

Symposium: Money in Politics: The Good, the Bad, and the Ugly

Dark Money in Motion: Mapping Issues Along the Money Trail

Frances R. Hill

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Frances R. Hill, *Dark Money in Motion: Mapping Issues Along the Money Trail*, 49 Val. U. L. Rev. 505 (2015).

Available at: <https://scholar.valpo.edu/vulr/vol49/iss2/10>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



DARK MONEY IN MOTION: MAPPING ISSUES ALONG THE MONEY TRAIL

Frances R. Hill*

It is now becoming clear that dark money is money in motion.¹ Moreover, dark money is moving on carefully designed and centrally controlled money trails that exist for purposes ranging from winning the next election to consolidating power in a much more encompassing sense over the long term. While relatively little is known about the operation of particular money trails, the information currently available suggests that they consist of multiple types of taxable and tax exempt entities through which money moves in complex and intentional patterns, and that most of the component entities offer some degree of protection against disclosure. If the component entities offer this kind of disclosure shield, nothing is gained by putting the political money in motion in such carefully designed and operated money trails. If money moves through several non-disclosing entities, it becomes necessary to trace the money through each of the entities, which is not only extremely difficult, but is also very costly and time-consuming. This is particularly useful in the case of political money where the dark money organizations are subject to limited disclosure—not protected completely against disclosure.

Awareness of money trails increased when the Center for Responsive Politics, together with the Washington Post, published diagrams of complex money trails developed by the Koch Brothers' political enterprises during the 2012 election cycle.² While the Koch Brothers may

* Professor of Law and Dean's Distinguished Scholar for the Profession, University of Miami School of Law. This piece is a part of the Valparaíso University Law School's 2014 Symposium. For more pieces from the symposium, see *Valparaíso University Law School Symposium: Money in Politics: The Good, the Bad, and the Ugly*, 49 VAL. U. L. REV. (2015).

¹ As used in this Essay, "dark money" refers to money that is in or passes through one or more organizations that are subject, under applicable law, to only limited disclosure or to no disclosure requirements relating to either sources or uses. As a result, interested members of the public are unable to access information that they might reasonably regard as relevant to their evaluation of the message being conveyed.

² Communications, *The Koch Network: A Cartological Guide*, OPENSECRETS (Jan. 7, 2014), <http://www.opensecrets.org/news/2014/01/koch-network-a-cartological-guide/>, archived at <http://perma.cc/VYC6-HJWL> [hereinafter *The Koch Network*]; see also Matea Gold, *Koch-Backed Political Network, Built to Shield Donors, Raised \$400 Million in 2012 Elections*, WASH. POST (Jan. 5, 2014), available at http://www.washingtonpost.com/politics/koch-backed-political-network-built-to-shield-donors-raised-400-million-in-2012-elections/2014/01/05/9e7cfd9a-719b-11e3-9389-09ef9944065e_story.html, archived at <http://perma.cc/KJG2-ECWL> [hereinafter *Koch-Backed Political Network*]. For broader coverage of the money trails, see the OpenSecrets Blog series, *The Shadow Money Trail*, and OpenSecrets.org series, at <http://www.opensecrets.org/news/reports/money-trail.php> (last visited Apr. 17, 2015), archived at <http://perma.cc/6L9S-BQU8>. For yet another analysis of the structure and operation of the Koch money trails, see Kim Barker & Theodor Meyer, *Who Controls the*

506 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

be leaders in the development of this kind of complex contemporary money trail, the Democrats made efforts to catch up, which led some Republicans to prepare their own chart of what they describe as the Democracy Alliance Political Activist Network.³ The chart shows the Democracy Alliance surrounded by concentric circles of twenty-one “Core Organizations” and 161 “Partner and Aligned Network Organizations.”⁴ The Koch money trail was redesigned and reengineered for the 2014 mid-term elections.⁵ The Democrats built something of a money trail around the Senate Majority Political Action Committee (“PAC”), which is an entity that discloses its contributors and its uses of the money it collects to the Federal Election Commission (“FEC”). The Senate Majority PAC is operated by “political confidants” of Senator Harry Reid, then the majority leader of the Senate.⁶ Former Vice President Dick Cheney and his daughter, Liz, announced the creation of a new section 501(c)(4) social welfare organization called the Alliance for a Stronger America, which is simply one more non-disclosing entity among the many such entities that the Cheneys used in their political endeavors for decades.⁷

Money trails put money in motion in complex patterns before the money is eventually deployed to achieve political goals. It is the movement of money that distinguishes the money trails among the various types of political actors. The implications of putting dark money in motion in this way are far from clear. Neither federal election law nor federal tax law provides much guidance. Existing judicial precedents take little account of any movement of money among parties prior to its use for

Kochs’ Political Network? ASMI, SLAH and TOHE, PRO PUBLICA (Mar. 17, 2014), available at <http://www.propublica.org/article/who-controls-koch-political-network-asmi-slah-tohe>, archived at <http://perma.cc/RGY7-LHHW>.

³ *Democracy Alliance Political Activist Network*, WASH. POST, available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2014/09/04/National-Politics/Images/kochgraphic.png> (last visited Nov. 5, 2014), archived at <http://perma.cc/85TE-SYRB> (displaying the chart the Republicans have developed to show what they describe as the Democrats’ money trail for the mid-term election).

⁴ *Id.*

⁵ Kenneth P. Vogel & Darren Goode, *Kochs Launch New Super PAC for Midterm Fight*, POLITICO (June 16, 2014, 8:20 PM), <http://www.politico.com/story/2014/06/2014-elections-koch-brothers-super-pac-107926.html>, archived at <http://perma.cc/S4EU-QRVG>; Nicholas Confessore, *Koch Group Forms ‘Super PAC’ as 2014 Races Near*, N.Y. TIMES (June 17, 2014), available at http://www.nytimes.com/2014/06/18/us/politics/koch-group-forms-super-pac-as-2014-races-near.html?_r=0, archived at <http://perma.cc/BVS5-PTAN>.

⁶ Kenneth P. Vogel & Tarini Parti, *Democrats Relying on Big Donors to Win*, POLITICO (Sept. 22, 2014, 7:49 PM), <http://www.politico.com/story/2014/09/democrats-big-donors-2014-elections-111225.html>, archived at <http://perma.cc/DB64-7W8A>.

⁷ Robert Maguire, *Dick Cheney Goes Dark: A Family Network of (c)(4) Groups*, OPENSECRETS (July 2, 2014), <http://www.opensecrets.org/news/2014/07/dick-cheney-goes-dark-a-family-network-of-c4-groups/>, archived at <http://perma.cc/8UVN-BCGM>.

an independent expenditure or a contribution. Designing and operating money trails comes at significant cost in the form of fees paid to lawyers, political consultants, management consultants, messaging consultant, and campaign strategists.⁸ The question is why. The most commonly discussed and easily comprehensible reason for creating complex money trails is to disguise the identity of contributors. The Koch Brothers themselves are certainly not hiding their political involvement, but they are not revealing much about how they are implementing their political objectives.

Some of the more colorful billionaires who financed fringe candidates in the 2012 Republican presidential primaries have never left the political stage.⁹ Other substantial contributors may place a greater value on privacy. Yet, the degree of complexity seems disproportionate to achieving this kind of privacy. Something other than defeating the easily evaded disclosure rules seems to be part of the decisions to design money trails for putting dark money in motion. This essay suggests that money trails are being constructed to facilitate centralized command and control, while creating the impression of a coalition designed to facilitate participation and representation. This kind of masked control mechanism serves two purposes. It enhances the effectiveness of the very large amounts of money that the participants are able to raise, and it masks the extent of the common purpose beyond winning the next election. An effective dark money trail can enhance the power of money in ways that enable money trails to serve as the infrastructure for transformative political activities at the federal, state, and local levels.

