relatively small amount of independent expenditures in 2010 federal races do not disprove the significant effect of *Citizens United* and campaign-finance deregulation.¹⁵⁹

4. Spending Predictions for the 2012 Presidential Election Cycle

The 2012 presidential contest will be an important testing ground for the changes in campaign-finance regulation captured by the metaphoric *Citizens*

Amway, and various hedge funds. *Id.* at 2. She speculates that such entities are more politically active because they “are pursuing a longer term and more proactive relational strategy with the political parties, while independently managed firms and their executives pursue a reactionary, post hoc or transactional CPA [corporate political action] strategy.” *Id.* at 5. Such a strategy can also explain indirect contributions to independent political groups; Muntean argues that “the strategy of making independent expenditures to influence public opinion suggests that principal-owners are selecting a constituency-building strategy and an entrepreneurial approach to political action. *Id.* at 9.

156. See YOUN, *supra* note 152, at 7.

157. See, e.g., Kirkpatrick, *supra* note 144 (“[W]ealthy individuals and companies might contribute to trade associations, groups like the Chamber of Commerce or the National Rifle Associations, or other third parties that could run commercials.”); see also TORRES-SPELLISCY, *supra* note 12, at 3 (noting that corporations avoid direct political spending by contributing to intermediaries, such as 501(c) organizations); Briffault, *supra* note 5, at 645 (discussing the need for obtaining records of not only the “spender of record,” but also the entities contributing to the organizations in order to have effective disclosure); Ron A. Schotland, *The Post-Citizens United Fantasy-Land*, 20 CORNELL J.L. & PUB. POL’Y 753, 753 (2011) (“Corporate actors have traditionally used trade associations and charitable associations as vehicles to shape political debate and engage in advocacy.”); Torres-Spelliscy, *supra* note 138, at 89–91.

158. See *supra* note 149 and accompanying text. Information from companies that disclose their political spending is suggestive of the possibilities. The *Los Angeles Times* reports that PACs operated by Prudential Financial, for example, gave only \$218,230 to candidates and other committees in 2010, but contributed more than \$2.2 million for lobbying and other political purposes to the U.S. Chamber of Commerce and other trade groups. Noam N. Levey & Kim Geiger, *Much Corporate Political Spending Stays Hidden*, L.A. TIMES, Apr. 23, 2011, <http://articles.latimes.com/2011/apr/23/nation/la-na-money-politics-survey-20110424> (noting that a “[c]ompany giving to trade associations for political campaigns can dwarf direct donations to candidates”).

159. See *supra* notes 154–58 and accompanying text; see also Dan Eggen, *Surge in PACs at the Last*, WASH. POST, Oct. 30, 2010, at A4 (reporting on the increase in the registering of PACs in the days leading up to the election, “dumping tens of millions of dollars into House and Senate races, and in many cases, avoiding the need to tell voters who is funding their activities”). These last-minute activities make it exceedingly difficult for candidates to respond effectively before election day. *Id.*

United effect.¹⁶⁰ Given that political-ad spending is typically higher in presidential election cycles than in midterm elections, groups are likely to engage in “blockbuster” spending in 2012.¹⁶¹ For example, Crossroads GPS and American Crossroads apparently plan to raise \$120 million in support of the Republican party.¹⁶² Over one hundred super PACs are registered to date,¹⁶³ and they are poised to spend millions more than the \$80 million spent by super PACs in the 2010 contests.¹⁶⁴ In fact, outside groups began running ads for the 2012 cycle in December 2010, just weeks after the midterm elections.¹⁶⁵ Many of the new super PACs are candidate-specific entities.¹⁶⁶ Furthermore, such blockbuster spending is likely to include many campaign messages funded by organizations that are not required to disclose their donors.¹⁶⁷ In June 2011, the Center for Responsive Politics identified five super PACs that disclosed that all, or a vast majority, of their funding came

160. See, e.g., Brookes, *supra* note 89 (discussing the amount of money likely to be spent for the 2012 election in light of *Citizens United*'s effects); Gold & Mason, *supra* note 20 (detailing the increased fundraising and spending by independent groups in anticipation of the 2012 election).

161. PUB. CITIZEN, *supra* note 3, at 9; Porter, *supra* note 88; see also Marian Wang, *FEC Data Show Big Jump in Spending by Super PACs and Outside Groups*, PROPUBLICA (Nov. 9, 2011), <http://www.propublica.org/article/fec-data-show-rise-of-super-pacs-and-outside-spending>. The Center for Responsive Politics has tracked close to \$6 million in spending by outside groups already for the 2012 cycle. *2012 Outside Spending*, OPENSECRETS.ORG, <http://www.opensecrets.org/outsidespending/summ.php?disp=O>.

162. See Blumenthal, *supra* note 25. Another source previously reported that the super PACs planned to raise half—\$120 million—of the currently circulating planned figure. Connelly, *supra* note 80 (“If the Rove group reaches its target . . . the Crossroads committees will be the biggest financial players in 2012 outside presidential candidates themselves.”).

163. Spencer MacColl, *Super PAC Registrations Accelerate, Favor Conservatives*, OPENSECRETS.ORG (June 17, 2011, 3:06 PM), <http://www.opensecrets.org/news/2011/06/super-pac-registrations-accelerate.html>.

164. Barker & Wang, *supra* note 11; see also Nicholas Confessore, *Super PAC Plans Major Primary Campaign for Perry*, N.Y. TIMES, Sept. 6, 2011, <http://www.nytimes.com/2011/09/07/us/politics/07donate.html?ref=campaignfinance> (noting that a new super PAC called “Make Us Great Again” plans to spend up to \$55 million to help Rick Perry win the Republican presidential nomination).

165. See, e.g., Wilson *supra* note 87 (noting that Crossroads ran its first 2012 advertisement, supporting the extension of Bush tax cuts, in December 2010 and that it had run three rounds of advertising by the second week of February 2011). Crossroads GPS spent \$700,000 in Florida on an anti-Obama ad this summer and planned on spending \$20 million in July and August. Alex Leary, *In 2012 Elections, Expect More Attack Ads with the Rise of Super PACs*, ST. PETERSBURG TIMES, July 24, 2011, <http://www.tampabay.com/news/politics/national/article1181968.ece>.

166. See Confessore, *supra* note 164; Confessore, *supra* note 104 (noting that almost all of the 2012 presidential candidates are supported by super PACs); *Elite Donors Do Double Duty: Presidential Super PACs Attract Wealthy Donors Who Have Maxed Out to Candidates*, OPENSECRETS.ORG (Oct. 4, 2011, 12:15 PM), <http://www.opensecrets.org/news/2011/10/elite-donors-do-double-duty-for-super-pacs.html>.

167. See LINCOLN & HOLMAN, *supra* note 69, at 1 (noting that the percentage of groups reporting the donors who funded their electronic communications has greatly decreased over the past decade, dropping from 97.9% in 2004 to 31.8% in 2010); Blumenthal, *supra* note 25.

from non-profit organizations themselves not subject to disclosure requirements.¹⁶⁸ Further obscuring the source of funding, many super PACs operate under unassuming names such as “Concerned Taxpayers of America,” “Citizens for a Working America,” and “We Love USA,” which do not reveal their actual political commitments.¹⁶⁹ If the trends of non-disclosure and negativity continue, the 2012 presidential election season may feature more money, more competitive and negative speech, more opportunities for corporations to contribute silently to intermediary groups, and more anodyne-sounding organizations with undisclosed affiliations.¹⁷⁰

D. Attempts to Mitigate the “Citizens United Effect”

In response to *Citizens United*, proponents of campaign reform turned to legislation both at the federal and state level, complaints to the IRS, administrative and judicial challenges against the FEC, White House involvement, and grassroots public advocacy. Some organizations and legislators even proposed a constitutional amendment limiting the free-speech protection of for-profit corporations.¹⁷¹ Conversely, campaign-finance-reform opponents sought to challenge disclosure legislation judicially and politically, and resisted administrative attempts to circumvent the effects of the *Citizens United* decision.¹⁷²

168. Barker & Wang, *supra* note 11.

169. *Id.*; see also YOUN, *supra* note 152, at 15 (describing misleading names); Michael Beckel, *Would a PAC By Any Other Name Sound As Sweet?*, OPENSECRETS.ORG (Sept. 29, 2011, 4:25 PM), <http://www.opensecrets.org/news/2011/09/a-pac-by-any-other-name.html> (noting that “names touting America and Americans are among the most common, as well as the words ‘citizens,’ ‘action,’ and ‘freedom’”).

170. See *supra* Part I.C–E.

171. For example, the advocacy organization Public Citizen submitted testimony suggesting a constitutional amendment to a congressional committee hearing on campaign-finance reform after *Citizens United*. Letter from Robert Weissman, President, Pub. Citizen, to Robert Brady, Chairman, Comm. on House Admin., U.S. House of Representatives 4 (Feb. 3, 2010), available at <http://www.citizen.org/documents/Final%20testimony%20on%20CU.pdf>; see also PUB. CITIZEN, *supra* note 3, at 2–3 (noting that Public Citizen collected roughly 750,006 signatures in support of a constitutional amendment). Representatives Donna Edwards and John Conyers, Jr. introduced a similar constitutional amendment resolution in the House of Representatives. H.R.J. Res. 74, 111th Cong. § 1 (2010). Similarly, Senators Christopher Dodd and Tom Udall proposed a constitutional amendment in response to *Citizens United*. S.J. Res. 29, 111th Cong. § 2 (2010); see also R. SAM GARRETT, CONG. RESEARCH SERV., R41054, CAMPAIGN FINANCE POLICY AFTER *CITIZENS UNITED V. FEDERAL ELECTION COMMISSION*: ISSUES AND OPTIONS FOR CONGRESS 3 (2010) (noting other proposals for constitutional amendments). See generally Senator Tom Udall, *Amend the Constitution to Restore Public Trust in the Political System: A Practitioner’s Perspective on Campaign Finance Reform*, 29 YALE L. & POL’Y REV. 235 (2010).

172. Yoo & Marston, *supra* note 25, at 4–5 (noting the opposition to the failed DISCLOSE Act and to any executive order mandating disclosure, and characterizing disclosure proposals as “[o]verruling Citizens United with Chicago-[s]tyle [p]olitics”).

The principal pro-reform tactic post-*Citizens United* centers on donor disclosure.¹⁷³ Professor Hasen was not alone when he warned that the need for an adequate disclosure policy is “urgent” in light of recent post-*Citizens United* developments.¹⁷⁴ Responding to the lack of transparency in many of the 2010 third-party advocacy ads,¹⁷⁵ the public called for stricter laws requiring disclosure of the names of those funding independent advocacy groups.¹⁷⁶

Accordingly, legislatures, at both the federal and the state levels, attempted to avert the predicted *Citizens United* effect by passing legislation requiring increased transparency in third-party ad funding.¹⁷⁷ Justice Kennedy’s rousing encomium to disclosure quieted concerns about the susceptibility of disclosure

173. See *infra* notes 174–76; see also Elizabeth Garrett, *Voting With Cues*, 37 U. RICH. L. REV. 1011, 1011 (2003) (“[T]he campaign finance reform eliciting nearly uniform support has been disclosure of the source and amount of campaign contributions and expenditures.”). Another reform proposal made after *Citizens United* required shareholder approval of corporate political spending. See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83, 85 (2010) (citing Shareholder Protection Act of 2010, H.R. 4790, 111th Cong. § 4(a)). Reformers have also discussed eliminating contribution limits under FECA. See Sullivan, *supra* note 5, at 167–80. Additionally, Representative Thomas Perriello proposed legislation prohibiting independent expenditures by foreign corporations. See Save Our Democracy from Foreign Influence Act of 2010, H.R. 4523, 111th Cong.

174. Rick Hasen, *President’s Statement on Passage of DISCLOSE Act in House Committee*, ELECTION L. BLOG (May 20, 2010, 3:50 PM), <http://electionlawblog.org/?p=14873>; see also Schotland, *supra* note 157, at 755–56 (discussing the need to update federal and state disclosure requirements); Sullivan, *supra* note 5, at 172–74; Francis Bingham, Note, *Show Me the Money: Public Access and Accountability After Citizens United*, 52 B.C. L. REV. 1027, 1056 (2011) (advocating state and federal increases in disclosure requirements); Winik, *supra* note 149, at 651 (proposing more disclosure requirements).

175. Peter Overby, *Who Writes the Check? Group Wants Voters to Know*, NAT’L PUB. RADIO (Mar. 22, 2011), <http://www.npr.org/2011/03/22/134746513/who-writes-the-check-group-wants-voters-to-know> (reporting that Media Access Project, a public advocacy organization, requested stricter disclosure rules from the FCC after many independent groups in the 2010 elections hid their donors behind vague entity names). One commonly cited example is the entity called the “Concerned Taxpayers of America,” whose name suggests a large group, but whose \$450,000 of television ads in two congressional races was secretly bankrolled by only two contributors whose identities were not publicly disclosed. *Id.*; Dan Eggen, *Concerned Taxpayers Group Is Powered by Only Two Donors*, WASH. POST, Oct. 16, 2010, at A6. Similarly, a single donor contributed \$1 million for campaign advertising under the name “Ending Spending Fund.” Dan Eggen, *supra* note 159, at A4. This phenomenon was not exclusive to Republican supporters; the advertisements purchased by “Iowans for Responsible Government” attacking Republican Terry Branstad was, in fact, funded by a \$370,000 contribution from the Democratic Governors Association. MAP Petition, *supra* note 25, at 2. One of the major sponsors of political-committee advertising in 2010 was Crossroads GPS, but nowhere in its advertisements did the entity disclose that it was cofounded by Karl Rove. See Connelly, *supra* note 80. Crossroads GPS and American Crossroads apparently plan to raise \$120 million to defeat President Obama and capture the Senate for Republicans. *Id.* (“If the Rove Group reaches its target . . . the Crossroads committees will be the biggest financial players in 2012 outside presidential candidates themselves.”).

176. See PUB. CITIZEN, *supra* note 3, at 17–19 (examining public-opinion polls, which show overwhelming support for stricter disclosure rules).

177. *Id.* at 24–26, 29–31.

rules to constitutional attack and opened the door for such legislation.¹⁷⁸ In 2010, Congress considered nine bills in response to *Citizens United*.¹⁷⁹ However, such legislation ultimately failed to reduce the decision's impacts. For example, the House narrowly passed the DISCLOSE Act,¹⁸⁰ which would have increased disclosure,¹⁸¹ but it was filibustered in the Senate.¹⁸² This history suggests that congressional action is therefore unlikely in 2011.¹⁸³

Moreover, at the state level, an early 2011 report by the National Conference of State Legislatures noted that eleven states amended their election laws to enhance disclosure in reaction to *Citizens United*.¹⁸⁴ Advocacy groups are litigating dozens of lawsuits challenging such statutes, which will lead, at a minimum, to controversy, delay, and uncertainty.¹⁸⁵ Advocacy groups also made claims that some third-party organizations that produced election-related advertising violated IRS rules,¹⁸⁶ but the IRS rejected the opportunity to

178. See Torres-Spelliscy, *supra* note 66, at 1079–82.

179. Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528, 1545 (2011).

180. DISCLOSE Act, H.R. 5175, 111th Cong. (2010); GARRETT, *supra* note 42, at 7 (“[T]he House of Representatives passed H.R. 5175, with amendments on June 24, 2010 by a 219-206 vote.”). “DISCLOSE” is an acronym for “Democracy is Strengthened by Casting Light on Spending in Elections.” H.R. 5175, § 1(a).

181. H.R. 5175, §§ 201–203, 211–215, 221, 231, 301; see also R. SAM GARRETT, L. PAIGE WHITAKER & ERIKA K. LUNDER, CONG. RESEARCH SERV., R41264, THE DISCLOSE ACT (H.R. 5175): OVERVIEW AND ANALYSIS 1–22 (2010) (providing an overview of the proposed DISCLOSE Act).

182. See GARRETT, *supra* note 42, at 7. The Senate denied cloture on S. 3628, the companion bill to H.R. 5175, by a 57-41 vote on July 27, 2010, and by a 59-39 vote on September 23, 2010. *Id.* The 111th Congress recessed without any further action on the DISCLOSE Act. *Id.*; see Deborah G. Johnson, Priscilla M. Regan & Kent Wayland, *Campaign Disclosure, Privacy, and Transparency*, 19 WM. & MARY BILL RTS. J. 959, 968 (2011); Schotland, *supra* note 157, at 758–60 & n.32 (providing a critique of the DISCLOSE Act).

183. See GARRETT, *supra* note 42, at 7; see also Hasen, *supra* note 14 (concluding that there is “virtually no chance that the current Congress will pass a viable disclosure bill absent some new scandal”). Although the DISCLOSE Act contained controversial provisions in addition to donor disclosure requirements, so that a pared-down version of the legislation, requiring *only* donor disclosure, might fare better, there has been a breakdown in the prior bipartisan support for campaign disclosure. See GARRETT, WHITAKER & LUNDER, *supra* note 181, at 10–12.

184. *Life After Citizens United*, NAT’L CONF. ST. LEGISLATURES (Jan 4, 2011), <http://www.ncsl.org/default.aspx?tabid=19607>; see also PUB. CITIZEN, *supra* note 3, at 29 (stating that at least sixteen states have passed legislation in to the wake of *Citizens United*); TORRES-SPELLISCY, *supra* note 12, at 5–7 (indicating that seventeen states adopted statutes regulating electioneering communications since 2002, and calling on states to improve their disclosure laws).

185. See GARRETT, *supra* note 42, at 7.

186. Press Release, Campaign Legal Ctr., IRS Urged to Review Crossroads GPS Tax Status: 501(c)(4) Status Questioned for Anonymously Funded Attack Ad Vehicle (Oct. 5, 2010), available at http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=1119:10-5-2010-irs-urged-to-review-crossroads-gps-tax-status-501c4-status-questioned-for-anonymously-funded-attack-ad-vehicle-&catid=63&Itemid=61 (reporting their claim that Crossroads GPS operated in violation of 501(c)(4)). In addition, legal academics

investigate the claim that Crossroads GPS violated the requirements for its tax-exempt status.¹⁸⁷

In addition to legislative disclosure initiatives, critics of *Citizens United* focused their attention on administrative and executive-branch responses. For example, Congressman Chris Van Hollen filed both a federal action against the FEC to challenge the agency's implementation of statutory disclosure rules, and an FEC petition to commence a new disclosure rulemaking.¹⁸⁸ However, Republican FEC Commissioners "are still blocking efforts to ensure effective disclosure,"¹⁸⁹ thereby deadlocking the FEC politically.¹⁹⁰ Pending lawsuits against the FEC also will take time and likely will only enhance preexisting election-law requirements.

The White House has also been involved in seeking mitigation. In April 2010, a draft White House Executive Order circulated in the press, which, if signed, would require companies applying for government contracts to disclose donations to advocacy groups involved in election activities.¹⁹¹ The order has

petitioned the SEC to adopt disclosure rules for political expenditures, with newspaper editorial support. See, e.g., Editorial, *Serving Shareholders and Democracy*, N.Y. TIMES, Aug. 9, 2011, <http://www.nytimes.com/2011/08/10/opinion/serving-shareholders-and-democracy.html?ref=campaignfinance>.

