

Symposium on Corporate Political Spending

THE NON-EXPERT AGENCY: USING THE SEC
TO REGULATE PARTISAN POLITICS

BRADLEY A. SMITH AND ALLEN DICKERSON*

ABSTRACT

Over the past 15 years advocates of campaign finance reform, frustrated by the structure and design of the Federal Election Commission (FEC), have attempted to offload the duties of campaign finance regulation to other federal agencies, most notably the Internal Revenue Service (IRS) but also the Federal Communications Commission (FCC). Recently, these efforts have expanded to include the Securities and Exchange Commission (SEC).

We respond specifically to Professors Lucian A. Bebchuk & Robert J. Jackson, Jr., who in their recent article “Shining Light on Corporate Political Spending,” urge the SEC to adopt compulsory disclosure rules to govern corporate political activity. We argue that whatever the theoretical merits of this position, the reality is that the current pressure on the SEC to adopt new compulsory disclosure regulations is a direct result of a desire to use the SEC to regulate not corporate governance or the world of investment and trading, but campaign finance. We suggest that, as a result, any rules adopted are likely to be ill-advised and co-opted in the enforcement process. Additionally, we note that efforts to require the IRS and FCC to regulate speech have resulted in very bad unintended consequences, the natural result of agencies operating outside their area of expertise.

At the core of the theory of the independent agency is a belief that administrative bodies will develop unique technical competence and will operate within that sphere of expertise. Pressure on the SEC (or other agencies) to regulate campaign finance takes these agencies out of their area of professional expertise and competence, and is thus likely to result in bad law, damage to institutional reputation, and a distraction from the agency’s core mission.

TABLE OF CONTENTS

INTRODUCTION	420
I. TURNING TO THE NON-EXPERT AGENCY: WHY THE SEC, WHY NOW?	423
II. ADMINISTRATIVE LAW DONE WRONG: REGULATION BY NON-EXPERT AGENCIES	427
A. <i>The Design and Mission of Independent Agencies: How the FEC Is Designed to Regulate Politics, and the SEC Is Not</i>	428

* Bradley A. Smith is the John T. Copenhaver, Jr. Visiting Chair of Law, West Virginia University, Josiah H. Blackmore II & Shirley M. Nault Professor of Law, Capital University Law School and Chairman, Center for Competitive Politics. Allen Dickerson is the Legal Director of the Center for Competitive Politics. We thank Professors Bebchuk and Jackson for this opportunity to reply to their work.

	<i>B. The Non-Expert Agency in Action: the IRS Experience . . .</i>	434
III.	ROOTS OF EXPERTISE: THE SEC DISCLOSURE REGIME	439
	<i>A. The Securities Exchange Act</i>	439
	<i>B. The Role of Materiality</i>	440
IV.	THE MECHANISMS OF CORPORATE DEMOCRACY: WHO DESIRES DISCLOSURE, AND WHY?	440
	<i>A. There is little evidence that shareholders desire this disclosure</i>	441
	<i>B. Shareholder resolutions are extraordinarily easy to bring, and, as demonstrated by their sometimes very low level of support, need not represent widespread views</i>	441
	<i>C. Those bringing shareholder resolutions on corporate political disclosure are not unbiased observers</i>	443
	<i>D. Popular support for these efforts has been largely motivated by opposition to Citizens United, and corporate political speech generally and not by considered concerns over shareholder value</i>	445
	<i>E. The comparison of the proposed rule to past SEC action requiring disclosure of executive compensation is inapt</i>	448
	<i>F. In the aftermath of Business Roundtable, the SEC should be cautious in adopting rules that may benefit self- interested advocacy over broader shareholder value</i>	449
	CONCLUSION	450

INTRODUCTION

The regulation of political speech, in the form of regulating contributions and spending, is one of the most constitutionally delicate operations in which the government can engage. As the Supreme Court stated in *Buckley v. Valeo*, “[Political] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. . . . [T]he First and Fourteenth Amendments guarantee ‘freedom to associate with others for the common advancement of political beliefs and ideas.’”¹

Compulsory disclosure of political contributions and spending are not exempt from these weighty First Amendment concerns: “the right of associational privacy . . . derives from the rights of the organization’s members to advocate their personal points of view in the most effective way.”² Compulsory disclosure can impose “very real, practical burdens . . . certain to deter individuals from making expenditures for their independent political speech.”³ The Supreme Court has stated that “compelled disclosure, in it-

¹ 424 U.S. 1, 14–15 (1976) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 56 (1973)).

² *Id.* at 75.

³ *Id.* (citing *Thomas v. Collins*, 323 U.S. 516 (1945)). *Thomas v. Collins*, 323 U.S. at 540 (“If the exercise of the rights of free speech and free assembly cannot be made a crime, we do

self, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”⁴

Given these important First Amendment concerns, advocates of campaign finance and political speech restrictions, while frequently successful in electoral and legislative politics, have not been able to impose the types of broad, comprehensive “reform” plans they have desired. Even when relatively comprehensive restrictions have been passed, the courts have carved them up.⁵ Perhaps for this reason, or perhaps because of more inherent contradictions in the theories of reform, campaign finance regulation has generally failed to achieve its stated goals.⁶

Implicitly admitting the failure of reform efforts, regulatory advocates have often accused the enforcement mechanism, which at the federal level is the Federal Election Commission (FEC), of being weak and ineffectual, and have sought to change the structure of the Commission to give it more power.⁷ There is good reason to believe that this diagnosis—that the failures of “reform”⁸ lie with the enforcers and enforcement structure—is incorrect,⁹

not think this can be accomplished by the device of requiring previous registration as a condition for exercising them”)

⁴ *Id.* at 64 (citing *Gibson v. Florida Legislative Comm’n*, 372 U.S. 539 (1963)); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, 357 U.S. 449 (1958).

⁵ See generally Kurt J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 *FORDHAM. L. REV.* 53 (1987).

⁶ See, e.g., PETER J. WALLISON & JOEL M. GORA, *BETTER PARTIES, BETTER GOVERNMENT: A REALISTIC PROGRAM FOR CAMPAIGN FINANCE REFORM* 1–86 (2009); Sam Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 *TEX. L. REV.* 1705 (1998); William P. Marshall, *The Last, Best Hope for Campaign Finance Reform*, 94 *NW. U. L. REV.* 335 (2000); Nahra, *supra* note 5, at 53; Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 *YALE L.J.* 1049, 1050–51.

⁷ See generally BROOKS JACKSON, *BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED* 59–73 (1990); PROJECT FEC, *NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION’S CAMPAIGN FINANCE LAWS* (2002) [hereinafter *NO BARK, NO BITE*]; FRED WERTHEIMER & DON SIMON, *AM. CONSTITUTION Soc’y, THE FEC: THE FAILURE TO ENFORCE COMMISSION* (2013); Amanda S. LaForge, *The Toothless Tiger: Structural, Political, and Legal Barriers to Effective FEC Enforcement*, 10 *ADMIN. L. J. AM. U.* 351 (1996); Editorial, *Rethinking the FEC*, *WASH. POST*, Mar. 5, 1999, at A32.

⁸ We will use this term in this article, from here on without quotes, to apply to those generally favoring increased regulation of campaign contributions and expenditures, and money in politics generally. “Reform” is a term that such advocates commonly use when referring to themselves, and which is often used by the press. E.g., Paul Blumenthal, *Obama’s State of the Union Address Lacks Call for Campaign Finance Reform*, *IRKING REFORMERS*, HUFFINGTON POST (Feb. 13, 2013, 7:59 PM), http://www.huffingtonpost.com/2013/02/13/obama-campaign-finance-reform_n_2678156.html (“reformers”); Paul Blumenthal, *Barack Obama Campaign Finance Reforms Fiddled While System Crumbled*, HUFFINGTON POST (Sept. 6, 2012, 9:59 AM), http://www.huffingtonpost.com/2012/09/06/barack-obama-campaign-finance_n_1855520.html (“reform community”); Azmat Kahn, *What’s the Future for Campaign Finance Reform*, *PBS FRONTLINE* (Nov. 19, 2012, 5:39 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/big-sky-big-money/whats-the-future-for-campaign-finance-reform/> (“reformers”); Kenneth P. Vogel, *Campaign Finance Reform, R.I.P.?*, *POLITICO* (Oct. 13, 2010, 1:47 PM), <http://www.politico.com/news/stories/1010/43515.html> (“Wertheimer, and the other lobbyists, lawyers and academics who push for tougher campaign cash restrictions . . . often refer to themselves as “the reform community’ . . .”). We note that

but it is, nevertheless, widely propagated. For one thing, it takes the blame off of the problems with attempting to regulate political speech itself, and thus avoids the difficult debate that ought to be at the center of campaign finance discussions: to what extent should the government be able to regulate political speech? Despite efforts to blame the FEC for the failures of reform, reformers have had little luck in restructuring the FEC.

Disgusted with the FEC for real or imaginary reasons—and unable to gain political support for a more “robust” agency structure—over the past fifteen years the Reform Community has begun to make periodic efforts to offload the duties of campaign finance regulation to other federal agencies, most notably the Internal Revenue Service (IRS), but also the Federal Communications Commission (FCC) and, most recently, the Securities & Exchange Commission (SEC).

Professors Lucian Bebchuk and Robert Jackson have been at the fore of intellectual arguments urging the SEC to engage in regulation of campaign finance, through increased compulsory disclosure of corporate spending on matters of politics and public affairs.¹⁰ In this article we respond to a number of particular arguments advanced by Professors Bebchuk and Jackson. Equally important, we argue that whatever the theoretical merits of the position put forth by Professors Bebchuk and Jackson, the reality is that the current pressure on the SEC to adopt new compulsory disclosure regulations is a direct result of a desire to use the SEC to regulate not just corporate governance or the world of investment and trading, but also campaign finance. As a result, we suggest that any rules adopted are likely to be ill-advised and co-opted in the enforcement process. At the core of the theory of the independent agency is that such agencies will develop a unique technical competence and will operate within that sphere of expertise. Pressure on the SEC (or other agencies) to regulate campaign finance takes these agencies out of their area of professional expertise and competence, and is thus likely to result in bad law, damage to institutional reputation, and a distraction from the agency’s core mission.

those who call for decreased regulation could equally consider themselves to be in favor or “reform” of the laws.

⁹ See generally Michael M. Franz, *The Devil We Know? Evaluating the Federal Election Commission as Enforcer*, 8 ELECTION L. J. 167 (2009); Allison R. Hayward & Bradley A. Smith, *Don’t Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L. J. 82 (2005); Bradley A. Smith & Stephen M. Hoerstering, *A Toothless Anaconda: Innovation, Impotence and Over-enforcement at the Federal Election Commission*, 1 ELECTION L. J. 145 (2002); *Federal Election Commission Panel Discussion, Problems and Possibilities*, 8 ADMIN. L. J. AM U. 223, 224–33 (1994) [hereinafter *Panel Discussion*].

¹⁰ See Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923 (2013) [hereinafter *Shining Light*]; Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech: Who Decides?*, 124 HARV. L. REV. 83 (2010); Letter from Comm. on Disclosure of Corporate Political Spending to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm’n (Aug. 3, 2011), available at <http://www.sec.gov/rules/petitions/2011/petn4-637.pdf>. [hereinafter “Committee Petition”]. As co-chairs of the Committee, Professors Bebchuk and Jackson were the principal drafters of the Petition. *Shining Light*, *supra*, at 923 n.1.

In Part I of this reply, we explore the reasons for the current pressure on the SEC to adopt new compulsory disclosure rules. In Part II, we discuss the theory of the independent agency and argue that these efforts to involve the SEC in regulating political activity violate that theory in general terms. We suggest that such a result is unlikely to produce effective regulation, and is more likely to embroil the SEC in political conflicts harmful to its traditional mission. Part III discusses the theory behind SEC rules governing corporate disclosures, and shows that current proposals to mandate more disclosure of public affairs spending do not serve the purposes of the SEC's traditional disclosure regime. Part IV addresses some of the specific arguments made by Professors Bebchuk and Jackson to support an SEC move into the area of law. We conclude by noting some particular problems with the proposals actually being floated.