Part I addresses the issue of how to think about money trails by considering two possible analytical templates. Part II looks at what law might be applicable to the operation of money trails. It also explores the implications of the non-enforcement of existing law and judicial disregard

⁸ For a detailed report of the role and compensation of one of the central consultants to the Koch money trails in the 2012 election cycle, see Kim Barker & Theodor Meyer, *The Dark Money Man: How Sean Noble Moved the Kochs' Cash into Politics and Made Millions* (Feb. 14, 2011), available at <http://www.propublica.org/article/the-dark-money-man-how-sean-noble-moved-the-kochs-cash-into-politics-and-made-millions>, archived at <http://perma.cc/9MZZ-PHNH9>. For a similar study of a Democratic political operative and fundraiser for the Democracy Alliance and other organizations earning commissions so lavish that they generated pushback among donors, see Nicholas Confessore, *The Secret Worlds of a Well-Paid 'Donor Adviser' in Politics*, N.Y. TIMES (Feb. 5, 2015), available at <http://www.nytimes.com/2015/02/06/us/in-invisible-world-of-political-donor-advisers-a-highly-visible-player.html>, archived at <http://perma.cc/C5ZP-ZDKV>.

⁹ See Thomas B. Edsall, *Billionaires Going Rogue*, N.Y. TIMES (Oct. 28, 2012, 10:53 PM), available at <http://campaignstops.blogs.nytimes.com/2012/10/28/billionaires-going-rogue/>, archived at <http://perma.cc/5R55-8K53> (describing how billionaires financed the 2012 Republican President primaries).

of judicial precedents that have never been overruled. Part III moves from a consideration of the gaps between the formal law and the law as enforced to a consideration of money trails and democratic principles. The tendency to see money trails primarily in terms of the role and goals of the Koch Brothers or similar mega-donors may well be important tactically, but may obscure the larger issues of how the consolidation of economic and political power through money trails may constrain the ability of “we the people” to exercise our authority under the Constitution in an era of increasing inequality.¹⁰

I. MONEY TRAILS: DESCRIPTIONS AND ANALYTICAL APPROACHES

Money trails through which dark money is put in motion became coterminous with the Koch Brothers. The reasons are certainly compelling. The scope and structure of the Koch Brothers’ money trails during the 2012 election cycle appeared to be unprecedented, and their plans to spend almost a billion dollars in the 2016 election cycle suggest that the same will be true going forward.¹¹ The enterprise not only moved a great deal of money during the 2012 election cycle, but also required a great deal of money to design and operate.¹² The money trails represent a significant investment in the outcome of the 2012 election and in more broadly ambitious political goals relating to the conduct of elections and qualifications of voters.¹³ Why would two successful businessmen, who could use their great wealth in whatever ways they chose to influence the outcome of the 2012 election, choose to construct money trails? Why would they choose to retain this model, albeit with a substantial redesign for the 2014 mid-term elections and beyond when the results of their

¹⁰ U.S. CONST. pmbl. (“We the people of the United States . . . do ordain and establish this Constitution for the United States of America.”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 6–8 (2004); William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 433–34 (1986).

¹¹ Nicolas Confessore, *Koch Brothers Budget of \$889 Million for 2016 is on Par with Both Parties’ Spending*, N.Y. TIMES (Jan. 26, 2015), <http://www.nytimes.com/2015/01/27/us/politics/kochs-plan-to-spend-900-million-on-2016-campaign.html>, archived at <http://perma.cc/SNT3-WNTX>.

¹² See Gold, *supra* note 2 (discussing the amount of donors the money trails had). The amount of money moved through the money trails is somewhat less opaque than the amount of money devoted to their design and operation. *Id.* Neither number can be established with any certainty precisely because the money trails deal in dark money moving through a series of entities, which are not subject to disclosure. *Id.*

¹³ See *id.* (acknowledging that political nonprofit organizations supported by the Kochs led the 2012 election financially).

investment in the 2012 election proved so disappointing to them?¹⁴ Why continue to design and operate money trails rather than trying something else?

Like all of the other questions raised in this essay, these questions have no clear answers. First, it seems apparent that enhancing non-disclosure by moving money through multiple entities that are subject to no or very limited disclosure requirements. While the Koch Brothers have not hidden their involvement, they have not made public any information about the terms and scope of their involvement.¹⁵ In addition, they raise significant amounts of money at their biannual donor conferences at which people who are very wealthy, but not necessarily in the same fraction of the one percent that the Koch Brothers occupy, might not attend at all or might not pledge to make contributions if their actions were not private.

Second, money trails are regarded as efficient structures for the kind of rapid response required in the political campaigns. Money trails may be built on the premise that designing and operating carefully designed trails for putting money in motion in specific circumstances to achieve specific goals enhances the impact of money. Such heightened impact might arise from having an array of entities that can be used to ensure that the publicly identified source of the money is consistent with the message being made by the specific use of the money.

Third, a centrally coordinated money trail that can move money rapidly to meet particular needs, including a perceived need to make not only independent expenditures, but also transfers that could reasonably be characterized as candidate contributions that are prohibited for both

¹⁴ See Nicholas Confessore & Jesse Bidgood, *Little to Show for Cash Flood by Big Donors*, N.Y. TIMES (Nov. 7, 2012), available at http://www.nytimes.com/2012/11/08/us/politics/little-to-show-for-cash-flood-by-big-donors.html?_r=0, archived at <http://perma.cc/TC2P-BUAP> (providing initial reactions to 2012 losses); Kenneth P. Vogel, *The Billion-Dollar Bust?* POLITICO (Nov. 10, 2012 6:58 PM), <http://www.politico.com/news/stories/111283534.html>, archived at <http://perma.cc/3UCQ-JF68> (stating some Republican megadonors consider “shabging their ways” in response to 2012 defeat); Kenneth P. Vogel, *Karl Rove Under Fire*, POLITICO (Nov. 10, 2012 7:13 PM), <http://www.politico.com/news/stories/1112/83658.html>, archived at <http://perma.cc/V32S-W88W> (providing criticism of results produced by Rove); Karen Tumulty, *Karl Rove and His Super PAC Vos to Press on*, WASH. POST (Nov. 10, 2012), http://www.washingtonpost.com/politics/karl-rove-and-his-super-pac-vow-to-press-on/2012/11/10/19ed28ea-2a96-11e2-b4e0-346287b7e56c_story.html, archived at <http://perma.cc/DV86-V7BJ> (calling the performance reviews of Rove “scathing”).

¹⁵ The Kochs’ donor meetings are closed to the press, as they have a right to be, and reportedly feature tight security to implement this policy. See also Lauren Windsor, *Exclusive: Inside the Koch Brothers’ Secret Billionaire Summit*, NATION (June 17, 2014), <http://www.thenation.com/article/180267/exclusive-behind-koch-brothers-secret-billionaire-summit>, archived at <http://perma.cc/9CRL-29R8> (discussing the Koch summer summit).

510 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

taxable and tax-exempt corporations and unions. Because the distinction between independent expenditures and contributions is far from clear, the use of expendable intermediaries to move money that will not be traced to their original source provides both protection from miscalculation with respect to the legal risks of transferring money intended to have the effect of a contribution while being made in a form intended to create the appearance that it is an independent expenditure.¹⁶

Fourth, a money trail may be an efficient structure for blending established organizations with their own sources of money and their own electoral agendas with the special purpose entities created expressly to function as barriers to disclosure in the larger money trail. For example, the National Rifle Association (“NRA”) appears in the diagram of the Koch Brothers’ money trails.¹⁷ The NRA is a powerful political actor in its own right.¹⁸ Its appearance in the Koch Brothers’ money trail might be regarded as an alliance, with the money trail offering a mechanism for implementing such alliances for carefully negotiated purposes related to a defined goal over a specified period of time.

Fifth, a money trail as carefully constructed as the money trail developed by the Koch Brothers offers a politically potent blend of highly centralized command and control with the appearance of diffuse authority and broad participation. This perception of shared goals and shared strategies might well be useful in obscuring the presence of organizations that seem to function solely as accommodation parties in moving money and special purpose entities that enable particular transfers among particular parties. There were some indications, during the 2012 election cycle and its aftermath, that the Koch Brothers wanted as much centralized control as possible and that they would make changes in their model to achieve it.¹⁹ But, it is likely that neither the Koch Brothers

¹⁶ See *infra* Part II (describing the difference between independent expenditures and contributions).