187. See *IRS Calls Off Gift Tax Investigation of Donors to Karl Rove's Crossroads GPS*, TAXPROF BLOG (July 7, 2011), http://taxprof.typepad.com/taxprof_blog/2011/07/irs-calls-.html (announcing that the IRS will not continue its investigation into the applicability of the gift tax to contributions to 501(c)(4) organizations, apparently due to Republican lawmaker pressure); Sean Parnell, *IRS Won't Tax Donations to 501(c)(4) Groups*, CTR. COMPETITIVE POL. (July 7, 2011, 4:23 PM), <http://www.campaignfreedom.org/blog/detail/irs-wont-tax-donations-to-501c4-groups> (deciding that prior donations to 501(c)(4) organizations are not subject to IRS gift taxes); Stephanie Strom, *I.R.S. Drops Audits of Political Donors*, N.Y. TIMES, July 7, 2011, at B1 (noting that the IRS has ceased to pursue gift taxes stemming from contributions to 501(c)(4) groups); see also *Democracy 21 and Campaign Legal Center Challenge Legality of IRS Regulations as Failing to Properly Limit Campaign Activity by 501(c)(4) Organizations*, DEMOCRACY 21 (July 27, 2011), http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7B91FCB139-CC82-4DDD-AE4E-3A81E6427C7F%7D&DE=%7BD68E818D-632A-4F25-B4E3-979BD1139FA4%7D (asserting that the IRS regulates all groups qualifying for tax-exempt status under § 401(c)(4) to "make far more campaign expenditures than is allowed by law"); *supra* notes 71, 105 (clarifying that 501(c)(4)s are not subject to disclosure requirements).

188. See Alex Knott, *Van Hollen Sues FEC for More Disclosure*, ROLL CALL (Apr. 21, 2011, 2:24 PM), http://www.rollcall.com/news/van_hollen_sues_fec_for_more_disclosure-205082-1.html; Kenneth P. Vogel, *Federal Election Commission Sued to Disclose Anonymous Donors*, POLITICO (Apr. 21, 2011, 11:17 AM), <http://www.politico.com/news/stories/0411/53534.html>.

189. Hasen, *supra* note 14.

190. See GARRETT, *supra* note 42, at 7.

191. Paul Blumenthal, *Draft Executive Order on Outside Spending Disclosure Would Have Sweeping Reach*, SUNLIGHT FOUND. (Apr. 22, 2011, 9:00 AM), <http://sunlightfoundation.com/blog/2011/04/22/draft-executive-order-on-outside-spending-disclosure-would-have-sweeping-reach/>. But see Yoo & Marston, *supra* note 25, at 1–10 (critiquing the executive order).

proven very controversial,¹⁹² and it may ultimately be seen as too politically costly.¹⁹³

Thus far, these multi-pronged efforts to mitigate *Citizens United* have had limited success. Given the impending 2012 presidential election, a more expansive examination of alternative avenues for reform would be prudent.

II. THE FCC ALTERNATIVE

Communications law and FCC rules could produce a more fruitful response to the *Citizens United* effect,¹⁹⁴ both because other efforts have faltered, and principally because television is still the medium of communication for political advertising today.¹⁹⁵ In June 2011, FCC Commissioner Michael Copps stated:

I continue to believe that the sooner we can ensure fuller disclosure of political advertising sponsorship, the better off our democracy will be. Voters have a right to know who is really behind all those glossy and sometimes wildly misleading ads we see on TV. Concealing from voters that an ad brought to us by “Citizens for a More Beautiful America” is really sponsored by a cabal of chemical companies polluting the water we drink is not just non-disclosure—it is deception aimed at buying elections. We need to fix this—and the FCC has an active role to play. I suggest the Commission tee up an item in the next two months that moves us toward meaningful disclosure of political advertising.¹⁹⁶

192. See GARRETT, *supra* note 42, at 10–11 (describing the controversy and noting that the House passed two otherwise-unrelated House bills to prevent executive agencies from conditioning government-contract grants on required political-spending disclosure).

193. Sam Stein, *Obama Administration Drafts Executive Order on Contractor Donation Transparency*, HUFFINGTON POST (Apr. 19, 2011, 5:52 PM), http://www.huffingtonpost.com/2011/04/19/obama-administration-drafts-order_n_851228.html.

194. For a discussion of *Citizens United*'s potential impact on FCC regulations (rather than the use of FCC rules to promote the underlying vision of *Citizens United*), see generally Elizabeth Elices, *Citizens United and the Future of FCC Content Regulation*, 33 HASTINGS COMM. & ENT. L.J. 51 (2010). See also Wang, *supra* note 71 (discussing the partisan deadlock in the FEC and its failure to regulate super PACs).

195. See, e.g., WALDMAN, *supra* note 80, at 13–14 (discussing the role of broadcast and cable television in political advertising); see also Kevin Downey, *In Political Spending, All Markets Not Equal*, TVNEWSCHECK (Mar. 2, 2010, 8:41 AM), <http://www.tvnewscheck.com/article/2010/03/03/40321/in-political-spending-all-markets-not-equal> (estimating that television political-advertising expenditures would exceed \$2.7 billion in 2010).

196. Press Release, Michael J. Copps, Comm'r, Fed. Commc'ns Comm'n, Statement of Michael J. Copps on Release of FCC Staff Report “The Technology and Information Needs of Communities” (June 9, 2011), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0609/DOC-307421A1.pdf.

In addition to the FCC's sponsorship-disclosure rules, communications regulation contains an antidiscrimination rule and limits on broadcaster immunity for the content of political ads.¹⁹⁷

A. The Regulation of Political Speech on Radio, Broadcast Television, and Cable

The regulation of political speech on radio and television has three components of relevance to this inquiry: the sponsorship-identification requirement, the equal opportunities rule, and the reasonable-access provision.¹⁹⁸

1. Sponsorship Identification

Since Congress passed the Radio Act of 1927, broadcasters have been subject to sponsorship-identification requirements.¹⁹⁹ Section 317 of the Communications Act of 1934, the current legislation governing such requirements, requires that:

[a]ll matter broadcast by any radio station for which service, money, or any other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person.²⁰⁰

All sponsored programming on television and radio is subject to this requirement.²⁰¹ The FCC applied similar rules to cable operator-originated

197. See 47 U.S.C. § 315(a) (2006).

198. WALDMAN, *supra* note 80, at 25, 296.

199. Radio Act of 1927, Pub. L. No. 69-632, § 19, 44 Stat. 1162, 1170. The Radio Act required stations to "afford equal opportunities" to candidates for public office and required broadcast disclosure of sponsors. Radio Act §§ 18–19. The rationale behind the sponsorship provision, as described by Representative Emanuel Celler of New York, was to prohibit radio stations from disguising advertisements as program content. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMM. L.J. 329, 334 (2004) ("[Rep. Emanuel Celler] unsuccessfully pressed for an amendment that would require stations to label such broadcast content as 'advertising,' not simply as 'paid for' or 'furnished by' an interested party." (citing 67 CONG. REC. 2309 (1926))).

200. Communications Act of 1934, Pub. L. No. 73-416, § 317, 48 Stat. 1064, 1089 (codified as amended at 47 U.S.C. § 317 (2006)). Section 508 makes nondisclosure of sponsorship by broadcast employees, program suppliers, and sponsors a crime. Communications Act Amendments, 1960, Pub. L. No. 86-752, sec. 8(b), § 508, 74 Stat. 889, 896 (codified as amended at 47 U.S.C. § 508 (2006)); see Ellen Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 96 (2006).

201. See Communications Act of 1934 §§ 2–3 (codified as amended at 47 U.S.C. §§ 152(a), 153) (2006)). Although few changes have been made to the statutory requirement since the 1940s, the "payola" scandals in the 1950s led to an uptick in broadcaster obligations to disclose sponsored programming. See Goodman, *supra* note 200, at 99. Recently, the issue of

programming in 1969.²⁰²

The FCC adopted regulations to implement section 317.²⁰³ The regulations require not only that sponsorship be revealed, but that broadcasters

fully and fairly disclose[] the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or other entity by whom or on whose behalf such payment is made or promised, or from whom or on whose behalf such services or other valuable consideration is received²⁰⁴

Additionally, section 73.1212(b) of the agency's regulations requires broadcast licensees to "exercise reasonable diligence to obtain . . . information to enable such licensee to make the announcement required by this section."²⁰⁵

With respect to political commercials, the regulations require on-air sponsorship identification, as well as identification of the sponsoring entity's top leadership in the broadcast station's publicly available file.²⁰⁶

2. Equal Opportunities

Section 315 of the Federal Communications Act of 1934 provides that if a broadcaster permits a legally qualified political candidate to "use" its station, it must provide equal opportunities to that candidate's opponents.²⁰⁷ Although the statute does not define the term "use," the agency has interpreted the word to include "any presentation or appearance that features a candidate's voice or image."²⁰⁸ This equal opportunities provision is commonly referred to as the "equal time" rule.²⁰⁹

sponsorship identification has been addressed in the context of embedded advertising. *Id.* at 89–90; see WALDMAN, *supra* note 80, at 280.

202. 47 C.F.R. § 76.1615 (2009); WALDMAN, *supra* note 80, at 296.

203. 47 C.F.R. § 73.1212 (2010) (tracking the language of section 317(a)(1) of the Communications Act of 1934 very closely).

204. *Id.* § 73.1212(e).

205. *Id.* § 73.1212(b).

206. *Id.* § 73.1212(e).

207. 47 U.S.C. § 315(a) (2006) ("If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford *equal opportunities* to all other such candidates for that office in the use of such broadcasting station." (emphasis added)).

208. Colin Vandell, Note, *Words Signifying Nothing? The Evolution of § 315(a) in an Age of Deregulation and Its Effect on Television News Coverage of Presidential Elections*, 27 HASTINGS COMM. & ENT. L.J. 443, 447 (2005) (internal quotation marks omitted) (quoting DON R. PEMBER, MASS MEDIA LAW 603 (McGraw-Hill 1999)).

209. See *id.* at 444. There are constraints on the equal opportunities provision, however. It is state law, not FCC rules, that is used to determine whether a candidate is legally qualified. 47 C.F.R. § 73.1940(a)(2). Moreover, even if a broadcaster has equal-time obligations in a particular political race, it is not required to provide exactly the same amount or class of time as was given the original use; it is enough that the original user's opponents are provided "equal opportunities." See *infra* notes 218–19.

The provision originated in Congress in the 1920s as its members expressed concern over the amount of electoral influence potentially wielded by radio stations and networks.²¹⁰ The fear that radio stations would “charge one man an exorbitant price [or arbitrarily exclude him] and permit another man to broadcast free or at a nominal price” led Congress to include section 18—the predecessor of section 315(a)—in the Radio Act of 1927.²¹¹ Historically, Congress was concerned with neutralizing the “kind of political advantage a discriminatory network can confer.”²¹²

Section 315 only applies to the political candidate’s use of broadcast stations and does not discuss advertising in support of a candidate by independent entities.²¹³ In 1970, the FCC addressed this statutory gap by adopting what came to be called the “*Zapple* doctrine,” or the “quasi-equal opportunities rule.”²¹⁴ In response to a request for an interpretive ruling by Nicholas Zapple, Communications Counsel to the Senate Committee on Commerce, regarding “the applicability of the fairness doctrine to situations where supporters of a political candidate purchase broadcast time,” the FCC opined that the fairness doctrine would be “plainly applicable” to circumstances in which a candidate’s supporters purchase airtime.²¹⁵ According to the FCC, a station selling airtime to a candidate’s spokesperson or supporter to discuss campaign issues could not reasonably refuse to sell similar airtime to the spokesperson in support of another candidate absent unusual circumstances, because allowing a candidate to air his or her position on a given issue is tantamount to broadcasting one side, and therefore, the opposing candidates are “the logical spokesmen for presenting contrasting views.”²¹⁶ However, the *Zapple* doctrine did not require the opponent’s supporters to be provided with free airtime to respond to the original advertising—a reasonable opportunity to purchase equal time was adequate.²¹⁷ The FCC reiterated its support for the general principle that a broadcaster’s inability to find paid sponsorship of the opposing view should not defeat the public’s right to know; however, the agency determined that this

210. See Vandell, *supra* note 208, at 446 (citing 67 CONG. REC. 5483 (1926)).

211. *Id.*

212. TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES 23–24 (2010).

213. See 47 U.S.C. § 315(a) (2006).

214. Nicholas Zapple, 23 F.C.C.2d 707 (1970) (discussing whether broadcast stations had obligations to provide equal opportunities for political messages by candidate supporters and opponents, as well as candidates themselves); see Ann Kramer Ricchiuto, *The End for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 281 n.95 (2005).

215. Nicholas Zapple, Comm’n’s Counsel, Comm. on Commerce, 23 F.C.C. 2d 707, 707 (1970).

216. *Id.* at 708.

217. *Id.*

general principle “should not have applicability in the direct political arena.”²¹⁸ The FCC simply held that the station would be obligated to permit the purchase of equal opportunities.²¹⁹

Section 315, as currently codified, has exceptions as well.²²⁰ As a result of congressional amendment in 1959, § 315 states:

Appearances by a legally qualified candidate on any—(1) bona fide newscast, (2) bona fide news interview, (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or (4) on the spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), shall not be deemed to be use of a broadcasting station²²¹

218. *Id.* The agency reasoned that

[w]hen spokesmen or supporters of candidates A half purchased time, it is our view that it would be inappropriate to require licensees to in effect subsidize the campaign of an opposing candidate by providing candidate B’s spokesmen or supporters with free time (e.g., the chairman of the national committee of a major party purchases time to urge the election of his candidate, and his counterpart then requests free time for program on behalf of his candidate). Any such requirement would be an unwarranted and inappropriate intrusion of the fairness doctrine into the area of political campaign financing. To implement this view, we would carve out the same area as in the case of our personal attack rules, i.e., there would be no obligation to provide free time to authorized spokesmen of or those associated with legally qualified candidate B in a situation such as your point where candidate A, his authorized spokesmen or those associated with him, have purchased time.

Id.; see also *Cullman Broad. Co.*, 40 F.C.C. 576, 577 (1963).

219. *Nicholas Zapple*, 23 F.C.C. 2d at 707.

220. Act of Sept. 14, 1959, Pub. L. No. 88-274, sec. 1, § 315(c), 73 Stat. 557, 557 (codified as amended at 47 U.S.C. § 315(a)(1)–(4) (2006)).

221. 47 U.S.C. § 315(a). Section 315(b), as currently codified, also constrains what charges broadcast stations can impose on political advertising. *Id.* § 315(b). During the forty-five days before a primary and sixty days before a general election, broadcast stations must offer political candidates airtime at the station’s lowest unit rate. *Id.* The statute does not define “lowest unit rate.” See *id.* § 315(c). Although the FCC’s enforcement of § 315(b) has been sporadic, the agency has accused stations of manipulating ad-sale practices to avoid bona fide compliance with the lowest-unit-rate requirement. Seth Grossman, Note, *Creating Competitive and Informative Campaigns: A Comprehensive Approach to “Free Air Time” for Political Candidates*, 22 *YALE L. & POL’Y REV.* 351, 355–57, 377 (2004).

In addition to the equal opportunities rule, the Communications Act of 1934 gives candidates for federal office a limited right of access to the air. See 47 U.S.C. § 312(a)(7). Section 312(a)(7) authorizes the FCC to revoke the license of any broadcaster who willfully or repeatedly fails to offer a federal candidate the reasonable opportunity to purchase reasonable amounts of airtime for political advertising. *Id.* Section 312(a)(7) specifically states that the FCC may revoke any station license for “for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy.” *Id.* Although the FCC has declined to provide formal guidelines defining this provision, it is clear that broadcasters are required to engage in bona fide individualized negotiations with the candidates over airtime

Communications law does not explicitly address the question of whether the Communications Act provisions and FCC rules may serve to limit the threatening effects posed by independent-group political advertising permitted by the *Citizens United* series of decisions. This Article contends that: 1) the FCC has the authority to read § 317 as requiring disclosure of major funders of independent groups airing political advertising, and 2) the FCC should not hesitate to apply a quasi-equal opportunities rule akin to the *Zapple* doctrine. Although the issue is not free from doubt, there is no clear prohibition to the analysis suggested in this Article.

B. Disclosure Obligations Under § 317

The potential for misleading voters is a major concern associated with post-*Citizens United* independent-group advertising.²²² For example, if voters believe that a neutral, expert group made statements in a given advertisement, they are likely to find that advertisement more credible than a message created by a clearly identified special-interest group. Because of this concern, observers have called for disclosure as an antidote to troublesome advocacy advertising by unaccountable speakers.²²³ Without adequate disclosure, voters

requests. Stations cannot impose blanket prohibitions on selling time to federal candidates in any day-part, or category of programming, or for any length of time. Codification of Commission's Political Programming Policies, 7 FCC Rcd. 678, 681 (1991). The requirement to negotiate applies even with when federal candidates request to purchase airtime in lengths typically not sold by the station.

The Supreme Court upheld the constitutionality of the federal-candidate reasonable-access provision under the First Amendment in *CBS, Inc. v. FCC*. 453 U.S. 367 (1981) ("Section 312(a)(7) represents an effort by Congress to assure that an important resource—the airwaves—will be used in the public interest. We hold that the statutory right of access, as defined by the Commission and applied in these cases, properly balances the First Amendment rights of federal candidates, the public, and broadcasters."). Although the Court affirmed broadcaster editorial discretion in that case and accepted the possibility that a realistic prospect of program disruption could properly lead to rejection of a candidate's request, the actual practice affirmed by the Court on the facts suggests that federal-candidate requests for airtime should virtually always be accommodated under § 312(a)(7).

222. See, e.g., PUB. CITIZEN, *supra* note 3, at 10.

223. See, e.g., Denniston, *supra* note 37 ("One approach would be to increase the transparency of 'special interest' spending by more rigorous disclosure legislation, in hopes of exposing more vividly who is in fact benefiting and, perhaps, by embarrassing the beneficiaries."). The Supreme Court in *Buckley v. Valeo* listed the three rationales for campaign disclosure requirements:

First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

are being “deprive[d] . . . of important cues they need to make informed decisions of how to vote.”²²⁴ Additionally, inadequate disclosure “also creates the conditions for actual corruption of elected officials.”²²⁵ Given that *Citizens United* set the new baseline for corporate funding of election speech, disclosure becomes more important than ever.²²⁶

This analysis poses the question: could § 317’s sponsorship-identification provisions reasonably be read to require major funders of groups airing political advocacy ads to be identified? MAP’s petition, which was submitted to the FCC on March 22, 2011, asked the agency to revise its sponsorship rules to require such disclosure explicitly.²²⁷ The group observed that a large increase in express and issue-advocacy spending followed *Citizens United* because “[e]xisting campaign-finance and IRS regulations allow organizations which are often hollow shells for one or a few organizations or individuals to purchase commercials without identifying the source of their funding.”²²⁸ According to the group, this practice is contrary to current FCC sponsorship-identification rules interpreting § 317, which nominally require disclosure of the sponsor’s “true identify.”²²⁹

Therefore, the group argues that because “the statutory objective of informing the electorate about who is the “true” sponsor of political messages is not being met,” the FCC should revise its political sponsorship-identification regulations.²³⁰

1. *The History and Scope of § 317*

Postal regulations mark the genesis of broadcasting sponsorship disclosure rules. In 1912, Congress enacted the Newspaper Publicity Act, a law requiring newspaper and magazine publishers receiving second-class mail privileges to identify paid advertisements²³¹ and to publish the names of the publishers’

424 U.S. 1, 66–68 (1976) (per curiam) (footnotes omitted) (internal quotation marks omitted); see also Recent Case, *Constitutional Law—First Amendment—Ninth Circuit Holds Montana Election Contribution Disclosure Requirements Unconstitutional as Applied to De Minimis Contributions—Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009), 123 HARV. L. REV. 1043, 1046 (2010) (applying the three rationales in the ballot-related context).

224. Hasen, *supra* note 14.

225. *Id.*

226. See Edward Wyatt, *The Caucus, A Plea for More Disclosure on Political Ads*, N.Y. TIMES, Mar. 22, 2011, <http://thecaucus.blogs.nytimes.com/2011/03/22/a-plea-for-more-disclosure-on-political-ads/> (discussing disclosure advocates’ pleas to the FCC for assistance in strengthening rules following *Citizens United*).

227. See MAP Petition, *supra* note 25, at 1.

228. *Id.* at 2.

