BRENNAN CENTER FOR JUSTICE

ANALYSIS

Election Spending 2014: 9 Toss-Up Senate Races

By Ian Vandewalker

Brennan Center for Justice *at New York University School of Law*

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INTRODUCTION

Most Americans know that this is an age of skyrocketing spending on elections. Less widely understood is how the source of that spending has dramatically changed in recent years, and what that means for our democracy. Outside spending — spending by those other than the candidates themselves — has increased dramatically both in dollar terms and as a percentage of total election spending. Among outside spenders, the portion coming from the political parties has diminished, as outside groups that are independent of both candidates and parties — or at least claim to be so — increase in importance.

The key players in our political system, candidates and parties, are not necessarily accountable for outside spending. And non-candidate expenditures are often lacking in transparency, leaving their effects on politics mysterious. Increasingly, outside spending is a way for those who can afford it to evade the regulation of elections — to try to influence elections without playing by the rules of our democracy.

We are now seeing the maturation of the system created by the Supreme Court's deregulatory zeal in *Citizens United v. FEC*. That decision allowed corporations and unions to spend their general treasury funds on politics. While many feared the decision would result in for-profit corporations spending massive amounts directly on elections, it is now clear that the largest impact was a proliferation of outside groups dedicated to influencing elections (some of which may, in fact, be conduits for corporate money). *Citizens United* led to the creation of super PACs and an explosion in the use of nonprofit organizations to influence elections. Super PACs and nonprofits can accept unlimited contributions from individuals, corporations, and unions. Nonprofits are not required to disclose the identities of their donors.

The reality of the post-*Citizens United* world bears little resemblance to the Supreme Court's rose-colored assumptions. The Court described a system where immediate disclosure would keep the public informed of the potential influence of money. The reality is that most nonparty outside spending originates with hidden sources. The Court assumed that outside spending could not corrupt candidates because it comes from entities whose activity is independent of candidates' campaigns. The reality is that outside groups, some devoted to electing a single candidate, cooperate with candidates in many ways, potentially making their unlimited contributions as valuable to candidates as the direct contributions that are subject to strict caps.

This report describes the realities created by *Citizens United* by examining the races where it is likely to have the biggest impact in 2014: competitive races for the U.S. Senate. Money is pouring into these races because the Republicans are widely seen as having a good chance to take the chamber from the Democrats, which along with their solid majority in the U.S. House, would give them control of Congress.

Our main findings include:

Dark Money

- Dark-money groups that hide some or all of their donors accounted for $88.6 million, or 56 percent, of nonparty outside spending.
    - In the seven races for which we have data on both candidate and non-candidate spending, dark money amounted to 24 percent of all spending.
    - Our analysis does not include tens of millions of dollars spent on ads that are not required to be reported to the FEC, all of which is dark money, meaning the true portion of outside spending is higher.
- Outside spending in favor of Republicans is much more likely to be dark money, (80 percent of nonparty outside expenditures), than pro-Democrat spending (32 percent of which comes from dark-money groups).

Single-Candidate Groups

- Single-candidate outside groups are active in every state in our sample, and they accounted for approximately half of nonparty spending in Alaska and Kentucky, as well as 30 percent in Georgia.
  - There is more single-candidate group spending on the Republican side, at $20 million. Pro-Democrat candidate-specific groups spent $8.3 million. There is reason to believe the partisan difference is due to the fundraising success of Senate Majority PAC, a Democrat-aligned group and the biggest non-candidate spender in our sample. Senate Majority has apparently attracted donors who might otherwise have given to Democratic single-candidate groups.

- Single-candidate groups that are also dark-money groups are a new phenomenon in this election. In our sample, six of the eight highest-spending candidate-specific groups hide some or all of their donors, including the top candidate-specific spender overall.

- Single-candidate groups depend heavily on money from double-dipping donors — individuals who have given up to the legal limit in direct contributions to the favored candidate's campaign. All but one of these groups got the great majority of their individual donations from maxed-out campaign donors.
  - At least 76 donors gave money to single-candidate groups in addition to giving the maximum amount to either the favored candidate's primary or general campaign.

- Single-candidate groups also accept sizable contributions from corporations and unions, which are completely prohibited from giving directly to candidates. Some groups got all their revenue from these entities.

Methodology

We analyzed Senate contests in nine states, chosen because they were listed as "toss-ups" by the Cook Political Report at the end of September: Alaska, Arkansas, Colorado, Georgia, Iowa, Kentucky, Louisiana, Michigan, and North Carolina.[1] We eliminated candidates who had attracted less than $300,000 in outside spending. The analysis covers independent expenditures and electioneering communications reported to the FEC through September 30. We used this cutoff to allow direct comparisons to candidate spending, since the most recent candidate filings to the FEC cover the period through September 30. However, we were only able to access FEC filings for twelve candidates; some of our data on candidate spending comes from information released by campaigns and press reports. Even considering those sources, we were not able to find spending data for all the candidates in two of our nine states. Thus, our comparisons between inside and outside money consider only a subset of the sample that excludes Georgia and Michigan.

The deadline for candidates' October quarterly filings is October 15. They are submitted on paper to the Secretary of the Senate before being scanned and sent to the FEC, which hires a contractor to manually enter the information into a database.[2] Filings for U.S. House and presidential candidates, in contrast, are electronic and immediately available on the FEC website. Despite perennially pending legislation to make Senate filings electronic, Congress has yet to bring Senate transparency into this century.[3] The expensive and inefficient process delays the public's access to vital information about Senate elections for weeks.

In North Carolina, outside groups have spent on electioneering communications, which are issue ads that mention a candidate close to an election. We have counted these expenditures in our analysis, and we do not differentiate between electioneering communications and independent expenditures, as those terms are defined in federal election law.[4] This report uses "outside spending" and similar terms to refer generally to reported non-candidate spending.

We used analysis by the Center for Responsive Politics to categorize outside spenders' disclosure. CRP categorizes spenders as providing full disclosure, partial disclosure, or no disclosure. We consider groups in the partial disclosure and no disclosure categories to be dark-money groups. We consider spenders to be single-candidate groups if they have made expenditures favoring only one candidate or attacking that candidate's opponent during this election cycle. A few of the single-candidate groups have spent in support of other candidates in past cycles.

After the election, we will issue an update to this report that analyzes the spending in competitive Senate races including the crucial period leading up to Election Day.

I. OUTSIDE SPENDING HITS NEW HIGHS

The most expensive race in terms of overall spending — candidates and non-candidate spenders together — so far has been North Carolina, at $64.8 million. Kentucky is close behind, with $58.2 million. Considering only non-candidate expenditures from party and nonparty groups, North Carolina is again the standout; outside spending was $39.3 million in the Tar Heel State.

