

# CITIZENS UNITED, SUPER PACS, AND CORPORATE SPENDING ON POLITICAL CAMPAIGNS:

## HOW DID WE GET HERE AND WHERE ARE WE GOING?

★★★ BY JAMES A. KAHL

We are in the midst of a presidential election cycle like none seen in the past. Corporations and unions are free to spend as much as they wish on television and radio advertisements that support or attack candidates for federal and state political offices. New political committees—all with strikingly similar names—are scooping up unlimited contributions from billionaires and corporations and spending those funds to influence elections across the country. It is not surprising to find that radio and television stations have been inundated with political ads in the weeks leading up to the primaries—and we can expect the same in the general election.

Is this the kind of vigorous political debate contemplated by the First Amendment, or are “special interests” undermining the country’s electoral process? Are both statements true? And, while we’re at it, how did we even get here in the first place?

Popular commentary focuses on the ills or benefits (depending on your perspective) brought about by the Supreme Court’s 2010 decision in *Citizens United v. Federal Election Commission*, which freed corporations to engage in independent political spending,<sup>1</sup> and the birth of Super PACs—a new breed of political committee that is playing a major role in the 2012 primaries. Two years after the *Citizens United* decision, there is still much confusion about what the Court’s ruling means.

In addition to discussing the *Citizens United* decision and Super PACs, this article addresses the impact of Super PACs thus far in the 2012 primaries, and some of the common misconceptions about *Citizens United* and Super PACs. Finally, the article will discuss current thinking on what—if anything—should be done or can be done regarding Super PACs and *Citizens United*, and whether



attention might be better directed to other issues that get far less public attention.

### It’s Only a Movie—But Maybe Not!

*Citizens United v. Federal Election Commission*, was a case that came up as a result of a movie, entitled “Hillary: The Movie,” that was produced by a nonprofit corporation. The film was highly critical of then Sen. Hillary Clinton, a candidate in the Democratic Party’s 2008 presidential primary elections. In the Court’s words, the film was “in essence ... a feature-length negative advertisement that urges viewers to vote against Senator Clinton for President.”<sup>2</sup> As a result, the film was subject to the restrictions of the Federal Election Campaign Act (FECA), which prohibits corporations from using general treasury funds to finance communications expressly advocating the election or defeat of a federal candidate—known as “independent expenditures” in campaign finance jargon.<sup>3</sup>

In its landmark 5-4 ruling in the case, the Supreme Court struck down this ban on corporate expenditures on political campaigns as unconstitutional and held that corporations cannot be barred from funding communications that expressly advocate the election or defeat of political candidates, provided those communications are not coordinated with candidates and their campaigns. The Court stated that political speech is indispensable to decision-making in a democracy, and that this is no less true when speech comes from a corporation rather than from an individual.<sup>4</sup> The Court held as a matter of law that independent expenditures, including those made by corporations, do not corrupt public officials or give the appearance of quid pro quo corruption, which the Court viewed as the only possible justification for the FECA’s ban on corporate independent expenditures.<sup>5</sup>

The debate over *Citizens United* can be framed this way: In the majority decision, Justice Anthony Kennedy stated that, “under our law and our tradition, it seems stranger than fiction for our Government to make ... political speech a crime.”<sup>6</sup> Two weeks later, in his State of the Union address, with several of the justices just steps away from him, President Barack Obama mentioned the decision, saying that it would “open the floodgates” for special interests. The President added, “I don’t think American elections should be bankrolled by America’s most powerful interests. ... They should be decided by the American people.”<sup>7</sup>

Often overlooked, however, is the fact that the Court spoke forcefully about the importance of transparency when it comes to corporate political speech and the public’s interest in knowing who is speaking about a candidate shortly before an election. According to the Court, “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”<sup>8</sup> Therefore, eight of the justices voted to leave in place the FECA’s requirement that ads must identify their sponsors and that organizations funding the ads must file disclosure reports with the Federal Election Commission (FEC). The Court even went so far as to highlight the central role that the Internet and advancing technology could play in providing information to citizens and shareholders so that they could make informed decisions and hold corporations and elected officials accountable.<sup>9</sup>

To be sure, the *Citizens United* decision was a dramatic change in campaign finance law as it pertains to corporate spending, but restrictions remain. Under federal law and the law in many states, companies are still prohibited from contributing directly to candidates or party committees. Corporate PACS (political committees funded with employee contributions) remain the only lawful means by which corporations can make contributions where those prohibitions are in place.