229. *Id.*

230. *Id.*

231. Goodman, *supra* note 200, at 98 (citing Act of Aug. 29, 1912, ch. 389, 37 Stat. 539, 554 (codified as amended at 18 U.S.C. § 1734 (2006))) (explaining that the legislation required

owners and stockholders twice a year.²³² Congress apparently exported this requirement to broadcasting, including it in the Radio Act of 1927 and the Communications Act of 1934.²³³ Because commercial advertisers sponsored much of the early programming and clearly identified themselves, the sponsorship-identification rules garnered little attention at the dawn of radio regulation.²³⁴ Over time, as spot-advertising began to overcome advertiser sponsorship of entire programs, the FCC became concerned that listeners “know when the program ends and the advertisement begins,”²³⁵ and therefore issued rules implementing the sponsorship-identification provision of section 317 of the 1934 Act.²³⁶ The quiz show and payola scandals of the 1950s caused Congress to amend section 317 to extend the sponsorship-disclosure requirement to station employees and criminalize non-disclosure.²³⁷ In recent years, the FCC’s discussion of sponsorship-identification rules has related principally to “sponsored news stories” and “video news releases.”²³⁸

A dearth of legislative history complicates attempts to ascertain Congress’s intent in adopting the sponsorship-identification provisions in the 1927 and 1934 Acts.²³⁹ Nevertheless, the history of the sponsorship-identification

publishers to provide “reading notices” identifying paid ads). *See generally* Richard B. Kielbowicz, *Postal Subsidies for the Press and the Business of Mass Culture, 1880-1920*, 64 BUS. HIST. REV. 64 (1990) (providing a historical summary of postal advertising). Congress enacted the Newspaper Publicity Act as a rider to the 1912 postal appropriations bill. *Id.* at 481.

232. Kielbowicz, *supra* 231, at 482.

233. Goodman, *supra* note 200, at 98.

234. *See id.*

235. *Id.* at 98–99 (quoting FED. COMM’NS COMM’N, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES 47 (Arno Press, Inc. reprt. ed. 1974) (1946)). This was consistent with the Hutchins Commission on the Freedom of the Press recommendation that “sales talk should be plainly labeled as such.” *Id.* at 99 n.97 (quoting COMM’N ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 64 (1947)).

236. *Id.* (citing Kielbowicz & Lawson, *supra* note 199, at 341–42).

237. *Id.* at 99.

238. WALDMAN, *supra* note 80, at 279–80. A “sponsored news story” occurs when a broadcaster agrees with a sponsor to air a news piece promoting the sponsor, but fails to disclose to the public that the story resulted from such a sponsorship agreement. *Id.* A “video news release” is a piece created by a sponsor to resemble a news story and aired by the broadcaster without disclosure of how the piece was produced. *Id.* The FCC also calls for sponsorship identification in “embedded advertising” and “product placement” contexts. *Id.* at 280; *see also* Clay Calvert, *What Is News?: The FCC and the Battle Over the Regulation of Video News Releases*, 16 COMM’LAW CONSP’CTUS 361, 366–67 (2008) (criticizing the FCC’s treatment of video news releases).

239. As part of the congressional discussion before the passage of the Radio Act of 1927, Congressman Emanuel Celler inserted the following statement into the *Congressional Record*:

Many broadcasting stations have developed paid-for propaganda and advertising. This is being done in a most deceptive and disguised manner.

It is illegal for newspapers or magazines to publish advertising without letting their readers know that the matter is paid for and is advertising. The reason for this was to avoid the foisting of disguised advertising matter “as reading notices” or news. The law was adopted to avoid this public imposition and deception.

requirements suggests a concern about deception.²⁴⁰ Indeed, the principle that viewers not be deceived or misled unites all the circumstances in which the FCC refers to sponsorship identification.

The FCC has repeatedly expressed the view that the public has a “right to know whether the broadcast material has been paid for and by whom.”²⁴¹ In the early days of radio, many expressed distrust of advertising.²⁴² Indeed, early on, many argued against radio becoming a commercial, advertising-based medium.²⁴³ In addition to concerns with avoiding vulgar commercialism and promoting programming not limited to the requirements of the market, the opponents of advertising feared that it would deceive and mislead listeners.²⁴⁴ According to the FCC, “[p]aramount to an informed opinion and wisdom of choice . . . is the public’s need to know the identity of those persons or groups

Broadcasting of paid-for or indirect advertising without a statement that the matter broadcast has been paid for is no less deceptive and an imposition.
67 CONG. REC. 2309 (1926).

240. The history of the Newspaper Publicity Act of 1912, from which the original sponsorship-identification requirement for radio was apparently derived, shows that periodicals had to identify their owners and stockholders to “address[] the concern that some publications were secretly controlled by interests who used their columns to influence public opinion.” Kielbowicz, *supra* 231, at 482. The statute’s “reader notice” requirement compelled periodicals to label paid-for material that could be mistaken for stories as “advertisements” in order to stymie “the widespread practice of disguising advertising as news stories or editorials.” *Id.* Both of these provisions were clearly aimed to prevent readers from being misled.

Professor Ellen Goodman identifies “three basic critiques [of undisclosed sponsorship]: that undisclosed sponsorship harms media competition, that it overcommercializes media content, and that it deceives audiences.” Goodman, *supra* note 200, at 99–100. To this list, she adds the harm of stealth marketing to “the public sphere and the integrity of public discourse.” *Id.* at 100. The last two factors seem most relevant to the context of non-disclosure in the political arena.

241. Goodman, *supra* note 200, at 110 & n.158 (quoting U.S. Postal Serv., 41 Rad. Reg. 2d (P&F) 877, 878 (1977)).

242. See, e.g., PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 338 (2004) (quoting one contemporary publication as declaring that “the family circle is not a public space and advertising has no business intruding there unless it is invited.”).

243. See *id.* (“Radio advertising, it was universally agreed, was highly undesirable.”). Nevertheless, the ability to reach a large audience at home with a repetitive message overcame this initial reluctance. *Id.* at 354–55. Sponsors and stations, which, in the 1920s, had “delicately refrained from explicit commercials or sales talks and allowed only ‘indirect’ advertisements,” had “given [themselves] wholly over to commercialism” and direct advertisements by the 1930s. *Id.*; see also ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935, at 5 (1993) (providing “a revisionist interpretation of American broadcasting history, one that regards the emerging status quo [of corporate, commercial, advertiser-supported radio] as the product of an intense and multifaceted political fight with obvious winners and losers, not as the ‘natural’ American system or as the product of consensus”).

244. See Goodman, *supra* note 200, at 110 n.158 (citing Broadcast Material Sponsorship Identification, 25 Fed. Reg. 2406, 2406 (Mar. 16, 1960) (characterizing a station’s failure to provide a notification that program material was aired in exchange for consideration as “deception”)).

who elicit the public's support."²⁴⁵ The agency's recognition that audience members are "'entitl[ed] to know by whom they are being persuaded'"²⁴⁶ is most persuasively explained as "directly related to a fear of deception."²⁴⁷

Although the statutory language of § 317 does not directly address *how much* sponsorship disclosure should be made in advertising, the goal of avoiding deception can serve as a useful guidepost for the FCC's standard.²⁴⁸ In 2002, the agency explained that because the sponsorship-identification requirement is "based on the principle that the public has a right to know whether the broadcast material has been paid for and by whom," the provision "mandates that 'the audience be clearly informed that it is hearing and viewing matter which has been paid for when such is the case, and that the person paying for the broadcast of the matter be clearly identified.'"²⁴⁹

Historically, the FCC has been particularly sensitive to the importance of sponsorship identification in the context of political advertising.²⁵⁰ In 1991, the FCC characterized the additional public-file requirements for political assignments as "designed to make information about their sponsors more available to the public."²⁵¹ This illustrates the FCC's recognition that disclosure of political-sponsor information had increasingly become a necessity for the public. The Commission has insisted on "full and fair" disclosure of sponsors' identities since the 1940s.²⁵² According to a 1963 public notice from the FCC, a station disclaimer stating that an advertisement was a paid political announcement is *per se* insufficient to adhere to sponsorship-identification rules.²⁵³ Instead, the rules require that the

245. *Id.* at 110 n.159 (quoting Sponsorship Identification Rules, 34 F.C.C. 829, 849 (1963)).

246. *Id.* (quoting Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 141 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975)).

247. *Id.* at 110. Professor Goodman situates this audience right "in the wreck of the payola and quiz show scandals." *Id.*

248. *See id.* (noting that the FCC's "fear of deception" dictates much of its language interpreting this law).

249. Advertising Council Request for Declaratory Ruling or Waiver Concerning Sponsorship Identification Rules Advertising Council, 17 FCC Rcd. 22,616, 22,620–21 (2002) (order responding to request for declaratory ruling).

250. *See generally* Identification of Sponsors, 9 Fed. Reg. 12,817 (Oct. 25, 1944).

251. Codification of the Commission's Political Programming Policies, 7 FCC Rcd. 678, 686 (1991) (responding to many complaints regarding the radio stations' failure to identify sponsors in compliance with § 317).

252. During the 1944 campaign season, for example, the FCC noted the need for regulations implementing § 317 in response to "numerous complaints . . . concerning the failure of radio stations to identify the sponsors of political spot announcements." Identification of Sponsors, 9 Fed. Reg. at 12,817. The current rule is only slightly modified from the rule adopted in 1944. *See* BCRA, Pub. L. No. 107-155, 116 Stat. 81, 88–90 (2002) (codified as amended at 2 U.S.C. §§ 431–456 (2006)).

253. Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 150 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975).

identification “*fully and fairly* disclose the *true* identity of the person or persons by *whom or in whose behalf* payment was made.”²⁵⁴

In its petition for rulemaking, MAP contended that the FCC has a “long history of directing stations to pierce the veil of the nominal sponsor.”²⁵⁵ For example, as far back as 1946, the FCC required broadcasters to “take all reasonable measures” to fully comply with identification rules, and explained that “[i]f a speaker desires to purchase time at a cost apparently disproportionate to his personal ability to pay, a licensee should make an investigation of the source of funds to be used for payment.”²⁵⁶ The FCC has long endorsed the principle that broadcasters have a duty to use “reasonable diligence” in discovering the funding behind sponsorship to make that information public.²⁵⁷ In 1992, the agency provided even more detailed instructions for candidate commercials, and required that the sponsor “of televised political advertisements . . . be identified with letters sized to at least four percent of the vertical picture height and displayed for a minimum of a few seconds.”²⁵⁸ In addition to on-air sponsorship identification, the FCC has imposed an additional obligation upon stations since 1944 to include sponsor-identifying information in the station’s public files with respect to political advertising.²⁵⁹ In a 1963 public notice, the Commission explicitly stated:

If payment is made by an agent, and the station has knowledge thereof, the announcement shall identify the person in whose behalf such agent is acting. If the sponsor is a corporation, committee, association or other group, the required announcement shall contain the name of such group; moreover, the station broadcasting any matter on behalf of such group shall require that a list of the chief officers, members of the executive committee or members of the board of directors of the sponsoring organization be made available upon demand for public inspection at the studios or general offices of one of the stations in each community in which the program is broadcast. In the event of a network originated broadcast, the records required by the Commission’s Rules shall be made available

254. *Id.* (emphasis added).

255. MAP Petition, *supra* note 25, at 5. Other examples include the FCC’s reminder to stations in 1950 that they had to make “adequate announcements when political broadcasts are made.” Identification on Broadcast Station, 40 F.C.C. 2, 3 (1950).

256. MAP Petition, *supra* note 25, at 1 (quoting Albuquerque Broadcasting Company, 40 F.C.C. 1 (1946)).

257. See WALDMAN, *supra* note 80, at 280.

258. Codification of the Commission’s Political Programming Policies, 7 FCC Rcd. 1616, 1616 (1992).

259. Compare Announcement of Sponsored Programs, 9 Fed. Reg. 14,734 (Dec. 12, 1944), with 47 C.F.R. § 73.1212 (2010).

upon demand for public inspection at the studios or general offices of the originating station.”²⁶⁰

The extensive regulatory history during which the FCC expressed an unwavering commitment to a fully informed electorate suggests that the agency could justify implementing an enhanced sponsorship-identification requirement.²⁶¹ The argument for donor disclosure in political ads today is the same as the argument for commercial-advertising disclosure in the 1927 and

260. Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 150 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975).

261. See *supra* notes 239–63. Although the evidence is sparse, the FCC may have shifted toward a narrower approach to § 317 in the 1970s. For example, *VOTER*, an unpublished opinion issued by the FCC’s staff in 1979, stated that licensees could satisfy their obligations under the § 317 sponsorship-identification requirement so long as the sponsoring organization claimed that it had editorial control of the program, regardless of who paid for it. *VOTER*, 46 Rad. Reg. 2d (P & F) 350, 352 (1979); see also Paul Loveday, 87 F.C.C. 2d 492, 497 (1981) (reiterating *VOTER*’s focus on the identity of the person with editorial control).

In Loveday, the FCC considered whether broadcast stations should have identified the tobacco industry as sponsors of political advertisements attributed to “Californians Against Regulatory Excess” (CARE), which advertised against a state proposition to create smoking and non-smoking areas in indoor, public places. Paul Loveday, 87 F.C.C. 2d at 493. The FCC concluded that the stations did not violate the sponsorship provisions of the Communications Act or the rules and that they were not required to investigate more diligently Loveday’s claims that the tobacco industry was the true sponsor. *Id.* at 497 (“To hold otherwise would require this agency to investigate the nature of political committees organized to support or oppose an election matter (e.g., whether or not corporate formalities were adhered to), to second-guess broadcast station licensees’ judgments and to rule on the basis of hindsight, rather than reviewing licensees’ decisions to determine if they acted reasonably and in good faith.”). The D.C. Circuit, affirming the FCC’s decision, concluded that “the licensees were not required to inquire further into the actual sponsorship of the political advertisements. Indeed, we have substantial doubt that the Commission could require licensees to do more.” *Loveday v. FCC*, 707 F.2d 1443, 1445 (D.C. Cir. 1983).

This focus solely on editorial control, however, is not a fully considered FCC interpretation; rather, it is a thinly supported staff reading that does not adequately reflect the statutory focus on the payer’s identity. Neither the statute nor the agency’s regulations identify the sponsor as the person or entity exercising editorial control over the advertisement. The statute targets identification of who paid for “all matter broadcast . . . for which any money . . . is directly or indirectly paid.” 47 U.S.C. § 317(a)(1) (2006). Historically, the FCC’s interpretation also focused on identification of the payer. In 1958, for example, in discussing a particular station’s § 317 violation, the Commission characterized as “of particular significance . . . the requirement of accurate and complete identification of the person or group paying for or furnishing material in connection with a discussion of political matters.” Violation of Section 317 of the Communications Act, *KSTP, Inc.*, 40 F.C.C. 12, 14 (1958). Similarly, in a 1963 ruling, the commission described the sponsorship-identification provision as requiring that the broadcaster disclose “the true identity of the person or persons by whom or in whose behalf payment was made.” *Applicability of Sponsorship Identification Rules*, 40 F.C.C. 141, 150 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975). In addition to lacking either a statutory referent or FCC regulatory precedent, the focus on editorial control is far less objectively verifiable than identifying who paid for the ad. There is no reason for the FCC to continue relying on this misguided and apparently idiosyncratic interpretation.

1934 Acts—namely, a concern with deceiving the public.²⁶² Intentional concealment to achieve a particular result undermines the ideal of voting competence.²⁶³ The argument for donor disclosure is not based on a vague and general preference for transparency in electoral structures; rather, it is based on the goal of empowering voters to understand what might otherwise be affirmatively misleading.²⁶⁴

Nevertheless, opponents to broader disclosure might argue that the requirement to identify who paid for political advertising does not necessarily entail full transparency of the identities of all, or even the major, donors to independent organizations airing advocacy advertising.²⁶⁵ Such opponents of a broad interpretation of § 317 might claim that the only disclosure authorized by statute relates to the paying entity's name.²⁶⁶ On this view, the statutory sponsorship-identification obligation would be satisfied so long as the public is advised of the formal identity of a political ad's sponsor.²⁶⁷ If viewers seek to find out more about the sponsoring entity, they can do so directly.

However, this formal reading is unsatisfactory and not statutorily required. The statute does not define the word "paid."²⁶⁸ To the extent that the FCC's implementing regulations since the 1940s have required broadcasters to "fully and fairly disclose the true identity" of the sponsor, the agency has implicitly supported the view that the public deserves to know the identity of the *true* movers behind front organizations.²⁶⁹ One potential objection to this position is that disclosing the sponsor's true identity does not necessarily mean disclosing the identities of its financial funders and supporters.²⁷⁰ Although the FCC's regulations require stations' public files to contain a list of the sponsoring entity's leadership,²⁷¹ objectors might claim that the leadership group is not necessarily coextensive with the major funders of the nominal

262. Goodman, *supra* note 200, at 108 (discussing the problem of stealth marketing in creating deception).

263. See Kang, *supra* note 132, at 1155.

264. Goodman, *supra* note 200, at 111–12. In addition to averting deception, a mandatory requirement of donor disclosure under § 317 promotes the broader interest in public discourse. *Id.* at 112–30. Professor Goodman argues that the anti-deception interest has limits "in a media environment of pervasive skepticism" with "savvy" consumers whose skepticism limits their credulousness. *Id.* at 111–12.

265. Cf. MAP Petition, *supra* note 25, at 6 (discussing the argument that disclosure of the entity with editorial control over the ads is adequate).

266. *Id.* (emphasizing the statutory language requiring disclosure of the entity responsible for payment).

267. *Id.* at 7.

268. 47 U.S.C. § 317 (2006).

269. See 47 C.F.R. § 73.1212(e) (2010).

270. See, e.g., Barker & Wang, *supra* note 11 (explaining that super PACs may get the majority of their funding from "affiliated nonprofits that are not required to reveal their donors").

271. 47 C.F.R. § 73.1212(e); Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 150 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975).

sponsor.²⁷² On the other hand, it would be unreasonable to exclude major donors to third-party advocacy groups from being considered “true” sponsors.²⁷³ Even if they are not the only “true” sponsors, the fact that the organizations would not be able to air the sponsored material without their funding, suggests they should be included in the category. Because a donor to an organization may not necessarily support every statement made by that organization, it might be argued that a closer link should be demonstrated between the donor and the advertisement itself in order to characterize the donor as a *true* sponsor. However, such a limitation would eliminate the important voting cue that the donor supports an organization that, in turn, is responsible for the election ads at issue.

The interpretation suggested here is not precluded by any statutory impediments. The FCC might be influenced to adopt such a reading by the strong public consensus in support of donor disclosure.²⁷⁴ In any event, the availability of this option might influence the political atmosphere, regardless of what the FCC ultimately decides to do in response to MAP’s petition for rulemaking.

2. *Constitutionality and Desirability of Donor-Disclosure Requirements*

The desirability of recourse to FCC regulation should also be considered as a policy matter, and disclosure regimes like those advocated here should be evaluated to determine whether they are consistent with the First Amendment and likely to be workable and beneficial.

272. Cf. MAP Petition, *supra* note 25, at 7–8 (recommending enhanced disclosure rules requiring disclosure of major contributors in addition to sponsorship). MAP called on the FCC to revise its sponsorship-identification rules to require on-air disclosure of the “actual sponsor, i.e., the source of the funds for the commercials.” *Id.* With respect to “front groups” and institutional sponsors funded by several sources, MAP called for on-air identification of any donor providing at least twenty-five percent of the funding for television commercials and one-third of the funding for radio ads. *Id.* at 7 & n.11. The petition also called on the FCC to amend its rules “to require that stations keep on file, along with a listing of the nominal sponsor of a political ad and its leadership, all who contribute 10% or more to the funding of the nominal sponsor.” *Id.* at 8. The petition also requested the FCC to “strengthen section 73.1212(b)” because the current provision “lacks any tool to assess compliance with the duty.” *Id.* Such strengthening would “require broadcasters to obtain sworn statements from political advertisers [as] to their largest sources of funding and place them . . . in the station’s public file.” *Id.* It is beyond the scope of this Article to comment on the specific numerical requirements suggested by MAP, although the twenty-five-percent figure does not appear unreasonable. Certainly, if the FCC agrees to undertake this petition for rulemaking, many comments will be received with regard to the specific provisions.