¹⁷ *The Koch Network*, *supra* note 2.

¹⁸ See, e.g., Walter Hickey, *How the NRA Became the Most Powerful Special Interest in Washington*, BUS. INSIDER (Dec. 18, 2012, 1:43 PM), <http://www.businessinsider.com/nra-lobbying-money-national-rifle-association-washington-2012-12>, archived at <http://perma.cc/X2H4-Q76Y> (analyzing how the NRA is a powerful political actor).

¹⁹ These efforts had become clearer during the 2014 election cycle. See Nicholas Confessore, *Kochs’ Network Wrestles with Expectations for Presidential Primaries*, N.Y. TIMES (Aug. 30, 2014), <http://www.nytimes.com/2014/08/31/us/politics/kochs-network-wrestles-with-expectations-for-presidential-primaries.html>, archived at <http://perma.cc/K4JM-HQQX> (describing the Kochs as having “cleaned house” and “retooled their data efforts and grassroots outreach”); Matea Gold and Tom Hamburger, *Koch Industries Adopts New Public Posture to Neutralize Opponents, Recast Image*, WASH. POST (Sept. 8, 2014), http://www.washingtonpost.com/politics/koch-industries-adopts-new-public-posture-to-neutralize-opponents-recast-image/2014/09/07/a85e8484-3502-11e4-a723-fa3895a25d02_story.html, archived at <http://perma.cc/U3LD-HMYD> (describing an offensive against the

nor any other political actors playing similar roles would want their roles to be fully understood even by their supporters, much less by their detractors.

Different money trails may well accord different priorities to these and other reasons for money trails raise a number of largely unaddressed questions that underscore how little is in fact known about money trails in politics. The following discussion about what is not known serves as a preliminary research guide, as well as a guide to the possible ways of characterizing money trails. Any effort to inventory what is not now known and what analysts might find particularly useful to know is limited by the fact that the money in question is both dark and in motion. It may well be that other questions become as more significant as more is discovered about the money trails of contemporary politics.

The first question is how money trails are financed. Is there one major source of funds, or do other participants buy-in by making financial contributions. Much of the discussion of the Koch money trails seems to assume that the Koch Brothers are the primary contributor.²⁰ Much of the discussion of the money trails seems aimed at attempting to document the nature and the extent of the Koch contributions. The focus on the limited liability companies (“LLCs”) that directed money to the core entities are assumed to have been established to obscure the amount if not the source of the Koch money. By focusing so intensely on the Koch’s contributions, other possible funding sources that might be important for understanding money trails may be overlooked. For example, the Koch Brothers hold invitation-only donor meetings every six months. These private meetings begin with policy discussions and appearances by invited politicians and end with a donor-only pledge meeting, which has been described by one observer as having an atmosphere akin to a revival meeting.²¹ How this money is used and what share of the funding of the money trails has been raised through these pledge meetings is unknown. In addition, at least one other high-profile billionaire reportedly contributed to the Koch money trails redesigned for the 2014 mid-term election, although neither he nor his representatives confirmed this or any other commitment of funds for the 2014 election cycle. The terms under which such transfers of funds were made, if they were, are unknown. In a rare lapse in security

Democrats’ Democracy Alliance, which is described as the “hub for wealthy liberal contributors”).

²⁰ *Koch-Backed Political Network*, *supra* note 2.

²¹ See Kenneth P. Vogel & Tarini Parti, *Inside Koch World*, POLITICO (June 15, 2012, 4:35 AM), <http://dyn.politico.com/printstory.cfm?uuid=2D316FDA-68AB-4826-A61A-20A870506921>, archived at <http://perma.cc/7SJF-ERV5> (describing the Koch summits).

512 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

at their donor conference in early 2014, the Kochs left a confidential document in a meeting room.²²

The second question relates to the focal point of decision-making within the money trails. How centralized is decision-making and how is the degree of centralization determined? Who decides what issues and how do the answers matter? Again, in the Koch money trails, it is assumed that the Kochs make the decisions, but no one knows what this means in operational terms. Who controls what decisions and at what level of specificity? How are disagreements, if any, among the components of the money trail addressed? Again, much of the focus on the Koch money trails focused on those organizations that appear to have been established by the Koch Brothers and which appear to be represented by the same law firm, which is also linked to the Koch Brothers. But, there are other organizations with their own money and their own agendas in the Koch money trails, and their roles have scarcely been considered.

The third question deals with the roles played by various components' entities of the money trails. Do some organizations engage overtly in political speech while others do not? Do some organizations collect money? Do some organizations serve primarily as conduits, intermediaries, or accommodation parties? If these various roles can be identified within money trails, how and by whom are these roles determined? No one viewing money trails from the outside can answer these questions with any confidence. But, assuming something akin to these roles can be identified, what purpose does this kind of a division of labor and specialization of function serve in a money trail?²³ Defeating disclosure would not seem to require anything this complex, given the protection against disclosure offered by the entities in the money trails. Implementing centralized command and control would be consistent with this kind of division of functions.²⁴ It would enhance the ability of those exercising control to monitor the functioning of components, and it would allow for rapid responses by having each component know the extent, and thus the limits, of their roles. But, this reveals little about the basis of the authority of those who exercise command and control functions. Are these functions reserved to those who finance the creation and ongoing operation of a money trail? Is it possible to have a money trail in the

²² See Andy Kroll and Daniel Schulman, *The Koch Brothers Left a Confidential Document at Their Donor Conference*, MOTHER JONES (Feb. 5, 2014), <http://www.motherjones.com/politics/2014/02/koch-brothers-palm-springs-donor-list>, archived at <http://perma.cc/24JA-FEAT> (showing close ties between Koch Industries and the Koch Brothers' political entities and activities).

²³ See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 1-7 (N.Y., Macmillan 1933) (explaining the concept of division of labor).

²⁴ See *infra* Part II (describing the centralized command and control of money trails).

absence of a primary donor? Efforts by some in the Democratic Party to approximate a modest money trail might provide further information on these issues.

This question is closely linked to issues relating to the degree of self-determination accorded the component entities that operate politically both as components of a money trail and independently of the money trail. Certainly, the NRA is not limited to a role in the Koch Brothers' money trail.²⁵ Does this external autonomy enhance discretion within a specific money trail? The same question might well be raised with respect to Sheldon Adelson, who certainly is not constrained by his reported transfer of money to the Koch money trail.²⁶

In light of how little is known about money trails and recognizing that much that appears to be at least potentially important is not known, thinking about what concepts might facilitate the analysis of money trails might seem premature. Yet, without conceptual frameworks, efforts to find and develop data are inhibited. So, without claiming that considering conceptual analogues will resolve the questions raised above, this Essay considers a limited number of concepts that might prove useful in characterizing and analyzing money trails.²⁷

In exploring issues of characterization, the foundational question is whether a money trail is "something" apart from its components that enables the components to operate more effectively than they would operate on their own. Is it useful to think of characterizing a money trail as "something" or would it be more useful to characterize particular transactions between and among the component entities? If one suspects that both are important, how does one account for both and for how each perspective shapes the other?

Organizations can be analyzed as entities or as aggregates.²⁸ Looking at a money trail as an aggregate puts the focus on the characteristics of the component entities and on the transactions between and among the component entities. This inquiry necessarily focuses on the law under which the components are organized. The legal terms of their organizational existence will define what each component contributes to the money trail and what organizational features constrain their roles. In

²⁵ See *The Koch Network*, *supra* note 2 (showing other donations the NRA makes and receives).

²⁶ See Adelson, Sheldon G. & Miriam O.: *Donor Detail*, OPEN SECRETS, http://www.opensecrets.org/outsidespending/donor_detail?cycle=2012&id=U00000000310&type=I&super=N&name=Adelson%2C+Sheldon+G.+%26 (last visited Apr. 20, 2014), archived at <http://perma.cc/PSP8-SS6V> (listing all the organizations to which Sheldon and Miriam Adelson have contributed).

²⁷ See *infra* Part II (considering ways to characterize and analyze money trails).

²⁸ R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 393-94 (Nov. 1937).