Outside spending is on track to shatter previous records. The record for most outside money in any senate race prior to this election was $52.4 million in Virginia in 2012.[5] We expect as much as three-quarters of the election's spending to come after September 30, when our sample ends, as we observed in past research.[6] If the races in our sample repeat that pattern, all but Louisiana will match or exceed the previous record high. North Carolina is on track to beat the record several times over.[7]

Outside groups have spent at a furious rate: Nonparty outside spending through September 30 amounts to $158.6 million in these nine most competitive races. As a comparison, in the last midterms in 2010, nonparty outside spending in all senate races reached only $97 million for 37 contests.[8] As with all analyses of FEC data, these totals do not include spending on ads that are not required to be reported to the FEC because they do not explicitly call for a vote and are not aired close to an election.

The biggest outside spender in our sample is the Senate Majority PAC, which outspent both major party committees. Senate Majority is what some have called a "shadow party," an outside group dedicated to winning seats for members of one party.[9] In addition to its own spending, Senate Majority has virtually fully funded Put Alaska First, a super PAC dedicated to reelecting Sen. Mark Begich (D-Alaska). If Senate Majority's more than $5 million in donations to Put Alaska First is added to its direct expenditures, the larger group's spending in these nine races amounts to $34 million.

Table 1: Top Outside Spenders — Nine Toss-Up Senate Races

Organization	*Expenditures*	*Description*
1. Senate Majority PAC	$29,083,280	Democratic-aligned super PAC
2. Democratic Senatorial Campaign Committee	$22,575,479	Democratic party committee
3. National Republican Senatorial Committee	$13,019,216	Republican party committee
4. U.S. Chamber of Commerce	$12,434,799	Conservative 501(c)(6) trade organization
5. Crossroads GPS	$9,900,929	Conservative 501(c)(4) social welfare group
6. NextGen Climate Action Committee	$9,483,407	Liberal super PAC
7. American Crossroads	$7,661,433	Conservative super PAC
8. Kentucky Opportunity Coalition	$7,551,379	McConnell (R) single-candidate 501(c)(4) social welfare group
9. Patriot Majority USA	$6,717,460	Democrat-aligned 501(c)(4) social welfare group
10. Put Alaska First	$6,660,083	Begich (D) single-candidate super PAC (funded by Senate Majority PAC)

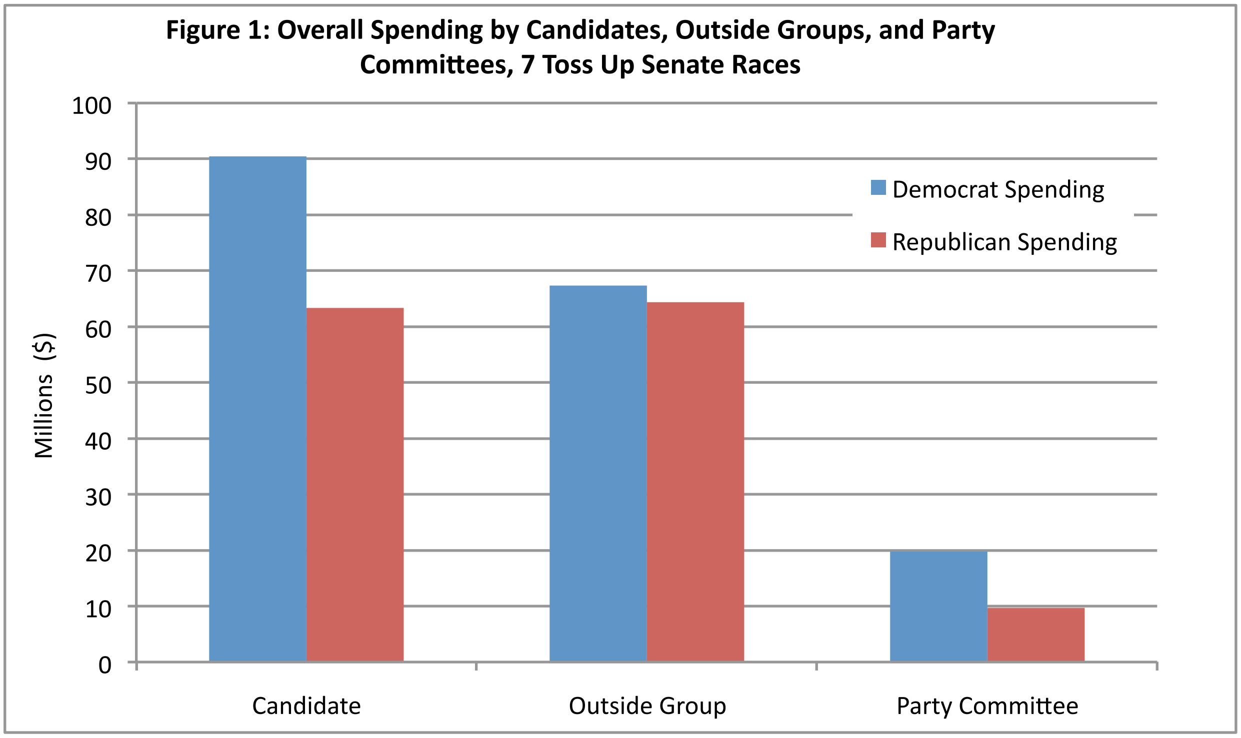
Expenditures by the parties through September 30 totaled $35.7 million. Nonparty outside groups have spent more than four times more than the parties so far in these nine elections. This is further evidence of the decline in the relative spending power of the parties compared to outside groups. This decline can be seen in longitudinal data from the Campaign Finance Institute concerning the whole Senate (data focused on the most competitive races is not available for past elections).[10] In 2008, the parties spent over six times more than outside groups. Two years later in 2010, nonparty spending exceeded party expenditures for the first time, by slightly less than 30 percent. In 2012, the first full cycle after *Citizens United*, nonparty spending shot up to three times higher than party spending.

Democrats had a relatively small advantage in outside spending through the end of September. Pro-Democrat outside spenders put up $101.3 million in expenditures across our sample, beating out those favoring Republicans, which added up to $93 million. Pro-Republican outside spending led only in Georgia and Kentucky, albeit with a huge margin in each race. However, looking only at expenditures earmarked for general, rather than primary, elections, the Democrat advantage essentially disappears, indicating that Democrats' advantage was largely in the past.

None of the Democrats in our sample faced a competitive primary, yet primary expenditures by outside groups favoring Democrats totaled $24.7 million, 82 percent of which was spent attacking Republicans. Pro-Democrat groups spent the most on cross-party primary attacks in Alaska and North Carolina, where incumbent Democrats got to wait out competitive Republican primaries, and in Louisiana, where the open primary system forces candidates from opposing parties to face each other for the whole election cycle. On the other side of the aisle, pro-Republican outside spending in the primaries came to $14.1 million, with only 17 percent attacking Democrats.