273. See Barker & Wang, *supra* note 11.

274. John Eggerton, *Survey Says: Put Contributors On Air*, BROADCASTING & CABLE (Sept. 16, 2010, 4:08 PM), http://www.broadcastingcable.com/article/457220-Survey_Says_Put_Contributors_On_Air.php (reporting that sixty-eight percent of respondents to a poll by the Center for Competitive Politics responded that “they favored making the heads and largest donors appear in campaign ads to take responsibility for them”).

a. Constitutionality

An FCC sponsorship-identification rule requiring entities sponsoring election-related advertising to disclose direct and indirect sponsors would likely pass constitutional muster. In the electoral context, the Supreme Court, has consistently recognized voter-informational and corruption-deterrence interests since the iconic *Buckley v. Valeo*.²⁷⁵ Indeed, as previously noted, *Citizens United* itself strongly endorses disclosure as the flip side of unfettered corporate electoral speech.²⁷⁶ In *Citizens United*, eight members of the Court agreed that “disclosure permits citizens . . . to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁷⁷ According to all but Justice Clarence Thomas, transparency concerning donors “help[s] citizens make informed choices in the political marketplace.”²⁷⁸ Revealing political affiliations also allows voters to determine whether elected officials are “‘in the pocket’ of so-called moneyed interests.”²⁷⁹

Election-law scholars as well have consistently argued in favor of expanded disclosure because publicity may reduce corruption and enhance accountability.²⁸⁰ Donor disclosure is also likely to help increase voter competence by serving as a useful cue to voters who would not otherwise conduct additional research before voting.²⁸¹ Disclosure can give voters useful

275. *Citizens United v. FEC*, 130 S. Ct. 876, 909 (2010); *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam).

276. *See supra* Part I.A.

277. *Citizens United*, 130 S. Ct. at 916; *see supra* note 59 and accompanying text.

278. *Citizens United*, 130 S. Ct. at 914 (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003), *overruled in part by Citizens United*, 130 S. Ct. at 913). In *McConnell*, the Court emphasized the informational value of source disclosure:

BCRA’s disclosure provision requires . . . organizations to reveal their identities so that the public is able to identify the source of the funding behind broadcast advertisements influencing certain elections. . . . Curiously, Plaintiffs want to preserve the ability to run these advertisements while hiding behind dubious and misleading names like: “The Coalition-Americans Working for Real Change” (funded by business organizations opposed to organized labor), “Citizens for Better Medicare” (funded by the pharmaceutical industry), “Republicans for Clean Air” (funded by brothers Charles and Sam Wily).

McConnell, 540 U.S. at 196–97.

279. *Citizens United*, 130 S. Ct. at 916 (quoting *McConnell*, 540 U.S. at 259 (Scalia, J., dissenting)).

280. *See Johnson, Regan & Wayland, supra* note 182, at 965–67.

281. *See Garrett, supra* note 173, at 1012–13 (arguing in favor of election-related disclosure requirements because they increase voter competence); *see also Sheff, supra* note 123, at 159 (discussing the incidence of low-information voters); *supra* notes 129–36.

shortcuts by allowing them to rely on information identifying candidate support groups and revealing the groups' intensity of support.²⁸²

Nevertheless, although *McConnell* upheld the BCRA's disclosure and disclaimer provisions,²⁸³ the Court in *Citizens United* recognized that a group could bring as-applied challenges upon a showing of a "reasonable probability" that disclosure of its contributors' names would "subject them to threats, harassment, or reprisals from either Government officials or private parties."²⁸⁴ Given that the Court did not find threats, harassment, or reprisal despite worrisome examples cited by amici in *Citizens United*,²⁸⁵ the Court may require a high reasonable-probability threshold.²⁸⁶ Nevertheless, this still leaves a viable avenue for litigation by groups resisting disclosure.

Additionally, because effective corporate disclosure rules are likely to entail "detailed requirements,"²⁸⁷ they might clash with the Court's expressed constitutional concerns in *Citizens United* about the complexity of campaign-finance law.²⁸⁸ Thus, despite the Court's affirmation of the value of disclosure, "*Citizens United* may make it possible for opponents of disclosure simply to rely on the administrative burden of keeping records, filing reports, and abiding by certain organizational requirements."²⁸⁹ To the extent that

282. See Garrett, *supra* note 173, at 1026–27. To be sure, compelled disclosure has been subject to heightened scrutiny, particularly in the context of political expression. In *McIntyre v. Ohio Elections Commission*, the Supreme Court, applying strict scrutiny, held that in the context of anonymous pamphleteering, the First Amendment protects anonymous speech. 514 U.S. 334, 357 (1995) (striking down a state statute prohibiting distribution of anonymous campaign literature on First Amendment grounds). Nevertheless, disclosure in the donor context has received less stringent constitutional scrutiny than disclosure of speaker identity in the pamphleteering context. See E. Rebecca Gantt, Note, *Toward Recognition of a Monetary Threshold in Campaign Finance Disclosure Law*, 97 VA. L. REV. 385, 399–400 (2011) (discussing levels of scrutiny and describing other scholars' attempts to distinguish *McIntyre* from disclosure cases). Notably, the Court in *McConnell* and *Citizens United* upheld BCRA disclosure requirements without reference to *McIntyre*. See William McGeeveran, *Mrs. McIntyre's Persona: Bringing Privacy Theory to Election Law*, 19 WM. & MARY BILL RTS. J. 859, 861–62 (2011). In any event, the Court in *McIntyre* found important that a private individual, whose signature would not have added much information to the content of the communication, wrote the anonymous handbill at issue. *McIntyre*, 514 U.S. at 348–49. The Court also recognized that anonymity itself is an important cue, which can perhaps lead the recipient of an anonymous communications to be skeptical. See *id.* at 348 n.11. In the context of electioneering communications by benignly named interest groups, voters would not have the informational cue triggering skepticism that anonymity would itself provide.

283. *McConnell*, 540 U.S. at 196.

284. *Citizens United*, 130 S. Ct. at 914 (quoting *McConnell*, 540 U.S. at 198).

285. *Id.* at 916.

286. See Torres-Spelliscy, *supra* note 66, at 1099; see also *Doe v. Reed*, 130 S. Ct. 2811 *passim* (2010); Gantt, *supra* note 282, at 412–13 (explaining that the evidentiary standard for showing the prospect of reprisals "is so high that it essentially requires a showing of a pattern of retaliation and harassment that has already occurred").

287. Briffault, *supra* note 5, at 669.

288. *Id.* at 663.

289. *Id.* at 669–70.

disclosure regulations are burdensome and subject to court's searching scrutiny, *Citizens United* ironically could become the basis for "constitutional challenges to the administrative requirements entailed in disclosure."²⁹⁰

b. Policy

Doctrinal issues aside, fundamental policy questions arise regarding the application of § 317 and the *Zapple* doctrine to mitigate *Citizens United*.²⁹¹ The fundamental policy question addresses the underlying value of disclosure itself: is disclosure an effective mechanism? If not, additional disclosure requirements might be an undesirable compromise of significant First Amendment values in support of illusory regulatory goals.

As critics have reminded, disclosure is not an unmitigated good²⁹²—too much can overwhelm and distract the hearer.²⁹³ According to skeptics, donor disclosure fails to improve voter competence in many contexts²⁹⁴ and could cause cascades of undesirable information cascades.²⁹⁵ Critics might question the bona fides of disclosure proponents and suggest that calls for mandatory

290. *Id.* at 670; see also Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 268 (2000) ("Disclosure laws have the best chance of passing constitutional muster if they contain clear standards for disclosure that are not overly burdensome.").

291. For a discussion of § 317 and the *Zapple* doctrine, see *supra* Part II.

292. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011) (critiquing mandated disclosure in the commercial context).

293. See Garrett, *supra* note 173, at 1025 ("Not only is it not the case, given voters' capabilities, that more information is always a good thing, but too much information can overwhelm the ability of average Americans to process and understand information and may result in their tuning out data that could provide helpful cues."); see also Ben-Shahar & Schneider, *supra* note 292, at 686–87 (discussing the "overload" effect of overly complex disclosures and the "accumulation" problem of too many disclosures); Richard Briffault, *Campaign Finance Disclosure 2.0*, 9 ELECTION L.J. 273, 299–301 (2010) ("[M]assive disclosure . . . threatens to inundate us in a sea of useless data, while potentially distracting attention from the big donors whose funds play a more meaningful role in understanding a candidate . . ."). See generally Lloyd Hitoshi Mayer, *Disclosures About Disclosure*, 44 IND. L. REV. 255 (2010) (reviewing some of the negative aspects of disclosure).

294. Arguably, even if disclosure is focused more on providing heuristic shortcuts, rather than enabling voters to engage in well-researched analyses, there may be extensive variation in the effectiveness of the cues provided, as well as limits to the enhancement of low-information voters' political knowledge through heuristic cues. See Sheff, *supra* note 123, at 152 ("The growing consensus is that, although heuristic cues can assist low-information voters in bringing their political decisionmaking closer to that of fully informed voters, persistent deviations remain."). A critic of full disclosure might assert that we should only expect voters to receive effective cueing effects from donors with clearly branded messages and politically active celebrities, which allows voters to discover their association with a candidate or an issue. See David Lourie, Note, *Rethinking Donor Disclosure After the Proposition 8 Campaign*, 83 S. CAL. L. REV. 133, 155–56 (2009).

295. See Garrett, *supra* note 173, at 1046 (discussing this possibility but concluding that "disclosure of group support for candidates seems unlikely to significantly increase the number of undesirable cascades and may actually forestall some from occurring").

donor disclosure are little but attempts to suppress political speech and association.²⁹⁶ They might also posit that such disclosure would have the unintended consequence of corrupting candidates.²⁹⁷ More broadly, it is unclear whether effective disclosure rules would suffice to resolve the much deeper problems associated with our excessively complex campaign-finance system.²⁹⁸ Some could fear that even good donor-disclosure rules would merely provide an illusion of improvement while hiding increasing electoral inequality.²⁹⁹

Despite these questions, this Article concludes that, on balance, mandatory disclosure of donor information for political advertising through FCC rules is desirable. Despite the risk of too much information leading to voter disengagement, the news media, parties, and advocacy groups can serve as intermediaries to collect, cull, and explain information for voters.³⁰⁰ Certainly some information cascades can be avoided by the increased availability of further credible information.³⁰¹ In any event, donor-identification information is easily processed, especially if it associates the message with an identifiable political, ideological, or economic brand.³⁰² Although heuristic cues cannot

296. See Alexandre Couture Gagnon & Filip Palda, *The Price of Transparency: Do Campaign Finance Disclosure Laws Discourage Political Participation by Citizens' Groups?*, 146 PUB. CHOICE 353, 353–74 (2011). Critics might suspect that mandatory disclosure rules could lead to extensive silencing, even if they would not engender the degree of harassment that would trigger the standard articulated in *Citizens United*. Indeed, some critics have already characterized calls for enhanced donor disclosure as strategic Democratic attempts to deter conservative speech. See, e.g., Yoo & Marston, *supra* note 25, at 5; see also James Bopp, Jr. & Jared Haynie, *Citizens Divided on Citizens United: Campaign Finance Reform and the First Amendment: The Tyranny of "Reform and Transparency": A Plea to the Supreme Court to Revisit and Overturn Citizens United's "Disclaimer and Disclosure" Holding*, 16 NEXUS 3, 19 (2010) (making a parallel between disclosure requirements for election advertising and Nazi laws requiring Jews to wear identifying armbands).

297. See Scott M. Noveck, *Campaign Finance Disclosure and the Legislative Process*, 47 HARV. J. ON LEGIS. 75, 75 (2010) (discussing the "unintended effect" of enabling political candidates to trace the origin of their financial support).

298. See Note, *Restoring Electoral Equilibrium in the Wake of Constitutionalized Campaign Finance*, 124 HARV. L. REV. 1528, 1128–31 (2011).

299. See *id.* at 1545–47.

300. See Garrett, *supra* note 173, at 1025–26 ("[I]nformation is usually filtered through intermediaries like the press before it reaches average citizens, so worries about overload can be overstated."); Briffault, *supra* note 293, at 299–300.

301. See Garrett, *supra* note 173, at 1026 (arguing that "targeting disclosure requirements to the information most likely to improve voter competence is sensible").

302. See *id.* at 1026–27 ("For group support to serve as a heuristic, at least three conditions must be met. First, voters must correctly associate the group with a particular ideology or policy position that allows them to draw inferences about the candidate's ideology and likely behavior in office. Second, the information conveyed by the group's support must be credible. In other words, the voters must be able to trust that the group really does support the candidate and is not acting strategically to send a false signal. Third, voters must be able to learn of the group's support; it must be publicized, preferably at a time when it will affect voters' decisions.").

completely substitute for extensive political knowledge and full information, they are “a pragmatic shortcut that both improves voter competence and preserves voters’ evaluative autonomy.”³⁰³ Even if all donors do not necessarily support each of the organization’s statements, disclosure of their support conveys information about both the donor’s and the group’s general ideological commitments,³⁰⁴ this is particularly true when the donor provides significant financial support. The extent of giving can serve as a common-sense measure of the donor’s commitment to the group.³⁰⁵ Given that some donors will be identified through voluntary or media disclosure, mandatory disclosure requirements would even the playing field for voters so that the availability of relevant information would not depend “on the vagaries of political competition for disclosure.”³⁰⁶ Despite some social scientists’ suggestions that disclosure requirements inhibit groups’ political involvement for fear of prosecution for alleged violations of reporting requirements,³⁰⁷ the number of political groups seems to be increasing.³⁰⁸

Finally, disclosure, which contextualizes the heuristic cues that low-information voters may glean from political advertising, surely serves the goal of reducing the gaps between uninformed voters and fully informed voters.³⁰⁹ In today’s political climate, donor-disclosure rules are defensive, rather than offensive, requirements aimed at preventing organizations that endorse or criticize candidates from hiding their ideological commitments in order to give a neutral or benign impression.³¹⁰ These “notorious” groups “strongly resist publicity . . . [and] work diligently to hide their campaign spending from disclosure.”³¹¹ Groups use “stealth PACs” and “veiled political actors” to evade FEC disclosure requirements.³¹² Examples of attempts to send voter “mis-cues” abound in connection with both initiatives and candidate

As for the claim that donor disclosure can reveal the identities of major donors to candidates and thereby increase the possibility of quid pro quo corruption, today’s practices of partial disclosure are arguably more likely to lead to corruption than a general disclosure mandate.

303. Kang, *supra* note 132, at 1160.

304. See Garrett, *supra* note 173, at 1026–29.

305. *Id.* at 1037; see Kang, *supra* note 132, at 1181.

306. Garrett, *supra* note 173, at 1031–32.

307. See, e.g., Gagnon & Palda, *supra* note 296, at 369, 373.

308. See Brookes, *supra* note 89 (discussing the increase in new entities and comparing the current trend to the midterm elections); *supra* note 85 and accompanying text.

309. See Kang, *supra* note 132, at 1164–65.

310. Garrett, *supra* note 173, at 1033–35.

311. *Id.* at 1035; cf. Jonathan C. Zellner, Note, *Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures*, 43 CONN. L. REV. 357, 361 (2010) (discussing “Astroturf” lobbying, which constitutes lobbying campaigns pretending to result from grass-roots activity despite actually being strategic enterprises sponsored by special-interest groups).

312. Garrett, *supra* note 173, at 1035.

elections.³¹³ A neutral or benign-sounding sponsor name lulls the voter into suspending her skepticism and believing the advertised claims.³¹⁴ In these circumstances, mandated donor disclosure does nothing more than set the record straight and provide an accurate way for voters to assess the credibility of what the aired advertisements tell them.³¹⁵ In effect, such requirements function to make voter cues as accurate and credible as possible.³¹⁶ Viewed in this light, an FCC requirement that political advertisers disclose their major sponsors is little more than a call to correct misleading cues in many election contests.³¹⁷

3. *What Should the FCC's Disclosure Regulations Look Like?*

As Professor Richard Briffault noted in the more general context of campaign-finance disclosure rules, “effective disclosure of corporate campaign spending is likely to require complex and detailed rules.”³¹⁸ Yet, to avoid constitutional problems, the rules must be constructed in a manner that avoids vagueness and overbreadth.³¹⁹ This Article does not propose to draft such rules. Ideally, in doing so, the FCC should engage in a full-fledged rulemaking proceeding during which it would solicit the full range of opinions.³²⁰ Yet, with the 2012 election looming, a more expedited process might be prudent.³²¹ In exercising its discretion, some guideposts are available to the FCC. The agency should keep in mind both what donor disclosure is designed to achieve, and the well-documented history of gaming and circumvention associated with existing campaign-finance disclosure requirements.³²²

313. *Id.* at 1035–36 (providing the example of advertisements sponsored by the pharmaceutical industry under the guise of “a conduit organization with a name that sounded as though it was an organization of senior citizens”).

314. *See id.* at 1053–37.

315. *See id.* at 1037 (discussing the important effects of mandatory disclosure).

316. *Id.*

317. *Cf.* *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (“The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.”); *see also* Garrett, *supra* note 173, at 1037 (explaining that mandatory disclosure provides a “vital voting cue”).

318. Briffault, *supra* note 5, at 645 (“With many business corporations likely to channel their funds through other organizations, disclosure will have to address not merely the spender of record, but the corporations and other donors contributing to those organizations.”); *accord* Richard Briffault, *Two Challenges for Campaign Finance Disclosure After Citizens United and Doe v. Reed*, 19 WM. & MARY BILL RTS. J. 983, 987 (2011).

319. *See* Hasen, *supra* note 290, at 268–69.

320. *See* PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV., RL 32589, THE FEDERAL COMMUNICATIONS COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 3 n.4 (2011) (describing the FCC’s rulemaking process).

321. *See id.* at 9 (recommending strict time limits on FCC processes, including rulemaking).

322. *See* Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and Congress*, 27 OKLA. CITY U. L.

Professor Elizabeth Garrett suggests that mandatory disclosure rules should be designed to provide information “in a way that increases the chances that [voters] will encounter it during the course of their everyday activities . . . [and] should be tailored to provide only the information most necessary for voter competence.”³²³ Although voter access to such information is important, it is only one part of the equation. As a practical matter, it is equally, if not more, important to ensure the ready availability of information for politically interested expert groups and organizations, which may serve as informational intermediaries for the voting public.³²⁴ For example, even if citizens do not have all of the detailed information about who is behind a group like Citizens United, making that information available to the media, non-partisan election-watching entities and even political opponents in an easily usable form would help such groups further inform the public by revealing the political views behind the group’s ads.³²⁵ Thus, as the first imperative for a disclosure rule, the FCC should make the information available electronically.³²⁶ Lengthy disclosures embedded in short radio and television spots can confuse prospective voters with too much indigestible information.³²⁷ Instead, the FCC should consider references and links to outside websites during § 317 announcements.³²⁸

In addition, an FCC attempt to draft rules to achieve the *Citizen United* goal of an informed voting public must address at least three challenges.³²⁹ First, critics could respond that even if the FCC adopted a rule requiring disclosure of donors to non-candidate organizations buying airtime, donors could easily seek to circumvent disclosure by incorporating and hiding behind the corporate shield.³³⁰ If donors could simply circumvent the § 317 requirement by structuring the ad-purchasing groups and their donors as matryoshka

REV. 665, 687–88 (2002) (describing ways organizations have circumvented various disclosure rules).

323. Garrett, *supra* note 173, at 1042; *see also* Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 295 (2005) (“Voters have limited time and attention, so they should be provided with information most crucial to improving their ability to vote consistently with their preferences.”). *See generally* Noveck, *supra* note 297 (discussing the range of possible disclosure regimes focused on achieving anti-corruption effects).

324. *See* Garrett & Smith, *supra* note 323, at 298.

325. *See id.* at 298–99 (discussing the effect intermediary groups could have if provided with donor disclosures).