I. TURNING TO THE NON-EXPERT AGENCY: WHY THE SEC, WHY NOW?

In January 2010, the Supreme Court issued its decision in *Citizens United v. Federal Election Commission*, striking down a federal prohibition on corporate political spending in candidate races.¹¹ The actual effects of *Citizens United* have been considerably overstated,¹² but there is no denying the psychological effect that the decision had on much of the country's progressive political community.

Then-MSNBC anchor Keith Olbermann compared the decision to the *Dred Scott* decision.¹³ Representative Alan Grayson (D-FL) used the same analogy and added that the decision "leads us down the road to serfdom."¹⁴ Former Senator Russ Feingold (D-WI) said that the Supreme Court was "wantonly willing to undo our democracy."¹⁵ The list of outraged and fear-

¹¹ *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

¹² Prior to *Citizens United*, over half the nation's states, covering over half the nation's population, already allowed direct and unlimited corporate spending in candidate elections. Additionally, corporations had until the 2004 electoral cycle been free to finance hard-hitting "issue ads" discussing candidates, so long as they stopped short of "express advocacy" of the election or defeat of a candidate, using such phrases as "vote for" and "vote against." *Buckley v. Valeo*, 424 U.S. 1, 45 (1976). Even after 2002 these issue ads could be run any time more than 60 days before a general election and 30 days before a caucus or primary, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 333-34 (2003); after 2007, they could still be run within those windows except in the narrowest circumstances. *Wisconsin Right to Life v. Fed. Election Comm'n*, 551 U.S. 449 (2007). Corporations could also organize "Political Action Committees" to solicit voluntary contributions from corporate managers, shareholders, and their families which could be used for direct contributions to candidate campaigns. See 2 U.S.C. §§ 431(4)(B), 441b(b) (2006).

¹³ Keith Olbermann, *Olbermann: U.S. Government for sale*, NBC NEWS (Jan. 21, 2010, 9:29 PM), <http://www.nbcnews.com/id/34981476/>. See also *Dred Scott v. Sanford*, 60 U.S. 393 (1857) (holding that persons of African ancestry were not and could not be U.S. citizens).

¹⁴ Glen Thrush, *Grayson: SCOTUS decision worst since Dred Scott*, POLITICO (Jan. 21, 2010) http://www.politico.com/blogs/glenthrush/0110/Grayson_SCOTUS_decision_worst_since_Dred_Scott.html.

¹⁵ Paul Blumenthal, *Russ Feingold, Citizens United Foe, Blasts Supreme Court as 'Arm of Corporate America'*, HUFFINGTON POST (June 27, 2012, 3:28 PM), <http://www.huffingtonpost.com>.

ful statements from Democratic representatives—"the consequences may be nightmarish"—goes on and on.¹⁶ A number of liberal political organizations argued for a Constitutional amendment to undo the decision.¹⁷

Most importantly, however, leading Democratic politicians also vowed to take action to limit the effects of *Citizens United*, which they clearly saw along partisan lines. This began at the top with President Obama, who in the immediate aftermath promised "a forceful response" to the decision.¹⁸ Democrats in Congress quickly introduced legislation, dubbed the "DISCLOSE Act,"¹⁹ that would not only have required added disclosure of politically-related spending, but would actually have prohibited much corporate spending that was legal before *Citizens United* was decided.²⁰ It was not lost on Republican leaders in and out of Congress that the initial legislation was sponsored by the Chairman of the Democratic Congressional Campaign Committee, Rep. Chris Van Hollen, and the immediate past-Chair of the Democratic Senatorial Campaign Committee, Sen. Chuck Schumer.²¹ Nor was it missed when Senator Schumer indicated that a primary purpose of the measure was not merely to disclose, but also to silence corporate and union

com/2012/06/27/russ-feingold-citizens-united-supreme-court-montana_n_1630948.html. In an earlier statement, Senator Feingold suggested that corporations would spend hundreds of billions or even trillions of dollars on political activity. See 155 CONG. REC. S10626 (2009) (comments of Sen. Feingold).

¹⁶ A good sampling of quotes has been compiled by People for the American Way. *Quotes by Members of Congress on Citizens United*, PEOPLE FOR THE AMERICAN WAY, <http://www.pfaw.org/issues/fair-and-just-courts/quotes-members-of-congress-citizens-united> (last visited Apr. 22, 2013). The "nightmarish" quote, by Senator Sheldon Whitehouse (D-RI) can be found there. *Id.*

¹⁷ See, e.g., MOVE TO AMEND, <http://www.movetoamend.org> (last visited Apr. 22, 2013). In July 2012 petitions with nearly 2 million signatures were delivered to the capitol, calling for a constitutional amendment. Press Release, People for the American Way, Activists Deliver 1.9 Million Petitions Calling for Constitutional Amendment to Protect Democracy (July 24, 2012), available at <http://www.commondreams.org/newswire/2012/07/24-7>. Several Democratic members of Congress also called for Constitutional Amendments. See, e.g., *Quotes by Members of Congress on Citizens United*, *supra* note 16 (quoting Senator Dodd (D-CT), Rep. Boswell (D-IA), Senator Kerry (D-MA), Senator Udall (D. NM), Rep. Peter Welch (D-VT)). President Obama suggested a constitutional amendment to overcome the decision in August, 2012. Andy Kroll, *Obama: "We Need to Seriously Consider" A Constitutional Amendment to Reverse Citizens United*, MOTHER JONES (Aug. 29, 2012, 4:05 PM), <http://www.motherjones.com/mojo/2012/08/obama-citizens-united-constitutional-amendment-reddit>.

¹⁸ Ben Smith, *Obama on Citizens United: "Stampede of Special Interest Money"*, POLITICO (Jan. 21, 2010 1:36 PM), http://www.politico.com/blogs/bensmith/0110/Obama_on_Citizens_United_Stampede_of_special_interest_money.html.

¹⁹ H.R. 5175, 111th Cong. (2010), S3628, 111th Cong. (2010). "DISCLOSE" is an acronym created by giving the bill the gimmicky title "Democracy Is Strengthened by Casting Light On Spending in Elections." Skeptics at the Center for Competitive Politics dubbed it "Democratic Incumbents Seeking to Contain Losses by Outlawing Speech in Elections." CENTER FOR COMPETITIVE POLITICS, LEGISLATIVE MEMO ON H.R. 5175, THE "DISCLOSE ACT" (2010), available at http://www.campaignfreedom.org/doclib/20100527_DISCLOSE-overview.pdf

²⁰ Letter from eight former FEC Comm'rs, to H.R. Comm. on House Admin. 12–13 (May 19, 2010), available at http://www.campaignfreedom.org/doclib/20100519_DISCLOSE_comments05192010.pdf.

²¹ Jennifer Steinhauer & Jonathan Weisman, *Amid Barrage Of Attack Ads, Considering Tighter Rules*, N.Y. TIMES, Oct. 24, 2012, at A11.

political participation: “The deterrent effect should not be underestimated.”²²

Democrats in the 111th Congress eventually jammed the DISCLOSE Act through the House over near-unanimous Republican opposition, but the bill was filibustered—along party lines—in the Senate.²³ Partisan vows to overturn *Citizens United* are still common as of this writing,²⁴ and Democrats have introduced the bill in subsequent sessions,²⁵ but with Republican majorities in the House since January 2011, no bill has passed.

With legislative action blocked, progressives shifted to possible administrative action. The first approach was, naturally, to the Federal Election Commission. *Citizens United* made a number of regulations obsolete, and one might have expected the FEC to repeal those regulations. Instead, the Commission’s Democratic members sought a broad rulemaking that would have essentially enacted parts of DISCLOSE through FEC regulations.²⁶ But the FEC is specifically constituted so that one party cannot force through decisions without support from its opposition.²⁷ As none of the Republican commissioners would vote to implement DISCLOSE through the regulatory process, Democratic activists and the Reform Community quickly gave up on the FEC—if they had ever had hopes for it.²⁸ The need arose to look elsewhere.

²² T.W. Farnam, *Disclose Act’s Scope Extends Beyond Its Name*, WASH. POST, May 13, 2010, at A15.

²³ In the House, Democrats voted for the measure by 217-36, with Republicans Opposed 170-2. *Final Vote Results For Roll Call 391*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2010/roll391.xml> (last visited Apr. 16, 2013). In the Senate the vote to end the filibuster failed 59-39 on a straight party vote. *On the Cloture Motion (Upon Reconsideration, Motion to Invoke Cloture on the Motion to Proceed to S. 3628)*, UNITED STATE SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00240 (last visited Apr. 16, 2013).

²⁴ See, e.g., Erin Mereshon, *Pelosi: If Democrats Win the House, I’ll Pass Jobs Bill, DISCLOSE Act*, NAT’L J. (Sept. 20, 2012, 4:03 PM), <http://www.nationaljournal.com/blogs/influencealley/2012/09/pelosi-if-dems-win-the-house-i-ll-pass-jobs-bill-disclose-act-20>.

²⁵ Kevin Bogardus & Rachel Leven, *Senate Dems push ‘Disclose Act 2.0’*, THE HILL (Mar. 3, 2012, 1:56 PM), <http://thehill.com/homenews/campaign/217329-senate-dems-push-disclose-act-20>.

²⁶ Jeff Patch & Stephen M. Hoersting, *How FEC Democrats Hold Regulatory Reform Hostage*, THE WEEKLY STANDARD (June 24, 2011 12:50 PM), http://www.weeklystandard.com/blogs/how-fec-democrats-hold-regulatory-reform-hostage_575510.html; Jonathan Salant, *U.S. Federal Election Commission Deadlocks on Greater ‘12 Donor Disclosure*, BLOOMBERG (Jun. 15, 2011, 4:13 PM), <http://www.bloomberg.com/news/2011-06-15/u-s-federal-election-panel-considers-increased-donor-disclosure-for-2012.html>.

²⁷ Because of the delicate political content of the FEC’s regulatory brief, the FEC was specifically set up differently from most regulatory agencies, such as the SEC. The FEC is a six-member body in which, by law, no more than three commissioners can represent one party, and four votes are needed for action. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974), codified at 2 U.S.C. § 437c et seq. (2006) [hereinafter FECA].

²⁸ See Fred Wertheimer, Prepared Testimony before S. Comm. on Rules and Admin. (Feb. 2, 2010), available at <http://www.democracy21.org/uploads/%7B18D7AEE8-5EC6-46CE-BEDE-966CEE2B6529%7D.PDF> (“Congress will have to enact new coordination provisions and bypass the Federal Election Commission . . .”).

One push came at the Federal Communications Commission. On March 22, 2011, the Media Access Project, a liberal interest group, filed a Petition for Rulemaking with the FCC seeking to have the Agency require political advertisers to disclose not only the names of advertisers, but the names of donors to advertisers.²⁹ The FCC eventually produced a narrower rule,³⁰ and in April 2012, voted on a party-line basis to require that broadcasters publish information on political advertising online.³¹ Even this was highly controversial, however. Republicans on the House Appropriations Committee voted in Committee to prohibit the FCC from spending money to implement the rule, but funding was restored later in the process.³² In 2013, Democrats renewed pressure on the FCC to go further and require disclosure of donors to advertisers, with the specific intent to regulate campaign financing.³³

The other major push has come at the SEC, in the form of efforts to mandate more public disclosure of political spending by publicly traded corporations. Within weeks of the *Citizens United* decision, an alliance of progressive activists, Democratic officeholders, and members of the Reform Community were arguing for increased compulsory disclosure and numerous other measures, administered by the SEC, to attempt to blunt the effect of the decision.³⁴ The end goal of these efforts are the types of compulsory disclosure now sought by Professors Bebchuk and Jackson. Some advocates

²⁹ Media Access Project, Petition for Rulemaking in the Matter of Amendment of 47 CFR §73.1212 (Mar. 22, 2011), available at <http://ecfsdocs.fcc.gov/filings/2011/03/22/6016374308.html>.