In addition, *Citizens United* authorized only “independent” spending by incorporated entities. If a person or corporation *coordinates* with a candidate or party committee about the content, timing, or placement of an advertisement, the payment for the ad is regarded as an in-kind campaign contribution, which would be illegal in federal campaigns and in many state races.<sup>10</sup>

Even though the law often evolves slowly, that has not been the case in the short time since the *Citizens United* decision was handed down. Other events—first the 2010 mid-term congressional elections and now the 2012 presidential and congressional elections—have pushed campaign finance law to change rapidly.

### The Birth of Super PACs

Despite widespread concerns about the impact of *corporate* political spending, the next legal development, just two months after the Court handed down its decision in *Citizens United*, did not involve corporate spending at all. In *SpeechNow.org v. Federal Election Commission*, the U.S. Court of Appeals for the D.C. Circuit addressed the question of whether a federally registered PAC that intended to sponsor only independent communications could accept unlim-

ited contributions from individuals.<sup>11</sup> Under the FECA, such a PAC would be prohibited from accepting contributions from individuals in excess of \$5,000 in a calendar year.

Relying on *Citizens United*, the circuit court found no anti-corruption interest in limiting contributions to an independent expenditure group such as SpeechNow. Therefore, even though *Citizens United* upheld the FECA’s limits on contributions to candidates, the D.C. Circuit found that such limits as applied to an independent expenditure-only group violated the First Amendment.<sup>12</sup>

In July 2010, the FEC issued two companion opinions formally recognizing what has come to be known as Super PACs. Both opinions concerned FEC-registered PACs that would make only independent expenditures (IE-only committees”). The first case involved the Club for Growth, a tax-exempt organization that proposed to establish and provide administrative support to a PAC that would solicit unlimited contributions from the general public.<sup>13</sup> The case of the Commonsense Ten, on the other hand, concerned a stand-alone committee that proposed to solicit unlimited contributions from individuals, political committees, corporations, and labor organizations.<sup>14</sup> Both committees agreed to include all required disclaimers in their communications and to file disclosure reports with the FEC.

The FEC approved both proposals based on the *Citizens United* and *SpeechNow* decisions. Each opinion, however, extended the *SpeechNow* ruling to a certain degree. In the case involving the Commonsense Ten, the FEC recognized that corporations and labor unions could contribute to IE-only committees, a question that had not come before the *SpeechNow* court. In the decision involving the Club for Growth, the FEC permitted the company to establish and support the IE-only committee and to solicit contributions from anyone who could legally make a federal campaign contribution. Under the FECA, PACs that are supported by corporations can solicit contributions only from their officers, managers, and other supervisory employees.

A year later, Majority PAC and House Majority PAC asked the FEC whether federal candidates and officeholders could raise unlimited funds on behalf of Super PACs.<sup>15</sup> The FEC concluded that they may attend, speak at, or be featured guests at fundraisers for IE-only committees at which unlimited individual, corporate, and union contributions would be solicited, so long as the solicitations are restricted to funds subject to the FECA’s limitations and prohibitions. In other words, candidates can make the pitch for a friendly Super PAC, but they can ask individuals and PACs to contribute only up to \$5,000, and they cannot ask corporations or unions to contribute.

In an editorial published immediately after the FEC blessed Super PACs, the *New York Times* commented that “the sluice gates are open at both ends.”<sup>16</sup> Of course, the editorial was referring to the fact that Super PACs can solicit unlimited contributions from individuals, corporations (for-profit and tax-exempt), and unions, and they have no limits on their independent spending. And as a result of the FEC’s opinion on the Majority PAC’s request, a Super PAC’s best salespeople—the candidate and his or her inner circle—can help fill the organization’s coffers.

## Off to the Races

Predictably, Super PACs proliferated quickly and have become deeply involved in the electoral process. As of the March 2012 Super Tuesday primaries, 363 Super PACs had registered with the FEC<sup>17</sup> and spent almost \$100 million in the primary elections. The Super PAC supporting Mitt Romney led the way with \$44.5 million in spending, followed by the committees linked to New Gingrich (\$26.4 million), Rick Santorum (\$6.7 million), and Ron Paul (\$3.1 million).<sup>18</sup>

In fact, in the two-week period before Super Tuesday, March 6, Super PACs supporting the Republican presidential hopefuls spent three times as much as the candidates themselves spent, according to an analysis reported in the *Wall Street Journal*. During those two weeks, Romney, Santorum, and Gingrich spent a combined \$2.4 million on television ads in Ohio, Oklahoma, Georgia, and Tennessee—the contests that had the most delegates at stake. By comparison, the Super PACs supporting the candidacies of these three men spent \$7.85 million in those four states during the same period.<sup>19</sup>