326. *Cf.* *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010) (suggesting that the Internet will play an important role in providing prompt disclosure, which would be readily accessible for the public); Bingham, *supra* note 174, at 1061–62 (explaining a proposed FEC rule requiring the availability of funding information on online databases).

327. *See* Garrett, *supra* note 173, at 1065 (noting that too much information can inhibit a viewer’s ability to comprehend the information).

328. *See* Bingham, *supra* note 174, at 1061–62.

329. *See Citizens United*, 130 S. Ct. at 916.

330. *See supra* note 70 and accompanying text.

corporations or dissolving them shortly after running ads,³³¹ structural flexibility permitted under non-FCC law could arguably hamper, if not negate, any FCC disclosure regime.

Second, skeptics could argue that although a rule requiring disclosure of *all* donors would be unworkable and undesirable, a rule limiting disclosure to just *some* donors is necessarily arbitrary.³³² On what basis is the FCC to set the donor disclosure level? Identities of small donors are unlikely to function as relevant cues or increase voter competence because such insubstantial amounts are not generally informative, but excluding this category does not provide much of a limit.³³³ MAP's rulemaking petition asks the FCC to amend its rules to require on-air disclosure in television ads of those donors giving twenty-five percent, for a maximum of four listed sponsors.³³⁴ In addition, MAP also proposes that the FCC require stations to keep in their public files a list identifying contributors of ten percent or more to the ad's nominal sponsor.³³⁵

331. See Garrett & Smith, *supra* note 323, at 296; Torres-Spelliscy, *supra* note 138, at 87–89; see also Michael Isikoff, *Firm Gives \$ 1 Million to Pro-Romney group, Then Dissolves, Records Offer No Clues Who Was Behind Mystery Company that Donated to 'Super PAC'*, MSNBC.COM (Aug. 4, 2011, 6:01 AM), http://www.msnbc.msn.com/id/44011308/ns/politics-decision_2012/t/firm-gives-million-pro-romney-group-then-dissolves/#.Tj2YTGH5NrY (describing one firm, W Spann LLC, that disappeared shortly after contributing \$1 million to the Romney 2012 presidential campaign, which left little evidence of donor information). Subsequently, the donor behind the corporation's contribution, a former partner of Romney's in a private equity firm, came forward to identify himself. See Dan Eggen, *Mystery Pro-Romney Donor Revealed as Former Executive at Private Equity Firm*, WASH. POST, Aug. 6, 2011, at A2. The donor, Edward Conard, had been a former partner of Mitt Romney's in Bain Capital. See Brad Hooker, *Men Linked to Corporate Donations to Pro-Romney Super PAC Have Long History of Donating to Romney*, OPENSECRETS.ORG (Sept. 13, 2011, 4:50 PM), <http://www.opensecrets.org/news/2011/09/money-men-pro-romney-super-pac.html>; see also Ronald Campbell, *SuperPACs May Leave Official Campaigns in Dust*, OC REGISTER.COM (Sept. 19, 2011, 5:02 AM), http://articles.ocregister.com/2011-09-19/news/30177265_1_romney-super-pac-priorities-usa-action-romney-campaign (discussing the affiliations of some super PACs with high-profile candidates).

332. See *infra* notes 342–47 and accompanying text.

333. See Garrett, *supra* note 173, at 1042 (“The source and amount of small contributions and expenditures are not generally informative to voters, so a disclosure statute should exempt individuals and groups that spend insubstantial amounts in this arena. This exception may be required for the law to pass certain constitutional tests, and it also enhances the effectiveness of the statute.” (footnote omitted)); see also Briffault, *supra* note 318, at 1004 (noting that U.S. “disclosure thresholds are . . . low by world standards” and that “[r]aising the disclosure threshold would protect the privacy of the most vulnerable political actors—small donors—with little or no harm to the public education function of disclosure”).

334. MAP Petition, *supra* note 25, at 7. The MAP petition suggested slightly different treatment of multiple sponsorships on radio broadcasts. *Id.* at 7 n.11 (“MAP proposes that [the Commission] limit on-air disclosure to persons or entities providing one-third or more of the funding of a commercial message. Where 10% or more of a commercial's funding comes from one source, radio political ads could include a mandatory statement during the ad that ‘a list of sponsors is available in this station's public file.’”).

335. *Id.* at 8. The current rules require stations to maintain a publically available file listing of “the chief executive officers or members of the executive committee or of the board of directors” of each entity paying for or furnishing political programming. 47 C.F.R. § 73.1212(e)

These proposals attempt to balance three types of interests: interests in privacy, practicability, and promotion of accurate voter cues.³³⁶ Of course, although these proposals appear reasonable, they beg the question of why these particular limits, rather than other plausible options. Any FCC rule must directly address this point.

Third, donor disclosure might not exhaust the information necessary for voting in an informed manner. Although it is often useful to identify financial support, there are many circumstances in which voters would benefit more from knowing the masterminds who operate advocacy organizations than from knowing their financial backers alone.³³⁷ The two categories are neither necessarily distinct nor necessarily coextensive. For example, Republican strategist Karl Rove's direction of Crossroads GPS and American Crossroads may be as important a voting cue as the identity of the groups' major donors.³³⁸

Responding to these challenges in reverse order, this Article proposes first that the FCC adopt rules requiring the disclosure of both direct and indirect major funders, as well as directors and principal officers of the nominal sponsor purchasing the air time. This rule will enable voters to take appropriate cues from the source of funds as well as the advocacy group.³³⁹ The FCC should require disclosure to prevent donors from hiding behind 501(c) groups that do not have to disclose their donors.³⁴⁰ Further, the identities of those directing the operations of the nominal sponsor should be disclosed because their background and political connection could influence a voter's interpretation of the ad.³⁴¹ If the sponsor is not a corporation, then the agency should require disclosure of the principal decision-making individuals associated with the entity.³⁴²

Second, the percentage chosen in the MAP petition as a threshold for donor disclosure is no more arbitrary than any other percentage that would lead to a

(2010); *see also id.* § 73.3526(b)(2) (requiring stations that have a website to make their files available online).

336. *See* Press Release, Media Access Project, Media Access Project to FCC: Mandate Disclosure of Political Broadcast Sponsors (Mar. 22, 2011), *available at* <http://www.mediaaccess.org/2011/03/media-access-project-to-fcc-mandate-disclosure-of-political-broadcast-sponsors/>.

337. *See, e.g.,* Kenneth P. Vogel, *Rove the Bogeyman Is Back*, POLITICO (Sept. 30, 2010, 4:32 AM), <http://dyn.politico.com/members/forums/thread.cfm?catid=1&subcatid=2&threadid=4572980&adv=1> (discussing the effect on the public and political opponents caused by identifying Karl Rove as the backer of independent groups supporting Republican candidates); *see also* Garrett, *supra* note 173, at 1043 (“In most cases . . . support by individuals is not an effective heuristic because most well-known people do not have clear reputations for policy positions.”).

338. *See* Vogel, *supra* note 337.

339. *See supra* notes 336–38.

340. *See* Barker & Wang, *supra* note 11 (explaining how some groups currently can organize to prevent disclosure).

341. *See supra* notes 336–38.

342. *See supra* notes 336–38 and accompanying text.

consensus that such an amount is significant enough qualify a donor as a “major funder.”³⁴³ The FCC can make a reasonable choice of threshold percentage based on a balance of the relevant parties’ interests.³⁴⁴ The most pressing need for voters is effective disclosure, due to the constraints of limited time and attention.³⁴⁵ Broadcasters’ principal concerns are cost, ease of administration, and the desire to increase political advertising.³⁴⁶ The interests of donors include privacy and the desire to avoid harassment.³⁴⁷ Independent groups are likely concerned with maintaining their reputations so as to garner supporters and influence policymakers.³⁴⁸

Finally, the claim that the proposed disclosure rules invite circumvention is no stronger in the FCC context than in any other disclosure-based reform.³⁴⁹ Although the opportunities for circumvention may exist, there are also costs associated with circumventing such rules and hiding information.³⁵⁰ Failure to disclose may also raise credibility concerns because viewers will wonder what the group is hiding.³⁵¹ Additionally, ideological organizations and their participants often face the conflicting desires of hiding their memberships from those who would disagree, while simultaneously publicizing their activities and donors to those in their ideological camp.³⁵² Satisfying both goals becomes increasingly difficult, as organizational structures tilt toward secrecy. At the same time, organizations trying to increase their political profiles might feel that more transparency could strengthen influence.³⁵³ Furthermore,

343. Cf. Editorial, *The FCC Muzzle*, WALL ST. J., Mar. 31, 2011, at A16 (“The petition also seems to have pulled the 25% and 10% disclosure thresholds out of the air, because it makes no attempt to justify them.”).

344. See *supra* note 336 and accompanying text.

345. See Garrett, *supra* note 173, at 1012–13 (discussing the importance of making information that is necessary for decision making easily available to voters who are too busy to spend extended time learning about candidates).

346. See, e.g., Michael Corcoran & Stephen Maher, *Media Don't Bite the Ruling that Feeds Them*, FAIR (Jan. 2011), <http://www.fair.org/index.php?page=4223>.

347. See Garrett, *supra* note 173, at 1043.

348. See *id.* at 1027–28 (discussing the desire of independent groups to have the public know who they support in order to encourage public supporters to become “due-paying members” and to use their reputations to influence policymakers).

349. See Garrett, *supra* note 322, at 686–88 (describing ways in which organizations circumvent various FCC and BCRA disclosure rules).

350. See, e.g., *id.* at 690 (“A candidate who discloses nothing does send an interesting signal about her credibility.”); Garrett, *supra* note 173, at 1027 (explaining advocacy groups’ incentive to publicize their views to attract supporters).

351. See Garrett, *supra* note 322, at 690.

352. See Garrett & Smith, *supra* note 323, at 297–99 (describing which organizations want to publish their membership and when they might work to hide their membership); see also Garrett, *supra* note 173, at 1027.

353. Admittedly, donors could choose to tell a partisan leadership group of their involvement while still remaining undisclosed to the public. See, e.g., Barker & Wang, *supra* note 11 (“Say I gave a million dollars to Crossroads GPS,” said [Professor] Rick Hasen . . . ‘You can tell the whole Republican leadership that. ProPublica can’t find it, but the people you are trying to

independent ideological groups that seek to engage in political advertising vary in their available resources and capacities.³⁵⁴ Strategies to evade disclosure that might be financially and otherwise viable for large, sophisticated groups might not be equally available to more modest organizations.³⁵⁵ Moreover, FCC sponsorship-identification rules configured to require corporate donors to reveal their directors, principal officers, and perhaps even major shareholders would likely reveal the organization's principal movers.³⁵⁶

4. *Voluntarily Adopted Disclosure Guidelines*

Nothing in the Communications Act or the FCC's rules prohibits broadcast stations and cable operators themselves from implementing their own private rules requiring more explicit disclosure about the people and entities funding and operating independent, third-party organizations.³⁵⁷

The main obstacle to stations voluntarily implementing their own disclosure rules is the concern that independent political-support groups might shun those stations requiring disclosure in favor of their less punctilious competitors. Fear of competitive disadvantage and the loss of political-advertising revenue might cause stations to be less willing to adopt contractual requirements voluntarily.³⁵⁸ If, however, loss of competitive advantage is the only obstacle impeding voluntary disclosure rules, corporations might be induced to adopt them in exchange for rewards or benefits. For example, the FCC and other organizations could give stations that have adopted voluntary disclosure rules an approval rating similar to a Good Housekeeping seal of approval, which could have positive reputational and economic value to the station and enhance the station's or network's brand.³⁵⁹ In light of the public's expressed distaste

influence can find it.”). Nevertheless, people know that as soon as information is revealed to one party, it will quickly spread to others.

354. See, e.g., Luo & Palmer, *supra* note 101 (describing considerable differences in spending among various independent groups).

355. See Barker & Wang, *supra* note 11 (describing the levels of organization necessary to evade disclosure); see also Garrett & Smith, *supra* note 323, at 296 (describing the complexity required to obscure the other source of funding).

356. Sponsorship-identification rules grant broad authority to the FCC. See Sponsorship Identification Rules, 34 F.C.C. 829, 849 (1963); Applicability of Sponsorship Identification Rules, 40 F.C.C. 141, 141 (1963), *modified*, 40 Fed. Reg. 41,936 (Sept. 9, 1975). As a practical matter, and to the extent that control follows investment, identification of the major actors in the corporation would probably reveal important donors even if shareholder disclosure was not directly required. Often, there will be an overlap between the directors and principal officers and the shareholders of these companies.

357. See 47 U.S.C. § 317 (2006); see also *supra* Part II.A.1.

358. In fact, stations heavily rely on political advertisements for their revenue. See, e.g., Corcoran & Maher, *supra* note 346 (“Political ads are expected to account for 11 percent of the total revenue for local broadcasters this year . . .”); Malone, *supra* note 82.

359. See *The History of the Good Housekeeping Seal*, GOODHOUSEKEEPER, <http://www>.

for negative advertising,³⁶⁰ some stations might opt for voluntary disclosure policies particularly if they were not alone in doing so.

C. Revival of a Zapple-Type Antidiscrimination Doctrine for Independent Ads

In addition to forcing third-party disclosures, the FCC could apply a rule based on its dormant *Zapple* doctrine to post-*Citizens United* advertising expenditures.³⁶¹ The FCC has the authority to adopt this quasi-equal opportunities rule, which could have a beneficial impact on disclosure, at least on the margins.³⁶²

Because the FCC never repudiated the *Zapple* doctrine, it still exists unofficially, although it has rarely been asserted with success.³⁶³ Critics would argue that the possibility of an equal opportunities requirement for independent-group ads is doomed because the *Zapple* doctrine has its roots in the now-abandoned fairness doctrine.³⁶⁴ However, a revival of the fairness

goodhousekeeping.com/product-reviews/history/ (last visited Oct. 24, 2011). The possibility that advertisers could move their business to other types of media does not necessarily mean that this kind of voluntary, industry-based “branding” approach would fail.

360. See Tom Denari, *Why Attack Ads and Disney Movies Are So Darned Effective*, ADAGE (Oct. 19, 2010), <http://adage.com/article/small-agency-diary/attack-ads-disney-movies-darned-effective/146579/>; *Do Negative Campaign Ads Work?*, THISNATION.COM (Oct. 25, 2011), <http://thisnation.com/question/031.html> (“[V]oters overwhelmingly dislike negative advertising and are troubled by its widespread use.”); Jeffrey M. Jones, *Americans Skeptical About What They See in Political Ads*, GALLUP (Oct. 20, 2006), <http://www.gallup.com/poll/25093/americans-skeptical-about-what-they-see-political-ads.aspx> (discussing the public’s distaste for negative advertising in political campaigns).

361. See *supra* Part II.A.2 (discussing the *Zapple* doctrine).

362. See 47 U.S.C. § 315(a) (2006) (granting the FCC the authority to require broadcasters to provide equal opportunity to opposing candidates).

363. See Vandell, *supra* note 208, at 455–56 (“The *Zapple* doctrine has survived, though successful complainants are rarely brought against networks for following it.”).

364. See *id.* at 456 (“Congress has never codified the *Zapple* rule, and so its future is in a much more precarious position after the fairness doctrine’s repeal . . .”). After much critique, the FCC abandoned the fairness doctrine in 1987. Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987) (memorandum opinion and order), *aff’d sub nom.* Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989). In August 2011, the FCC officially removed the fairness doctrine from its books. John Eggerton, *FCC Strikes Fairness Doctrine from Fed Rulebook*, BROADCASTING & CABLE (Aug. 22, 2011, 2:00 PM), http://www.broadcastingcable.com/article/472722-FCC_Strikes_Fairness_Doctrine_From_Fed_Rulebook.php.

Many years after the FCC abandoned the general fairness doctrine, the U.S. Court of Appeals for the D.C. Circuit ordered the FCC to repeal the personal-attack and political-editorializing rules, which were particular applications of the fairness doctrine. See *Radio-Television News Dirs. Ass’n v. FCC*, 229 F.3d 269, 272 (D.C. Cir. 2000); *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 65 Fed. Reg. 66,643, 66,644 (Nov. 7, 2000) (revising sections 73 and 76 of Title 47 of the *Code of Federal Regulations*).

Calling for the revival of a regulatory doctrine associated with the fairness doctrine may be particularly dangerous as a political matter. Perhaps because of the view that right-wing talk radio was able to develop only because of the demise of the fairness doctrine, conservatives are strongly opposed to a return of the doctrine. See Stephen Clark, *FCC Agrees to Take ‘Fairness*

doctrine is not a necessary prerequisite for the application of the *Zapple*-type antidiscrimination doctrine to independent expenditures.³⁶⁵ Commissioner Nicholas Johnson, in his concurring opinion in *Zapple*, chided the FCC's decision as effectively "bring[ing] in 'supporters' of or 'spokesmen' for candidates through the back door of the fairness doctrine."³⁶⁶ He saw "no legal reason why the Commission could not rule that sec. 315 (a) encompasses spokesmen for or supporters of political candidates as a logical extension of congressional intent."³⁶⁷ This Article does not contend that § 315, in an expanded reading, should cover airtime purchases by independent groups; rather, it proposes that the FCC can and should apply antidiscrimination principles to airtime sales for non-candidate electoral speech under the ancillary authority granted to the FCC to effectuate the goals of § 315.

Doctrine' Off the Books, FOXNEWS.COM (June 8, 2011), <http://www.foxnews.com/politics/2011/06/08/fcc-agrees-to-take-fairness-doctrine-off-books/>.

365. The *Zapple* doctrine was associated with the now-defunct fairness doctrine only because the request for an interpretive ruling from which the *Zapple* doctrine was derived was specifically couched in terms of the fairness doctrine. See Nicholas Zapple, 23 F.C.C. 2d 707, 707 (1970). Rather than an application of the fairness doctrine, the *Zapple* doctrine is, in fact, much closer to a determination of the outer parameters of the equal opportunities principle under the FCC's ancillary jurisdiction. See *infra* notes 373–80.

This is not inconsistent with the FCC's recent rejection, under judicial duress, of its personal-attack and political-editorializing rules. See *Radio-Television News Dirs. Ass'n*, 229 F.3d at 272; Repeal or Modification of the Personal Attack and Political Editorial Rules, 65 Fed. Reg. at 643. The FCC's now-eliminated political-editorializing rule had required broadcasters endorsing a candidate to notify the candidate's opponents and offer them equal opportunities to respond to the endorsement. 47 C.F.R. § 73.1930 (1998). The personal-attack rule required broadcasters to notify the victim of an on-air attack on her character or integrity and offer equal opportunities to the subject of the attack to respond. 47 C.F.R. § 73.1920. Broadcasters challenged the personal-attack and political-editorializing rules after the fairness doctrine was struck down, but the challenges were stalled on the FCC docket for years prior to the Court of Appeals's intervention. See *Radio-Television News Dirs. Ass'n*, 184 F.2d at 877–78 (recanting the history of challenges to the personal-attack and political-editorializing rules).

Repeal of the political-editorializing and personal-attack rules should not necessarily imply the same outcome for the *Zapple* doctrine. These rules were far more intrusive on editorial discretion than the quasi-equal opportunities doctrine. The political-editorializing rule directly penalized broadcasters' decisions to make political endorsements, and doubtless had a chilling effect on direct political speech by the broadcast licensee itself. Similarly, the personal-attack rule imposed a potentially onerous and vague obligation to identify attacks and provide free response time. In addition to these distinctions, it should be noted that the personal-attack and political-editorializing rules arose not out of § 315, but directly out of the fairness doctrine from the outset. In fact, the famous case in which the Supreme Court rejected a First Amendment challenge to the fairness doctrine—*Red Lion Broadcasting Co. v. FCC*—dealt with those rules rather than the general fairness-doctrine obligation. See *generally* 395 U.S. 367 (1960).

366. Zapple, 23 F.C.C. 2d at 710 n.4.

367. *Id.* (charging that the majority failed to explain why "the Commission is apparently unwilling to enlarge sec.315(a), but willing to narrow the *Cullman* interpretation of the fairness doctrine. There may well be policy reasons for this approach; if so, I would have preferred that they appear in the majority's letter").