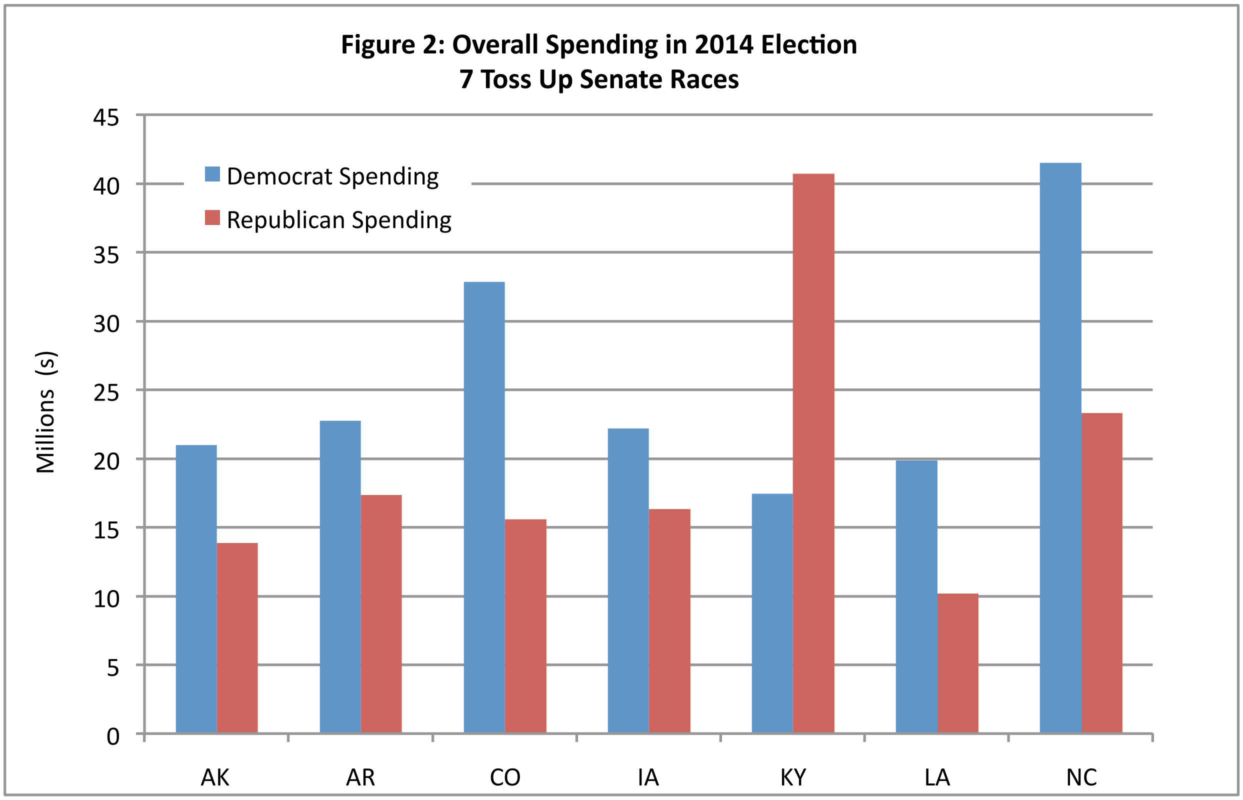
A. Candidates Made Less than Half of Expenditures

Because we were only able to collect complete candidate spending information for seven of the races in our sample, this section considers a subset of our sample: Alaska, Arkansas, Colorado, Iowa, Kentucky, Louisiana, and North Carolina.[11] Across all seven races, candidate spending accounted for 49 percent of total expenditures. Parties spent 9 percent, and the remaining 42 percent came from nonparty groups.



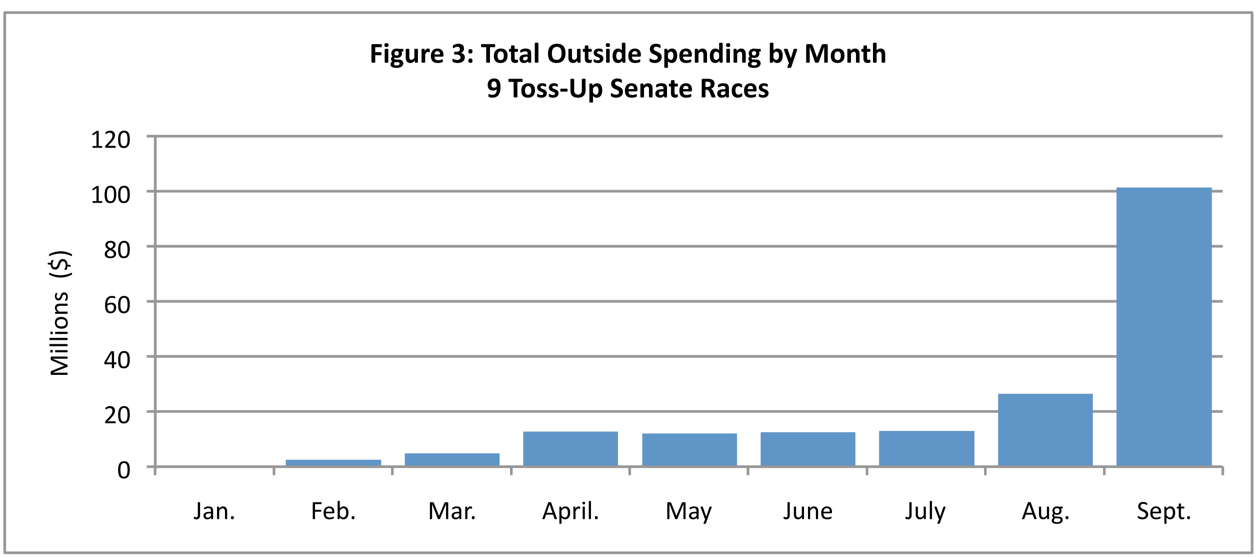
There was some variation in the portion of spending that came from candidates among the seven races. Candidate spending made up the largest part in Louisiana, which has the lowest outside spending in our sample, and Kentucky, where candidate spending was the highest. The portion candidates spent was smallest in Iowa, where the candidates made $13.6 million worth of expenditures compared to $25 million in outside spending. Candidates were outspent by total outside spending in four of the seven races, and candidates were outspent by nonparty spending alone in Alaska, Iowa, and North Carolina.

When candidate and non-candidate spending are added together, Democrats have the advantage in six of the seven races, although the Republican advantage in Kentucky, where the Senate minority leader is defending his seat, is vast. And as mentioned above, the Democratic spending advantage may have been most pronounced in the primary season; Republicans may catch up before Election Day.