514 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

the Koch money trails from the 2012 election cycle, the section 501(c)(4) social welfare organizations, the LLCs, and the trusts all bring their own defenses against disclosure of both contributors to them and expenditures they themselves make.²⁹ Both are essential in a money trail based on putting money in motion and eventually deploying it for a political objective. A money trail consisting of non-disclosing entities defeats efforts to trace money. As a result, those who fund components of money trails can have a reasonable expectation that, if a particular transfer of money is treated as a contribution to a candidate, this amount will not be traced back to them. The immediate transferor might be found to have acted in a manner inconsistent with its exempt status or to have violated federal election law, but that transferor can be an accommodation party that is dispensable and disposable.

Looking at a money trail as an entity, in contrast, puts the focus on the command and control structure of a money trail. It raises such questions as whether there is a command and control structure? Who operates this structure and on what factors is their authority based? Does the largest donor operate the command and control structure? What kind of control is exercised? To what extent does it define the roles of various types of parties? What are the incentives for acceptance of centralized direction?

None of these questions have satisfactory answers based on current data. But, asking these questions contributes to crafting an analytical framework that might help understand additional information on the structure and operation of various types of money trails. This Essay suggests that two possible analogues to money trails might prove useful in developing such an analytical framework. The first is the concept of a network, which is now being widely used in the study of political parties and certain other political actors.³⁰ The second is the model of the now-defunct but still (in)famous Enron Corporation, which created and controlled a number of special purpose entities to conduct special projects to create the appearance of a strong balance sheet as well as to achieve certain abusive tax advantages.³¹ This model has not yet been used to analyze political actors.

²⁹ Robert Maguire & Viveca Novak, *Exclusive: Largest Dark Money Donor Groups Share Funds, Hide Links*, OPENSECRETS (Sept. 10, 2013), <http://www.opensecrets.org/news/2013/09/exclusive-largest-dark-money-donor-groups-hide-ties-using-new-trick/>, archived at <http://perma.cc/76RX-H4SK>.

³⁰ See Brian Uzzi, *The Sources and Consequences of Embeddedness for the Economic Performance of Organizations: The Network Effect*, 61 AM. SOCIOLOGICAL REV. 674, 674–76 (Aug. 1996) (describing the concept of a market).

³¹ See STAFF OF JOINT COMMITTEE ON TAXATION, 108TH CONG., VOL. I: REPORT OF INVESTIGATION OF ENRON CORP. AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS 2, 8–10 (Comm. Print Feb. 2003).

The concept of a network encompasses a broad range of relationships among the components.³² There are no limits based on ownership or other forms of control defining affiliation.³³ A network can encompass multiple types of relationships. Similarly, a network approach is not limited by varying treatment of component entities under election law or tax law or business entity law. In addition, a network can also encompass varying degrees of centralized control and various types of command and control structures. As a result, network analysis is well-adapted to tracing money through relationships that are novel and even confusing if one is accustomed to viewing the movement of political money through the prism of only one body of law.

In addition to these reasons for analyzing money trails as networks, network analysis is being used to explore the “ecosystem” of political networks. Money trails are not the only type of political organization that is raising significant sums of money and implementing tactical and strategic plans that require carefully defined relationships with other political actors. Political scientists found the network concept a useful analytical framework for analyzing contemporary political parties and other political organizations that cannot be insightfully analyzed using the older, more hierarchical approaches of the past.³⁴

The Enron approach focuses more directly on command and control issues.³⁵ Enron is a case study of the design of command and control through relationships that will not trigger reporting requirements under the then-applicable law based on concepts of control that did not capture the substance of the actual relationships and transactions. The command and control system Enron developed to insulate the special purpose entities from the kind of financial reporting and disclosure that was required with respect to its subsidiary corporations rested not on

[VOL. I: ENRON REPORT] (discussing the investigation of tax abuse using special purpose entities and recommendations for reform); STAFF OF JOINT COMMITTEE ON TAXATION, 108TH CONG., VOL. II: REPORT OF INVESTIGATION OF ENRON CORP. AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS, APPENDICES A & B (Comm. Print Feb. 2003) (analyzing specific transactions); STAFF OF JOINT COMMITTEE ON TAXATION, 108TH CONG., VOL. III: REPORT OF INVESTIGATION OF ENRON CORP. AND RELATED ENTITIES REGARDING FEDERAL TAX AND COMPENSATION ISSUES, AND POLICY RECOMMENDATIONS, APPENDICES C & D (Comm. Print Feb. 2003) (providing opinion letters from lawyers and accountants relating to specific projects).

³² See Uzzi, *supra* note 30, at 674–76 (establishing the concept of a network).

³³ See *id.* at 674–75 (explaining how networks have the ability to change organizations).

³⁴ Richard Skinner, Seth Masket & David Dulio, 527 *Committees, Formal Parties and Party Adaptation*, 11 FORUM 137, 137 (2013). The American Political Science Association now has a section on network analysis in political science. *Political Networks*, AM. POL. SCI. ASS’N (2014), <http://www.polinetworks.org/>, archived at <http://perma.cc/WR69-4Y6Y>.

³⁵ VOL. I: ENRON REPORT, *supra* note 31.

516 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

ownership but on management.³⁶ Managers of the special purpose entities were Enron managers. The special purpose entities were developed and operated to play roles in projects designed by Enron for the benefit of Enron. This was a system of control in substance but not expressed through the forms on which accounting principles, federal income tax reporting, and reporting to other agencies such as the Securities and Exchange Commission depended. Because the special purpose entities were operating under a new model of control, few experts inside or outside government saw the entire picture for what it was. The continuous change in the types of so-called projects involving new special purpose entities obscured the larger design of the entire project designed and operated to benefit Enron by creating the illusion of profit without taxation that appeared, while it lasted, to make Enron the very paradigm of a modern corporation posed to provide the model for the twenty-first century.

Enron imploded dramatically, taking the Arthur Andersen accounting firm with it.³⁷ Other forms of corporate tax shelters continued to appear, supported by tax opinions issued by tax lawyers who certainly knew the interpretive infirmities in their opinion letters. The IRS battled tax shelters through audits and through changes in tax law. The Joint Committee on Taxation issued a comprehensive report on what happened and how it was done.³⁸ Congress amended the Code to require that taxpayers identify any transactions that were “abusive” with it under the new statutory definitions. This latter change’s greater transparency with respect to transactions allowed the IRS to audit corporate returns more effectively and efficiently.

The Enron model provides the important insight that old forms and old assumptions can be bypassed by creative design based on changing fundamental assumptions. Understanding the assumptions and categories of current law is the foundation for designing approaches that operate outside current law. These new designs do not violate the law so much as simply disregard it. An approach to law based solely on form

³⁶ *Id.*

³⁷ Tom Fowler, *Enron’s Implosion was Anything but Sudden*, HOUS. CHRON. (June 30, 2004), <http://www.chron.com/business/enron/article/Enron-s-implosion-was-anything-but-sudden-1569592.php>, archived at <http://perma.cc/DK77-2PC3>; see also C. William Thomas, *The Rise and Fall of Enron: When a Company Looks Too Good to be True, It Usually Is*, J. ACCT. (Apr. 2002), <http://www.journalofaccountancy.com/Issues/2002/Apr/TheRiseAndFallOfEnron.htm>, archived at <http://perma.cc/NCG3-D2ER> (describing Arthur Andersen as “preparing for a storm of litigation as well as a possible criminal investigation in the wake of the Enron collapse”).

³⁸ VOL. I: ENRON REPORT, *supra* note 31.

can always be disregarded by designing new approaches that take advantage of form-based premises.

II. MONEY TRAILS AND DISREGARDED LAW

Money trails exist outside of the law, which is not to say that they are lawless or unlawful. Whether analyzed as networks or as a structure of centrally controlled special purpose entities, money trails are outside of the law in two senses. In the first sense, few provisions of current law apply to money trails whether considered as an entity or an aggregate of components. In the second sense, those provisions that might apply to certain transactions in certain circumstances are now “disregarded” by the Supreme Court and not enforced by either the FEC or IRS. A statute or a judicial precedent is “disregarded” if it has not been found unconstitutional or overruled but is not taken into account by the Court in cases where it might reasonably be thought relevant.