The doctrine of ancillary jurisdiction, recognized by the Supreme Court in *United States v. Southwestern Cable Co.*, provided that the FCC should have the authority to regulate in a manner “reasonably ancillary to the effective performance of [its] various responsibilities for the regulation of television broadcasting.”³⁶⁸ Given the FCC’s express statutory authority to regulate political advertisements under § 315, the FCC can reasonably read the ancillary-jurisdiction doctrine to permit the adoption of regulations that adapt the statutory antidiscrimination regime to the realities of modern political advertising.³⁶⁹ Although the dangers of an expansive ancillary jurisdiction doctrine are evident, adoption of an antidiscrimination rule akin to *Zapple’s*

368. *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968) (interpreting the 1968 incarnation of 47 U.S.C. § 152(a)). Under this grant of authority, the FCC commenced its regulation of cable television two decades before Congress enacted the Cable Communications Act of 1984. Thomas G. Krattenmaker & A. Richard Metzger, Jr., *FCC Regulatory Authority over Commercial Television Networks: The Role of Ancillary Jurisdiction*, 77 NW. U. L. REV. 403, 436–39 (1982); see also Cable Communications Act of 1984, Pub. L. 98–549, 98 Stat. 2779. Title I of the Act also gives the FCC authority to “perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.” 47 U.S.C. § 154(i) (2006). This provision is often referred to as the “necessary and proper” clause of the Act. John Blevins, *Jurisdiction as Competition Promotion: A Unified Theory of the FCC’s Ancillary Jurisdiction*, 36 FLA. ST. U. L. REV. 585, 596 & n.53 (2009). The extent of the agency’s ancillary authority is also part of the current discussion on FCC’s authority to regulate the Internet. See, e.g., *id.* at 587; James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. TELECOMM. & HIGH TECH. L. 101, 107 (2010) [hereinafter Speta, *Shaky Foundations*]. More specifically, with regard to radio and television, the preamble to section 303 of the Communications Act of 1934 provides that the standard for FCC action is “public convenience, interest, or necessity.” Communications Act of 1934, §303, 47 U.S.C. § 303 (2006). Section 303(r) of the current statute authorizes the FCC to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary.” *Id.* § 303(r). Section 315(d) provides that “[t]he Commission shall prescribe appropriate rules and regulations to carry out” its statutory authority. *Id.* § 315(d).

For further discussions of the Commission’s ancillary authority, see Susan P. Crawford, *The Ambulance, the Squad Car, & the Internet*, 21 BERKELEY TECH. L.J. 873, 925–31 (2006); Joseph R. Fogarty & Marcia Spielholz, *FCC Cable Jurisdiction: From Zero to Plenary in Twenty-Five Years*, 37 FED. COMM. L.J. 113 *passim* (1985); Mark D. Hoffer, *The Power of the FCC to Regulate Cable Pay-TV: Jurisdictional and Constitutional Limitations*, 53 DENV. U. L. REV. 477 *passim* (1976); Krattenmaker & Metzger, *supra*, *passim*; James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 LOY. U. CHI. L.J. 15, 22–30 (2003) [hereinafter Speta, *FCC Authority*]; Speta, *Shaky Foundations*, *supra*, at 107; Philip J. Weiser, *Toward a Next Generation Regulatory Strategy*, 35 LOY. U. CHI. L.J. 41, 50–51 (2003).

369. 47 U.S.C. § 315(d). Perhaps the ancillary jurisdiction doctrine was not mentioned in *Zapple* because its recognition by the Supreme Court in the 1968 *Southwestern Cable* decision was so recent at that time. See *supra* note 368 and accompanying text. In addition, the *Zapple* ruling was issued in response to a request specifically phrased in fairness-doctrine terms. See *Zapple*, 23 F.C.C.2d at 707. Because the fairness doctrine was still in force and could easily resolve the questions posed, and because (as pointed out by Commissioner Nicholas Johnson in his concurrence) the FCC had previously taken the position that § 315(a) did not apply to airtime purchases by candidate supporters, the FCC may not have thought it necessary to revisit § 315(a) or invoke the new doctrine of ancillary authority. See *supra* notes 363, 366–67 and accompanying text.

quasi-equal opportunities is a far less aggressive exercise of regulatory power than others the FCC has previously justified under the mantle of ancillary authority.³⁷⁰

370. To be sure, the ancillary-jurisdiction doctrine is controversial and its boundaries unclear. *See, e.g.,* Blevins, *supra* note 368, at 587 (“Analyzing the FCC’s ancillary jurisdiction has been an exercise in confusion.”). Some have criticized the doctrine as “vague and incoherent,” whereas others have warned of its “virtually limitless” scope. *Id.* Professor (and former FCC Commissioner) Glen Robinson views the FCC’s use of the doctrine to regulate cable as a seminal example of the agency “creat[ing] its mandate out of thin air.” Glen O. Robinson, *Regulating Communications: Stories from the First Hundred Years*, 13 GREEN BAG 2D 303, 308–09 (2010).

Regardless of one’s view of the extent of the FCC’s residual authority to regulate technologies not clearly subject to the Act in the absence of explicit statutory jurisdiction, application of ancillary authority to the narrow context of political ads should be far less troublesome. In the context of political advertising, the FCC would be regulating areas in which it has much more express statutory authority, and with regard to technologies, it is expressly authorized to regulate in the public interest, convenience, and necessity. *See* Krattenmaker & Metzger, *supra* note 368, at 454–55 (proposing that “the Commission’s jurisdiction extends to entities that (1) own, operate, or use interstate wire or radio communications facilities; and (2) thereby engage in activities that have a substantial impact on the Commission’s ability to carry out its statutory obligations”). In other words, a *Zapple*-like equal opportunities regime for third-party political advertising is arguably “sufficiently close to the underlying jurisdictional hook” to fit a traditional account of when courts uphold FCC exercises of ancillary jurisdiction. *See* Blevins, *supra* note 368, at 607 (describing and criticizing the traditional account). For an early judicial recognition of the FCC’s “expansive powers” to regulate under the Communications Act of 1934, see *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 219 (1943) (approving the FCC’s broad “chain broadcasting” rules, which were designed to curb monopolistic network power, even though the agency did not have direct statutory authority over broadcast networks).

Of course, reasonable minds could disagree as to the closeness of the relationship between direct statutory authority and any given exercise of FCC ancillary authority. *See* Blevins, *supra* note 368, at 607–08 (“What exactly makes a given regulatory scheme ‘close’ to the underlying statutory authority? Are there any objectively verifiable ways to assess it?”). Critics of the approach suggested here could also claim that the FCC should not be able to adopt regulations under its ancillary authority that could be said to undermine the legislative intent behind the direct statutory hook. In addition, those who seek to limit the exercise of ancillary authority to situations in which regulation will promote market competition might be concerned that a *Zapple*-type rule would extend ancillary jurisdiction improperly to promote controversial non-economic goals. *Id.* at 617–18, 627–28.

These objections should not, however, preclude a quasi-equal opportunities rule grounded on ancillary jurisdiction. Political broadcasting is one area in which there should be little disagreement that the goals of the explicit statutory provisions would be closely promoted by a well-crafted and reasonable *Zapple*-type rule. Congress saw “radio’s potential importance as a medium of communication of political ideas [and] . . . sought to foster its broadest possible utilization.” *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 529 (1959). Moreover, if independent third-party ads are likely to flood radio and television during elections, the FCC needs the power to prevent partisan distortions in such ads so that they do not undermine the goals of § 315. If cable regulation was properly justified under the FCC’s ancillary jurisdiction because of cable’s impact on broadcasting, then surely the FCC should have the authority to regulate non-candidate ads possibly affecting the role of candidate equal opportunities in the electoral scheme. *See infra* note 385 (noting that neither the legislative history nor the text of § 315 establish whether a *Zapple* rule would be inconsistent with § 315). Courts have affirmed exercises of FCC ancillary authority in circumstances of clearer tension.

Indeed, there is a direct relationship between ensuring rough equivalence in independent political ads and effectuating the congressional intent behind § 315(a), which provides political opponents with equal opportunities to address the voters.³⁷¹ Without a similar antidiscrimination principle applied to independent-group advertising, opposing independent advocates could well drown out the candidates whose speech is protected under § 315(a).³⁷² The FCC surely has the authority to ensure that § 315(a) does not become an insignificant and irrelevant element in a political discourse.

The Radio Act of 1927 and the Communications Act of 1934 envisioned a politics in which broadcasters would not stack the deck against candidates' opportunities to speak to the voters.³⁷³ Today's political reality—in contrast to that of 1927 and 1934—is that much election advertising is controlled not by parties or candidates, but by third-party, independent groups.³⁷⁴ The § 315 antidiscrimination principle originated from legislators' concerns about discriminatory sales of political-advertising time.³⁷⁵ Today, when independent advertising expenditures may well exceed candidate- and party-funded ads, it would be prudent to ensure that broadcast licensees do not unduly favor a particular side and thereby effectively eviscerate § 315(a).³⁷⁶

See Blevins, *supra* note 368, at 595–600. Perhaps that is because too limiting a reading of the direct statutory authority would effectively eliminate ancillary authority. Finally, whatever the merits in general of distinguishing between economic and noneconomic regulatory goals to justify the exercise of ancillary jurisdiction, a reasonable attempt to prevent strategic political partisanship in the transmission of independent political ads would not likely be a controversial goal as such. Disagreement would likely be limited to the particulars of the rules as adopted.

371. 47 U.S.C. § 315(a).

372. *See supra* Part II.A.2.

373. *See* Vandell, *supra* note 208, at 446 (discussing the history of § 315(c)).

374. *See* Barker & Wang, *supra* note 11 (discussing the rapidly increasing rule of independent groups in recent years); *see also* Gold & Mason, *supra* note 20 (discussing the relationship between candidates and independent support groups). On the other hand, it is true that such independent groups can informally coordinate with parties and candidates. *See* Barker & Wang, *supra* note 11 (discussing the interplay between independent groups and parties and candidates); Hooker, *supra* note 331.

375. Herbert Hoover, then-Secretary of Commerce, testified before Congress in the 1920s that “[w]e can not allow any single person or group to place themselves in position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.” *To Regulate Radio Communication: Hearing on H.R. 7357 Before H. Comm. on the Merchant Marine & Fisheries*, 68th Cong. 8 (1924) (statement of Herbert Hoover, Secretary of Commerce). Many congressmen sought common-carrier status for broadcasters with respect to use of stations for political candidates and “discussion of any question affecting the public.” *Columbia Broad. Sys. Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 104 (1973) (quoting 67 CONG. REC. 12,503 (1928)). Ultimately, the 1927 Act did not include common-carrier language, but it did include an amended equal opportunities provision, which has since been enacted in § 315. *Id.*

376. *Cf.* Reed-Huff, *supra* note 31, at 204 (discussing increasing levels of independent advertising expenditures).

It is important for the FCC to provide a bulwark against partisan decisions by broadcasters with respect to advocacy ads. Some critics of this assertion might argue that this kind of antidiscrimination rule is unnecessary, because private, profit-maximizing broadcast licensees, which are increasingly reliant on political advertising for their bottom lines, will not sacrifice profit at the altar of ideology.³⁷⁷ However, this is not entirely reassuring, as the history of broadcasting contains examples of political favoritism.³⁷⁸ Today, as well, entities like Fox Broadcasting give reason to fear electoral partisanship by at least some broadcasters.³⁷⁹ Moreover, industry accounts suggest that groups spurred by *Citizens United* may inundate broadcasters with requests for third-party political ads.³⁸⁰ If stations are faced with a scarcity of airtime available for political advertising during peak electoral periods, they will have to select from a number of competing advertisements and advertisers. This might lead to at least some partisan effects, even if political partisanship is not the official policy of the station.³⁸¹ If that is so, then a quasi-equal opportunities rule could help level the playing field among non-candidate electoral advertisers.³⁸²

377. See *supra* note 358 (noting stations' heavy reliance on political-advertising revenue).

378. See Vandell, *supra* note 208, at 44 (highlighting that concern over "politically interested media owners" and paternalistic concern for the public were factors that led to the adoption of § 315(a)).

379. See, e.g., Stephen Clark, *FCC Agrees to Take 'Fairness Doctrine' Off the Books*, FOXNEWS.COM (June 8, 2011), <http://www.foxnews.com/politics/2011/06/08/fcc-agrees-to-take-fairness-doctrine-off-books/>.

380. Reed-Huff, *supra* note 31, at 204 (citing Downey, *supra* note 195).

381. Cf. Jeremy P. Jacobs, *Media Buying After Citizens United*, CAMPAIGNS & ELECTIONS, June 2010, at 10 (discussing the increased competition among advertisers after *Citizens United*).

382. See *supra* notes 216–17 and accompanying text. Alternatively, the application of the *Zapple* doctrine arguably could have the negative effect of "tak[ing] [further] inventory away from the candidates." Cf. Jacobs, *supra* note 381, at 10 (arguing that because third-party groups are not guaranteed the stations' lowest unit rates applicable to candidate advertising, broadcasters might prefer to sell airtime to them, thereby putting candidates "at a disadvantage because wealthy third party groups could lock in their ad buys early, before a candidate has raised the money to cover his or her media plan"). On this view, imposing *Zapple* obligations on third-party advertising might create a scarcity of broadcast ad time for candidates, who might shift to non-broadcast advertising venues, leaving broadcast television as the noisy battleground of third-party groups. However, this is not likely to happen very soon. First, broadcasters have statutory obligations to offer equal opportunities when § 315 applies and to provide reasonable access to federal candidates under § 312(a)(7). See 47 U.S.C. §§ 312(a)(7), 315 (2006). They logically must be conservative in their third-party airtime sales to make sure that they can meet candidate airtime requests. Second, broadcast television and cable are still the most significant advertising venues. Katharine Q. Seelye, *About \$2.6 Billion Spent on Political Ads in 2008*, N.Y. TIMES (Dec. 2, 2008, 4:15 PM), <http://thecaucus.blogs.nytimes.com/2008/12/02/about-26-billion-spent-on-political-ads-in-2008/>. The Internet, although increasingly important, cannot yet compete with the traditional electronic media, so it is unrealistic to expect massive candidate flight from television.

This Article does not follow Commissioner Johnson's lead in *Zapple*³⁸³ by arguing that requiring equal opportunities for a candidate's supporters and opponents is a logical interpretation of § 315(a). One simple reason is that reading independent third-party political advertising into § 315(a) would stretch the statutory language³⁸⁴ and legislative history.³⁸⁵ Another is that strict

383. Nicholas Zapple, 23 F.C.C.2d 707, 709–11 (1970) (Johnson, Comm'r, concurring).

384. See 47 U.S.C. § 315. The statutory language limiting its application to "legally qualified candidates" constrains how expansively § 315(a) can reasonably be interpreted. See *id.* It would not unduly stretch the statute to conclude that equal opportunities should apply not only to candidates, but also to the candidate's authorized speakers. In such circumstances, the authorized speaker would effectively be acting as a proxy for the candidate, and the statutory language could reasonably be considered to cover such speakers. As for unauthorized supporters, the statute could be interpreted to include such independent speakers if the statutory terms "legally qualified candidates" could be read to refer not to candidates, but to candidacies. Such a reading, however, conflicts with the § 315 language securing equal opportunities to "*any person who is a legally qualified candidate* for any public office to use a broadcasting station." *Id.* (emphasis added).

385. One argument for why the FCC should not seek to situate a *Zapple*-type doctrine in the equal opportunities provision itself is that in 1927 and 1934 Congress chose not to enact proposed bills that would have extended equal opportunities to candidate supporters and parties. Although the legislative history provides no clear explanation of why Congress so limited equal opportunities, it could be argued that Congress, by its actions, effectively rejected *Zapple*-like protections. See *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 1, 3 (3d Cir. 1950) ("[T]here are strong reasons for advocating . . . a broad construction [of § 315 to include broadcasts by candidate supporters]. When we turn to the legislative history of Section 315, however, we find this very question of including supporters of candidates within the purview of that section has been specifically considered and rejected by the Congress, which has made it perfectly clear that the section is intended to apply only to the personal use of broadcasting facilities by the candidates themselves.").

Before the passage of the Radio Act of 1927, a significant number of congressmen objected to what they called private censorship by broadcasters and called for licensees to be regulated as common carriers, required to provide "equal service and equal treatment to all." *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 105 (1972) (quoting 67 CONG. REC. 5482 (1926) (statement of Rep. Edwin Davis)). A bill reported to the Senate by the Committee on Interstate Commerce specified that broadcasters could "make no discrimination as to the use of such broadcasting station" if they permitted their stations to be used "for the discussion of any question affecting the public." *Id.* (citing H.R. REP. NO. 69-404, at 18 (1926)). However, many others objected to broadcasters becoming common carriers "compelled to accept anything and everything that was offered." *Id.* (quoting 67 CONG. REC. 12,502 (statement of Sen. Clarence Dill)). Senator Clarence Dill, explaining the need for an amendment to the proposed legislation, stated the view that "[w]hen we recall that broadcasting today is purely voluntary, and the listener-in pays nothing for it, that the broadcaster gives it for the purpose of building up his reputation, it seemed unwise to put the broadcaster under the hampering control of being a common carrier." *Id.* Ultimately as passed, section 18 provided that:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the licensing authority shall make rules and regulations to carry this provision into effect: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this paragraph. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

Radio Act of 1927, Pub. L. No. 69-632, §18, 44 Stat. 1162, 1170; *see also* 5 AMERICAN LANDMARK LEGISLATION: PRIMARY MATERIALS 419–52 (Irving J. Sloan, ed. 1977) (discussing the legislative history of the Radio Act of 1927 and the Communications Act of 1934).

Before the passage of the 1934 Act as well, Congress sought to require licensees to give equal opportunities to candidate supporters and opponents “to permit equal opportunity for the presentation of both sides of public questions.” Mark R. Arbuckle, *The Evolving “Communications Marketplace”: Rethinking Broadcast Fairness Two Decades After Syracuse Peace Council*, 18 MEDIA L. & POL’Y 69, 72 (2008) (quoting H.R. REP. NO. 72-2106, at 4 (1933)). In the 72nd Congress, the House and Senate both passed H.R. 7716, a bill to amend the Radio Act of 1927, which contained an amendment broadening section 18, “generally referred to as the ‘political section[,]’ [which was] designed to insure equality of treatment to candidates for public office, those speaking in support of or in opposition to any candidate for public office, or in the presentation of views on public questions.” 76 CONG. REC. 5038 (1933); *see* 5 AMERICAN LANDMARK LEGISLATION, *supra*, at 448. Without explanation, President Herbert Hoover pocket-vetted this amendment in addition to numerous other pieces of legislation in 1933. Arbuckle, *supra*, at 72; *see also* Turner Catledge, *Congress Ends in Solemn Dignity*, N.Y. TIMES, Mar. 5, 1933, at D5. In the next Congress, a bill including a proposed § 315 modeled on the expanded section 18 that had been pocket vetoed was again introduced in the Senate. S. 3285, 73rd Cong. (1934). Although the Senate passed the bill “extend[ing] the requirement of equality of treatment of political candidates to supporters and opponents of candidates, and public questions before the people for a vote,” differences between the Senate and House bills led to the appointment of a conference committee, whose report struck out this expanded equal opportunities provision. *Felix v. Westinghouse Radio Stations, Inc.*, 186 F.2d 3, 5 (1950); 5 AMERICAN LANDMARK LEGISLATION, *supra*, at 450–52. Instead, it was decided that the new § 315 should mirror section 18 of the Radio Act of 1927. *See* 78 CONG. REC. 10,988 (1934) (reflecting the conferees’ report, without explanation, that “[t]he Senate provisions, which would have modified and extended the present law, is not included in the substitute”). Ultimately, Congress passed § 315 of the Communications Act of 1934 without any reference to uses of broadcast stations by non-candidates. The Third Circuit read this legislative history as “clearly disclos[ing] the intention of the Congress with respect to a provision which otherwise might be regarded as ambiguous.” *Felix*, 186 F.2d at 5.