As expected, a great deal of attention has focused on Republican-leaning Super PACs during the presidential primary season, but these groups are not a one-party phenomenon. President Obama has a Super PAC supporting him—Priorities USA Action—and he has blessed a plan for cabinet and other senior administration officials to help that group.<sup>20</sup> In addition, conservative organizations like the Club for Growth and environmental and union organizations, such as the League of Conservation Voters and the United Food and Commercial Workers International Union, have all established Super PACs to complement their traditional PACs. Many of these PACs currently have little or no cash, but they were created as spare weapons, should they be needed to advance their sponsors' agendas in the upcoming state and federal elections.<sup>21</sup>

There is no doubt that Super PACs will account for a sizable share of the projected \$9.8 billion in election spending this election year.<sup>22</sup> And much has been written about the negative nature of the ads sponsored by Super PACs.<sup>23</sup> It is, however, too early to know the real impact that Super PACs will have on the outcome of the 2012 elections. With the benefit of hindsight, political scientists, lawyers, lawmakers, and judges will at some point be able to comb through the facts and look for answers to many important questions, including the following:

- Did “special interests” really decide the outcome of elections?
- Was the electorate swayed by the deluge of independent ads?
- Did voters tune out Super PAC ads like the thousands of commercial ads they see each week?
- What impact has public disclosure had on the funding of Super PACs?
- And, most important, can independent ads have a corrupting influence on the candidates they benefit?

## First Impressions Can Be Deceiving

Before any assessment of the impact—be it positive or

negative—of the *Citizens United* decision and Super PACs is even possible, it is essential to clear up some of the confusion that has seeped into popular commentary.

First, the *Citizens United* decision empowered incorporated entities to engage in candidate advocacy; the decision did not address political spending by individuals. To date, most of the money pouring into Super PACs has come from individuals. The top 10 donors to Super PACs are all individuals, and they have contributed more than \$37 million.<sup>24</sup> Less than one half of a percent of all contributions to Super PACs has come from publicly traded companies.<sup>25</sup> This is not to say that corporations are without a role in this election; nothing could be further from the truth. Corporations and unions have played—and will continue to play—a prominent role in federal and state elections through contributions by their traditional PACs and by their executives as well as to Super PACs. But if the perceived negative outcome is shadowy corporate spending, then those seeking fixes to campaign contributions might be better off looking elsewhere than Super PACs, which have thus far received limited corporate support and fully disclose all their activities.

Related to this is the notion that the *Citizens United* ruling freed wealthy Americans to spend unlimited amounts on political ads. Even before the Court's decision, it was perfectly legal for Thurston Howell III (or the billionaire of your choice) to pay for as many political ads as he pleased to support or oppose candidates for office as well as political parties. Restrictions applied only if he or she gave the money to, or coordinated with, a campaign or other political committee.

Finally, there is an undercurrent in some analyses that Super PACs, in fact, are illegally “coordinating” with the campaigns that they support. Critics point to the fact that the major Super PACs backing the President and the Republican candidates are run by close political associates of the candidates, such as senior officials from prior campaigns, former congressional employees, former White House officials, fund-raisers, and even family members.<sup>26</sup> In addition, candidates and their surrogates actively raise funds for Super PACs that support them.<sup>27</sup> Mitt Romney's Super PAC even re-aired a 2008 ad that had been used by the Romney campaign—a move that some contend is an illegal contribution to Romney's 2012 campaign.

Simply put, just because a Super PAC does any of these things does not mean that it has “coordinated” with a candidate about communications within the meaning of the law. The FECA treats expenditures made in “cooperation, consultation, or concert with or at the request or suggestion of a candidate” as contributions to the candidate's campaign.<sup>28</sup> These simple words mask the ephemeral nature of the activity. To make things more complicated, in *Citizens United*, the Supreme Court did not provide any guidance on how to determine if spending is truly independent. Similarly, Congress has not provided greater clarity on the subject. The McCain-Feingold campaign financing legislation passed in 2002 instructed the FEC to write new rules without developing a clearer definition of its own, and a 2010 effort to tighten the definition of the word “coordination” died in the Senate.

In the absence of congressional or judicial clarification, candidates and Super PACs have to look to the FEC for guidance, and that agency has struggled mightily in drawing the line between independent and coordinated communications. Since 2002, the agency has rewritten its coordination rules three times—twice by court order. The result is a complex multi-part test that forbids a candidate from suggesting, discussing, or being materially involved in candidate advocacy communications paid for by an outside group.<sup>29</sup> To no great surprise, the rules have many exceptions. Therefore, Super PACs and candidates, with the aid of experienced counsel, are able to communicate and interact with each other, within limits, and remain completely within the law.

### What's Next?

From the moment the *Citizens United* decision was handed down, there have been numerous proposals in Congress and state legislatures aimed at overturning or “softening” the impact of the ruling. At the same time, others have argued that Congress and state legislatures should go slow and assess the true impact of *Citizens United* before attempting to implement so-called cures. Three ways to approach *Citizens United* and Super PACs are summarized below.