B. More Spending in Store

Spending increases dramatically as Election Day nears, meaning we still have not seen the full extent of the money. More than half of total non-candidate spending for the cycle, when party expenditures are included, was in September alone. Last month saw $101.8 million in outside spending — October's total may be higher still. In a 2012 analysis of competitive U.S. House races, the Brennan Center found that three-quarters of outside expenditures were made after September 30, and one-half were made in just the last three weeks of the campaign.[12]



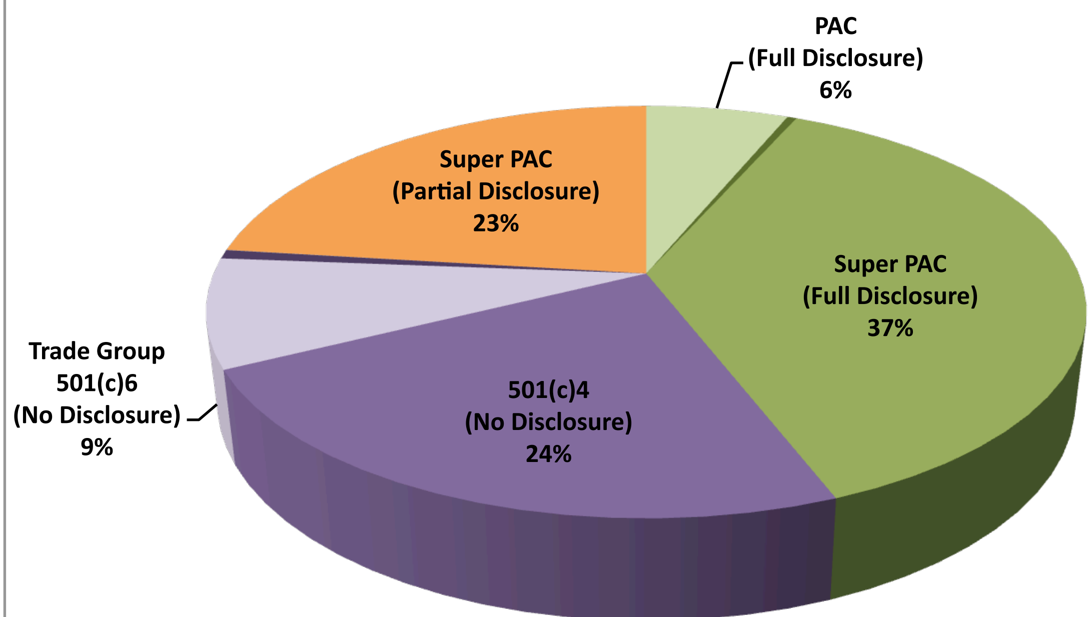
II. DARK MONEY DOMINATES NONPARTY SPENDING

"Dark money" refers to spending by groups that hide the identities of some or all of their donors, and a majority of nonparty outside spending in our sample of nine races — 56 percent — came from these secretive groups. There was $88.6 million in dark money spent in these nine contests more than a month before Election Day, already approaching the $97 million in dark money that was spent across all 33 Senate elections in 2012.[13] This cycle, dark money has increased both in terms of dollars and as a portion of total election spending.[14]

Newsweek reported at the end of September that dark money expenditures are approximately 10 percent of total candidate committee spending for House and Senate races this cycle.[15] But in our sample's subset of seven competitive races for which we have candidate spending information, the portion is 23 percent. Dark money, like outside spending generally, appears to be focused on the races that have the best chance of changing the party in control of one of the chambers of Congress.[16]

Our totals don't include tens of millions in unreported spending, all of it dark, meaning that the true portion of dark money is undoubtedly higher than 56 percent.

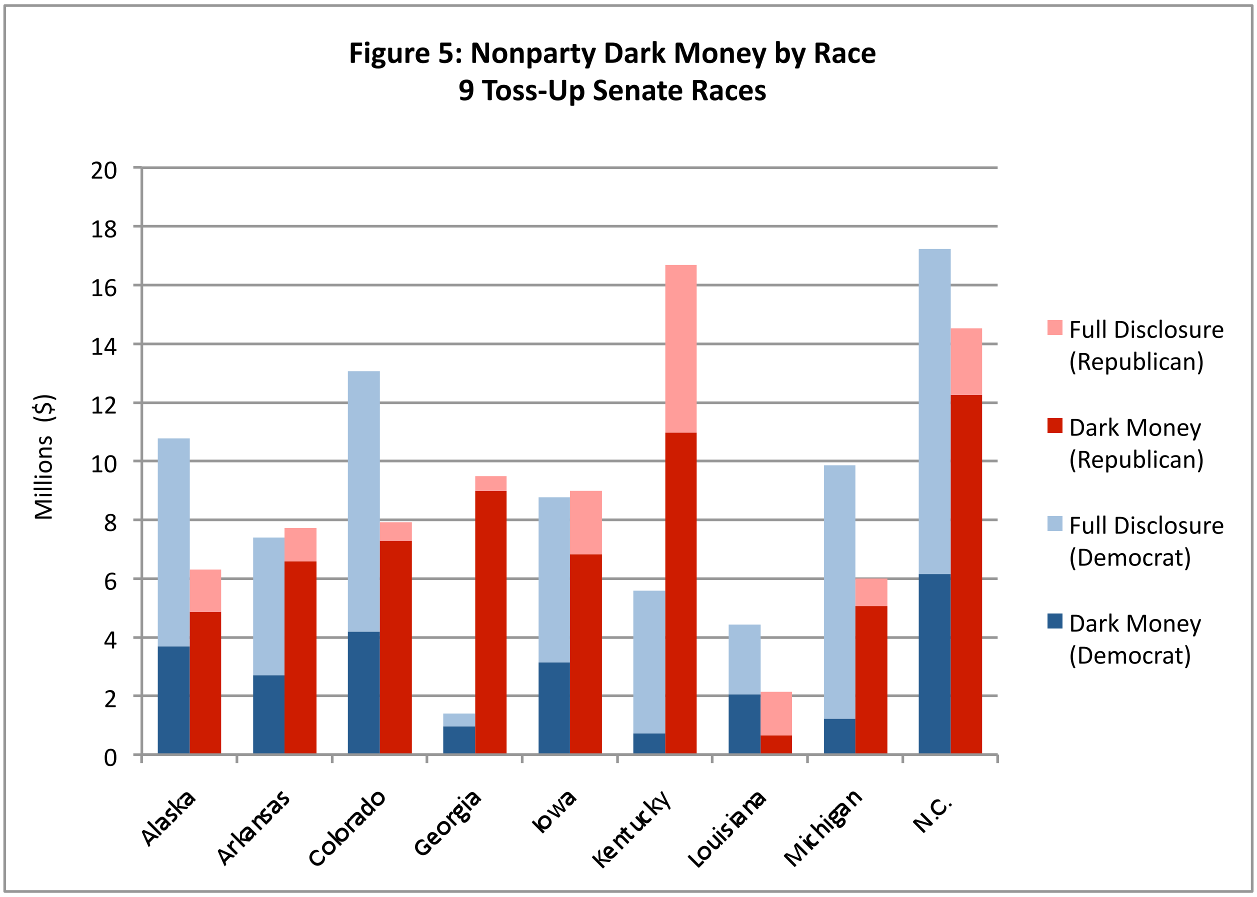
Figure 4: Nonparty Outside Spending by Source
9 Toss-Up Senate Races



Total Nonparty Outside Spending: $158.6 Million

The most active dark money group (and fourth-biggest spender overall) in our sample is the U.S. Chamber of Commerce, a nonprofit trade organization that does not disclose its donors. The Chamber, with $12.4 million in expenditures in these nine contests, was outspent only by the two national party committees and the Democrat-aligned Senate Majority PAC. Crossroads GPS, a social welfare nonprofit that also favors Republicans, is close behind with $10 million in spending.[17] And if Crossroads GPS is considered together with its sister super PAC, American Crossroads, which only partially discloses its donors, the group would surge ahead of the Chamber with $17.6 million in combined spending. In addition, as noted below, Crossroads is one of the heavyweights of unreported spending, which adds untold millions to their expenditures.