Nevertheless, an argument can be made that a *Zapple*-like quasi-equal opportunities FCC regulation would not, in fact, be inconsistent with congressional intent if we focus on the entire period at the dawn of radio regulation and the overall legislative debates. First, there was strong legislative sentiment throughout the period for an expansion of the non-discrimination provision beyond candidates. *See* Arbuckle, *supra*, at 72. But for the President’s unexplained pocket veto of H.R. 7716 in 1933, an equal opportunities requirement extending to supporters and opponents of candidates would have amended section 18 of the Radio Act and become law. *Id.* Although President Hoover did not explain the veto, it is unlikely to have resulted from the equal opportunities provision. *See id.* Thereafter, S. 3285, which passed in the Senate, expanded § 315 by “extend[ing] the requirement of equality of treatment of political candidates to supporters and opponents of candidates, and public questions before the people for a vote.” S. REP. NO. 72-564, at 10 (1932). Available records do not explain the trimming of the provision by the conference committee, which resulted in the limited version appearing in the Communications Act of 1934. At worst, then, the legislative history shows a controversial provision that missed becoming law by a hair’s breadth.

Second, congressional discussion throughout this period also demonstrates a concern that legislating equal opportunities for the discussion of public issues would lead broadcasters to avoid airing discussions of public issues. 67 CONG. REC. 12,504 (1926). In a statement delivered during a Senate hearing on S. 2910 in 1934, an officer of the National Association of Broadcasters characterized “the inevitable effect” of the proposed § 315 as “tak[ing] away the usefulness of radio by driving political discussions off the air.” *A Bill to Provide for the*

Regulation of Interstate and Foreign Communications by Wire or Radio, and for Other Purposes: Hearing on S. 2910 Before the S. Comm. on Interstate Commerce, 73rd Cong. 67 (1934) (statement of Henry Bellows, Officer of the Nat'l Ass'n of Broadcasters) [hereinafter *Hearing on S. 2910*]. This may have been, in part, because of concerns about imposing expanded defamation liability on broadcasters. Under one of the proposed bills, for example, broadcasters would not have any power of censorship over the political speech they aired, but they would not be granted the immunity against defamation liability later recognized in *WDAY*. See 68 CONG. REC. 4152 (1926) (statement of Sen. Robert Howell). The larger the number of people who would have to be granted equal opportunities, the larger the threat of defamation liability for the stations. It is because of this that the National Association of Broadcasters representative argued against S. 2190: "It says, in effect, that since the present situation [liability without the right to censor under section 18 of the Radio Act of 1927] is intolerable, this bill [will] make it very much worse." *Hearing on S. 2910, supra*, at 67; see also 68 CONG. REC. 4152 (1926) (Statement of Sen. Robert Howell). If this is so, then the objecting congressmen were worried not about equal opportunities for political speech by candidate supporters as such, but by the expanded defamation liability such speakers would pose under a regime in which no immunity was statutorily provided. *Hearing on S. 2910, supra*, at 67; 68 CONG. REC. 4152 (1926) (statement of Sen. Robert Howell). In addition to concerns about defamation liability, broadcasters also expressed concern about the potentially expansive obligations to provide equal opportunities: "If I permit 1 person to speak over a station for 15 minutes in behalf of a candidate, then I must permit 50 other people to have the same amount of time each. That is what you say but I take it that is not what you meant." *To Amend the Radio Act of 1927: Hearing on H.R. 7716 Before the S. Comm. on the Interstate Commerce, 72nd Cong. 11 (1932)* (statement of Henry Bellows, Officer of the Nat'l Ass'n of Broadcasters).

Third, none of the unsuccessful bills limited the expansion of equal opportunities just to supporters and opponents of candidates. In rejecting those provisions, Congress was thus rejecting much more expansive regulation than simply broadcasts by candidate supporters or opponents. The proposed bills effectively turned broadcasters into common carriers in the area of speech on matters of public concern. See 67 CONG. REC. 12,502 (1926) (Statement of Sen. Clarence Dill). Many legislators, including Senator Dill, objected to the transformation of radio stations into common carriers. *Id.* Thus, it is not clear whether the application of equal opportunities only to supporters and opponents of candidates would necessarily have been seen as posing as great a threat.

Fourth, one commentator claims that "key legislators believed the 1927 Radio Act already required stations to provide fair access to non-candidates. In their view, it was not necessary to add a fairness amendment since the Radio Act was left intact when it was transplanted into the 1934 Act." Arbuckle, *supra*, at 73. As documented in the legislative history, some commented that discrimination in political advertising had not been a significant problem prior to 1927, indicating a desire to limit the relevance of the issue. See 68 CONG. REC. 3032, 3258 (1927) (statement of Sen. Clarence Dill). There is also evidence that "many licensees have operated on the assumption that supporters are also included. They have made equal time available to opposing supporters, parties and candidates." Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 484-65 (1959); Note, *Campaign Speeches on Radio and TV: Impartiality Via the Communications Act*, 61 YALE L.J. 87, 89 (1952) (footnote omitted). They may have done so on the assumption that their public interest obligations and the FCC's fairness doctrine required it. Now that the fairness doctrine is no longer part of the FCC's regulatory arsenal, it could be argued that it is necessary to assimilate speech by candidates' supporters and opponents back into § 315.

Finally, the original drafters of radio law were open to statutory revision in light of experience. Given the "new and undeveloped" character of the radio industry, Senator Dill argued in 1926 that Congress should not "put too many legislative shackles around the industry at this stage of its

application of the § 315 regime would be unworkable. Even though broadcasters have been known to complain about “equal time” burdens in crowded electoral fields, it is easy enough to determine who should be considered a “legally qualified candidate” under § 315.³⁸⁶ However, the universe of groups and individuals potentially entitled to equal opportunities under an expanded definition of § 315(a) is both far greater and more uncertain. Given the potentially innumerable equal opportunity requests that could be received in response to a single ad supporting or opposing a candidate, a broadened application of the equal opportunities provision could paralyze broadcasters and cable operators. Indeed, in an election with many candidates and support groups, imagining circumstances in which a station would *not* be vulnerable to a claim that it had not provided strictly equal opportunities to all views would be very difficult. Further, the legislative histories of the Communications Act and the Radio Act demonstrate a concern that requiring equal opportunities for the discussion of public issues would overburden broadcasters with demands for equal airtime because “public issue” can be interpreted very broadly.³⁸⁷

Of course, neither the Communications Act nor the FCC’s rules prohibit broadcast licensees from either rejecting non-candidate political advertising or negotiating its revision.³⁸⁸ In *Columbia Broadcasting Systems v. Democratic National Committee*, the Supreme Court explicitly upheld broadcaster discretion to reject advocacy advertising.³⁸⁹ Thus, broadcasters could choose to reject an offensive or misleading political advertisement.³⁹⁰ Indeed, the

development.” 68 CONG. REC. 3028 (1927). As broadcast interference called for legislation, but the two Houses could not agree, Senator Dill argued for passage of a compromise statute open to future revision. *Id.* In sum, Congress’s passage of equal opportunities provisions limited to candidates in 1927 and 1934 need not be read as an explicit rejection of a general antidiscrimination principle with regard to political advertising by candidates’ supporters and opponents.

Despite these arguments about the legislative history of the early radio statutes, this Article takes the position that there are policy advantages to grounding a *Zapple*-like doctrine on the FCC’s ancillary jurisdiction rather than in the logic of § 315, regardless of Commissioner Johnson’s position in *Zapple*.

386. 47 C.F.R. § 73.1940 (a)(1) (2010). The regulation includes additional requirements for legal qualification as well. *Id.* § 73.1940.

387. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 99, 106–07 (1973) (quoting 67 CONG. REC. 12,509 (1926)). Congress wanted to avoid setting up broadcasters as common carriers required to air everything that came their way “so long as the price was paid.” *Id.* at 106 (quoting 67 CONG. REC. 12,502 (1926)).

388. *See id.* at 122–23 (finding that the Act does not prohibit the FCC from allowing broadcasters to refuse to sell ad space to groups that desire to spend on an issue).

389. *Id.* at 94, 97, 132.

390. LaVonda N. Reed-Huff, *Offensive Political Speech from the 1970s to 2008: A Broadcaster’s Moral Choice*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 241, 282–83 (2008).

broadcast industry had a long history—particularly at the networks—of rejecting all advocacy advertising prior to the 1980s.³⁹¹

Television and radio have shifted radically. Too much money is at stake in political advertising for stations to even consider rejecting many outside-group political ads.³⁹² Economically beleaguered stations and networks are no longer squeamish about avoiding advocacy advertising.³⁹³ Although stations might still reject some kinds of political advertising as a moral matter,³⁹⁴ the large majority of commercial broadcasters and cable companies are likely to resist foregoing significant financial benefits in response to arguably moral objections. As commercial enterprises with profit-maximizing officers and fiduciary duties to their shareholders, these entities will face commercial imperative weighing heavily against moral scruples over³⁹⁵ harsh and arguably misleading political-advocacy advertising.³⁹⁶

Short of a blanket rejection of all ads that might trigger expanded § 315 obligations, how could a broadcaster avoid rejecting some ads to which equal opportunities obligations would attach in principle? As a practical matter, a workable antidiscrimination rule in the context of non-candidate political advertising must give stations significant discretion to achieve a rough balance serving the public interest, rather than formal equality.³⁹⁷ A formal incorporation of outside ads into § 315 would not permit the exercise of broadcaster discretion once the station chose to air a third-party ad supporting or opposing a candidate and thereby automatically triggered the statutory equal opportunities requirement.³⁹⁸

391. See, e.g., *Columbia Broad. Sys.*, 412 U.S. at 98–99 (describing CBS’s policy against accepting controversial advocacy advertising).

392. See *supra* notes 162–64 and accompanying text (describing the recent increase in independent groups’ political-ad spending levels).

393. See *supra* notes 162–64 and accompanying text.

394. Reed-Huff, *supra* note 390, at 282–83.

395. See *supra* note 377 and accompanying text.

396. See *supra* notes 79–82 and accompanying text. Admittedly, a *Zapple*-like antidiscrimination rule could lead stations to avoid highly partisan ads by outside groups, and thereby lead to an arguably unconstitutional chilling effect under the First Amendment. Indeed, it might lead to a constitutional challenge to § 315 itself. Although Supreme Court cases such as *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1960), implicitly confirm the constitutionality of the current version of § 315, query whether an interpretation that includes a quasi-equal opportunities component might not increase the burden on stations with limited airtime and lead to an overly conservative approach to the sale of airtime to outside groups. The limited right of access under § 312(a)(7) could not offset such a chilling effect because of its limitation to federal candidates. See *supra* note 221. In addition, if the lowest-unit-rate provisions of § 315(b) were deemed applicable to the revived *Zapple*, then stations would doubtless complain about the financial burdens imposed by an expanded equal-time rule. See *supra* note 221. This is another reason not to call for formal incorporation.

397. Cf. Reed-Huff, *supra* note 390, at 282–83 (describing how broadcasters are “fiduciaries of the public trust” that make decisions on advertising to serve the public interest).

398. This is, of course, assuming that opponents of a candidate or the candidate’s support group or supporters of another candidate would seek equal opportunities for their messages.

Reading *Zapple* as incorporated formally through § 315 would also likely hamstring the FCC in any attempt to promote voluntary implementation of private, self-regulatory measures to control offensive and misleading political ads.³⁹⁹ Self-regulatory measures could include rejecting such ads, requiring additional documentation of truth regarding claims made, or negotiating changes in the ads.⁴⁰⁰ Stations may have some economic incentives to exercise editorial control over outside-group ads or reject the most inaccurate and misleading. They may have concerns about reputational harm from association with excessively negative and false advertising, as commercial broadcasters develop business reputations that could be tarnished by excessive association with such fare.⁴⁰¹ Although the principal object of voter discontent with offensive and false attack ads is likely to be the speaker, it stands to reason that station association with this kind of advertising would diminish the station's credibility as well. This is particularly true if the group responsible for the attack ad does not itself have a clearly established reputation. In such circumstances, viewers might be more likely to question the station's decision to air the ad rather than simply reacting to the speaker alone. Stations may also have incentives to reduce potential litigation risk. In the past, the FCC has taken the position that political advertising by supporters or opponents of candidates does not receive the immunity from defamation claims that is granted to candidates under § 315.⁴⁰² If that is the rule, rational broadcasters

399. There is also an argument that assimilation of the *Zapple* rule into § 315 might entail the application of the lowest-unit-rate discounted-time provision under § 315(b) where relevant. *See supra* note 221 (discussing the lowest-unit-rate discount). However, the *Zapple* doctrine does not require an extension of the lowest-unit-rate obligation. There are good reasons for requiring airtime discounts for candidates themselves, so that they have the opportunity to address the voting public directly. This rationale does not logically apply in the same way to outside groups supporting or opposing the candidate. In any event, given the complexities in the way that stations sell airtime and the extent to which they profit from political advertising, even the extension of the lowest-unit-rate requirement to independent ads would not likely be deemed a significant burden by broadcasters.

400. *Cf. Reed-Huff, supra* note 390, at 283–85 (discussing the roles and responsibilities of broadcasters and the necessity of allowing broadcasters to blame the pros and cons of airing an ad).

401. *See* Christina H. Burrow, Thomas M. Clyde & Michael D. Rothberg, *Negative Issue Advertisements: A Practical Matter*, COMM. LAWYER, Summer 2004, at 7. Although the speaker is likely to be the principal object of voter discontent with offensive, false attack ads, it is reasonable to expect that association with such advertising would diminish the station's credibility, particularly if the group airing the ad does not have a clearly established reputation.

402. *See, e.g.,* FCC Political Primer, 100 F.C.C.2d 1476, 1513 (1984) (citing *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959); *Felix v. Westinghouse Radio Station*, 186 F.2d 1 (1950)); *Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832, 874 (1970) (“Section 315 . . . is not a defense to an action for libel or slander arising out of broadcasts by non-candidates speaking in behalf of another's candidacy. Since section 315 does not prohibit the licensee from censoring such a broadcast, the licensee is not entitled to the protection of section 315.” (citing *George F. Mahoney*, 40 F.C.C. 336 (1962)));

concerned about litigation risk would have clear incentives to involve their legal departments in advertising review, to request more documentation of the truth of claims made, and to negotiate revisions toning down falsehoods in third-party advocacy ads. A strict application of equal opportunities under § 315 to such ads would significantly limit broadcaster choice and editorial control.⁴⁰³

Even if the FCC can revive a *Zapple*-like non-discrimination obligation under its ancillary authority, does *Zapple* provide enough insulation from the potentially distorting effects of *Citizens United*? If one of the most worrisome aspects of the decision is that it opened “the floodgates”⁴⁰⁴ to disproportionate amounts of corporate money overwhelming the political process, then it is unclear whether application of the quasi-equal opportunities doctrine could realistically reduce the threat of the spectacular expense of political campaigns.⁴⁰⁵ Because *Zapple* does not require broadcasters to subsidize the speech of less well-funded supporters to help equalize the messages heard by the audience, the practical effect of the doctrine in today’s environment of dominating independent-ad coffers is uncertain.⁴⁰⁶

FCC, Use of Broadcast Facilities by Candidates for Public Office, 31 Fed. Reg. 6660, 6671 (Fed. Comm’n’s Comm’n Apr. 27, 1966).

403. To be sure, § 315 contains a prohibition on censoring candidate messages, and the Supreme Court affirmed broadcasters’ immunity against defamation actions concerning those messages. *WDAY*, 360 U.S. at 529 (affirming broadcasters’ immunity against defamation actions when they broadcast ads by candidates without censoring candidates’ messages). It is not self-evident that the immunity against defamation is inapplicable in *Zapple* cases. Despite the FCC’s previously stated view, the Supreme Court’s argument in *Farmers Education & Cooperative Union of American v. WDAY, Inc.* could be read to apply to ads by supporters as well as candidates. *See id.* at 529–30. If the FCC were to adopt an antidiscrimination provision directly under the authority of § 315, courts might interpret the *WDAY* immunity as applicable regardless of prior FCC precedent. Stations would be less concerned with defamation claims against them for airing libelous independent political ads. Even so, of course, rational broadcasters should be concerned about reputational harm. In any event, the Court’s articulated concerns about the chilling effect of broadcaster censorship of candidate speech in *WDAY* are not necessarily relevant to non-candidates’ speech, so courts considering the issue would not necessarily adopt this expansive reading of *WDAY*.

404. *See* Reed-Huff, *supra* note 390, at 214 (citing *Citizens United v. FEC*, 130 S. Ct. 876, 968 (2010) (Stevens, J., dissenting)); *see also* John Eggerton, *Obama Takes on Campaign-Ad Ruling in State of the Union*, BROADCASTING & CABLE (Jan. 27, 2010, 10:32 PM), http://www.broadcastingcable.com/article/446345-Obama_Takes_on_Campaign_Ad_Ruling_in_State_of_the_Union.php (quoting President Obama’s statement that “[l]ast week, the Supreme Court reversed a century of law that I believe will open the floodgates for special interests—including foreign companies—to spend without limit in our elections” (internal quotation marks omitted)); Guthrie, *supra* note 137 (quoting Representative Chris Van Hollen, stating that the decision “will open the floodgate, if left unchecked and unchallenged, to more and more special interest money” (internal quotation marks omitted)).

405. *See* Jacobs, *supra* note 381, at 10 (quoting the comment that if there is high demand for third-party ads, “it can be pretty expensive for independent expenditures and issue advocacy to go in and do television advertising” (internal quotation marks omitted)).

406. *Cf.* Nicholas Zapple, 23 F.C.C. 707, 708 (1970) (declining to require free rebuttal time).

Regardless of the merits of proposals designed to reduce the effect of wealth disparities in elections, currently no political will exists to require broadcasters to subsidize ads by less well-funded groups.⁴⁰⁷ Moreover, evidence from the 2010 midterm election suggests that although an astronomical amount of money was spent on television advertising in support of the candidates, supporters of candidates from both parties were well funded.⁴⁰⁸ Additionally, corporations are not alone in contributing to political advertising, with labor unions taking an increased role.⁴⁰⁹ It is true, of course, that even if money might not have been a significantly differentiating factor between the titanic major players, minor party candidates and their supporters can be significantly hobbled by having less of it.⁴¹⁰ Applying the *Zapple* doctrine admittedly does not address that problem.⁴¹¹ Nevertheless, there is sufficient benefit to deterring partisanship to justify reviving the doctrine, even if some real, unresolved problems remain in the political system.⁴¹²

III. INSTITUTIONAL CHOICE AND INSTITUTIONAL LIMITS

A. *Why the FCC?*

A focus on the FCC as a means to regulate campaign finance naturally raises questions of institutional choice. Television, as the premier venue for political advertising, is central to American political discourse,⁴¹³ and the FCC is in a

407. *Cf. id.*

408. See *The Money Behind Elections*, OPENSECRETS.ORG, http://www.opensecrets.org/big_picture/ (last visited Oct. 28, 2011).

409. Suzy Khimm, *The Citizens United Effect*, MOTHER JONES (June 7, 2010, 3:00 AM PDT), <http://motherjones.com/politics/2010/06/citizens-united-effect> (“Just as predicted, campaign ads that would previously have been illegal are now airing in key midterm election races. But the players funding those ads aren’t the ones you might expect. It turns out that some of the first groups to exploit *Citizens United* aren’t corporations, but labor unions.”). But see Corcoran & Maher, *supra* note 346 (taking exception with “the implication that labor unions benefited as much from the *Citizens* decision as corporations”).

410. *Cf. Jacobs, supra* note 381, at 10 (discussing the increased cost of political-advertising airspace after *Citizens United* and its effect on the ability of less well-funded actors to buy spots).

411. See *id.* (reporting on the predicted spike in television ad costs due to third-party involvements and how expensive ad space could harm candidates).