### Stop, Look, and Listen

The response of some First Amendment advocates on the right and the left has been that the Court got it right in *Citizens United*, and nothing at all should be done. The First Amendment's role is to guarantee, not inhibit, free speech, especially when it comes to discourse regarding the selection of our political leaders. Certainly, some individuals and entities will have greater resources to expend on political activities than others will have, but that is inherent in a free society. And that outcome is preferable to having the government limit the political speech of some persons and entities in order to augment the others' rights to free speech.

It is equally true that, just because a wealthy individual or corporation can blanket the airwaves with ads supporting a favored candidate, there is no guaranty that those views will prevail in the court of public opinion. Moreover, individuals and organizations of more modest means have the capability to join in a corporate or noncorporate form to promote their jointly held views. In fact, the FEC recently approved the activities of an organization that intends to facilitate the production and airing of candidate and issue ads created and paid for by individuals and small businesses.<sup>30</sup>

Those who support the Court's ruling point out that corporations are hesitant to sponsor political ads or to fund Super PACs. Under current disclosure rules, customers and shareholders will know about—and may be antagonized by—such activities.<sup>31</sup> And that's not good for business.

The experience of the discount chain Target is a cautionary tale in this regard.<sup>32</sup> In 2010, Target and several other companies financed a group called Minnesota Forward, which sponsored ads supporting Tom Emmer, a Republican candidate and a staunch opponent of gay marriage. Because Target was known as a company with gay-friendly employment policies, when its involvement in the

campaign was discovered, many customers and employees were enraged. In addition to the public relations nightmare, the candidate whom Target supported lost.

### Back to the Future

Efforts to overturn *Citizens United* have been underway since the day the ruling was handed down.<sup>33</sup> No fewer than 19 resolutions have been introduced in the 111th and 112th Congresses to amend the Constitution to reverse the *Citizens United* decision.<sup>34</sup> Many proposals, such as Senate Joint Resolution 29, which was introduced on Nov. 1, 2011, would amend the Constitution to authorize Congress and the states to regulate the raising and spending of money by political campaigns and limit independent expenditures in support of or in opposition to candidates for office. Other proposals, such as House Joint Resolution 88, aim more directly at the concept of corporate personhood and could have an impact on a wide range of corporate speech rights.

In addition, resolutions to amend the Constitution have been proposed at the state and local government levels and by local political organizations in 23 states. On Super Tuesday, more than 50 communities in Vermont passed initiatives calling on legislators and the state's congressional delegation to support a constitutional amendment that would overturn the *Citizens United* decision.<sup>35</sup>

Amending the Constitution is a long, involved, and usually unsuccessful process. As a result, critics of the *Citizens United* decision have looked for other ways to attack it, and a recent ruling handed down by the Montana Supreme Court in the case of *Western Tradition Partnership v. Attorney General of the State of Montana* may offer just that opportunity. The U.S. Supreme Court is considering whether to hear arguments regarding the Montana court's decision, which upheld the state's century-old ban on corporate expenditures for political campaigns.<sup>36</sup>

The Montana Supreme Court was of the view that the *Citizens United* decision would allow a state court to reach its own conclusion as to whether corporate expenditures on electoral campaigns have a corrupting influence in that state.<sup>37</sup> In the court's opinion, the state's long history of corporate corruption during the 1800s and early 1900s provided the voters with a compelling interest in the referendum that banned such corporate expenditures. Moreover, as a state with a small population that could quickly be overrun by wealthy corporate interests, that compelling interest to ban corporate expenditures persists.

Montana Justice James C. Nelson, writing in dissent, was of the view that “the Supreme Court has spoken ... vis-à-vis corporate political speech,” and he bluntly addressed the shortcomings of the majority opinion: “The Supreme Court in *Citizens United* ... rejected several asserted governmental interests; and this Court has now come along, retrieved those interests from the garbage can, dusted them off, slapped a ‘Made in Montana’ sticker on them, and held them up as grounds for sustaining a patently unconstitutional state statute.”<sup>38</sup>

There has been recent speculation that Justice Kennedy is “about to flip” with respect to his deciding vote in *Citizens United*.<sup>39</sup> Although such an about-face is a possibility, it is not

the norm at the Supreme Court, particularly in the absence of a change in personnel. Thus, for the time being, a reversal of fortune for the *Citizens United* decision seems unlikely.

### **Let the Sunshine In**

Recognizing the difficulty in reversing the *Citizens United* ruling, most attention has focused on enhancing the contribution and expenditure disclosure regimes—an approach that stands on firm constitutional footing. Proposals to fix the disclosure regulations are under consideration across the country at the federal and state levels. Some of the major campaign finance disclosure efforts under way in Washington, D.C., are discussed below.