³⁰ In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Order on Reconsideration and Further Notice of Proposed Rulemaking, MM Docket No. 00-168, FCC 11-162 (Oct. 27, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-162A1.pdf.

³¹ In the Matter of Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Second Report and Order, Appendix A, Section 73.1943(d), MM Docket No. 00-168, FCC 12-44 (Apr. 27, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-44A1.pdf.

³² Erik Wasson, *House GOP Reverses Position, Won't Block FCC Political Rule*, THE HILL (June 20, 2012, 10:39 AM), <http://thehill.com/blogs/on-the-money/appropriations/233747-house-gop-reverses-position-on-fcc-political-ad-disclosures>.

³³ See, e.g., David Seyler, *Democrats cite GAO report on political ad sourcing*, RBR.COM (Mar. 1, 2013), available at <http://rbr.com/democrats-cite-gao-report-on-political-ad-sourcing/> (quoting House Minority Leader Nancy Pelosi as stating that “The FCC must simply update its rules . . . ensuring disclosure in our elections, transparency in our campaigns, and fairness for all voters.”); Amar Toor, *Democrats say FCC should unmask identity of political ad backers*, THE VERGE (Mar. 3, 2013), <http://www.theverge.com/2013/3/3/4059180/pelosi-urges-fcc-to-reveal-identity-campaign-donors> (noting Democratic claims that “the FCC has ‘the power, the authority, and the responsibility’ to unmask the identity of campaign ad donors”).

³⁴ See, e.g., *Defining the Future of Campaign Finance in an Age of Supreme Court Activism: Hearing before the H. Comm. on House Admin.*, 111th Congress (2010) 48–67 (testimony of Ciara Torres-Spelliscy) (calling for more compulsory disclosure as well as advance shareholder authorization before particular political expenditures are made); *First Amendment and Campaign Finance Reform After Citizens United: Hearing before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Congress 73–89 (testimony of Donald J. Simon) (calling for added disclosure and new “disclaimer” provisions); Craig Holman, *Congress Must Pass Shareholder Protection Act*, ROLL CALL, (March 11, 2010), http://www.rollcall.com/issues/55_102/44055-1.html.

have openly stated their desire to use harassment, boycotts, and intimidation to pressure corporate speakers out of the political marketplace of ideas.³⁵

In recounting this history of the partisan pressure for SEC involvement in political regulation, we do not argue that Professors Bebchuk and Jackson are motivated by the partisan calculations of many of the politicians and others cited in this section. Nor do we argue that the partisan motivation that is driving political pressure for new compulsory disclosure rules means that there are not valid, non-partisan reasons that might cause fair-minded individuals to support new disclosure mandates.

We do argue, however, that any new regulations, their enforcement, and public perception of their legitimacy, are all likely to be heavily influenced by this partisan background. We further suggest that in this situation, the SEC lacks both the expertise in campaign finance law and the structure that will enable it to regulate effectively in this area. Additionally, we believe that many of the reasons cited by Professors Bebchuk and Jackson for implementing new disclosure rules lose much of their power when set against this background. In particular, claims of investor interest are likely to be exaggerated,³⁶ and concern about the nonpartisan effects of corporate political spending is likely to be overstated.

Indeed, there can be little doubt that what is driving the move for greater disclosure regulation through the SEC is not a desire to protect investors or to provide for orderly securities regulation, but a desire to regulate politics in a manner that members of the progressive left believe is desirable and to their partisan advantage. Using the SEC for a mission for which it is not designed is contrary to the basic theory of independent agencies. We turn to these concerns in Part II.

II. ADMINISTRATIVE LAW DONE WRONG: REGULATION BY NON-EXPERT AGENCIES

As part of the 1974 Amendments to the Federal Election Campaign Act (FECA), Congress created the FEC and provided it with “exclusive jurisdiction with respect to the civil enforcement” of the Act.³⁷ Almost from the start, the Reform Community has been deeply disappointed with the FEC, and out of cynicism or honest belief has blamed the agency for many of the failures of regulation. The Reform Community’s claims that the structural problems and lack of willpower at the FEC are the reason why campaign finance regulation never seems to accomplish its objectives are likely, as

³⁵ See, e.g., MEDIA MATTERS, MEDIA MATTERS, 2012: A THREE-YEAR CAMPAIGN 82–83 (2010), available at <http://dailycaller.com/wp-content/uploads/2012/02/MMFA-2012-full.pdf> (“[W]e will utilize the . . . information to provoke backlashes among companies’ shareholders, employees, and customers, and the public-at-large.”).

³⁶ Bebchuk & Jackson, *Shining Light*, *supra* note 10, at 937–40.

³⁷ 2 U.S.C. § 437c(b)(1) (2006).

noted above, without merit.³⁸ Without delving too deeply into the details of FEC operations, and taking many criticisms of the FEC at face value, understanding the FEC and the rationale behind its design is important to understanding the problems of using an agency designed for one thing (the smooth functioning of securities markets) for another purpose, such as regulation of campaign spending.

A. *The Design and Mission of Independent Agencies: How the FEC Is Designed to Regulate Politics, and the SEC Is Not.*

Why did Congress give the FEC—an agency, in the refrain of the Reform Community, “designed to fail”³⁹—“exclusive jurisdiction” over civil enforcement of campaign finance laws? The best way to answer that question is to deny its premise and recognize that rarely, if ever, is anything “designed to fail.” Saying that something is poorly designed is not the same as saying it is designed to fail. It turns out, however, that those who make the “designed to fail” claims about the FEC simply disagree with key elements in the design of the Agency and with what it ought to do.

To begin, we look at the purpose of independent agencies generally. Independent agencies are created for several reasons. An independent agency’s singularity of purpose can be vital in developing and enforcing a unified government policy.⁴⁰ That singularity of purpose can also help the agency to develop expertise⁴¹ and is therefore particularly advantageous when there is a need for “intimate and expert knowledge of numerous and complex facts, a knowledge which can only be obtained by processes of patient, impartial and continued investigation.”⁴² Perhaps most important to early theories of independent agencies was the notion that insulating such bodies from partisan politics would improve public policy.⁴³ Administrative theory has come a long way during the twentieth century,⁴⁴ but these reasons remain the bedrock justifications for independent agencies.⁴⁵

³⁸ See references accompanying note 9, *supra*.

³⁹ *E.g.*, MELVIN L. UROFSKY, MONEY AND FREE SPEECH: CAMPAIGN FINANCE REFORM AND THE COURTS 82 (2005); Benjamin Weiser & Bill McAllister, *The Little Agency That Can't*, WASH. POST, Feb. 12, 1997, at A1 (quoting Frank P. Reiche).

⁴⁰ Joseph B. Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 97–98 (1928).

⁴¹ MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 67 (1955).

⁴² Eastman, *supra* note 40, at 97.

⁴³ Lisa Shultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 612 (2010). *See also* Humphrey’s Ex’r v. United States, 295 U.S. 602, 625 (1935) (independent agencies “should not be open to suspicion of partisan direction.”).

⁴⁴ *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK (1992); JAMES Q. WILSON, THE POLITICS OF REGULATION (1980).

⁴⁵ Bressman & Thompson, *supra* note 43, at 612.

The move to shift enforcement to agencies that are not expert in the field cuts against these justifications. The SEC is not an expert in the field (nor is the FCC). How many members of the SEC, or their personal staffs, or their career staff, could answer the most elementary questions about campaign finance law, regulation, history, and practice? At the heart of campaign finance law are numerous complex questions and regulatory decisions that are simply not familiar to the SEC, because it is not an agency intended or structured to regulate money in politics.

With these principles in mind, it becomes apparent that what some would describe as “bugs” in the FEC structure are, to many, “features.” Perhaps the most important feature of the FEC’s design is the one that most bothers many reformers: its bipartisan makeup.⁴⁶ Most federal independent agencies are directed by a board or commission with some guaranteed level of bipartisan makeup.⁴⁷ Yet only two, the FEC and the U.S. International Trade Commission, have equal size blocks of commissioners, with three from each major party, and only the FEC then requires a four-vote majority for action.⁴⁸

The reason for that design should be obvious. If some measure of guaranteed bipartisanship is viewed as a valuable thing in most independent agencies, it would seem absolutely essential for an agency whose core mission is to regulate the political process in ways that can determine who wins and who loses elections.⁴⁹ This is an issue both of preventing actual abuse of the Agency for partisan gain and preventing the appearance that the Agency’s decisions are based on partisan motivations.⁵⁰ In short, there is a strong argument that the FEC should not be structured like the SEC, in order to prevent one party from changing the regulatory regime for partisan gain. The primary motivation in the political system for urging the SEC to undertake regulation of corporate political donations, however, is to allow one

⁴⁶ See, e.g., NO BARK, NO BITE, *supra* note 7, at 53–56; Jackson, *supra* note 7, at 63–65; Urofsky, *supra* note 39, at 82 (“The requirement that there be four affirmative votes to take action has led to a stalemate on most issues coming before the Commission.”). This statement is false: “stalemates” have been rare at the FEC, typically from one to four percent of all substantive votes. Smith & Hoersting, *supra* note 9, at 159. The numbers have increased substantially since Smith & Hoersting wrote, but remain low. CRAIG HOLMAN, PUB. CITIZEN, ROILED IN PARTISAN DEADLOCK, FEDERAL ELECTION COMMISSION IS FAILING (2013), available at <http://www.citizen.org/documents/fec-deadlock-statement-and-chart-january-2013.pdf>. Despite the headline rhetoric, the report shows that the Commission voted 3-3 approximately twenty percent of the time in 2012, a far cry from “most.” *Id.* Not all of those splits, of course, involved straight party line votes by the commissioners. However, despite its inaccuracy, this claim is regularly repeated by the Reform Community and the fact that Professor Urofsky, a keen and at least somewhat skeptical observer, repeats this as fact is evidence of the success of repetition.

⁴⁷ Bressman & Thompson, *supra* note 43, at 611.

⁴⁸ Jackson, *supra* note 7, at 63. FEC structure is set forth at 2 U.S.C. § 437c (2006).

⁴⁹ See Franz, *supra* note 9, at 185; LaForge, *supra* note 7, at 359 n.34.

⁵⁰ Smith & Hoersting, *supra* note 9, at 158–59.

party, with a majority of SEC commissioners, to change the regulatory system for partisan gain, on a straight party-line vote.⁵¹

Moreover, it is doubtful that the FEC's partisan makeup is really the reason for its perceived failures.⁵² The FEC divides on straight partisan lines only one to four percent of the time, though that number has risen in recent years and was at ten percent of enforcement matters in 2012.⁵³ The FEC also has an enforcement process that aims to resolve matters through conciliation rather than fines or litigation.⁵⁴ This, too, has drawn much criticism from those seeking "stronger" enforcement.⁵⁵ But this process exists for a reason. The overwhelming number of complaints and violations at the FEC are not over corruption, but over inadvertent violations of the law.⁵⁶ Many are nothing more than administrative violations against the state.⁵⁷ The cost to a political candidate of being found to have "violated the law," however, can be great. The rewards to a zealous prosecutor or even an FEC Commissioner or General Counsel who is seen to be crusading for "clean elections" are perhaps even greater in the other direction.⁵⁸ Structuring the system around voluntary conciliation agreements is an intentional means to depoliticize the complaint process. Again, placing enforcement responsibility with the SEC or another agency whose process is geared to leveling direct sanctions dramatically alters the balance, and does so in a way that may reward overly aggressive prosecution by government officials in this sensitive First Amendment area.

Thus, while it is true that almost all independent agencies, including the SEC, have structural features to insulate them from politics, the FEC has more political safeguards than most agencies, including the SEC, and it has them for very compelling reasons. Indeed, it is fair to say it that the FEC has safeguards for exactly the reasons that have led Congressional Democrats and progressive political activists to seek to move enforcement away from the FEC and to other, less politically insulated and balanced agencies, including the SEC and the FCC. Indeed, the "investor interest" cited by

⁵¹ See Part I, *supra*.