Dark money strongly favors Republicans. Overall, 80 percent of pro-Republican nonparty expenditures came from dark money groups, compared to 32 percent of outside spending favoring Democrats.[18] In addition, unreported spending — where the leaders are conservative groups like Americans for Prosperity and Crossroads — leans Republican, meaning the 80 percent figure underestimates the true extent of dark money supporting GOP candidates.[19]

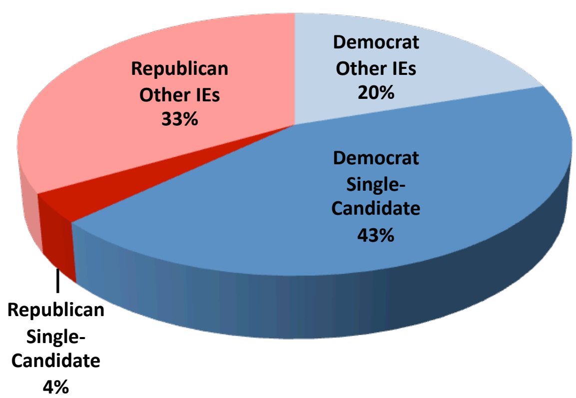


III. SINGLE CANDIDATE GROUPS SPEND MORE AND DISCLOSE LESS

Single-candidate groups, or "buddy groups," are outside spenders that devote all of their resources to the election of one candidate. When they take the form of a super PAC, candidate-specific groups can accept unlimited donations from individuals and other entities. When they take the form of a nonprofit, they can accept unlimited donations and hide the identities of their donors. Since campaigns are limited in the amount they can accept from each individual, these groups allow donors to give more than $5,200 — the contribution limit to federal candidates' primary and general campaigns together — and know their money will be spent in aid of the candidate's election.

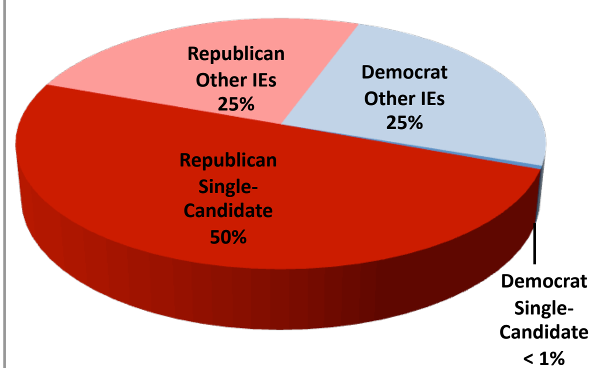
Single-candidate groups are active in all the states in our sample, although the amounts spent in Colorado, Iowa, and Louisiana were small. Buddy groups spent approximately half of all nonparty outside expenditures in both Alaska and Kentucky, and around 30 percent in Georgia.

Figure 6: Alaska Single-Candidate Spending



Total Nonparty Outside Spending: $17.1 Million

Figure 7: Kentucky Single-Candidate Spending



Total Nonparty Outside Spending: $22.3 Million

Some have labeled this category "buddy PACs," but we use the term "buddy groups" because more and more single-candidate organizations are nonprofits that hide their donors, rather than super PACs.[20] Candidate-specific groups that keep some or all of their donors hidden are active in seven of the nine contests in our sample. Prior to this election, Senate races have not seen significant spending by single-candidate dark-money groups.[21] But in our sample, six of the eight highest-spending buddy groups hide some or all of their donors, including the top candidate-specific spender overall, Kentucky Opportunity Coalition. The last column in Table 2 displays the lack of transparency in the top-spending single-candidate groups.

Candidate-specific groups appear to be growing in significance. There are a few more single-candidate groups focused on Senate candidates this year than there were in 2012.[22] More importantly, these organizations are on track to spend significantly more in this election. At the end of the 2012 elections, seven Senate buddy groups had spent more than $1 million, and the biggest spender hit $5.9 million.[23] In our sample of nine races with more than a month left until the election, six groups have spent more than $1 million, and two have already broken last election's record high.

Table 2: Top Single-Candidate Groups — Nine Toss-Up Senate Races

Organization	*Expenditures*	*Description*	*Transparency*
1. Kentucky Opportunity Coalition	$ 7,551,379	Pro-McConnell 501(c)(4) social welfare group	No disclosure
2. Put Alaska First	$ 6,660,083	Pro-Begich super PAC	Full disclosure
3. Kentuckians for Strong Leadership	$ 3,570,459	Pro-McConnell super PAC	Full disclosure
4. Carolina Rising	$ 3,179,626	Pro-Tillis (North Carolina) 501(c)(4) social welfare group	No disclosure
5. Citizens for a Working America	$ 2,152,656	Pro-Perdue (Georgia) super PAC	Partial disclosure
6. Government Integrity Fund Action Network	$ 1,047,880	Pro-Cotton (Arkansas) super PAC	Partial disclosure
7. Southern Conservatives Fund	$ 735,947.46	Pro-Kingston (Georgia) super PAC	Partial disclosure
8. Alaska Salmon PAC	$ 723,464.27	Pro-Begich super PAC	No disclosure
9. Alaska's Energy/ America's Values	$ 628,992.88	Pro-Sullivan super PAC	Full disclosure
10. B-PAC	$ 606,515.00	Pro-Land (Michigan) super PAC	Full disclosure

In the nine most competitive Senate races, Republicans have a distinct advantage in single-candidate group spending. Twenty-five percent of pro-Republican nonparty spending, or $20 million, comes from buddy groups, compared to 11 percent for groups that favor Democrats, or $8.3 million. Most of the Republican spending is driven by $11.1 million from two groups focused on reelecting Senate Minority Leader Mitch McConnell (R-Ky.).

There have been reports that single-candidate groups focused on Senate Democrats have not been able to raise money because Senate Majority PAC has elbowed other groups out.[24] Our sample lends support to the notion. Of the nine Republican nominees, eight have candidate-specific groups spending on their behalf. Of the nine Democratic nominees, on the other hand, only four are being helped out by active single-candidate groups. Single-candidate groups have formed to support another four of the Democrats, but with little or no fundraising and no spending.[25]

The buddy-group spending on the Democrats' side is mostly driven by Put Alaska First, which is virtually fully funded by Senate Majority. Removing Put Alaska First from the analysis would drive the candidate-specific group spending down to just two percent of pro-Democrat nonparty outside spending, or only $1.6 million. Thus is it likely that there would be more single-candidate spending in our sample if it were not for the fundraising prowess of Senate Majority.

A. Double-dipping Donors Can Evade Contribution Limits

Single-candidate outside groups can accept donations of unlimited size, allowing donors who have given up to the candidate contribution limits to "double-dip" and provide further monetary support to a candidate's bid. The contribution limit for federal candidates is indexed to inflation and raised every two years. This cycle it is $2,600 per election, and primary and general elections are considered separate elections, allowing candidates to accept $5,200. But there is no limit on contributions to super PACs or political nonprofits. In addition, corporations and unions are prohibited from contributing directly to candidates at all, but they are allowed to give to outside groups.