This section of the Essay explores the concept of disregarded law by considering the issue of whether money trails are making independent expenditures or contributions and, as part of this analysis, asking who might be the speaker or the contributor. These are questions that are thought to have answers in federal election law or federal tax law. Because money trails consists of entities, determining whether particular uses of money constitute independent expenditures or contributions involves complex issues of how money is treated as it moves from one organization to another and to yet others after that.

Citizens United addressed only independent expenditures.³⁹ The election law prohibition on contributions by corporations and unions remains in place. The Court held that this prohibition on corporate contributions applies to nonprofit corporations like the section 501(c)(4) social welfare organizations that are commonly found in the money trails.⁴⁰ If the money trails are moving money that finds its way into a candidate’s campaign committee, thereby becoming a contribution instead of an independent expenditure, then some or all of the components of the money trail might well be found to have violated federal election law. No one has a clear idea of how this analysis would apply to money trails characterized either as aggregates or entities. Indeed, it is possible that one purpose of moving money in sometimes inexplicable patterns might be designed to defeat any such inquiry.

Current law does not recognize the role of networks and provides for tracing money in only very limited circumstances. Money used to make a

³⁹ *Citizens United v. FEC*, 558 U.S. 310, 361 (2010).

⁴⁰ *FEC v. Beaumont*, 539 U.S. 146, 149 (2003).

518 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

contribution to a candidate will be traced in cases where there is some evidence that the apparent contributor is a “straw contributor” who is not the actual source of the money contributed.⁴¹ This has been done in cases involving individuals, but not in the multi-entity money trails that came to public attention in the 2012 election cycle.

The distinction created in *Buckley* between independent expenditures and contributions has not been overruled.⁴² Under the reasoning in *Buckley*, an independent expenditure is given the highest level of protection under the First Amendment because the source of the money is also the speaker.⁴³ A contribution is given a lesser level of protection because the source of the money enables speech by the candidate, who is treated as the speaker.⁴⁴ *Buckley*, then, addresses the question of who is a speaker and not just the question of whether the speech is political speech which is protected under the First Amendment.⁴⁵ This is a transactional framework for campaign finance that requires identification of the source of the money as well as of the end user, or speaker. An independent expenditure is based on the premise that the funder is also the speaker.⁴⁶ A contribution, in contrast, is a transfer of money to enable the candidate to speak.⁴⁷ The difference between independent expenditures and

⁴¹ The Federal Election Campaign Act, 52 U.S.C. § 30116(a)(8) (2000), provides that:
For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Id.

⁴² *Buckley v. Valeo*, 424 U.S. 1, 12–13 (1976) (per curiam); see Adam Liptak, *Supreme Court Strikes Down Overall Political Donation Cap*, N.Y. TIMES (Apr. 2, 2014), available at http://www.nytimes.com/2014/04/03/us/politics/supreme-court-ruling-on-campaign-contributions.html?_r=0, archived at <http://perma.cc/UC86-LAA8> (providing insight into Chief Justice Roberts’ opinion that he found no need to revisit *Buckley*’s distinction between contributions and expenditures).

⁴³ *Buckley*, 424 U.S. at 49, 51.

⁴⁴ *Id.* at 22.

⁴⁵ *Id.* at 20–22.

⁴⁶ See 2 U.S.C. § 30101(17) defines independent expenditure in the following terms:

The term *independent expenditure* means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party committee or its agents.

Id.

⁴⁷ 52 U.S.C. § 30101(8)(A)(i)–(ii). The term “contribution” includes:

contributions turns on the nexus between the source of the money and the speaker.

The question of nexus remains inadequately conceptualized in *Buckley*, largely because the Court focused on individuals as both funders and speakers in an independent expenditure. In this case, the nexus is established by evidence the funder and the speaker are the same individual. The analysis is far less straightforward when an individual makes a contribution to an organization. Although the *Buckley* Court referred to organizations, it did not analyze organizations as organizations or consider the implications of such an analysis for determining who is the funder and who is the speaker. These questions are difficult when an individual makes a contribution to one association. They become far more difficult when the individual's contribution is moved through a network of organizations without the individual's knowledge or consent.⁴⁸

These questions cannot be addressed satisfactorily by applying current legal concepts. Election law has no provisions directly applicable to money in motion in the case of independent expenditures. The provisions applicable to contributions prohibit making contributions in the name of another, but these have not involved transfers among entities that characterize contemporary money trails. This absence of applicable law is an important factor in facilitating the design and operation of money trails. It also facilitates broad judicial flexibility because there is so little law to disregard. However, two judicial precedents were potentially relevant to the money trails. In *Citizens United*, the Court overruled one and disregarded the other.⁴⁹ Both of these cases considered the question of the relationship between a contributor to a tax-exempt organization and the organization that sought to use general treasury funds for independent expenditures that expressly advocated the election or defeat of a clearly identified candidate for public office. A brief discussion of these two cases helps to clarify the difficulties in identifying the source of funds and the speaker, and thus the difficulty in treating a particular use of money as an independent expenditure.

any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

Id.

⁴⁸ Frances R. Hill, *Nonparticipatory Association and Compelled Political Speech: Consent as a Constitutional Principle in the Wake of Citizens United*, 35 N.Y.U. REV. L. & SOC. CHANGE 550 (2011).

⁴⁹ *Citizens United v. FEC*, 558 U.S. 310, 320 (2010).

520 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

The first case was *FEC v. Massachusetts Citizens for Life (MCFL)*, which involved a section 501(c)(4) social welfare organization that advocated policies opposed to abortion.⁵⁰ The case focused on a special edition of the organization's newsletter that featured a score card that rated candidates on issues relating to abortion.⁵¹ The threshold issue in the case was whether the special edition constituted express advocacy or issue advocacy. The Court held that the special edition constituted express advocacy and, thus, that the expenditure in question was an independent expenditure.⁵² Section 441(b) of federal election law prohibited "any corporation" from using its treasury funds to make independent expenditures and required that corporations make such expenditures through controlled section 527 political action committees.⁵³

The Court held that the prohibition on independent expenditures was unconstitutional when applied to MCFL but not when applied to either business corporations or tax-exempt corporations that accepted funding from either unions or business corporations, both of which were subject to the prohibition on the use of corporate treasury funds for independent expenditures.⁵⁴ MCFL could have funded the special edition of its newsletter through the controlled political action committee it had established in 1980.⁵⁵ The Court dismissed the relevance of the political action committee to the case before it.⁵⁶ The Court identified "three features essential to our holding" that MCFL was not subject to section 441(b).⁵⁷ The first was that MCFL "was formed for the express purpose of promoting political ideas, and cannot engage in business activities."⁵⁸ The second was that, as a nonprofit organization, it had no shareholders or

⁵⁰ *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 242 (1986).

⁵¹ *Id.* at 243–44.

⁵² *Id.* at 249.

⁵³ 52 U.S.C. § 30118(a) (2012).

⁵⁴ *Mass. Citizens for Life*, 479 U.S. at 263.

⁵⁵ *Id.* at 255 n.8.

⁵⁶ *Id.*

⁵⁷ *Id.* at 263–64.

⁵⁸ *Id.* at 264. Both clauses of this statement are incorrect. Had MCFL been formed to promote political ideas, it would be treated as a section 527 political committee. MCFL was formed to oppose policies permitting abortion through issue advocacy and lobbying and was permitted to engage in election campaign activities to an extent never defined in tax law. MCFL could have engaged in business activities, which would have been taxed under the unrelated business income tax of sections 511–14 if they were unrelated to the organization's exempt purpose but would not have been taxed at all if they have been business activities "related" to MCFL's exempt purpose. This point was made to bolster the argument that MCFL was not a business corporation. *Id.* at 241. For purposes of this case, the statement correctly described the fact that MCFL did not engage in any business activities, but it remains incorrect as a description of the law.

other persons with a “claim on its assets or earnings.”⁵⁹ As a result, people connected with the organization “will have no economic disincentive for disassociating with it if they disagree with its political activity.”⁶⁰ The third is that “MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.”⁶¹ The Court concluded that this kind of organizational independence “prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.”⁶² These three elements were subsequently incorporated into the regulations defining independent expenditures.⁶³

These three elements taken together provided the nexus between the contributor to MCFL and MCFL’s use of the funds to finance independent expenditures even though contributors to the organization had no formal role in determining how the organization used the funds, which they contributed. The Court reasoned:

It is true that a contributor may not be aware of the exact use to which his or her money ultimately may be put, or the specific candidate that it may be used to support. However, individuals contribute to a political organization in part because they regard such a contribution as a more effective means of advocacy than spending the money under their own personal direction. Any contribution therefore necessarily involves at least some delegation of authority to use such funds in a manner that best serves the shared political purposes of the organization and contributor.⁶⁴

The Court also suggested that contributors could earmark their contributions for particular purposes.⁶⁵ The MCFL Court preserves at least some elements of nexus in defining an independent expenditure.