⁵² See Franz *supra* note 9, at 181 ("[E]ven in the most political of enforcement matters, the FEC is almost never handcuffed by its bipartisan structure.")

⁵³ See Smith & Hoersting, *supra* note 9, at 159.

⁵⁴ 2 U.S.C. § 437g (a)(4)(A)(i) (requiring FEC to use "informal methods" to "correct or prevent" violations).

⁵⁵ See, e.g., NO BARK, NO BITE, *supra* note 7, at 50–52.

⁵⁶ Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1, 6–9 (2000).

⁵⁷ *Id.*

⁵⁸ For instance, Jeff Smith, a Missouri state senator who ran an underdog campaign for a seat in the House of Representatives and was featured glowingly in the political documentary *Can Mr. Smith Get to Washington Anymore?* was later sent to prison after his campaign was found to have violated FECA. Press Release, Missouri State Senator Jeff Smith, Missouri State Representative Mark Brown, and Nicholas Adams Plead Guilty to Federal Obstruction Charges (Aug. 25, 2009), available at <http://www.fbi.gov/stlouis/press-releases/2009/sl082509.htm>.

Professors Bebchuk and Jackson⁵⁹ appears to be based more on politics and the desire to silence political opposition than on return on investment, capital formation, or the need to assess the company's financial future.⁶⁰

Professors Bebchuk and Jackson argue that the type of compulsory disclosure they seek is justified by precedent and sound principles of securities law, regardless of *Citizens United*. Setting aside the fact that we disagree with their conclusion, even if Professors Bebchuk and Jackson are correct the SEC had never seen fit to regulate in this area before *Citizens United*. Walking back through time, one finds that the trail of calls for compulsory disclosure through the SEC disappears on January 19, 2010, one day before *Citizens United*. Yet the call for new rules from the SEC cannot be solely because the substantive arguments have changed with *Citizens United* and *SpeechNow.org v. FEC*.⁶¹ Even before those decisions, corporate America made large dues payments to trade associations such as the U.S. Chamber of Commerce, or contributions to non-profits such as the Sierra Club, Planned Parenthood, or the NAACP, which were heavily involved in elections. Even before *Citizens United*, a majority of states allowed corporate spending in state elections, including Delaware, New York, Illinois, and California,⁶² the homes of a plethora of publicly traded corporations. Before *Citizens United*, the Supreme Court had held that corporate spending on ballot issues was constitutionally protected.⁶³ Also before *Citizens United*, corporations had often helped fund millions of dollars in "issue ads" of the type the proposed SEC rulemaking would regulate.⁶⁴ The difference seems to be nothing more than a concern that *Citizens United* would allow more of that spending, and that spending would be detrimental to the Democratic Party and progressive politicians.

This is not regulation that the SEC normally does. The proposed SEC rule alters the SEC's basic definition of "materiality,"⁶⁵ adopting a much lower threshold for political spending than for charitable giving or all types of other corporate activity. It also purports to find a need to protect investors from corporations spreading messages with which investors might prefer not to be associated.⁶⁶ But this protection extends only to a certain type of political ad, not to other ads that may draw the ire of some investors. For example,

⁵⁹ See Bebchuk & Jackson, *Shining Light*, *supra* note 10 at 937–41.

⁶⁰ See ALLEN DICKERSON, CTR. FOR COMPETITIVE POLITICS, ACTIVIST INVESTING IN POST-CITIZENS UNITED AMERICA 6–13, available at <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Activist-Investing-Report-For-Print.pdf>.

⁶¹ 599 F.3d 686 (D.C. Cir. 2010).

⁶² See *State Laws Affected by Citizens United*, NAT'L CONF. OF ST. LEGISLATORS (Jan. 4, 2011), <http://www.ncsl.org/legislatures-elections/elections/citizens-united-and-the-states.aspx>.

⁶³ *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

⁶⁴ See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 124–25 (2003); *Wisconsin Right to Life v. Fed. Election Comm'n*, 551 U.S. 449 (2007).

⁶⁵ J.W. Verret, *The Securities Exchange Act is a Material Girl, Living in A Material World: A Response to Bebchuk and Jackson's "Shining Light on Corporate Political Spending"*, 3 HARV. BUS. L. REV. (forthcoming 2013).

⁶⁶ See Bebchuk & Jackson *Shining Light*, *supra* note 10, at 943–44.

some Audi investors may prefer not to have the company associate environmentalists with obsessively-controlling “Green Police,” as the company did in a clever Super Bowl ad in 2010.⁶⁷ Others may prefer not to have the company associate with the sort of “green” messaging that is now common in corporate advertising. Corporations may support art museums that feature unpopular displays, colleges that invite controversial speakers, or charities that ignite controversy.⁶⁸ Historically, concerns over investor sensibilities have not been grounds for compulsory disclosure. In short, little suggests that anything has changed in securities markets since 2009 to justify the new regulation. Much suggests that things have changed in the realm of campaign finance, and for that reason parties are seeking to use the SEC for partisan advantage.

The SEC has, or should have, other priorities. The regulations proposed have little to do with capital formation, value determination, or the smooth functioning of markets. Rather, in addition to protecting investor “expressive” sensibilities, they are advertised as a means of holding corporations “accountable.”⁶⁹ But accountability in securities markets normally means accountability for generating returns, not for expressing political views that some investors (and non-investors) do not like. The example given by Professors Bebchuk and Jackson, that investors must be protected because politically ambitious CEOs may seek to advance their future electoral prospects,⁷⁰ seems like something of a rarity, to say the least, and in any case is not one that is fundamentally different from dozens of other decisions CEOs routinely make that might affect their future careers.

Similarly, Professors Bebchuk and Jackson express concern that the “willingness of executives to spend substantial amounts in support of candidates, even when they were personally required to bear the full cost of such support, suggests that executives would be willing to spend even more to advance such causes using corporate funds.”⁷¹ But this problem exists for questions of charitable support, which is typically many times that of political spending, but still does not rise to the level of materiality.⁷² Nor does the

⁶⁷ *Green Police: Audi Super Bowl ad*, YOUTUBE (Feb. 5, 2010), <http://www.youtube.com/watch?v=Ml54UuAoLSo>. In this ad, the “Green Police” are seen arresting citizens for putting food down disposals, asking for plastic bags at the supermarket, using incandescent light bulbs, and more, using helicopters and SWAT team tactics in making the arrests. *Id.*

⁶⁸ Even once innocuous charities such as the Boy Scouts can be controversial, in this case for the organization’s stand on homosexual scoutmasters.

⁶⁹ Bebchuk & Jackson *Shining Light*, *supra* note 10, at 942.

⁷⁰ *Id.* at 943.

⁷¹ *Id.* at 937.

⁷² U.S. corporations contributed roughly \$14.5 billion to charity in calendar 2011. CTR. FOR PHILANTHROPY AT IND. UNIV., GIVING USA 2012: EXECUTIVE SUMMARY 4 (2012), *available at* <http://www.alysterling.com/documents/GUSA2012ExecutiveSummary.pdf>. In contrast, all corporate contributions to “Super PACs” (corporations may not contribute directly to candidates or regular PACs) totaled approximately \$75 million in the entire 2012 cycle (Super PACs must disclose all donations over \$200). Michael Beckel & Reity O’Brien, *Mystery firm is election’s top corporate donor at \$5.3 million; Companies gave \$75 million to super PACs*, CTR. FOR PUB. INTEGRITY (Nov. 5, 2012, 4:10 PM), <http://www.publicintegrity.org/2012/11/>

hypothesis square with what is actually observed. In fact, if corporate executives wanted to spend more money on politics, most could readily do so. Only about 60 percent of Fortune 500 companies operated a political action committee (PAC) before *Citizens United* was decided, and fewer than five percent of corporate PACs actually contributed the legal maximums to the candidates to which they contributed.⁷³ Further, prior to *Citizens United*, corporations were using PAC funds to pay for nearly \$300 million a year on compliance, administration, and fundraising.⁷⁴ These costs could have been paid from general treasuries, thus freeing up that \$300 million for political activity.⁷⁵ That corporate executives already had at their disposal roughly \$300 million that could have gone to political activity—an amount equal to what they were spending—but did not deploy those resources for political activity suggests that executives are not seeking to broadly use corporate funds for their personal political gain. Such spending is at this point a mere hypothetical, though the SEC's lack of expertise in campaign finance law might lead it to overestimate the problem. Thus the SEC is taken away from its core mission so that it can address concerns about political speech.

Second, dividing the regulatory function confuses the law and makes it difficult to manage a unified government policy. We have already seen the results of this type of division of labor in 2000 when Congress gave the IRS enforcement authority over the tax-exempt status of non-profit groups. The result was and remains substantial public confusion and a complex yet loop-hole-riddled system.⁷⁶ Adding a third and even fourth federal disclosure scheme is not likely to be enlightening so much as maddening.

Finally, one form of expertise we expect from independent agencies is familiarity with the law. Campaign finance law has become one of the most complex areas of legal practice, with a substantial overlay of constitutional law, and numerous legal terms of art.⁷⁷ The SEC has historically operated in

05/11689/mystery-firm-elections-top-corporate-donor-53-million. It appears that 501(c) organizations of all types spent less than the \$660 million spent by Super PACs, much of which, of course, came from individuals and privately held corporations. *2012 Election Spending Will Reach \$6 Billion, Center for Responsive Politics Predicts*, CTR. FOR RESPONSIVE POL. (Oct. 31, 2012), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html>. Thus it is highly doubtful that all political spending by corporations over the two-year cycle equaled even \$500 million, and was probably considerably less. Another \$350 million or so was contributed by traditional corporate PACs. Press Release, Fed. Election Comm'n, FEC Summarizes 21-Month Campaign Activity of the 2012 Election Cycle (Jan. 30, 2013) *available at* http://www.fec.gov/press/press2013/20130130_2012-Q3Summary.shtml.

⁷³ Stephen Ansolabehere, John M. de Figueiredo & James M. Snyder Jr., *Why is There so Little Money in U.S. Politics?*, 17 J. ECON. PERSP. 105, 108 (2003).

⁷⁴ *Id.* at 109.

⁷⁵ 11 C.F.R. § 114.5(b) (2011).

⁷⁶ See Part II.B, *infra*.

⁷⁷ Compare the different meanings of “for the purpose of influencing any election for federal office,” 2 U.S.C. § 431(9)(A)(i), as interpreted in *Buckley* to mean “explicit words of advocacy of election or defeat of a candidate,” 424 U.S. at 44, and as interpreted in *Fed. Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987) and *Christian Action Network v. Fed. Election Comm'n*, 894 F.Supp. 946 (W.D. Va. 1995), *aff'd* 92 F.3d 1178 (3d Cir. 1996), and ultimately “the functional equivalent of express advocacy” in *McConnell v. Fed. Election*

an area with few First Amendment constraints. Its culture and expertise are therefore quite different from that of the FEC, which regularly faces these issues. Indeed, one reason for the Reform Community's frustration with the FEC has been the unwillingness of that Community to accept the constitutional restraints under which the FEC operates.⁷⁸ Those who seek to push regulation onto other agencies often do so precisely because they seek to bypass such constitutional sensitivities that are, and ought to be, a hallmark of the FEC, the agency charged by Congress with "exclusive civil enforcement" of campaign finance laws.

B. *The Non-Expert Agency in Action: the IRS Experience*

It is true, however, that there is an important way in which enforcement by other agencies may help to achieve more aggressive regulation of political speech, if that is the overriding goal. Though the Supreme Court has provided at least reasonably robust protection to political speech as political speech, clipping the wings of both federal and state enforcement authorities with regularity,⁷⁹ the Court has sometimes been more likely to uphold speech regulations if the reasons given for the regulations are not directly related to their political content. However, the one notable effort to pull regulation out of the FEC and give it to a non-expert agency is a telling cautionary tale.