We analyzed donors to the single-candidate super PACs in our sample to look for individuals who had given up to the limit to the donee's favored candidate. The most recent searchable FEC records for most races are from the second quarter filings, except for two groups with somewhat later filings due to the timing of a primary and runoff election. Therefore, any individuals who became double-dipping donors within the last few months are not captured here. And of course, there may be more double-dippers among the contributors to the single-candidate dark-money groups, who remain hidden from the public.

Seventy-six donors gave to buddy groups in this cycle while also giving up to the contribution limit for either the favored candidate's primary or general campaign; their donations totaled $3.4 million. Of those, 58 were $5,200 donors who gave to both campaigns. These 58 people together gave single-candidate groups $2.7 million more than contribution limits allowed them to give to their favored candidate. The biggest-spending double-dipper was Robert Mercer, who gave $350,000 to virtually fully fund American Heartland, a group supporting Iowa Republican Joni Ernst.

The candidate-specific groups in our sample depend heavily on double-dipping donors for their revenue. We calculated the portion of each group's individual contributions from double-dippers, discounting money from corporations and unions. Of the nine groups in our sample that took money from individuals at all, four took in 99 percent or more of their individual contributions from double-dipping donors, and only one received less than 70 percent from such donors.

Corporations and unions have also made sizable donations to single-candidate groups, despite the prohibition on direct candidate contributions from those entities. Some buddy groups have taken no money at all from individuals, such as Citizens for a Working America, funded by $2.1 million from two nonprofits and a limited liability corporation; Michigan for All, funded by $1.3 million from unions; and Alaska SalmonPAC, funded by $773,000 from environmentalist nonprofits.

The option of unlimited contributions raises concerns about the apparent corruption of candidates through buddy groups. For example, controversy has arisen around contributions to a super PAC supporting North Carolina Republican challenger Thom Tillis from three men whom Tillis, as speaker of the state House of Representatives, supported for prestigious appointments to the University of North Carolina Board of Governors.[26] Tillis said in an email to legislators that one should be appointed because of his past political contributions.[27] Each of the men became double-dipping donors within months of being appointed to the board. In fact, they all made five-figure contributions to the pro-Tillis super PAC on the same day.

B. Possible Cooperation with Campaigns

The more that single-candidate groups are able to collaborate with the candidates they support, the more unlimited contributions to buddy groups function as unlimited contributions to candidates. Candidate-specific groups can legally cooperate with campaigns in several ways: they can hire former aides to the candidate, they can share vendors on key services like political strategy and messaging, they can have candidates solicit funds for them, and they can use campaign materials in their own appeals to voters, among other strategies.[28]

A group called Put Alaska First that is supporting incumbent Democrat Mark Begich meets our criteria for a single candidate super PAC because all of its spending has been in support of Begich or attacking Republicans running for his seat. The group has accepted donations from a handful of Begich donors. But it gets almost all of its money from Senate Majority PAC, a group dedicated to the Democratic Party holding the Senate. Senate Majority has accepted donations from maxed-out Begich donors, although of course those donors could not guarantee that their money would help Begich. Put Alaska First, like other single-candidate groups, seems to test the notion that putatively independent groups do not coordinate with campaigns. The Begich campaign uses some of the same vendors as Put Alaska First and Senate Majority.[29]

Kentucky Opportunity Coalition, the single-candidate dark-money group backing Mitch McConnell, spent $1.8 million to air an ad that used footage produced by the campaign itself.[30] As detailed in a new Brennan Center report, *After* Citizens United: *The Story in the States*, it has become common for campaigns to post "B-roll" footage on their websites of candidates doing the kinds of things typically seen in campaign commercials, such as meeting with senior citizens or touring factories.[31] This allows putatively independent supporters to produce ads that portray the candidate just the way the campaign wishes.

Because the window of our sample closed at the end of September, it does not include more than $1 million in spending in October by a single-candidate super PAC, Priorities for Iowa, which is supporting Joni Ernst by attacking her opponent, Democrat Bruce Braley.[32] The super PAC is run out of a consulting firm that also employs David Kochel, who consults for Ernst's campaign, although the group's leader, Sara Craig said there is a firewall in place to prevent illegal coordination. Craig and Kochel previously ran a nonprofit with a similar name that also attacked Braley. The nonprofit was never required to report its donors, and the super PAC has not yet disclosed its donors.

In fact, political operatives may still be creating single-candidate groups. New super PACs were formed in October in five of the states with competitive Senate elections, and the Sunlight Foundation has reported that the new groups have ties with the Republican leadership in the Senate.[33]

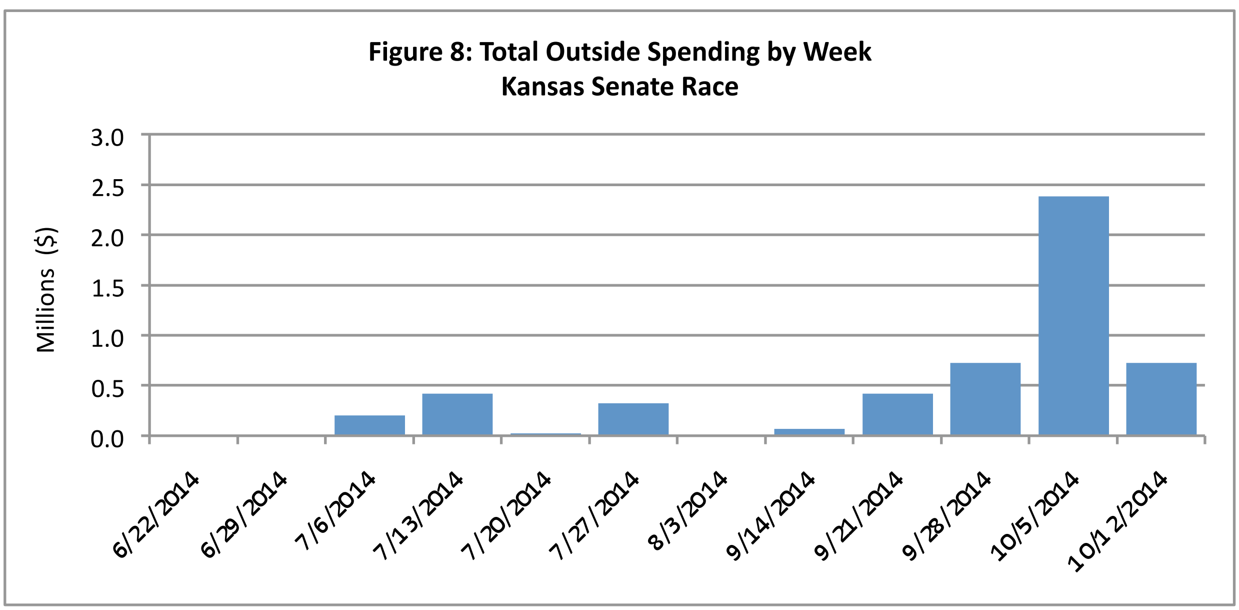
IV. NEWLY COMPETITIVE KANSAS

The Senate election in Kansas became competitive in September when the Democratic candidate successfully withdrew his name from the ballot, setting up a head-to-head contest between the incumbent Sen. Pat Roberts (R-Kan.) and independent Greg Orman.34 The race was listed as a "toss-up" by the Cook Political Report around the same time. We excluded Kansas from our analysis because it has not been considered competitive for as long as other contests, and outside spending in the race has only become significant after the close of our sample on September 30. In order to gauge the effect of the race's new significance in the battle for control of the Senate, this section examines outside spending in the Kansas Senate race through October 15.