The second case was *Austin v. Michigan Chamber of Commerce*, which involved a section 501(c)(6) chamber of commerce that wanted to use its general treasure funds to finance an independent expenditure.⁶⁶ In *Austin*, the Court held that a section 501(c)(6) supported in part by contributions

⁵⁹ *Mass. Citizens for Life*, 479 U.S. at 264.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 11 C.F.R. § 114.10 (2012).

⁶⁴ *Mass. Citizens for Life*, 479 U.S. at 261.

⁶⁵ *Id.*

⁶⁶ 494 U.S. 652, 656 (1989).

522 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

from taxable corporations could not make an independent expenditure using its general treasury funds.⁶⁷ The Michigan Chamber of Commerce had exhausted the resources of its controlled section 527 political action committee and could not raise additional money through member solicitation during the election cycle at issue.⁶⁸ The ad it proposed to finance with its treasury funds would expressly advocate the election of an identified candidate for public office, which meant that the expenditure was an independent expenditure for purposes of federal election law and not issue advocacy, which is not subject to federal election law.⁶⁹

The Court held that the exception it had created in *MCFL* did not apply because taxable corporations funded the Michigan Chamber of Commerce.⁷⁰ As it had in *MCFL*, the Court based its reasoning on the claim that the aggregation of wealth in corporate form posed a risk of corruption or the appearance of corruption, which was the compelling government interest identified in *Buckley* that permitted the regulation of political speech.⁷¹ The Court found that both contributions and independent expenditures presented the danger of this kind of corruption and were thus subject to regulation.⁷² The Court in *Austin* found that the contributions from taxable corporations created the possibility of “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form.”⁷³ In addition, the Court found that the members of the Michigan Chamber of Commerce could not predict which candidate the organization would choose to support or oppose using, at least in part, the dues paid by members and that members who objected to the political activities but valued the other activities of the organization could not simply leave the organization.⁷⁴ All of these factors distinguished *Austin* from *MCFL* and supported the Court’s holding that the Michigan Chamber of Commerce could not use its treasury funds to finance independent expenditures.⁷⁵

Citizens United addressed a fact pattern that implicated both of these precedents. *Citizens United*, a section 501(c)(4) organization, was

⁶⁷ *Id.* at 664–65.

⁶⁸ *Id.* at 656.

⁶⁹ *Id.*

⁷⁰ *Id.* at 664–65.

⁷¹ *See id.* at 659 (citing *Citizens United v. Mass. Citizens for Life*, 479 U.S. 238, 257 (1986); *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)) (recognizing a compelling government interest of preventing corruption as in *MCFL*, and also recognizing the “danger of real or apparent corruption” that the corporate funding could have on candidacy found in *Buckley*).

⁷² *Austin*, 494 U.S. at 659–60.

⁷³ *Id.* at 660.

⁷⁴ *Id.* at 662–63.

⁷⁵ *Id.* at 669.

supported by both individual and corporate contributions.⁷⁶ It claimed that its expenditures relating to a film that took a negative view of Hillary Clinton during the 2008 election cycle while she was a candidate for the Democratic Party nomination for President was issue advocacy properly characterized as education of the public and thus outside the scope of federal election law.⁷⁷ The Court found that the film constituted the functional equivalent of express advocacy.⁷⁸

At this point, the Court had a choice of rejecting *Citizens United*'s claim, granting the claim by relaxing the requirements for satisfying the exception crafted in *MCFL*, or granting the claim by overturning the prohibition on independent expenditures by corporations. The Court expressly rejected relaxing the requirements for satisfying the *MCFL* exception and instead overturned the prohibition on independent expenditures funded by using the corporation's general treasury funds.⁷⁹

To achieve this result, the Court simply ignored the reasoning in *Buckley* and *MCFL* that focused on a nexus between the source of the money and the speaker.⁸⁰ Had it addressed this issue, the Court would have had two options. One would have been to treat the corporation as the source of the funds in its general treasury. The other would have been to acknowledge that the funds in the general treasury were derived from multiple sources outside the organizations as well as corporate earnings, particularly in the case of taxable corporations, which would have raised issues of participation and representation that the Court did not choose to address.⁸¹

It is at this point that the reasoning in *Citizens United* becomes a parade of result-driven paradoxes. The two options for dealing with the nexus issue operate differently in the context of taxable and tax-exempt corporations. The general treasury funds of taxable corporations are derived primarily from earned income, as well as from the sale of corporate equity and corporate debt. But, shareholders and bondholders have a claim on the general treasury for either the payment of dividends, depending on the type of stock held, or for the return of capital and the payment of interest in the case of investments in debt instruments.⁸² The earned income can reasonably be treated as the corporation's money, which makes it reasonable and perhaps easy to treat the corporation as both the source of the funds and the speaker who makes the independent

⁷⁶ *Citizens United v. FEC*, 558 U.S. 310, 319 (2010).

⁷⁷ *Id.* at 319–20 (describing the *Hillary* movie).

⁷⁸ *Id.* at 326 (finding *Hillary* to be the functional equivalent of express advocacy).

⁷⁹ *Id.* at 412.

⁸⁰ *Id.* at 356, 359 (comparing *Citizens United* to *Buckley* and *MCFL*).

⁸¹ Hill, *supra* note 48.

⁸² *Citizens United v. FEC*, 558 U.S. 310, 477 (2010).

expenditure. The question in the context of taxable corporations relate to the amounts derived from investments made by shareholders and investors in corporate bonds, which are likely to have been made for the purpose of making a profitable return on the investments, not to support the political agenda of the corporation. Indeed, investors may not have any idea that the corporation has a political agenda and perhaps no way of finding out whether the corporation has a political agenda at the time that they make their investment. Both equity investors and investors in corporate debt have continuing claims on corporate earnings. Holders of corporate equity have a vote on some matters of corporate governance. Because of the earned income, the corporation can claim to be a source of at least some of the general treasury funds, but this is not a claim that can exclude the claim of shareholders and investors in corporate debt instruments, that they have also provided part of the funds in the general treasury. In the case of a taxable corporation, there is some nexus between the source and the speaker, but not the kind of nexus required under the MCFL requirements.

The general treasury funds of tax-exempt organizations come from some combination of contributions and earned income, depending on the types of exempt organization involved and the operational model of each particular organization. *Citizens United* derived its general treasury funds from contributions, with no reference to earned income, not even to the “bake sales” that engaged the Court in *MCFL*.⁸³ The same seems to have been true of *Austin*. The difference was that *Austin* accepted contributions from taxable corporations.⁸⁴ *Citizens United* accepted a relatively small amount of corporate contributions, with the bulk of the general treasury funds coming from individual contributions.⁸⁵ There is no reference to earned income. In the case of tax-exempt organizations, it is far more problematic to ignore the contributors as the source of funds used for independent expenditures. But, because most exempt entities do not have voting members, it is very difficult to characterize the contributors as speakers. Again, in a somewhat different way, the MCFL nexus requirement cannot be satisfied.

The majority opinion in *Citizens United*, however, could not consider these distinctions because it insisted that speech is speech and all speakers, individuals, and corporations, have the same constitutional rights.⁸⁶ Within its own reasoning, it had no response to the departure from the concept of nexus in defining independent expenditures. This does not

⁸³ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 242 (1986).