The landmark 1976 decision *Buckley v. Valeo* is generally described as having "upheld" mandatory disclosure provisions in the law.⁸⁰ This is true

Comm'n, 540 U.S. 93 (2003); "electioneering communication" 2 U.S.C. 434 (f)(3) and as interpreted in *McConnell v. FEC* and *Wisconsin Right to Life v. FEC*, 551 U.S. 449 (2007); "generic campaign activity," 2 U.S.C. 431 (21); "public communication," 2 U.S.C. § 431 (22); "federal election activity," 2 U.S.C. § 431 (20); and "independent expenditure," 2 U.S.C. § 431 (17) and as interpreted in *Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n*, 518 U.S. 604 (1996). One author of this paper, while an FEC Commissioner, recalls meeting with foreign election officials. Efforts to explain these differences ran into a standstill when the interpreter confessed, "There are not enough different words to communicate these different definitions."

⁷⁸ Cf. Robert F. Bauer, *The Demise of Reform: Buckley v. Valeo, the Courts, and the "Corruption Rationale,"* 10 STAN. L. & POL'Y REV. 11, 18 (1998) ("[P]art of the Commission's failure may be traced to tactical error or insufficient resources, but the larger case lies with the almost insurmountable obstacle presented by the courts . . ."). See also *Panel Discussion, supra* note 9, at 225–26; Smith & Hoersting, *supra* note 9 at 162–71.

⁷⁹ See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976); *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Fed. Election Comm'n v. Wisconsin Right to Life*, 551 U.S. 449 (2007); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996); *Randall v. Sorrell*, 548 U.S. 230 (2006); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238 (1986); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978).

⁸⁰ E.g., Trevor Potter, *Buckley v. Valeo, Political Disclosure, and the First Amendment*, 33 AKRON L. REV. 71, 73 (1999) ("In *Buckley*, the Court upheld all of the disclosure provisions reviewed by the Court. . . ."); Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 266–67 (2000).

so far as it goes, but it only tells half the story. In fact, *Buckley* struck down as unconstitutional most of the disclosure required by the FECA, or, to be more precise, it so narrowed the scope of those provisions as to hold unconstitutional the majority of the mandated disclosure of the FECA. The *Buckley* Court upheld forced disclosure of candidate, party, and PAC contributions and expenditures, but through its narrowing construction it effectively struck sweeping disclosure provisions that would have required detailed financial reports from organizations that did not have a “primary purpose” of electing or defeating candidates through express advocacy of the election or defeat of those candidates.⁸¹ That which it swept away was potentially far broader in scope and likely to snag far more organizations than that portion of the disclosure law that the Court left intact.

The Court has been more willing, however, to allow restrictions on speech that are, at least in theory, unrelated to the political nature of the speech. It has held, for example, that at least some restrictions can be placed on the speech of a recipient of a government subsidy. For example, in *Regan v. Taxation With Representation of Washington*, the Court held that tax-exempt status amounted to a “subsidy” that the government was not required to provide.⁸² Therefore, the Court held in *Regan* that the state could limit the lobbying activities of a tax-exempt organization, at least to the extent it relied on tax-deductible contributions to do so.⁸³

These two cases, *Buckley* and *Regan*, led to the first effort to involve a non-expert agency—in this case the IRS—in the regulation of campaign finance. The *Buckley* Court had specifically foreseen that its narrowing construction of what counted as political spending for purposes of disclosure and contribution limitations would lead to widespread circumvention of the limits; the Court accepted that result as a necessary price to protect free speech.⁸⁴ By the late 1990s, politically active citizens and groups were avoiding FECA’s limits on the sizes and sources of contributions by simply keeping “express words of advocacy,” such as “vote for” and “vote against,” out of their ads.⁸⁵ This also exempted them from FECA’s disclosure requirements.⁸⁶ Many of these groups and entities were organized as educational institutions under Section 501(c)(4) of the Internal Revenue Code, but in the 1990s the IRS began urging these groups to reorganize under Section

⁸¹ *Buckley*, 424 U.S. 1 at 81.

⁸² 461 U.S. 540 (1983).

⁸³ *Id.*; see also *Buckley*, 424 U.S. at 95 (stating that a candidate’s voluntary acceptance of government campaign subsidies could be tied to a requirement that the candidate limit his spending in the race); *Cammarano v. United States*, 358 U.S. 498 (1959) (upholding IRS denial of deduction for lobbying as a business expense).

⁸⁴ *Cf. Buckley*, 424 U.S. at 45, 79.

⁸⁵ See, e.g., Kirk L. Jowers, *Issue Advocacy: If it Can’t be Regulated When it is Least Valuable, it Can’t be Regulated When it is Most Valuable*, 50 CATH. U. L. REV. 65, 66-67 (2000); David A. Pepper, *Recasting the Issue Ad: The Failure of the Court’s Issue Advocacy Standards*, 100 W. VA. L. REV. 141, 153 (1997).

⁸⁶ See Hasen, *supra* note 80, at 267.

527 of the Code.⁸⁷ Because, 501(c)(4) organizations must limit their political activity to maintain their tax status, while 527 organizations need not, the increased use of Section 527 allowed the IRS to avoid policing political speech, while having no effect on revenue collection.⁸⁸ Indeed, lessening government regulation of political speech was one purpose of creating Section 527 in the first place.⁸⁹

Over the spring and summer of 2000, Congress grew increasingly frustrated with the use of 527 organizations to run issue ads, many of which were highly critical of incumbent members of Congress. Moreover, members of Congress seemed particularly upset that they did not know the identities of the persons funding the organizations that ran these ads,⁹⁰ although why donor anonymity was so problematic got relatively little attention. Members' desire to gain information on their critics was frustrated by the substantial constraints that *Buckley* placed on FEC enforcement of campaign finance disclosure laws.

The solution Members hit upon was to turn the IRS into a campaign finance enforcement agency.⁹¹ On June 30, 2000, Congress passed amendments to the Internal Revenue Code requiring entities operating under Section 527, but not subject to regulation as political committees by the FEC, to disclose to the IRS the names, addresses, and amounts given by their donors.⁹² Using the theory that tax exempt status was a privilege and subsidy, per *Regan*, Congress was able to bypass the *Buckley* Court's concerns about First Amendment freedoms.⁹³

⁸⁷ Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 623 (2002). See I.R.S. Priv. Ltr. Rul. 1999-25-051 (Mar. 29, 1999); I.R.S. Priv. Ltr. Rul. 97-25-036 (Mar. 24, 1997); I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996).

⁸⁸ See *Disclosure of Political Activities of Tax Exempt Organizations: Hearing Before the House Subcomm. on Oversight of the Comm. on Ways and Means*, 106th Cong. 35 (2000) (statement of Joseph Mikrut, Tax Legis. Counsel, U.S. Dep't of Treasury).

⁸⁹ Tobin, *supra* note 87, at 623.

⁹⁰ *Id.* at 631-33.

⁹¹ Richard Kornylak, *Disclosing the Election-Related Activities of Interest Groups Through 527 of the Tax Code*, 87 CORNELL L. REV. 230, 249 (2001) ("Although Congress enacted the new law as a tax amendment and empowered the IRS, not the FEC, to oversee its implementation, the stated rationales behind the amendment were inescapably focused on campaign finance reform.").

⁹² Pub. L. No. 106-230, 114 Stat. 477 (2000) (codified at 26 U.S.C. § 527(j) (2006 & Supp. V 2011)).

⁹³ In fact, the theory is somewhat dubious in the most basic sense—unlike the non-profit plaintiffs in *Regan*, which were organized under Section 501(c)(3) of the Code and to which contributions were therefore tax deductible, contributions to 527 entities are not deductible as charitable contributions. Prior to the addition of Section 527 to the Code, the IRS had simply taken the position that political entities were not taxed, since funds given to them were gifts, and there was, in any case, no taxable income as the money was, in most cases, spent entirely on campaigning. Section 527 came about because it was discovered that some political committees received small amounts of investment income, so 527 status became a way to capture that non-gift income. But in no realistic way can 527 political committees be said to be subsidized by tax deductibility in the manner of the 501(c)(3) organizations that were plaintiffs in *Regan*. See Tobin, *supra* note 87, at 621-23.

The IRS's experiment with regulating political advertising has not been particularly successful. The IRS is not a campaign finance agency. Moreover, its normal culture is to maintain the privacy of the information with which it is provided, not to disclose it to the public. This mismatch between the IRS's expertise and culture and the mission it was asked to perform soon became apparent.

Almost immediately, both the design and execution of the IRS disclosure plan were subject to intense criticism. The system could be easily circumvented, yet even filed reports failed to "shed much light on [the] activities, agenda or directors" of filers.⁹⁴ At the same time, the law was criticized for "requiring filings from thousands of state candidate, party and interest groups that already disclose at the state level."⁹⁵ The IRS's enforcement system turned out to be ineffective as well, in part because of other provisions of the Internal Revenue Code that did not jibe with the agency's new campaign finance disclosure mission.⁹⁶

The IRS had also long used, consistent with its culture, mission, and expertise as a tax collection agency, a flexible test for determining the tax exempt status of groups that do some political work, but that have a non-political major purpose.⁹⁷ The Courts, however, have consistently required a "bright line" test for the FEC when regulating political speech.⁹⁸ For political speakers, operating with very low thresholds to trigger status as regulated political committees, such bright lines are essential—there is little room for error.⁹⁹ Charged with a new mission for which it lacks knowledge and expertise, and which is tangential to its core responsibilities, the IRS has yet to produce any type of bright-line test similar to that used by the FEC. As a result, politically active groups can be sure they are complying with FECA, only to be left to guess whether they will be pursued by the IRS in the alternative.

Probably more important, the move into political regulation has embroiled the IRS in political fights the Service would as soon avoid. Given some history of presidents attempting to use the IRS to attack political ene-

⁹⁴ Kathryn Wallace & Marianne Holt, *Hired hands grab chance to skirt '527' disclosure law*, CTR. FOR PUB. INTEGRITY, <http://www.publicintegrity.org/2000/11/01/3254/hired-hands-grab-chance-skirt-527-disclosure-law> (last updated Apr. 1, 2011).

⁹⁵ *Id.*

⁹⁶ Steven Weiss, *Another Loophole? 527 Disclosure Provision Could Allow Big Donors to Remain Anonymous*, CTR. FOR RESPONSIVE POL. (May 26, 2004), <http://web.archive.org/web/20040604133415/http://www.capitaleye.org/inside.asp?ID=126>.

⁹⁷ See JOHN FRANCIS REILLY & BARBARA A. BRAIG ALLEN, POLITICAL CAMPAIGN AND LOBBYING ACTIVITIES OF IRC 501(C)(4), (C)(5), AND (C)(6) ORGANIZATIONS L-2 (2003), available at <http://www.irs.gov/pub/irs-tege/eotopic103.pdf>. See also KATHRYN CLABBY, OVERCAUTION AND CONFUSION: THE IMPACT OF AMBIGUOUS IRS REGULATION OF POLITICAL ACTIVITIES BY CHARITIES AND THE POTENTIAL FOR CHANGE (2007), available at <http://www.foreffectivgov.org/files/npadv/paci2rpt.pdf>.

⁹⁸ See, e.g., Buckley, 424 U.S. at 80; Wisconsin Right to Life, 551 U.S. at 456–57.

⁹⁹ Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, A New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 912–13 (2007).

mies,¹⁰⁰ the Service has long been particularly prickly about being dragged into political wars. The IRS has quickly learned that avoiding such wars is not possible once it has been given the assignment to regulate political activity. The Agency has been buffeted by politicians from both parties with regularity over its disclosure and enforcement policies for non-profits.¹⁰¹ It is safe to say that the IRS is rapidly hitting the point at which it will be in regulatory gridlock—no new regulation or changes in enforcement policies in this area will be considered by members of Congress to have been put forth in good faith, each being viewed instead as a partisan scheme.¹⁰²

The IRS gives us a cautionary tale: the agency was not equipped or structured to do the job it was asked to do for political purposes; as a result its approach was poorly designed and executed; the dual regulatory scheme created confusion in the regulated community and among the public, created a series of seams and loopholes that the least scrupulous and most lawyered could exploit, and embroiled the agency in partisan battles on the Hill.¹⁰³

In summary, even if all of the points made by Professors Bebchuk and Jackson had merit, we believe that SEC action, in service of political aims, regarding amounts of spending that are immaterial to the companies involved, in areas only tenuously related to the Agency's mission, brings costs

¹⁰⁰ See BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 195 n.59 (2001).