Since the Kansas Supreme Court approved a ballot without the Democratic candidate on September 18, outside money has poured into the state. Outside groups spent $4.3 million in the four weeks after that decision; the entire race up until mid-September had only accumulated $1.2 million in non-candidate spending.

Dark money's influence in Kansas is in line with our sample: 59 percent of nonparty outside spending comes from groups that hide donors. All of the dark money in the contest has favored the Republican, and the largest dark-money spender is Freedom Partners Action Fund, a super PAC created this year by the Koch brothers' political spending network.35

On the other hand, all of the single-candidate group spending has favored Orman. The Committee to Elect an Independent Senate is the only buddy group in the race and the only outside spender on Orman's side so far. It has spent about $389,000 in support of Orman since it was formed on October 6. The super PAC was reportedly founded and at least partially funded by a friend of Orman's, who has also given the maximum contribution to Orman's campaign.36 Due to the timing of filing deadlines, the Committee to Elect an Independent Senate has not yet reported any donors to the FEC.



V. CANDIDATE SPOTLIGHT: SENATE MINORITY LEADER MITCH MCCONNELL

Few have embraced the Supreme Court's *Citizens United* decision more vociferously than long-time campaign finance reform foe Senator Mitch McConnell.[37] In a brief to the Supreme Court in 2012, he argued that critics of the decision got it exactly wrong: Despite the warnings, unlimited spending from corporate treasuries had not skyrocketed as a result of the decision, and it should stand.[38] McConnell has also opposed a form of campaign finance regulation blessed by *Citizens United*: disclosure. In 2010 and again in 2012, McConnell led the successful opposition to legislation intended to bring greater transparency to political money.[39]

And Senator McConnell is easily one of the biggest beneficiaries of new campaign finance strategies that have emerged since the deregulatory shock of *Citizens United*. As the top Republican in the Senate, McConnell is one of the most powerful people in the nation, which makes him a focus of campaign fundraising and spending, especially as he faces a tight reelection battle. And if the Republicans take the Senate, McConnell will presumably become even more powerful as majority leader. McConnell has raised $28.6 million and seen $15.5 million in outside spending on his behalf.[40]

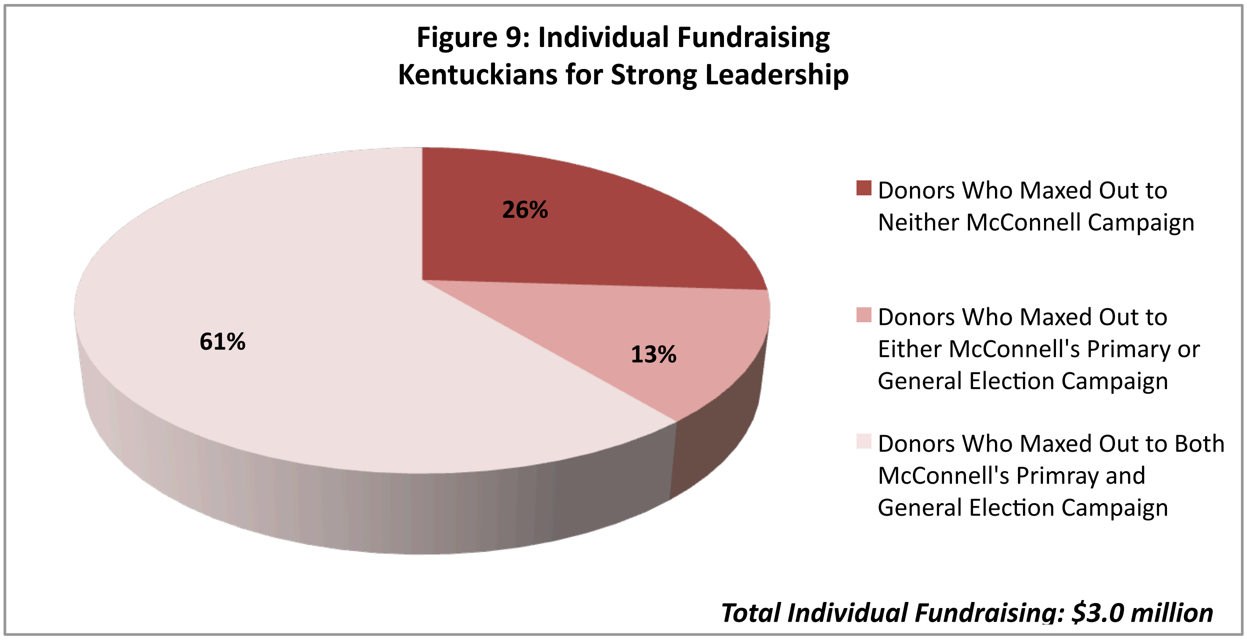
The great majority of the outside spending favoring McConnell is from dark-money groups, just as with other Republican candidates. With $10.7 million in dark money supporting him, McConnell is second only to Thom Tillis in the amount of dark-money spending in his favor.

In terms of support from single-candidate groups, McConnell towers over the field, with 72 percent of nonparty outside spending in his favor coming from buddy groups — more than $11 million. Only Mark Begich, at $7.4 million, even comes close.

One of McConnell's biggest supporters is a single-candidate super PAC called Kentuckians for Strong Leadership. Kentuckians for Strong Leadership was founded by a senior adviser to McConnell's 2008 campaign and was set up exclusively to support his reelection.[41] One of its three board members is McConnell's former chief of staff.[42]

Kentuckians for Strong Leadership has collected the most money from double-dipping donors of any group in our sample. Sixty-eight percent of the individuals who have given to the super PAC have also maxed out to McConnell's primary or general election campaign.[43] Slightly more than half maxed out to both campaigns. While the group counts just 40 of these double-dipping donors, their contributions have had a serious impact, adding up to about $2.25 million and comprising 74 percent of the group's revenue from individual donors. The average maxed-out donor contributed about $56,000 to the super PAC, more than 10 times what can be given directly to McConnell. Not included in these figures are some super PAC donors who also gave $5,000 to McConnell before the contribution limit was raised in 2013. Although these donors have the option of giving another $200 in this cycle, they maxed out at the time they contributed and before giving to the super PAC in excess of current contribution limits.