⁸⁴ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 656 (1990).

⁸⁵ *Citizens United*, 558 U.S. at 319.

⁸⁶ *Id.* at 340.

explain why the Court in *Citizens United* overruled *Austin*, but disregarded *MCFL*. The difference is explained by *Austin*'s holding that independent expenditures can pose a danger of corruption or the appearance of corruption when they are made by corporate entities, while *MCFL* created an exception to this prohibition because, although *MCFL* was a corporation, it did not accept contributions from corporations.⁸⁷ The nexus requirement in *MCFL* was simply disregarded so that the Court in *Citizens United* could issue a broad holding that all corporations had the same right as individuals to make independent expenditures. Technical legal issues relating to the identification of or the nexus between the source of the funds and the user of the funds were not permitted to limit this broad holding.

Although *Citizens United* did not consider money in motion or structures at all akin to the Koch Brothers' networks, it enabled the movement of money by disregarding the nexus requirement that addressed the issue of how to claim that an organization was both the source of funds and the user of funds, the core definitional element of an independent expenditure. Because *MCFL* has not been overruled but only disregarded, it is possible to say that the nexus requirement still applies. But, this means little because the Court has signaled it will not be enforced.

Where does this leave the money trails? One interpretation is that the money trails have been freed from a potentially bothersome legal requirement. The other interpretation is that the money trails now have no basis for claiming that their uses of money constitute independent expenditures if a different Court should in the future recall that *MCFL* is still formally good law. For now, politicians of both parties appear to be embracing the first interpretation.

This interpretation is bolstered by the failure, refusal, or inability of both the FEC and the IRS to enforce compliance with what remains of federal election law and of tax law applicable to dark money groups, especially section 501(c)(4) social welfare organizations.⁸⁸ A former Chair of the FEC, Trevor Potter, described the current situation as the "Wild West era of campaign finance."⁸⁹ He found that "the laws on the books

⁸⁷ *Id.* at 327.

⁸⁸ For a comprehensive analysis of the requirements for tax exemption in the case of section 501(c)(4) social welfare organizations, see FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS*, Chap. 13 (2002, revised 2012).

⁸⁹ Trevor Potter, *California's FPPC Provides Examples for Dysfunctional Federal Agencies to Follow: 40th Anniversary Keynote Address*, CAMPAIGN LEGAL CENTER BLOG (Sept. 19, 2014, 6:52 PM), http://www.clcblog.org/index.php?option=com_content&view=article&id=575:californias-fppc-provides-example-for-dysfunctional-federal-agencies-to-follow-trevor-potters-40th-anniversary-keynote-address, archived at <http://perma.cc/CUY2-8Q2P?type=source>.

are merely just that, and often do not reflect actual campaign practices[.]”⁹⁰ Potter decried “political players’ ability and willingness to essentially nullify duly enacted laws.”⁹¹ He found that:

There appears to be a dangerous new lawless reality in Washington and many states: laws are passed by democratically elected legislators; the laws are then signed by the President or Governor, only to be completely frustrated by political actors who do not have the legislative strength to change them but do have sufficient strength to block their enforcement.⁹²

It is difficult to say whether the IRS or the FEC is more unwilling or unable to enforce the statutes each is expected to administer.

In light of the Supreme Court’s disregard of applicable law and the enforcement failures of the two relevant federal agencies, how does one think about the money trails? Is it useful or even rational to think about them technically in terms of laws that are disregarded and not enforced? Or, should one focus on the larger issue of the relationship between economic power and political power? Should scholarship extend beyond a focus on the judicial and regulatory arenas to larger issues of the relationship between economic inequality and democracy?

III. ECONOMIC INEQUALITY AND POLITICAL POWER

This Essay has pointed out repeatedly what is not known about the money trails and why money that is already shielded from disclosure is being put in motion and sent along such circuitous paths that often, from the outside, seem to have little purpose. The one thing that is known is that the design, operation, and funding of money trails is not an enterprise for Americans of ordinary means. Money trails are for the wealthy—perhaps the mega-wealthy. The purpose of this Essay is not to suggest that the very wealthiest Americans should not be able to organize in any lawful manner that they choose, but to consider what questions beyond the technical legal questions the use of money trails might raise. The technical complexity of money trails is a form of masking that should be understood not only in technical terms but also in terms of political theory relating to the meaning of power and democracy.

Organizing to win political power is a core activity in a democracy and is protected under the First Amendment rights of speech and

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

association. It is far less clear that the First Amendment protects the right of economic power to determine political power. Does the First Amendment protect the right of Americans of ordinary means to be heard in the public square even though they do not have enough money either individually or collectively to challenge the kind of wealth that is represented in the money trails? If not, why not? If so, what does this mean in practice?

The 2012 election cycle provided clear evidence that election campaigns are being financed by a limited number of affluent Americans. In a study for the Sunlight Foundation, Lee Drutman found that, “[i]n the 2012 election, [28%] of all disclosed political [money] came from just 31,385 people[] [i]n a nation of 313.85 million [people.]”⁹³ Every winning congressional candidate received money from this small elite group.⁹⁴ Of the successful congressional candidates in 2012, 84% “took more money from these 1% of the 1% donors than they did from *all* of their small donors (individuals who gave \$200 or less) combined.”⁹⁵ The median contribution was \$26,584, which was more than half of the median income of a family of four.⁹⁶ The Sunlight Foundation described “this elite group of donors as the collective gatekeepers of public office.”⁹⁷

For their part, candidates for Congress face the need to raise significant amounts of money every day if they hope to win office or retain their office. Incumbents in the House of Representatives raised an average of \$1.64 million each, or approximately \$2250 per day during their two-year term.⁹⁸ Senate incumbents who retained their seats in 2012 raised an average of \$10.3 million, or approximately \$14,125 per day.⁹⁹ Both incumbents seeking re-election and challengers will necessarily devote significant amounts of time to fundraising. What this means in practice was made very clear in the case of a candidate running for an open Senate seat when a campaign memorandum on, among other things, allocation of the candidate’s time, became public.¹⁰⁰ The memoranda identified a

⁹³ Lee Drutman, *The Political 1% of the 1% in 2012*, SUNLIGHT FOUND. (June 24, 2013, 9:00 AM), http://www.sunlightfoundation.com/blog/2013/06/24/1pct_of_the_1pct/, archived at <http://perma.cc/9U8J-LMZQ>. This percentage meant that in 2012 “candidates got more money from a smaller percentage of the population than any year for which we have data[.]” *Id.* This study makes it clear that it does not take account of dark money, which would increase the disparity.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Drutman, *supra* note 93.

⁹⁹ *Id.*

¹⁰⁰ See James Hohmann, *The Michelle Nunn Memos: 10 Key Passages*, POLITICO (July 28, 2014, 6:32 PM), <http://www.politico.com/story/2014/07/michelle-nunn-memos-10-key->

fundraising target of \$18 to \$20 million, which “will require us to prioritize fundraising above all else and to focus the candidate’s time on it with relentless intensity.”¹⁰¹ The year would begin with the candidate spending 80% of her time on fundraising and end in October, the month before the election, with her spending 50% of her time fundraising.¹⁰² There was no indication that this effort would be focused on the time-consuming task of raising money from people of ordinary means and several indications that it would focus the campaign would accept substantial funds from various third-party affiliates of fund raising structures identified with the Democratic Party. None of this is unusual. Nothing in the documents appears to suggest that campaign finance laws as currently interpreted have been violated. The point is that everything in these documents appears to be consistent with the contemporary norm and most of it could be said, and almost certainly is being said, by every other Senate campaign, albeit with the obvious adjustments for which interest groups and third-party fundraising groups are referenced by candidates from the other party.

Economic inequality shapes political campaigns as much as it shapes so many other elements of American society. Candidates need money and know they cannot raise it from Americans of ordinary means because so few Americans can afford to make political contributions in any amount. Some Americans can give a great deal. A few Americans can give a great deal more. The money trails appear to involve the latter group, those who can afford to contribute millions or tens of millions of dollars and who want to ensure that this level of giving results in efficient investments in political success.¹⁰³ The failure to win the presidency in 2012 seems to have fueled the determination to make much more effective use of the money trails in 2014 while making the Democrats detoured to build their own versions of money trails.