¹⁰¹ See, e.g., Nicholas Confessore, *G.O.P. Senators Question I.R.S. Scrutiny of Donors*, N.Y. TIMES, May 18, 2011, at A18 (describing Republican senators' scrutiny of IRS plans to look more closely at gift taxes to non-profits). The IRS soon backed off this plan. Andrew Zajac, *IRS Ends Investigation Into Gifts to Non-Profit Groups*, BLOOMBERG (July 8, 2011, 12:00 AM), <http://www.bloomberg.com/news/2011-07-07/irs-ends-investigation-into-gifts-made-to-political-groups-1.html>. The IRS announcement regarding the gift tax itself came after a letter to the Service by Sen. Max Baucus (D-MT), Chairman of the Senate Finance Committee, demanding more vigorous enforcement of political restrictions. Confessore, *supra*.

¹⁰² As this article was going to press, the IRS has become further embroiled in scandal after a report by the Treasury Department's Inspector General found that the Service had targeted certain groups for added scrutiny because their applications for 501(c)(4) status contained terms such as "Patriot" and "Tea Party." The IRS was using such targeting to attempt to determine if the groups ought to be organized under Section 527. TREASURY DEP'T. INSPECTOR GEN. FOR TAX ADMIN., INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW, REF. NO. 2013-10-053 6-7 (2013). From a revenue standpoint, the decision makes little or no difference. However, numerous Democratic Senators had pressured the IRS to scrutinize these groups, presumably because 527 organizations must disclose donors publicly. See, e.g., Letter from Senator Charles E. Schumer, et al. to Hon. Douglas H. Shulman, Comm'r, Internal Revenue Serv. (Mar. 12, 2012), available at <http://www.schumer.senate.gov/Newsroom/record.cfm?id=336270>.

¹⁰³ The FCC's lack of disclosure expertise has similarly caused problems for that agency as it has been forced into political regulation. In response to pressure from congressional Democrats, in 2012 the FCC, by a straight party-line vote, required on-line disclosure of political advertising buys. Not used to running a disclosure regime, the FCC's regulation and the advice given for compliance have provided a gold mine for identity thieves. The information, placed on line without consideration for security, has been plumbed by identity thieves to steal tens of thousands of dollars from advertisers and political consultants. Peter Overby, *Thieves Target Political Ad Consultants on New FCC Site*, NAT'L PUB. RADIO (Mar. 28, 2013), <http://www.npr.org/blogs/itsallpolitics/2013/03/28/175570650/political-ad-consultants-targeted-by-criminals-on-new-fcc-site>.

that outweigh any benefits. It is, simply put, a bad approach to administrative law.

In the next two sections, we address some particulars of Professor Bebchuk and Jackson's proposal.

III. ROOTS OF EXPERTISE: THE SEC DISCLOSURE REGIME

The SEC is a longstanding federal institution, and it has substantial discretion in carrying out its work. But there is little doubt that the Commission's expertise lies in the area of economic regulation, and not in the enforcement or interpretation of statutes governing political speech.

A. *The Securities Exchange Act*

Born in the context of the Great Depression, the SEC was formed by its eponymous statute: the Securities Exchange Act of 1934. Professors Bebchuk and Jackson are correct in noting that the Act "specified only a few matters required to be disclosed" and that Congress "opted to rely on the discretion and expertise of the SEC for the determination of what types of additional disclosure would be desirable."¹⁰⁴

But that discretion and expertise were set out, in broad terms, in the Act itself. The Commission was instructed to take steps to "require appropriate reports:"

in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.¹⁰⁵

This statutory language is the legal hook upon which the Commission would need to hang any disclosure regime involving political activity. While the Act does not speak directly to these issues (perhaps because the thought of an economic regulator governing political activity would not have occurred to Congress in 1934), and consequently any SEC action may enjoy *Chevron* deference, there is reason to be skeptical of a construction of the Act that would allow the SEC to regulate in any area whatsoever, no matter how far removed from macroeconomic concerns.¹⁰⁶ This is especially the case as Congress has created an agency with expertise in the area of political disclosure: the FEC.

¹⁰⁴ *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1045 (D.C. Cir. 1979).

¹⁰⁵ Securities Exchange Act of 1934, 15 U.S.C. § 78b (2006 & Supp. V 2011).

¹⁰⁶ *See Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842–43 (1984) ("[T]he question for the court is whether the agency's answer is based on a permissible construction of the statute.").

B. The Role of Materiality

While the SEC has broad discretion in crafting its regulations, it must still demonstrate that it has conducted a proper cost-benefit analysis before it may enact a mandatory rule.¹⁰⁷ As J.W. Verrett notes, “[w]hile there is no express statutory requirement that disclosure regulations meet a materiality test, it is unclear how mandatory disclosure of immaterial items would ever survive the kind of cost-benefit analysis contemplated by the [courts].”¹⁰⁸

Considerations of materiality impact the likely fate of any mandatory rule regarding corporate reporting, but they also raise important questions of policy and have an impact on the applicability of current laws. All material information must already be reported by public companies. Failure to do so can constitute securities fraud, whether the omissions were made in public filings or were instead distributed with the corporation’s proxy.¹⁰⁹ In order to be material, and thus disclosed, there must be a substantial likelihood that a reasonable shareholder would consider the information important in deciding how to vote his or her shares.

Materiality serves as an important gatekeeper because there is harm to disclosing too much information. Too much disclosure “simply [] bur[ies] the shareholders in an avalanche of trivial information – a result that is hardly conducive to informed decisionmaking.”¹¹⁰ Moreover, if information is emotionally charged but unlikely to impact the financial health, management, or value of a company, it may serve as a distraction that is equally harmful to careful decisionmaking.

IV. THE MECHANISMS OF CORPORATE DEMOCRACY: WHO DESIRES DISCLOSURE, AND WHY?

Professors Bebchuk and Jackson point to an uptick in shareholder resolutions requesting disclosure of political spending as evidence of investor interest in related regulation. While a number of such votes have been held, they have almost invariably been defeated. Furthermore, a closer look at those bringing these proposals casts doubt on Bebchuk and Jackson’s belief that such proposals speak for a broader swath of shareholders.

¹⁰⁷ See, e.g., Verrett, *supra* note 65.

¹⁰⁸ *Id.*

¹⁰⁹ 15 U.S.C. § 78n(e) (2006); 17 C.F.R. § 240.14a-3 (2008); 17 C.F.R. § 240.14a-9 (1978).

¹¹⁰ See *TSC Indus. v. Northway*, 426 U.S. 438 (1976).

A. *There is little evidence that shareholders desire this disclosure.*

The “procedures of corporate democracy”¹¹¹ have been widely invoked in the debate over non-material corporate political disclosure. While Bebchuk and Jackson are correct that shareholders at a number of large companies have been asked to vote on increased disclosure, they neglect to note the results of those elections. With very few exceptions, those proposals have been defeated.

Last year, for example, corporate disclosure resolutions were voted upon at 71 companies.¹¹² Of those, only one—a resolution at WellPoint—received a majority (52.7%). The remaining 70 resolutions were defeated.¹¹³ The average vote in favor was 21.2%, a total down more than 20% from the year before.¹¹⁴ While 2013 results are not yet fully available, preliminary votes suggest that this trend will continue.¹¹⁵ Taken together, these results indicate that those bringing these resolutions do not represent shareholders overall.

B. *Shareholder resolutions are extraordinarily easy to bring, and, as demonstrated by their sometimes very low level of support, need not represent widespread views.*

As a preliminary matter, it is surprisingly easy to force a shareholder vote on controversial issues. As a general rule, any shareholder who has continuously held a stake worth \$2,000 for at least one year, and who continues to hold that stake through the date of the annual meeting, may ask for a proposal to be included with a company’s proxy materials, provided the appropriate procedures are followed.¹¹⁶

¹¹¹ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (quoting *Bellotti v. First Nat’l Bank of Bos.*, 435 U.S. 765, 794 (1978)).

¹¹² CAROLYN MATHIASSEN, ERIK MELL & ALEX GALLIMORE, 2012 U.S. PROXY SEASON REVIEW: ENVIRONMENTAL AND SOCIAL ISSUES 3 (2012), available at <http://www.issgovernance.com/files/private/2012USProxySeasonReviewES.pdf>.

¹¹³ *Id.* at 6.

¹¹⁴ *Id.* at 10.

¹¹⁵ As of May 1, 2013, results were available for political disclosure votes involving four companies: AT&T, Johnson & Johnson, Humana, Humana and Praxair. Two of these (Johnson & Johnson and Praxair) were brought by NorthStar Asset Management, and received support of 6.38% and 4.03%, respectively. Humana’s resolution was brought by the New York State Common Retirement Fund and received 20.71% support. The sponsor of AT&T’s proposal was undisclosed, but the resolution did best, garnering 25.36% of the vote. In addition, Starbucks was asked by Harrington Investments to cease all political spending; the resolution as defeated with just 3.81% support. *Score Card 2013*, PROXY MONITOR, <http://www.proxymonitor.org/ScoreCard2013.aspx> (last visited May 3, 2013).

¹¹⁶ *E.g.*, 17 C.F.R. § 240.14a-8(b) (2011); U.S. SEC. & EXCH. COMM’N, STAFF LEGAL BULLETIN No. 14 (2001), available at <http://www.sec.gov/pdf/cfs1b14.pdf>; Christopher M. Bruner, *Managing Corporate Federalism: the Least-Bad Approach to the Shareholder Bylaw Debate*, 36 DEL. J. CORP. L. 1, 29 (2011) (describing requirements).

The law does provide a number of substantive bases for excluding a proposal. These vary widely. For instance, companies may exclude a proposal which is “not a proper subject for action by shareholders under the laws of the jurisdiction of the company’s organization,” although such concerns are generally waived if the proposal is advisory in nature.¹¹⁷ Proposals may also be excluded if they “relate to ordinary business, conflict with or duplicate other proposals to be considered at the same meeting, or are moot.”¹¹⁸

Before excluding a proposal on one of these grounds, however, a company must inform the SEC.¹¹⁹ This is done by requesting a so-called “no action letter” from the SEC’s Division of Corporate Finance. Importantly, “the burden is on the company to demonstrate that it is entitled to exclude a proposal.”¹²⁰

One very public example of a no-action letter involved a 2011 request from Walden Asset Management that Home Depot disclose all “electioneering communications” to shareholders and allow an advisory vote on the topic.¹²¹ Home Depot attempted to exclude the proposal on three grounds: that the company had already “substantially implemented” the proposal (Rule 14a-8(i)(10)); that the matter dealt with the company’s “ordinary business operations” (Rule 14a-8(i)(7)); and that the petition was “vague, indefinite and materially misleading” contrary to other SEC regulations (Rule 14a-8(i)(3)).¹²²

In a subsequent, one-page “no action” letter, the SEC disagreed with each of these grounds.¹²³ Little analysis was given, but the authoring staff attorney did note that “the proposal focuses primarily on Home Depot’s general political activities and does not seek to micromanage the company to such a degree that exclusion of the proposal would be appropriate.”¹²⁴

Because SEC approval is required before blocking a shareholder vote, no action letters are common.¹²⁵ While a review of the thousands of letters

¹¹⁷ 17 C.F.R. §§ 240.14a-8(i)(1)–(2) (2011); see generally Jill E. Fisch, *Leave it to Delaware: Why Congress should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 771 n. 269 (2013).

¹¹⁸ David M. Lynn, *The Dodd-Frank Act’s Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. BUS. & TECH. L. 327, 353 (2011) (citing 17 C.F.R. § 240.14a-8(i) (2010)).