In February 2012, Rep. Chris Van Hollen (D-Md.) introduced the Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2012—the DISCLOSE 2012 Act for short.<sup>40</sup> Van Hollen’s bill, a pared-back version of legislation he and Sen. Charles Schumer (D-N.Y.) introduced shortly after the Supreme Court issued its ruling in *Citizens United*, would impose new disclosure requirements on “covered organizations,” a term that encompasses corporations, unions, tax-exempt organizations, and Super PACs that make disbursements for campaign-related ads.<sup>41</sup> Among other things, the proposal would provide for the following:

- The head of a covered organization must certify in FEC reports that the organization’s disbursements are not coordinated with a candidate or a political party.
- The head of a covered organization is required to “stand by the ad”—that is, include in the ad a statement that he or she “approves this message.” Ads by the organization would also have to disclose the Top Five contributors (for television ads) or Top Two contributors (for radio ads).
- A covered organization has to identify its contributors in FEC reports and disclose campaign-related expenditures to its shareholders and members in its periodic and annual financial reports. The organization also must include a hyperlink to its FEC reports on its website.

By covering tax-exempt organizations, the DISCLOSE 2012 Act moves beyond regulating only Super PACs and attempts to address what many believe to be a problematic issue related to 501(c)(4) advocacy groups: These groups, officially known under the Internal Revenue Code as “social welfare” organizations, are allowed to engage in political activities so long they are not the organization’s primary mission. But unlike traditional PACs and Super PACs, which file public reports with the FEC, as well as nonregistered 527 political organizations, which file public reports with the IRS, the reporting requirements for 501(c)(4) groups are much looser.

Under IRS rules, contributors to 501(c)(4)s are not disclosed publicly.<sup>42</sup> Under the FEC’s disclosure rules, any organization—including a 501(c)(4) entity—that sponsors independent expenditures must file reports disclosing its spending. But the existing rules are not clear as to when such an organization’s contributors, whose dollars fund those ads, have to be disclosed to the FEC.<sup>43</sup> Moreover, there is disagreement among FEC commissioners as to

when such disclosure is required. The Republican commissioners have indicated that a contributor must be disclosed only when the person has made a donation for the specific purpose of funding a particular ad.<sup>44</sup> The Democratic commissioners seem to favor greater disclosure of donors.<sup>45</sup> The result is that a person or company can contribute to a 501(c)(4) entity, that group can then sponsor an independent expenditure or even contribute to a Super PAC, and the person or company making the contribution may never be disclosed in the organization’s reports to the FEC.

The ongoing philosophical divide between the three Republican and three Democratic commissioners at the FEC has also precluded a broader revision of the agency’s disclosure rules. In February 2010, the FEC promised to review its regulations in light of the *Citizens United* decision. After two years, the commission issued proposed rules that recognize the ability of corporations to sponsor independent expenditures in keeping with the *Citizens United* holding. The commissioners could not, however, agree on draft rules that would address the extent to which disclosure is required regarding contributors to intermediary organizations.<sup>46</sup>

In the absence of new FEC regulations, other agencies may enter the regulatory picture. For example, in November 2011, the Federal Communications Commission issued a draft rule that would require broadcasters to replace their hard copy public inspection file with a more standardized online reporting system.<sup>47</sup> These files, which are available for inspection by the public at a broadcaster’s office, contain information regarding time sold for political advertising. Broadcasters believe that the rules would impose new costs and burdens on them, but an array of public interest groups have lobbied aggressively in favor of the proposed rule. The Federal Communications Commission may act on the rule in the first half of 2012.

In addition, in August 2011, a group of academics submitted a petition for rulemaking to the Securities and Exchange Commission asking the agency to require corporations to disclose political expenditures to shareholders.<sup>48</sup> Commissioner Luis Aguilar has spoken favorably about this proposal and believes that both the Securities and Exchange Commission and corporations must ensure that “investors are not left in the dark while their money is used without their knowledge or consent.”<sup>49</sup>

Finally, there are reports that the Internal Revenue Service has sent letters to dozens of 501(c)(4) social welfare organizations, many with conservative leanings, asking for information to determine if the groups qualify for their tax status. A group whose tax designation is revoked could be subject to fines and the disclosure of its donors. The battle has already begun as to whether the IRS is merely enforcing the tax code or harassing enemies of the administration.<sup>50</sup>

### **Time Will Tell**

So, where are we going? It’s hard to say at this point in the 2012 election cycle, but the law will surely continue to evolve in the aftermath of *Citizens United*. New reforms may be enacted, new rules may be adopted, and judicial challenges may follow. But one thing is constant in the campaign finance world: Participants in the political pro-

cess—candidates, political parties, corporations, unions, and others—will find creative responses to any changes in the rules of the game. There is just too much at stake for campaign finance laws to stand still. **TFL**

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## Endnotes

<sup>1</sup>*Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

<sup>2</sup>*Id.* at 890.