In light of the confluence of increasing economic inequality and increasing costs of election campaigns, the question of the relationship between economic power and political power becomes a more acute practical inquiry. This is the question that the Supreme Court refuses to consider because it rejects the idea that the government may have a

passages-109463.html, archived at <http://perma.cc/SY82-YFY6> (highlighting a memoranda that was made public about Michelle Nunn). The Politico story acknowledges the original reporting in the National Review, which posted 144 pages of campaign documents on its website on July 28, 2014. *Id.* The campaign did not deny the authenticity of the documents. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See Drutman, *supra* note 93 (examining the amount donated by the elite group of wealthy Americans).

compelling interest to take economic inequality into account.¹⁰⁴ The Supreme Court insists that differences in economic power are irrelevant to understanding elections, campaign finance, representation, participation, and the nature of democracy.¹⁰⁵ Addressing the political implications of economic inequality is not a compelling state interest for purposes of campaign finance cases.¹⁰⁶ The rich must not be denied the right to speak to whatever extent their economic resources permit. The same right is, of course, accorded to people of ordinary means who cannot afford to make themselves heard in the public square. Their role is confined to listening to the messages by very different people with very different agendas.

This reasoning was entrenched in campaign finance jurisprudence long before it was consolidated in *Citizens United* and *McCutcheon*.¹⁰⁷ The Court in *Buckley* struck down the limits on independent expenditures, reasoning that:

It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitations on express advocacy of the election or defeat of candidates imposed by [section] 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."¹⁰⁸

Through this reasoning, the *Buckley* Court served notice that the Court will not limit the amount of speech of any speaker.¹⁰⁹ The Court based its

¹⁰⁴ See Richard Briffault, *Corporations, Corruption, and Complexity: Campaign Finance After Citizens United*, 20 CORNELL J.L. & PUB. POL'Y 643, 656–57 (2011) (discussing the Court's rejection of economic inequality as a rationale for spending limits).

¹⁰⁵ Ciara Torres-Spelliscy, *The Democracy We Left Behind in Greece and McCutcheon*, 89 N.Y.U. L. REV. ONLINE 112, 115 n.17 (2014) (noting the lack of consideration by the Court of economic inequality).

¹⁰⁶ *Id.* at 117.

¹⁰⁷ *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976).

¹⁰⁸ *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 269 (1966), *Assoc. Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S. 476, 484 (1957)).

¹⁰⁹ *Id.* at 48.

530 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

position on the evils that it saw as flowing from any limits on the overall amount of speech, reasoning that:

A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.¹¹⁰

If market power permits Speaker A to finance far more political speech than Speaker B can afford to finance, then the Court will protect the right of Speaker A to speak up to the limits of his or her market power. The Court was willing to assume that increasing the overall amount of speech would translate into increasing the diversity of speakers and of issues discussed.¹¹¹ The defense of this assumption over time resulted in a jurisprudence that precludes any consideration of the case in which market power increases the total amount of speech but at the same time limits the number of speakers, the range of viewpoints, and the spectrum of issues. The Court in both *Citizens United* and *McCutcheon* made it clear that it will not consider any evidence relating to this consequence of its jurisprudence.

In *Citizens United*, the Court overruled *Austin*, primarily on the grounds that it prohibited political speech in the form of independent expenditures by corporations.¹¹² The Court in *Austin* found a compelling governmental interest in preventing what it described as “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹¹³ The Court in *Citizens United* devoted little effort to disaggregating these two arguments and focusing virtually exclusively on the rights of corporate speakers.¹¹⁴

¹¹⁰ *Id.* at 19. The Court observed in a footnote that “[b]eing free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.” *Id.* at 19 n.18.

¹¹¹ *Id.* at 19.

¹¹² See *Citizens United v. FEC*, 558 U.S. 310, 348–56 (2010) (discussing the rationale for overruling *Austin*).

¹¹³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 660 (1990).

¹¹⁴ See *Citizens United*, 558 U.S. at 348–49 (noting that the Government had “virtually abandoned” its reliance on anti-distortion rationale and had chosen instead to rely on an anti-corruption interest and a shareholder protection interest).

The Court devoted its full attention to broadening the latitude for wealthy contributors in its 2014 plurality decision in *McCutcheon*, which abolished the aggregate cap on contributions by individuals. Chief Justice Roberts' opinion was marked by concern for wealthy individuals who could not support as many candidates as they wished to support even if they were willing to abide by the limits on contributions to particular candidates, which remain in place.¹¹⁵ This solicitude resulted in a curt dismissal of the *Buckley* Court's decision upholding the aggregate limits based on the brevity of its discussion of the issue.¹¹⁶

Chief Justice Roberts' plurality opinion does contain an element that provides tantalizing glimpses of what a judicial consideration of networks might include.¹¹⁷ Because *McCutcheon* involved contributions to candidates and not independent expenditures and because FECA contains a provision prohibiting "straw donors" and conduits, it raised the issue of the potential for corruption arising from efforts to disguise the true source of contributions.¹¹⁸ Describing one such pattern, Chief Justice Roberts observed that "it is hard to believe that a rational actor would engage in such machinations."¹¹⁹ This remark does not inspire confidence that the current Court would bring a great deal of insight to the task of considering the claims arising in the context of the operation of a complex money trail. The complexity of networks might well pose a sufficiently difficult challenge to forestall meaningful judicial review. Complexity may well prove to be a shield for the consequences of using economic power to consolidate political power.

The problems arising from the Court's willful insistence that a very narrow concept of *quid pro quo* corruption is the only compelling government interest that is permissible to consider in the context of campaign finance litigation extend beyond the realities of crafting arguments for litigation.¹²⁰ The problem is that legal scholars appear to have internalized these limitations in their scholarship. This is a significant problem. Precisely because the Roberts Court's five-Justice coalition agreed that *quid pro quo* corruption is the only permissible

¹¹⁵ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1473–74 (2014).

¹¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 38 (1976); see *McCutcheon*, 134 S. Ct. at 1446 ("Although *Buckley* provides some guidance, we think that its ultimate conclusion about the constitutionality of the aggregate limit in place under FECA does not control here. *Buckley* spent a total of three sentences analyzing that limit[.]").

¹¹⁷ *McCutcheon*, 134 S. Ct. at 1437.

¹¹⁸ *Id.* at 1454–56.

¹¹⁹ *Id.* at 1454.

¹²⁰ For an example of a much broader approach, see ZEPHYR TEACHOUT, CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN'S SNUFF BOX TO CITIZENS UNITED 280–84 (2014), discussing corruption as a subset of equality concerns.

532 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

government interest, it is not possible to expect the Court to provide much if any assistance in escaping this very small interpretative box. The alternative is to engage the legal academy and the legal profession in ways that delegitimize the Court's view. To the extent that members of the legal academy accept the premise that the boundaries of the Supreme Court's jurisprudence should also provide the boundaries of scholarship, they are shifting to the Court sole responsibility for a role that is in part theirs. In other words, those legal scholars who find the current jurisprudence of campaign finance insufficient or even inconsistent with broad principles relating to the integrity of elections, should not limit their work to criticizing the Court solely within the small, confining, and misleading interpretative box that the Court created but should develop an alternative jurisprudence, and challenge the Roberts Court in the broader marketplace of jurisprudential ideas.

This is a particularly auspicious time to bring issues of economic inequality into the marketplace of ideas. There is now serious scholarship based on reputable data dealing with inequality and this economic scholarship is reaching an audience beyond the confines of academia. Thomas Piketty's book has generated serious discussion among scholars from a broad range of academic disciplines.¹²¹ Our intellectual horizons need not be bound by the ungrounded assertions of a Court that seems unable or unwilling to address politics as it is practiced through the ordinary development of evidentiary records in the lower courts but instead addresses issues as matters of abstract theory of their own devising. Those who argue before the Court must work within this system of constrained ideas. Scholars are not so constrained unless they constrain themselves.

¹²¹ See generally THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2014).