¹¹⁹ *Id.*; Erin White, *Stage-Managing the Annual Meeting*, WALL ST. J., Apr. 16, 2007, at B1.

¹²⁰ Bruner, *supra* note 116 (quoting 17 CFR § 240.14a-8(g), and noting that this provision appears to require that ties “break in favor of the shareholder proponent”).

¹²¹ Letter from Gregory S. Belliston, Special Counsel, U.S. Sec. & Exch. Comm’n to Stacy S. Ingram, Ass. Sec’y and Senior Counsel, The Home Depot, Inc. 25 (Mar. 25, 2011), available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2011/northstarasset032511-14a8.pdf>.

¹²² 17 C.F.R. §§ 240.14a-8(i)(3), (i)(7), (i)(10) (2011).

¹²³ Belliston, *supra* note 121, at 2.

¹²⁴ *Id.*

¹²⁵ Well over 100 letters were issued concerning Rule 14a-8 in the month of January, 2013 alone. *Chronological Listing, Division of Corporate Finance 2013 No-Action Letters Issued Under Exchange Act Rule 14a-8*, U.S. SEC. & EXCH. COMM’N, http://www.sec.gov/divisions/corpfin/cf-noaction/2013_14a-8.shtml#chrono (last visited Mar. 1, 2013).

that have been issued to date is beyond the scope of this article, a former Chief Counsel of the Division issuing such letters has noted that:

The SEC Staff has allowed. . . proposals to be included in proxy materials when the subject matter of the proposal relates to a significant policy issue that “transcends” ordinary business. As a result of the this [sic] position, the SEC Staff has, through the no-action letter process, determined that certain proposals could not be excluded under Rule 14a-8(i)(7) when the[y] relate to a wide range of policy issues, thereby permitting the proposal and supporting statement to be included in an issuer’s definitive proxy statement and be subject to a shareholder vote. . . . The types of policy-oriented proposals could be included in the proxy statement regardless of whether the policy or information regarding the policy is material to the issuer’s shareholders, and, in most cases, do not receive substantial support from shareholders voting on the proposals.¹²⁶

In short, political proposals can be placed on the proxy ballot with relative ease, both because the barriers to entry are low and because the SEC is relatively unlikely to allow corporations to exclude such proposals. Consequently, at a minimum, the mere presence of an issue on the proxy ballot indicates little beyond the interest of an individual or group holding \$2,000 of that company’s shares.

C. Those bringing shareholder resolutions on corporate political disclosure are not unbiased observers.

Not all “disclosure” resolutions are the same. Indeed, the broad range of proposals and voting outcomes argues against the one-size-fits-all approach implicit in SEC regulation. Moreover, shareholder resolutions—while nearly always defeated—nonetheless receive widely varying vote totals, with many enjoying only single-digit support and others averaging closer to 25%. A review of this varied landscape follows.¹²⁷

According to ISS, five proposals were brought by Evelyn Davis,¹²⁸ a longstanding corporate gadfly.¹²⁹ None received more than single-digit support. One asked that PepsiCo disclose political contributions in certain newspapers, and received 7.1 percent of the vote.¹³⁰ Another, requesting JP

¹²⁶ Lynn, *supra* note 118, at 353–54.

¹²⁷ This information comes from the 2012 proxy season. But, as noted above, there is little reason to believe that 2013 will vary substantially from the 2012 experience.

¹²⁸ MATHIASSEN, *supra* note 112, at 10 n.4.

¹²⁹ JAMES R. COPLAND, YEVGENIY FEYMAN & MARGARET O’KEEFE, PROXY MONITOR 2012: A REPORT ON CORPORATE GOVERNANCE AND SHAREHOLDER ACTIVISM 9 (2012), available at http://www.proxymonitor.org/pdf/pmr_04.pdf.

¹³⁰ MATHIASSEN, *supra* note 112, at 27.

Morgan Chase to affirm its nonpartisanship, received 5.9% support.¹³¹ A third, requesting political disclosure by Pfizer, received 4.11%.¹³²

While support for Ms. Davis' efforts is notably low, her results were not unique. ISS notes that a further "seven proposals requesting shareholder approval of political contributions received an average of 4 percent and three proposals asking for a prohibition of political contributions received an average of 3.1 percent"¹³³

These dismal results are somewhat counterbalanced by the efforts of the Center for Political Accountability (CPA), which received average support of 30.2% for the 26 resolutions it coordinated.¹³⁴ This represents a range from 10.4% (Caterpillar) to 52.7% (WellPoint).¹³⁵ The average vote total was down slightly from 2011.¹³⁶

CPA does not bring its own resolutions, as it does not own the requisite shares in targeted companies. Rather, it works with those who do own the requisite number of shares, and its choice of partners is instructive. Of the 26 votes, at least 17 were brought either by unions or by state pension funds controlled by elected officials of the Democratic party, or directly by unions.¹³⁷ A further seven were brought by the Nathan Cummings Foundation, Newground Social Investment, and Harrington Investments.¹³⁸

Another major player was NorthStar Asset Management, a group devoted to progressive causes,¹³⁹ which brought proposals to seven companies.¹⁴⁰ None received better than 7% support. Indeed, NorthStar has explicitly noted that it holds shares not for shareholder value, but to push an ideological agenda. Specifically, NorthStar advises its clients to divest from certain companies, but then continue to hold "the minimal number of shares required by law" to engage in corporate activism.¹⁴¹ In short, NorthStar holds shares for the sole purpose of making political points, having already explicitly limited its clients' exposure to the actual economic effects of a corporation's decisions.

¹³¹ *Id.* at 28.

¹³² Letter from Ted Yu, Special Senior Counsel, U.S. Sec. & Exch. Comm'n, to Matthew Lepore, Pfizer Inc. 7 (Jan. 9, 2013), available at <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/afscme010913-14a8.pdf>.

¹³³ MATHIASSEN, *supra* note 112, at 10, n.4.

¹³⁴ *Id.* at 7.

¹³⁵ *Id.* at 25.

¹³⁶ *Id.*

¹³⁷ Bruce Freed, Ctr. for Pol. Accountability, *2012 Proxy Season Political Spending Shareholder Resolutions*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (June 1, 2012, 9:27 AM), <http://blogs.law.harvard.edu/corpgov/2012/06/01/2012-proxy-season-political-spending-shareholder-resolutions>.

¹³⁸ *Id.*

¹³⁹ MATHIASSEN, *supra* note 112, at 27.

¹⁴⁰ *Id.*

¹⁴¹ CTR. FOR COMPETITIVE POLITICS, ACTIVIST INVESTING IN POST-CITIZENS UNITED AMERICA 11 (2011), available at <http://www.campaignfreedom.org/wp-content/uploads/2012/05/CCP-Report-with-ATA.pdf>.

This is perfectly legal, but it shows that NorthStar's policy preferences are unrelated to increasing shareholder value. NorthStar's clients may wish to hold a nominal number of shares in order to advocate, but this approach is not representative of shareholders generally, who are presumably looking to increase the value of their investment. Indeed, the fact that NorthStar encourages its own clients to hold only nominal shares in these companies is somewhat at odds with a claim that its preferred policies will increase share values. Otherwise, one would expect NorthStar to have some exposure to the potential upside of a successful shareholder vote.

In short, those bringing proposals concerning political disclosure are not politically neutral, and in fact skew a particular ideological direction. This should concern the SEC, both because it betrays a potential ideological bias against corporate political speech generally, and also because it suggests that those bringing these proposals are likely not representative of the broader community of shareholders. Moreover, there is reason to believe that at least some of those bringing shareholder resolutions are motivated by purposes other than increasing shareholders' return on investment.

D. Popular support for these efforts has been largely motivated by opposition to Citizens United and corporate political speech generally, and not by considered concerns over shareholder value.

In previous public statements, Professors Bebchuk and Jackson have expressed a belief that widespread popular support for their proposal, indicated by the unprecedented number of supporting comments filed with the SEC, should give the Commission confidence that their Petition reflects the concerns of investors.¹⁴²

A brief review of those comments suggests, rather, that they reflect widespread hostility to *Citizens United* and political speech by organizations taking the corporate form. There is, indeed, little indication that the vast majority of those comments reflect the view of investors.

More than 500,000 comments have been submitted to the SEC concerning the proposed rule. The overwhelming majority, however, are form letters that do not reflect a sophisticated understanding of the issues involved, and which often show no concern for shareholder value, capital formation, or other concerns that may properly motivate the SEC's regulatory process.

Of the many comments submitted to date, two in particular stand out. The first was submitted by roughly 250,000 commentators, and the second

¹⁴² Lucian A. Bebchuk & Robert J. Jackson, Jr., *Rulemaking Petition on Disclosure of Corporate Political Spending Attracts Massive Support from over 250,000 Comments Filed with the SEC*, HARV. LAW SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (May 22, 2012, 9:30 AM), <http://blogs.law.harvard.edu/corpgov/2012/05/22/rulemaking-petition-on-disclosure-of-corporate-political-spending-attracts-massive-support-from-over-250000-comments-filed-with-the-sec>.

by 52,000.¹⁴³ Together, they represent a substantial majority of the overall comments.

The first reads:

I am deeply concerned about the influence of corporate money on our electoral process.

In particular, I am appalled that, because of the Supreme Court's ruling in *Citizens United v. Federal Election Commission*, publicly traded corporations can spend investor's [sic] money on political activity in secret.

I am writing to urge the Securities and Exchange Commission to issue a rule requiring publicly traded corporations to publicly disclose all their political spending.

Both shareholders and the public must be fully informed as to how much the corporation spends on politics and which candidates are being promoted or attacked. Disclosures should be posted promptly on the SEC's web site.¹⁴⁴

The second begins similarly:

In January 2010, the Supreme Court issued a ruling that opened the floodgates for increased corporate influence in our elections. This decision, *Citizens United v. FEC*, rolled back long-standing restrictions on corporate spending in elections, allowing corporations, trade associations and nonprofits to spend unlimited, and often undisclosed, amounts of money directly on elections.¹⁴⁵

Both comments are explicitly motivated by an opposition to the *Citizens United* ruling and its political effects. Neither expresses a concern for the value of regulated companies, the economic effects of the proposed rule, or similar issues.

This is unsurprising: the first is a form letter distributed by AFSCME and Common Cause, a union and an advocacy organization.¹⁴⁶ The second was authored by New York City Public Advocate Bill de Blasio,¹⁴⁷ a Democratic elected official and board member of the New York City Employee Retirement System. In both cases, the comments are the result of a political

¹⁴³ *Comments on Rulemaking Petition: Petition to require public companies to disclose to shareholders the use of corporate resources for political activities*, U.S. SEC. & EXCH. COMM'N, <http://www.sec.gov/comments/4-637/4-637.shtml> (last visited Mar. 30, 2013).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Compare Letter Type A, *supra* note 143, with American Federation of State, County and Municipal Employees, *Tell the SEC – Make Corporations Disclose Donations*, AFSCME, http://action.afscme.org/c/51/p/dia/action/public/index.sjs?action_KEY=3783 (last visited Mar. 30, 2013).

¹⁴⁷ Compare Letter Type D, *supra* note 143, with Bill de Blasio, *Keeping Corporate Money out of Our Elections*, N.Y. CITY PUB. ADVOCATE, <http://pubadvocate.nyc.gov/political-spending> (last visited Mar. 30, 2013).

letter-writing campaign, and there is no indication that the individuals submitting these comments even own shares in any publicly traded company.

These comments are comparatively tame. Other comments expressed even less well-grounded support for the proposed rule:

“We oppose dictatorship – but being able to buy an election is the same in some ways.”¹⁴⁸

“It is also my opinion that before long, the 99% will rise up in social revolution.”¹⁴⁹

“The Citizens United decision has tipped the scales tremendously toward corporate influence of our politics. We are losing our democracy; we have fascism instead.”¹⁵⁰

“Sooner or later a radical Islamist will run for president and will get funded by overseas donation, perhaps billions! And no one will ever know. Is that what the SEC wants?”¹⁵¹

Of course, comments have also been submitted by reputable organizations,¹⁵² but this quick summary should suggest that while there may be interest in the proposed rule, it is not necessarily motivated by a concern for

¹⁴⁸ Letter from Denise Anderson to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Sept. 10, 2012), <http://www.sec.gov/comments/4-637/4637-1118.htm>.