<sup>3</sup>2 U.S.C. §§ 441b, 431(17).

<sup>4</sup>*Citizens United*, 130 S. Ct. at 904.

<sup>5</sup>*Id.* at 910.

<sup>6</sup>*Id.* at 917.

<sup>7</sup>Andrew Malcolm, Commentary, *Obama's State of the Union Address: Criticism of the Supreme Court Campaign Finance Ruling*, L.A. TIMES (Jan. 27, 2010), available at [latimesblogs.latimes.com/washington/2010/01/obamas-state-of-the-union-address-criticism-of-the-supreme-court-campaign-finance-ruling.html](http://latimesblogs.latimes.com/washington/2010/01/obamas-state-of-the-union-address-criticism-of-the-supreme-court-campaign-finance-ruling.html).

<sup>8</sup>*Citizens United*, 130 S. Ct. at 916.

<sup>9</sup>*Id.*

<sup>10</sup>2 U.S.C. § 441a(a); 11 CFR Part 109.

<sup>11</sup>*SpeechNow.org v. Federal Election Commission*, 599 F.3d 686 (D.C. Cir. 2010).

<sup>12</sup>*Id.* at 696.

<sup>13</sup>FEC Advisory Opinion 2010-09 (Club for Growth).

<sup>14</sup>FEC Advisory Opinion 2010-11 (Commonsense Ten).

<sup>15</sup>FEC Advisory Opinion 2011-12 (Majority PAC and House Majority PAC).

<sup>16</sup>Editorial, *Let the Spending Begin*, N.Y. TIMES (July 26, 2010), available at [www.nytimes.com/2010/07/27/opinion/27tue2.html?\\_r=1](http://www.nytimes.com/2010/07/27/opinion/27tue2.html?_r=1).

<sup>17</sup>OpenSecrets.org, *2012 Outside Spending by Super PACs*, available at [www.opensecrets.org/outsidespending/summ.php?disp=Q](http://www.opensecrets.org/outsidespending/summ.php?disp=Q) (then follow "Super PACs") (last visited March 8, 2012).

<sup>18</sup>Kenneth P. Doyle, *Super PAC Spending to Eclipse \$100 Million; Money from 501(c)'s More Difficult to Track*, BLOOMBERG BNA, MONEY & POLITICS REPORT (March 7, 2012), available at [news.bna.com/mpdm/MPDMWB/split\\_display.adp?fedfid=24795255&vname=mpebulallissues&fcn=1&wsn=498706500&fn=24795255&split=0](http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=24795255&vname=mpebulallissues&fcn=1&wsn=498706500&fn=24795255&split=0) (subscription service).

<sup>19</sup>Brody Mullins and Alicia Mundy, *Super PACs Outspent Candidates in Run-Up to Tuesday*, WALL ST. J. (March 7, 2012), available at [online.wsj.com/article/SB10001424052970203961204577267822228233682.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB10001424052970203961204577267822228233682.html?mod=googlenews_wsj) (last updated March 7, 2012).

<sup>20</sup>Michael Luo and Nicholas Confessore, Posting to THE CAUCUS, March 2, 2012, available at [thecaucus.blogs.nytimes.com/2012/03/02](http://thecaucus.blogs.nytimes.com/2012/03/02).

<sup>21</sup>Kevin Bogardus and Rachel Leven, *Super-PACs: A*

*New Tool in Trade Groups' 2012 Arsenal*, THE HILL at 8 (March 7, 2012).

<sup>22</sup>*Super PACs Could Drive Total 2012 Election Spending to \$9.8 B*, ADVERTISING AGE (March 7, 2012), available at [adage.com/print/233155](http://adage.com/print/233155).

<sup>23</sup>Bill Schneider, *Super PACs are Ruining GOP*, POLITICO (March 5, 2012), available at [www.politico.com/news/stories/0312/73630.html](http://www.politico.com/news/stories/0312/73630.html).

<sup>24</sup>OpenSecrets.org, *2012 Top Donors to Outside Spending Groups*, available at [www.opensecrets.org/outside\\_spending/summ.php?disp=D](http://www.opensecrets.org/outside_spending/summ.php?disp=D) (last visited March 11, 2012).

<sup>25</sup>Anna Palmer and Abby Phillip, *Corporations Not Funding Super PACs*, POLITICO (March 8, 2012), available at [www.politico.com/news/stories/0312/73804.html](http://www.politico.com/news/stories/0312/73804.html).