412. See *supra* Part II.C.

413. By television, I mean to refer to both broadcast and cable television. Broadcast television is still the primary venue for political advertising. See Andrea Morabito, *The Cable Show 2011: Local TV Still ‘Nuclear Weapon’ of Election Ads*, BROADCASTING & CABLE (June 15, 2011, 12:59 PM), http://www.broadcastingcable.com/article/469757-The_Cable_Show_2011_Local_TV_Still_Nuclear_Weapon_of_Election_Ads.php (observing the dominance of broadcast television in election ad spending); see also Fowler & Ridout, *supra* note 78, at 2 (“[T]he best evidence suggests that local cable does not represent a large population of the ads aired during congressional campaigns.”). However, local cable has become more significant as a venue for political ads recently. See WALDMAN, *supra* note 80, at 108–09.

natural position to consider how to regulate television.⁴¹⁴ Although online political advertising has become an important element in the campaign landscape,⁴¹⁵ it is overshadowed by broadcast and cable television, which are far more central to political advertising as a whole.⁴¹⁶

The obvious benefit of calling for an FCC-based administrative solution is that it does not require congressional approval. Congress has already given the FCC a broad mandate for executing and enforcing electronic-media regulation.⁴¹⁷ The statutory and regulatory tools for FCC intervention in this

414. See *supra* Part II.A. But see Yoo & Marston, *supra* note 25, at 4 (criticizing the political expansion of FCC jurisdiction into regulation of political speech through MAP's rulemaking petition).

415. See Travis N. Ridout, Erika Franklin Fowler & John Branstetter, Political Advertising in the 21st Century: The Rise of the YouTube Ad 13–17 (Aug. 23, 2010) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1642853; Kate Kaye, *The State of Online Political Advertising*, YALE L. SCH., http://www.law.yale.edu/documents/pdf/ISP/Kate_Kaye.pdf (last visited Dec. 16, 2011).

416. See Ridout, Fowler & Branstetter, *supra* note 415, at 14. Critics of FCC involvement have also called the possibility of agency action a “grab for new jurisdiction [by] tired old New Deal agency . . . approaching its eightieth birthday and . . . seeking new regulatory turf.” Yoo & Marston, *supra* note 25, at 4. To the extent that comments like this are attempts to paint the FCC as a self-interested regulatory agency arbitrarily involving itself into a debate to which it is irrelevant, they forget the FCC's role in regulating the medium that is still most central to political advertising in the modern campaign. See *supra* Part II.A.

417. See 47 U.S.C. § 154 (2006). Of course, adding another administrative entity into the mix may lead to institutional conflict, complexity, and confusion. The 1974 amendments to FECA created the FEC and tasked it with overseeing the conduct of election campaigns and the voting system. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, §201(a), 88 Stat. 1263, 1272 (codified as amended at 2 U.S.C. § 431 (2006)). The FCC currently cooperates with the FEC. E.g., *Political Programming*, FED. COMM. COMMISSION, <http://transition.fcc.gov/mb/policy/political/> (last visited Oct. 30, 2011) (noting the FCC compliance with “the requirement that the FCC compile, maintain, and provide to the public on its website any information the Federal Election Commission may require to carry out Section 304(f) of the Federal Election Campaign Act of 1971, as amended”); see also *Compliance with Laws Outside the FEC's Jurisdiction*, FED. ELECTION COMMISSION, http://www.fec.gov/pages/brochures/compliance_nonfec.shtml#communications (last updated 2008) (providing direction to FCC and FTC regulations that cover certain political broadcast ads and telephone communications). Will involvement of the FCC inappropriately undermine this structure? With inconsistent approaches to funding disclosure, will the two agencies further contribute to campaign-finance complexity and incoherence? The fact that different administrative agencies with different enabling statutes may simultaneously exercise jurisdiction over the same phenomena does not necessarily require one to concede to the other. To the extent that involvement of the FCC fills in limitations and gaps in the FEC's rules—and to the degree that FCC action can get around FEC dysfunction—the campaign system is likely to benefit. Overlapping administrative regulation is fairly common. Compare 15 U.S.C. § 57a (2006) (granting the FCC rulemaking authority to combat deceptive practices in communication), with 15 U.S.C. § 54 (authorizing the FTC to prevent deceptive practices that affect commerce). The FCC and the FTC have overlapping jurisdiction in the area of deceptive practices and that overlap does not appear to have resulted in significant policy incoherence. *Id.* There is no reason to believe the situation would be different with the FEC.

area are already in place.⁴¹⁸ However, some critics challenge the legitimacy of FCC action by arguing that it is improper for the agency to read its existing precedents in a manner contrary to Congress's rejection of the DISCLOSE Act.⁴¹⁹ This argument is not persuasive because the DISCLOSE Act included provisions for more controversial campaign-disclosure reform.⁴²⁰ Furthermore, both Republicans and Democrats have traditionally agreed on the desirability of disclosure in the election context.⁴²¹ Moreover, interested parties can participate in an FCC proceeding and voice their views, which would generate much clearer signals to the FCC regarding desirable regulations than can be gained from a complex congressional failure to act.⁴²²

Other opponents criticize possible FCC action as a Democratic tactic designed to suppress effective Republican advertising.⁴²³ Indeed, Professors John Yoo and David W. Marston describe all the disclosure-seeking responses to *Citizens United* as having "a single goal: to stifle the First Amendment speech rights of political opponents."⁴²⁴ The fundamental problem with this characterization is that the proposed disclosure rules would apply equally to all political advertisers regardless of political-party affiliation.⁴²⁵

Of course, an expansive reading of § 317 and a revival of the *Zapple* doctrine may not be consistent with the FCC's current regulatory priorities. The agency may choose not to wade into the post-*Citizens United* political advertising controversy. Even advocates of disclosure within the FCC might hesitate to act without *some* congressional support for fear of congressional

418. See 47 U.S.C. § 151 (2006).

419. See John Eggerton, *Rep. Walden Will Go 'Nuclear' If FCC Adopts MAP Petition*, BROADCASTING & CABLE (Apr. 1, 2011, 6:24 PM), http://www.broadcastingcable.com/article/466160-Rep_Walden_Will_Go_Nuclear_If_FCC_Adopts_MAP_Petition.php (noting that House Communications Subcommittee Chair Greg Walden saw the MAP petition "as an end-around after Congress did not pass tougher on-air disclosure laws backed primarily by Democrats"); see *supra* Part II.A (discussing the relevant regulatory provisions of the Communications Act of 1934).

420. See *supra* note 183. The bill went much further than merely adding a donor-disclosure provision and was controversial for reasons far beyond donor disclosure. GARRETT, WHITAKER & LUNDER, *supra* note 181, at 6–8. That the bill did not reach consideration in the Senate says little both about overall congressional will regarding donor disclosure and about how the FCC should interpret its own policies adopted under different statutory schemes.

421. Noveck, *supra* note 297, at 75, 96 ("[I]ncreased reporting and disclosure of political contributions has seen widespread support from across the political spectrum.").

422. Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 9224, 926–27 (2009); see also Roger C. Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 525 (1982) (discussing public participation leading to better development of policy).

423. See Yoo & Marston, *supra* note 25, at 2, 4 ("The FCC, of course, is an independent regulatory agency, but Genachowski bundled more than \$500,000 for Obama's 2008 presidential campaign and has visited the White House more than 80 times.").

424. *Id.* at 2.

425. See *id.* at 4.

retaliation.⁴²⁶ There is a clear risk that the agency may paralyze the MAP initiative through inattention and delay.⁴²⁷ Forging ahead with such a controversial change could certainly cost the FCC political capital, and there is already pressure on the agency to stay out of the highly controversial area of campaign finance.⁴²⁸ Representative Greg Walden, chairman of the House Communications Subcommittee, explicitly warned the FCC that he would “go ‘nuclear’” if the FCC used its sponsorship-identification rules to require disclosure of political-message sponsors in response to the MAP petition.⁴²⁹

Nonetheless, there is support at the FCC for requiring increased disclosure. Commissioner Michael Copps has already publicly expressed his support, stating that “[i]f some group called ‘Citizens for Spacious Skies and Amber Waves of Grain’ is actually under-written by a chemical company that doesn’t want to clean up a toxic dump, viewers, listeners and voters should know this.”⁴³⁰ Commissioner Mignon Clyburn also expressed her support for increases in political-ad disclosure requirements.⁴³¹ Additionally, a recent FCC staff report advocated a shift in the agency toward greater disclosure.⁴³² Continuing attention to the issue might prompt new actors to support FCC regulations increasing disclosure requirements. Regardless of the ultimate outcome, it is clear that the FCC is an appropriate conduit for the realization of Justice Kennedy’s vision of an effective marketplace of political information in *Citizens United*.⁴³³

B. Beyond Disclosure: Whether the FCC Should Adopt Affirmative Political-Programming Requirements

Critics of *Citizens United* who worry that wealthy advertisers will evade disclosure, dominate political discourse, and skew electoral results are unlikely to be satisfied with the procedural proposals thus far; however, they might look to the FCC for more affirmative solutions. For example, Commissioner Copps has called on the agency to adopt a public-value test, including “meaningful

426. See Barry R. Weingast, *Regulation, Reregulation and Reregulation: The Political Foundations of Agency Clientele Relationships*, 44 L. & CONTEMP. PROBS. 147, 152 (1981).

427. See Wyatt, *supra* note 226.

428. See, e.g., Yoo & Marston, *supra* note 25, at 4; Eggerton, *supra* note 419.

429. Eggerton, *supra* note 419.

430. Press Release, Fed. Comm’n Comm’n, Statement of Commissioner Michael J. Copps on the Importance of Disclosure for Political Advertisements (Mar. 22, 2011), available at <http://www.fcc.gov/document/copps-importance-disclosure-political-ads>.

431. Wyatt, *supra* note 226.

432. WALDMAN, *supra* note 80, at 347–48. The Third Circuit’s recent rejection of a prior FCC attempt to deregulate some of its ownership rules may also reduce administrative timidity. Bill Carter, *Court Overturns FCC Cross-Ownership Rule*, N.Y. TIMES, July 7, 2011, at B4. Admittedly, the Third Circuit’s opinion rests on narrow grounds.

433. See *Citizens United v. FEC*, 130 S. Ct. 876, 916 (2010).

commitments to news and public affairs programming,” to update the licensing-renewal system for radio and television licensees.⁴³⁴

In keeping with that approach, the FCC might be tempted to adopt an affirmative requirement for political programming on broadcast television akin to the FCC’s current children’s educational television rules.⁴³⁵ If voters are “civic slackers” who could benefit from additional political education,⁴³⁶ and if the political education they are likely to receive from partisan, negative, and veiled ads is likely to skew the voting system,⁴³⁷ then broadcasters arguably should tap the extensive educational potential of the medium to improve political discourse. Assuming that a flood of conflicting independent ads unduly confounds the public, does—or can—station-sponsored political programming enhance voters’ political information and serve as a contextualizing counterweight to partisan advertising? Can the FCC intervene, within the bounds of the First Amendment? Even if it is authorized to do so, should it?

Many complain about the current picture of political programming on television. They point to a marked decline in political programming on the broadcast airwaves⁴³⁸ and disparage cable political programming as polarizing

434. Michael J. Copps, Comm’r, Fed. Comm’n’s Comm’n, Remarks at the Columbia University School of Journalism: Getting Media Right: A Call to Action 4 (Dec. 2, 2010), available at <http://www.fcc.gov/document/getting-media-right-call-action-fcc-commissioner-michael-j-copps-columbia-university-school>; see also WALDMAN, *supra* note 80, at 292–93 (explaining Commissioner Copps’s proposal); Brian Stelter, *A New Test Is Proposed in Licensing Radio Ad TV*, N.Y. TIMES, Dec. 3, 2010, at B31.

435. See Copps, *supra* note 434, at 4. See generally Lili Levi, *A “Pay or Play” Experiment to Improve Children’s Educational Television*, 62 FED. COM. L.J. 275 (2010) (discussing the FCC’s children’s E/I (educational/informational) programming requirements).

436. See Sheff, *supra* note 123, at 150–51 (“One robust and persistent finding validates the ‘civic slacker’ view of the electorate. It is generally recognized in social science circles that American voters tend not to be especially well informed . . .”). *But cf.* James A. Gardner, *Anti-regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673, 702–04 (2011) (discussing how voters develop coping strategies to address “overabundance” of information, including selectively ignoring available information).

437. See *supra* Part I.B.

438. See, e.g., Broadcast Localism, 23 FCC Rcd. 1324, 1348–49 (2008). In its inquiry into broadcast localism, the FCC reported that there was variation in the amount of political programming aired on broadcast stations and “sharp disagreement among commentators as to the broadcasters’ record in airing programming addressing political issues and the commission’s legal authority in the area.” *Id.* at 1349. Recounting its previous observations that although “some broadcasters have aired many hours of political programming and . . . several television networks have provided free airtime to candidates for president in recent elections,” the FCC Localism inquiry also referred to research indicating a decline in political programming. *Id.* at 1348. Indeed, the FCC noted congressional testimony to the effect that “larger station group owners air less local campaign news than smaller and midsized station group owners.” *Id.*; see also Seth Grossman, Note, *Creating Competitive and Informative Campaigns: A Comprehensive Approach to “Free Air Time” for Political Candidates*, 22 YALE L. & POL’Y REV. 351, 358 (2004) (asserting both reduction in and limited, “horse-race” focus of television campaign coverage).

infotainment.⁴³⁹ They argue that commercial broadcasters have not “cover[ed] the political news to the fullest degree” as intended when Congress adopted exemptions to the equal opportunities requirements of § 315 fifty years ago.⁴⁴⁰ Despite these limitations, as well as critics’ commendable concerns about voter ignorance and disaffection, FCC adoption of “meaningful”⁴⁴¹ programming requirements for political coverage would be troubling and unwise.

An FCC-implemented affirmative political-programming requirement risks government intervention into broadcaster speech without any clear evidence of likely need or likely success.⁴⁴² The rich media environment available today, including the web and social media, provides voters with the degree of political information they desire, in whatever customized form they choose.⁴⁴³ It is far

439. See, e.g., Kevin Koe et al., *Hostile News: Partisan Use and Perceptions of Cable News Programming*, 58 J. COMM. 201–19 (2008); Lili Levi, *A New Model for Media Criticism: Lessons from the Schiavo Coverage*, 61 U. MIAMI L. REV. 665, 686–96 (2007) and sources cited therein; Ricchiuto, *supra* note 214, at 268; cf. Lauren Guggenheim, Nojin Kwak & Scott W. Campbell, *Nontraditional News Negativity: The Relationship of Entertaining Political News Use to Political Cynicism and Mistrust*, 23 INT’L J. PUB. OPINION RES. 287 (2011).

440. See Ricchiuto, *supra* note 214, at 268 (quoting 105 CONG. REC. 14,451 (1959) (statement of Sen. Spessard Holland)). The decline in broadcast political programming has occurred despite the FCC’s very liberal interpretations of the four exceptions to § 315 since the 1980s. Vandell, *supra* note 208, at 458–62. Starting with the FCC’s decision to classify the *Phil Donohue* program as an exempt offering under § 315(a), the FCC has consistently expanded the range of programming exempt from equal opportunities obligations. *Id.* at 459–62 & n.96; accord Michael Damien Holcomb, *Congressional Intent Rebuffed: The Federal Communications Commission’s New Perspective on 47 U.S.C. § 315(A)(2)*, 34 SW. U. L. REV. 87, 88–89 (2004); see also Telepictures Prod., Inc., 23 FCC Rcd. 7168, 7169 (2008) (declaring more recently that the television program entitled *TMZ*, consisting of “entertainment news events,” should be considered an exempt bona fide newscast); Angelides for Governor Campaign, 21 FCC Rcd. 11,919, 11,923 (2006) (finding the “news interview” segment of the *Tonight Show with Jay Leno* to qualify as an exempt bona fide news interview). As the FCC explained, the news-interview segments of the *Tonight Show with Jay Leno*, *Oprah*, *Howard Stern*, the *Sally Jessy Raphael Show*, *Jerry Springer*, *Politically Incorrect*, and the *700 Club* are now all considered exempt programs. See *id.* at 19,922–27; Clay Calvert, *What Is News?: The FCC and the New Battle Over the Regulation of Video News Releases*, 16 COMM.LAW CONSPECTUS 361, 362 (2008). Some have argued that this has opened the door to partisan licensee programming decisions with no FCC oversight and has particularly hurt minority or unsuccessful candidates. See Akilah N. Folami, *Freeing the Press From Editorial Discretion and Hegemony in Bona Fide News: Why the Revolution Must Be Televised*, 34 COLUM. J.L. & ARTS 367, 368 (2011) (arguing that early interpretations of § 315 exemptions led to narrow political discourse).

441. See Copps, *supra* note 434, at 4.

442. See Gardner, *supra* note 436, at 705–04; Daniel R. Ortiz, *The Engaged and the Inert: Theorizing Political Personality Under the First Amendment*, 81 VA. L. REV. 1, 27–29 (1995) (coining the term “civic slob”).

443. Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 905 (1998); see also Gardner, *supra* note 436, at 702–09.

As for political junkies, arguably better and more immediately accessible information may be available to them elsewhere—in newspapers, magazines, web sites, and social media on the Internet. See WALDMAN, *supra* note 80, at 226. Although Americans are consuming more media and have not abandoned traditional media, studies show fluctuation in the consumption of news.

from clear that broadcast programming aired to satisfy FCC requirements would provide any significant “value added” to what is already available in the overall media marketplace, at least without an unacceptable degree of quality oversight by the FCC. Whatever the constitutionality, practicability, and wisdom of more indirect, incentive-oriented regulations designed to promote more and better political programming on television, a traditional, mandated programming requirement is a very bad idea.

IV. CONCLUSION

Campaign-finance-reform advocates decry the Roberts Court’s use of the First Amendment to undercut attempts to level the electoral playing field. Although the possibility of involving the FCC in a response to these developments has received little notice, there is reason to believe that this alternative may generate a moderate and realistic approach to mitigating some of the troubling effects of the Court’s deregulatory campaign spending jurisprudence. Reaching out to the FCC is neither illegitimate nor institutionally problematic.

The FCC should: 1) interpret the sponsorship-identification provision of the Communications Act of 1934 to require disclosure of direct and indirect donors to, and directors and principal officers of, groups purchasing political airtime; and 2) adapt its moribund quasi-equal opportunities doctrine under *Zapple* to the current political-advertising landscape in order to prohibit broadcaster discrimination and partisanship in the sale of airtime to supporters of political candidates. The FCC has the authority for both regulatory initiatives: disclosure under its sponsorship-identification authority and an anti-partisanship rule under its ancillary authority. Additionally, broadcasters and cable systems could be induced to adopt ameliorative policies voluntarily. Brand-enhancing rewards systems could be used to influence the private adoption of enhanced disclosure rules. Similarly, if the FCC reaffirms its prior view that the statutory immunity against defamation suits for candidate speech does not apply to ads by supporters or opponents of candidates, then television stations will have potentially significant economic incentives to reject or negotiate edits in at least the most obviously false and misleading third-party ads. There is nothing to prevent the FCC from reading its enabling statute and precedents consistently with these proposals, and such a reading would likely be deemed constitutional under the Roberts Court’s First Amendment jurisprudence.

Naturally, skeptics who fear § 317’s vulnerability to gaming and evasion, who question the need for (and usefulness of) the *Zapple* doctrine, and who doubt the ability of voluntary responses to curb the *Citizens United* effect, and who despair of the television coverage of electoral politics today, might

Id. However, “news junkies have more ways of finding news . . . [.] everyone else has more ways of avoiding it.” *Id.* at 227.

recommend instead that the FCC adopt affirmative political-programming rules to promote democracy. However, it would be misguided for the agency to require political-programming minima from regulated television entities. Instead of affirmative content control, FCC disclosure requirements and a policy of overall non-discrimination in airtime sales for independent political advertising are more likely to advance the goals of campaign-finance reform.