¹⁴⁹ Letter from Anna M. Peterson to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (May 1, 2012), <http://www.sec.gov/comments/4-637/4637-471.htm>.

¹⁵⁰ Letter from Deborah Fulton to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Feb. 9, 2012), <http://www.sec.gov/comments/4-637/4637-623.htm>.

¹⁵¹ Letter from Robert Benson to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (July 28, 2012), <http://www.sec.gov/comments/4-637/4637-814.htm>.

¹⁵² *See, e.g.*, Letter from J. Gerald Hebert, Campaign Legal Ctr., to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Mar. 7, 2013), <http://www.sec.gov/comments/4-637/4637-1585.pdf>. Even CLC, however, appears to be involved for reasons unrelated to securities markets and protection of shareholder investments. Its stated mission is to “work[] in the areas of campaign finance and elections, political communication and government ethics.” The Center’s mission statement further specifies that it “participates in generating and shaping our nation’s policy debate about money in politics, disclosure, political advertising, and enforcement issues before the Congress, the Federal Communications Commission (FCC), Federal Election Commission (FEC) and the Internal Revenue Service (IRS).” *See Mission Statement*, CAMPAIGN LEGAL CTR., http://www.campaignlegalcenter.org/index.php?option=com_content&view=article&id=50&Itemid=64 (last visited Apr. 8, 2013).

In the very few instances where organizations and individuals concentrating on economic, as opposed to social or political, outcomes have submitted comments, the range of viewpoints is far better balanced. *Compare, e.g.*, Letter from Daniel Pedrotty, Director, Office of Inv., AFL-CIO to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Jan. 18, 2012), <http://www.sec.gov/comments/4-637/4637-25.pdf>; *with* Letter from James J. Angel to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Mar. 22, 2013), <http://www.sec.gov/comments/4-637/4637-1589.pdf>; Letter from Harry M. Ng, Vice President & Gen. Counsel, Am. Petroleum Inst. to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Sept. 4, 2012), <http://www.sec.gov/comments/4-637/4637-1095.pdf>; Letter from 29 Organizations to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Jan. 4, 2014), <http://www.sec.gov/comments/4-637/4637-1198.pdf>. Some of these disputes have become rather involved. *See* Letter from John C. Coates, IV to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Feb. 4, 2013), <http://www.sec.gov/comments/4-637/4637-1473.pdf>; Letter from Robert Shapiro, Chief Exec. Officer, Somecon LLC to Elizabeth M. Murphy, Sec’y, U.S. Sec. & Exch. Comm’n (Mar. 1, 2013), <http://www.sec.gov/comments/4-637/4637-1557.pdf>.

shareholders. Instead it reflects the ongoing, public, and often vitriolic debate over *Citizens United*.

E. The comparison of the proposed rule to past SEC action requiring disclosure of executive compensation is inapt.

It is true that the SEC imposed disclosure requirements on executive compensation in 1992, and did so, in part, because of shareholder proposals which, while not successful, nonetheless showed shareholder interest in such disclosure.¹⁵³ Contrary to Professor Bebchuk and Jackson's assertion,¹⁵⁴ this does not mean that the experience of executive compensation provides a useful roadmap for SEC action in the area of political spending.¹⁵⁵

First, the scope of disclosure for executive compensation is relatively narrow. While the overall compensation for members of the "executive group" must be disclosed in the aggregate, individualized compensation information is not generally public. Rather, only the Chief Executive Officer (or equivalent) and the four other most highly compensated executives are individually named, provided their salaries exceed \$100,000.¹⁵⁶ Consequently, the burden imposed by executive compensation disclosure is arguably less than would be imposed under any SEC rule brought pursuant to Professor Bebchuk and Jackson's petition.

Second, the SEC's executive compensation disclosure rules impose a threshold: \$100,000.¹⁵⁷ This provides at least some guarantee that the amounts involved will be material.¹⁵⁸

Finally, there is reason to believe that executive compensation payments are more material to company operations than political contributions. Executives have an incentive to self-deal, and because (all else being equal) a dollar of additional unearned compensation comes directly from the corporation's profits, shareholders and top-level management do, in some ways, have differing interests in the area of compensation. Corporate political,

¹⁵³ See generally Executive Compensation Disclosure, 57 Fed. Reg. 48,126 (1992).

¹⁵⁴ See Bebchuk & Jackson, *supra* note 10.

¹⁵⁵ It should be noted that one of the most widely-covered forms of shareholder action in the executive-compensation space—advisory votes, or so-called "say on pay" votes—were not pursued by the SEC under the Securities and Exchange Act and were not, in fact, voluntary. Rather, such votes were affirmatively required by the Dodd-Frank Act. 15 U.S.C. § 78n-1.

¹⁵⁶ See Bebchuk & Jackson, *supra* note 10.

¹⁵⁷ *Id.*

¹⁵⁸ Indeed, Target's 2010 contribution of \$150,000 to MN Forward, arguably the most talked-about corporate political contribution by those encouraging limits on or disclosure of political activity, would have been well below the disclosed level for executive compensation at many corporations. By contrast, Seaboard Corporation, the smallest company in the 2011 Fortune 500, disclosed the compensation of five executives. The lowest disclosed compensation was that of Terry J. Holton, who earned \$1,307,855—nearly an order of magnitude more than the Target contribution. See generally Seaboard Corp., Proxy Statement (Schedule 14A) 12 (Apr. 23, 2012), available at <http://www.seaboardcorp.com/wp-content/uploads/pdfs/SEC-Filings/2012/Proxy%20Statement%20-%202012.PDF>.

charitable, and advocacy work, at a minimum, does not necessarily place management and shareholders on opposite sides of the negotiating table, as is the case with CEO pay.

F. In the aftermath of Business Roundtable, the SEC should be cautious in adopting rules that may benefit self-interested advocacy over broader shareholder value.

Not only do those bringing campaign finance-related shareholder resolutions not necessarily reflect the broader class of shareholders, there is reason to believe they may have interests that, in certain circumstances, do not easily dovetail with the value-maximization interests that motivate shareholders generally and which are the cornerstone of management's fiduciary duties.

The issue is not new. In 2011, the U.S. Court of Appeals for the D.C. Circuit was asked to review an SEC rule that would make it easier for so-called dissident board slates to be brought to a shareholder vote.¹⁵⁹ The Court found that the Rule was arbitrary and capricious, and consequently invalid.¹⁶⁰ This was "because, among other reasons, the Commission failed adequately to consider the rule's effect upon efficiency, competition, and capital formation"¹⁶¹ as required by federal law.¹⁶²

With particular relevance to the debate over mandatory corporate disclosure, the Court noted that commentators on the proposed rule warned of the danger of "costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds."¹⁶³ This was because such organizations may have an "interest[] in jobs [which] may well be greater than their interest in share value. . . ." and who consequently "can be expected to pursue self-interested objectives rather than the goal of maximizing shareholder value."¹⁶⁴

This conflict between certain groups and the overall interests of shareholders, if it applies to the nomination and election of directors (a core element of "corporate democracy"), would certainly appear to apply to political activity. If an "interest in jobs" is sufficient to create a conflict the SEC must consider in any potential rulemaking, then certainly an elected official's interest in his *own* job should create a similar concern.

In any event, the D.C. Circuit was explicit in saying that the results of a shareholder vote were not the only relevant metric. Rather, "costs may be incurred either by a board succumbing to the demands, unrelated to increas-

¹⁵⁹ See *Business Roundtable v. SEC*, 647 F. 3d 1144 (D.C. Cir. 2011).

¹⁶⁰ *Id.* at 1156.

¹⁶¹ *Id.* at 1146.

¹⁶² 15 U.S.C. §§ 78c(f), 80a-2(c) (2006).

¹⁶³ *Business Roundtable*, 647 F. 3d at 1152.

¹⁶⁴ *Id.*

ing value, of a special interest shareholder threatening to nominate a director.”¹⁶⁵ Again, if certain groups pose a potential conflict of interest in nominating a director, how much more apparent is the conflict when an elected official, or less direct ideological or political opponent, is affected by speech?

Of course, a quick review of the supporters of CPA’s petitions shows that they are overwhelmingly supported by the same groups that gave the D.C. Circuit pause in *Business Roundtable*: organized labor and public officials elected in partisan elections.

CONCLUSION

Independent agencies exist to bring particular expertise, knowledge, and understanding to regulation and policy. When agencies are used to regulate activity outside their core area of responsibility and expertise, they are not usually equipped to address the issues involved, they risk their credibility, and they potentially do damage to the original regulatory scheme. This is especially true when the regulation is the result of, or accompanied by, partisan political pressure. Worse still is regulation by a new non-expert agency pushed into the field because the original expert agency does not act. Still worse is regulation by a new non-expert agency because the original expert agency’s design was intended to frustrate exactly the type of partisan regulation at issue in the case of corporate disclosure.

It may be that it would be valuable to shine more light on corporate political spending. We are skeptical. In the U.S., very nearly all political spending states who paid for it in the first instance; only about five percent of that spending in the 2012 campaign was by spenders who, in turn, kept their donors anonymous.¹⁶⁶ And we are skeptical that further disclosure will shed much light, rather than confusion, on the nature and sources of political finance.¹⁶⁷ But those are arguments for other fora and other days. Our key point here is that (1) core principles of administrative law, (2) the statutory

¹⁶⁵ *Id.*

¹⁶⁶ According to the Center for Responsive Politics, approximately 29 percent of all independent spending in 2012, or about \$375 million, came from groups that did not disclose donors to the group. *Outside Spending by Disclosure, Excluding Party Committees*, CTR. FOR RESPONSIVE POL., <http://www.opensecrets.org/outsidespending/disclosure.php> (last visited Apr. 20, 2013) (showing a decline from nearly 40 percent in 2010). Given that candidates, parties, PACs, and coordinated spenders must disclose all donors, we can presume that the rest was disclosed. Total political spending in 2012 amounted to about \$7 billion, according to the FEC. Tarini Parti, *\$7 Billion Spent on 2012 Campaign, FEC Says*, POLITICO (Jan. 31, 2013, 10:26 PM), <http://www.politico.com/story/2013/01/17-billion-spent-on-2012-campaign-fec-says-87051.html>.

¹⁶⁷ See Bradley A. Smith, *Disclosure in a Post-Citizens United Real World*, 7 ST. THOMAS J. L. & PUB. POL’Y (forthcoming 2013) (discussing how mandatory “second level” disclosure, that is disclosure of donors to organizations that then make political expenditures, among other activities, leads to over-reporting of amounts spent and can mislead about the true identity of sponsors).

enforcement scheme of campaign finance, and (3) the mission of the SEC, are each violated by forcing the Commission into a role for which it is not designed.

We again emphasize that we do not argue that Professors Bebchuk and Jackson have offered their proposal for partisan gain. Rather, what we argue is that they ignore important reasons why the SEC ought not act. In particular, they ignore that the FEC—the agency entrusted with exclusive civil enforcement of campaign finance laws—is wisely designed not to allow regulation so actively promoted by partisans. They downplay or ignore the lack of expertise within the SEC to take on the task they propose for it, and the probability that regulation will be hijacked by the kind of partisans who have provided the hundreds of thousands of form comments they cite as evidence of the need for regulation. We note that they urge the SEC to sidestep its own understanding of materiality, an important principle undergirding its actual mission of regulating capital markets, in order to find a basis to regulate political markets, a secondary mission at best. We note that the experience of the IRS in being roped into campaign finance regulation has not been a happy one, and that it now threatens the Service's careful effort to remain separate from the reality of political partisanship.

Whenever political partisans decide to bypass Congress and the expert agency it established to regulate in an area, we should be skeptical. The theory of administrative law has no role for the non-expert agency.