<sup>26</sup>Andy Kroll, *Candidates and the Totally Unrelated Super-PACs That Love Them*, MOTHER JONES (Jan. 20, 2012), available at [motherjones.com/print/157701](http://motherjones.com/print/157701).

<sup>27</sup>Luo and Confessore, *supra* note 20.

<sup>28</sup>2 U.S.C. § 441a(a)(7)(B).

<sup>29</sup>11 CFR Part 109.

<sup>30</sup>FEC Advisory Opinion 2011-24, (*StandLouder.com*).

<sup>31</sup>Lanny Davis, Editorial, *Court Ruling Maybe Less Consequential than it Seems*, THE HILL (Feb. 3, 2010), available at [thehill.com/opinion/columnists/lanny-davis/79659-ruling-maybe-less-consequential](http://thehill.com/opinion/columnists/lanny-davis/79659-ruling-maybe-less-consequential).

<sup>32</sup>Peter Overby, Posting to POLITICAL JUNKIE (July 27, 2010), available at [www.npr.org/blogs/politicaljunkie/2010/07/27/128802661/](http://www.npr.org/blogs/politicaljunkie/2010/07/27/128802661/).

<sup>33</sup>On Jan. 21, 2010, Rep. Leonard Boswell (D-Iowa) introduced House Joint Resolution 68 to amend the Constitution to prohibit corporations from funding political ads.

<sup>34</sup>People for the American Way, *Citizens United v. FEC Constitutional Remedies: List of Local, State and Federal Resolution Efforts* (Jan. 13, 2012), available at [www.pfaw.org/issues/government-the-people/citizens-united-v-fec-constitutional-remedies-list-of-local-state-and-federal](http://www.pfaw.org/issues/government-the-people/citizens-united-v-fec-constitutional-remedies-list-of-local-state-and-federal).

<sup>35</sup>*Id.*, see also Ashley Portero, *Vermont Towns Vote to Overturn Citizens United, Call for Constitutional Amendment*, IBMTIMES.COM (March 7, 2012), available at [www.ibmtimes.com/art/services/print.php?articleid=310793](http://www.ibmtimes.com/art/services/print.php?articleid=310793).

<sup>36</sup>*Western Tradition Partnership v. Attorney General of the State of Montana*, 363 Mont. 220 (2011).

<sup>37</sup>*Id.* at 227.

<sup>38</sup>*Id.* at 271.

<sup>39</sup>Corbin Hiari, *Lawrence Lessig on Campaign Finance Reform: Overturning Citizens United Isn't Enough*, IWATCH NEWS (Feb. 29, 2012), available at [www.iwatchnews.org/2012/02/29/8278/lawrence-lessig-campaign-finance-reform-overturning-citizens-united-isnt-enough](http://www.iwatchnews.org/2012/02/29/8278/lawrence-lessig-campaign-finance-reform-overturning-citizens-united-isnt-enough).

<sup>40</sup>U.S. House of Representatives, H.R. 4010, 112th Cong. (2d Sess. 2012).

<sup>41</sup>The 2010 version of the DISCLOSE Act went beyond enhanced disclosure and banned foreign interests, federal contractors, and TARP recipients from making independent expenditures, and sought to tighten coordination rules.

<sup>42</sup>U.S. Senate, Committee on Environment and Public Works, *Political Activity of Environmental Groups and*

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<sup>34</sup>*Cf. Grove v. Emerson*, 507 U.S. 25 (1993) (holding that the district court should defer to the state legislature in drawing redistricting plans unless the legislature fails to timely adopt a plan). It should be noted, however, that the plan at issue in *Grove* was not subject to pre-clearance under § 5 of the Voting Rights Act. *Branch*, 538 U.S. at 264 (making this distinction).

<sup>35</sup>*Upham v. Seamon*, 456 U.S. 37 (1982).

<sup>36</sup>See also *White v. Weiser*, 412 U.S. 794–95 (1973) (holding that the district court, in choosing among redistricting plans, should choose the plan that is closest to the state’s proposed plan).

<sup>37</sup>*Cf. Lopez v. Monterey County*, 525 U.S. 266 (1999) (holding that state is required to pre-clear a statewide change to its regime for electing judges, even where the state itself is not covered by § 5 of the Voting Rights Act, in order for the VRA to have effect in jurisdictions within the state that are covered by the act).

<sup>38</sup>*Id.* at 272 (holding that in adopting “2 U.S.C. § 2c Congress mandated that States are to provide for the election of their Representatives from single-member districts, and that this mandate applies equally to courts remedying a state legislature’s failure to redistrict constitutionally”).

<sup>39</sup>See, e.g., *Abrams v. Johnson*, 521 U.S. 74 (1997).

<sup>40</sup>*Upham*, 456 U.S. 938.

<sup>41</sup>See, e.g., *Branch*, 538 U.S. at 269.

<sup>42</sup>Compare *id.* at 276 (finding that § 2c “directs federal courts to redistrict *absolutely and without qualification*”) (emphasis in original) *with id.* at 300 (O’Connor, J., concurring in part and dissenting in part) (reading § 2 to say that courts may not undertake initial redistricting but may draw single-member districts after the court determines that the legislature’s plan violates the Constitution).

<sup>43</sup>*Texas Redistricting Cases*, slip op. at 6.

<sup>44</sup>See *United Jewish Organizations v. Carey*, 430 U.S.

144, 175 (1977) (Brennan, J., concurring) (“In my view, if and when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act.”).

<sup>45</sup>*Texas Redistricting Cases*, slip op. at 6 (“This Court recently noted the ‘serious constitutional questions’ raised by § 5’s intrusion on state sovereignty. Those concerns would only be exacerbated if § 5 required a district court to wholly ignore the State’s policies in drawing maps that will govern a State’s elections, without any reason to believe those state policies are unlawful.” (citation omitted)). The Court’s approach in *Northwest Austin Municipal District Number One* was permissible, because it allowed a small utility district that had never conducted voter registration or discriminated on the basis of race to bail out, which is arguably consistent with § 5. The *Texas Redistricting Cases*, on the other hand, conflict with this purpose by using non-pre-cleared plans subject to cognizable § 2 challenges to influence the interim plans.

<sup>46</sup>Franita Tolson, *Reinventing Sovereignty: Federalism as a Constraint on the Voting Rights Act*, 65 VAND. L. REV. \_\_ (forthcoming 2012) (arguing that the Supreme Court’s federalism concerns regarding the Voting Rights Act are unfounded because Congress, not the states, is sovereign over federal elections and has extensive authority to regulate state election practices under the Fourteenth and Fifteenth Amendments).

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*Their Supporting Foundations* at 6 (Sept. 2008), available at [epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore\\_id=142d595f-411a-4057-b495-029a095fe25f](http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=142d595f-411a-4057-b495-029a095fe25f).

<sup>43</sup>11 CFR § 109.10.

<sup>44</sup>See Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, *Statement of Reasons*, MUR 6002 (Aug. 13, 2010), available at [eqs.nictusa.com/eqsdocsMUR/10044274536.pdf](http://eqs.nictusa.com/eqsdocsMUR/10044274536.pdf).

<sup>45</sup>See Vice Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub, *Statement of Reasons*, in MUR 6002 (Sept. 16, 2010), available at [eqs.nictusa.com/eqsdocsMUR/10044280805.pdf](http://eqs.nictusa.com/eqsdocsMUR/10044280805.pdf).

<sup>46</sup>*Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations*, 76 FED. REG. 80803 (Dec. 27, 2011).

<sup>47</sup>*Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations; Extension of the Filing Requirement for Children’s Television Programming Report (FCC Form 398)*, 76 FED.

REG. 72144 (Nov. 17, 2011).

<sup>48</sup>*Petition to Require Public Companies to Disclose to Shareholders the Use of Corporate Resources for Political Activities*, Securities and Exchange Commission, File No. 4-637 (Aug. 3, 2011), available at [www.sec.gov/rules/petitions/2011/petn4-637.pdf](http://www.sec.gov/rules/petitions/2011/petn4-637.pdf).

<sup>49</sup>Rick Cohen, *SEC Commissioner Calls for Corporate Disclosure of Contributions to Political Nonprofits*, NON-PROFIT QUARTERLY (Feb. 27, 2012), available at [www.nonprofitquarterly.org/policysocial-context/19875-sec-commissioner-calls%20for-corporate-disclosure-](http://www.nonprofitquarterly.org/policysocial-context/19875-sec-commissioner-calls%20for-corporate-disclosure-).

<sup>50</sup>Jonathan Weisman, *Scrutiny of Political Nonprofits Sets Off Claim of Harassment*, N.Y. TIMES (March 6, 2012), available at [www.nytimes.com/2012/03/07/us/politics/irs-scrutiny-of-political-groups-stirs-harassment-claim.html?\\_r=](http://www.nytimes.com/2012/03/07/us/politics/irs-scrutiny-of-political-groups-stirs-harassment-claim.html?_r=); see also Dan Froomkin, HUFFINGTON POST (March 8, 2012), available at [www.huffingtonpost.com/2012/03/08/irs-political-groups-501c4-n-1333389.html?view=print&comm\\_ref](http://www.huffingtonpost.com/2012/03/08/irs-political-groups-501c4-n-1333389.html?view=print&comm_ref).