One of the top double-dippers in McConnell's corner, coal magnate Joe Craft, gave $200,000 to the super PAC as well as $5,200 to the campaign. He and two other double-dippers also hosted a fundraiser for the candidate that featured remarks from former Republican presidential nominee Mitt Romney.[44]



One other super PAC — the pro-Begich Put Alaska First — spent significantly more than Kentuckians for Strong Leadership. It has only two double-dipping donors, having received almost all of its money from the Democrat-aligned Senate Majority PAC. As noted, however, Senate Majority has donors who have maxed out to Democratic Party committees, as well as to Begich.

McConnell's campaign is also being buoyed by the biggest-spending single-candidate dark-money group in the history of Senate elections: the Kentucky Opportunity Coalition. This social welfare nonprofit has hired the same former McConnell campaign advisor as Kentuckians for Strong Leadership.[45] Kentucky Opportunity Coalition spent $7.6 million through September 30 to help reelect McConnell, all on ads attacking his opponent. Of course, there is no way of knowing whether the donors behind Kentucky Opportunity Coalition have donated up to the contribution limit to McConnell, or what interests they represent.

VI. SPENDER SPOTLIGHT: SENATE MAJORITY PAC

Nonparty outside spending in our sample is more than four times higher than party spending adding to the evidence that outside groups may be overtaking political parties in importance to campaign funding.

But a closer look at the spending reveals a more complicated story. The largest nonparty spenders are closely aligned with the parties, raising the question whether their spending is best considered in the "party" or "nonparty" column.[46] On the GOP side, the largest outside spender is Crossroads, when the super PAC and nonprofit are considered jointly. Crossroads has outspent the Republican Party's official Senate committee, the National Republican Senatorial Committee in our nine races. The group, co-founded by George W. Bush aide Karl Rove, has long been known to have close ties to the Republican Party.[47]

By far the largest nonparty spender overall is Senate Majority PAC. Even if the group were not explicit about its mission to maintain the Democratic majority in the Senate,[48] its allegiance is obvious from its spending behavior: Of the 10 races that the Democratic Party's national Senate committee has targeted this election, Senate Majority has also spent in all of them except Alaska, where it funneled millions through Put Alaska First instead.[49] Senate Majority is run by people with close ties to Senate Majority Leader Harry Reid (D.-Nev.), including his former chief of staff of eight years, his former chief political strategist, and his former communications director, as well as the former executive director of the Democratic Party's official Senate organization, the Democratic Senatorial Campaign Committee.[50] Reid himself has reportedly solicited donations for Senate Majority PAC.[51]

By way of analogy to single-candidate groups, Senate Majority is a single-party group. It therefore presents the opportunity for donors to give large amounts in excess of party contribution limits while still knowing that the money will be spent to benefit the Democratic Party. And in fact Senate Majority has taken enormous amounts from donors who also gave the maximum to the Democratic Senatorial Campaign Committee. Some of these party double-dippers give in amounts that dwarf the six-figure contributions common among single-candidate groups.

This cycle, individuals are limited to giving a national party committee $32,400 per year, or $64,800 in a two-year cycle. One donor, media mogul Fred Eychaner, gave the maximum $64,800 to the Democratic Senatorial Campaign Committee and is tied for the title of top donor to Senate Majority with donations totaling $5 million. Eychaner has also given up to the contribution limit to all nine Democratic nominees in our sample, which as noted are almost all of the races where the DSCC and Senate Majority are spending their money in the midterms. An incomplete review of only the biggest Senate Majority donors revealed several others who maxed out to DSCC and gave six-figure donations to Senate Majority, often also maxing out to one or more of the candidates that both committees are spending on.

VII. UNREPORTED SPENDING: DARK MONEY THAT CANNOT BE COUNTED

As noted above, FEC data does not include spending on sham issue ads, which attack or praise candidates without explicitly calling for a vote. When these ads are aired within 60 days before a general election or 30 days before a primary election, the spending is required to be disclosed to the FEC as an "electioneering communication."[52] But outside those time periods, the sham issue ads are unregulated.[53] The groups that have engaged in tens of millions of dollars' worth of this unreported spending are doubly dark: They conceal their donors and they do not report their spending.

Several groups do, however, describe their spending in press releases or statements to reporters. For example, the social welfare nonprofit Americans for Prosperity has said it plans to spend $125 million on election advocacy.[54] There is no way to verify these amounts or to calculate an accurate total for unreported spending in a given race or for the elections overall.[55] The reports typically count only money spent on ad buys and leave out other costs such as ad production, as well as spending that has nothing to do with ads, like voter canvassing.[56] We have reviewed press reports and spenders' own statements to estimate levels of unreported spending in some of the races in our sample.

In North Carolina, we found evidence of more than $23.5 million in unreported spending, a total that does not include unspecified amounts spent on three reported ad buys. This estimate is nearly as much as the $25.5 million in candidate spending in the race. Our analysis of reported spending shows that 58 percent of nonparty outside spending in North Carolina came from groups that hide some or all of their donors, but adding our unreported spending estimate would bring the portion of dark money up to 76 percent.

Crossroads GPS, whose sister super PAC spent $1.9 million in North Carolina, has reportedly poured $10.1 million into ads attacking Sen. Kay Hagan (D-N.C.).[57] Other conservative unreported spending came from several groups in the network connected to billionaire industrialists Charles and David Koch: Americans for Prosperity, the American Energy Alliance, Concerned Veterans for America, Freedom Partners, and the 60 Plus Association.[58] Liberal groups have joined in as well, although they have been outspent seven to one in this category by conservatives, according to our estimates. There was unreported spending by Patriot Majority USA, a nonprofit affiliated with Senate Majority PAC, and the League of Conservation Voters, which also made expenditures in the race that were reported to the FEC.[59]

All of these groups are either trade organizations or social welfare nonprofits, which are permitted to engage in a certain amount of political activity. But the race has also seen a 501(c)(3) nonprofit group spend $1 million on ads praising Hagan during the primary.[60] The tax laws forbid organizations registered under section 501(c)(3) from participating in politics at all.[61] Nevertheless, the Southern Alliance for Clean Energy ran ads touting Hagan's environmental record and asking viewers to call and thank her. The ad is indistinguishable from a campaign spot, and in fact it uses footage of the candidate created by Hagan's campaign and also used in a campaign ad.[62] The group said that the ads were not political,[63] but the Sunlight Foundation discovered that some of the spots ran less than 30 days before the election, which required them to be reported to the FEC as "electioneering communications."[64] The group then reported some of its pro-Hagan spending to the FEC, and that spending is included in our analysis, although the unreported spending on the spots that ran before the 30-day window is not.

Several of the organizations spending in North Carolina have been active in Arkansas, where we found evidence of more than $8 million in unreported spending, more than half the amount of reported nonparty outside spending. Adding the unreported spending estimate to our analysis would raise the percentage of dark money from 62 percent to 75 percent. We also found reports of more than $6 million spent in Colorado and more than $4 million spent in Alaska. In all of these states, the vast majority of unreported spending we found was spent on ads attacking the Democrat or praising the Republican.

VIII. POLICY RECOMMENDATIONS

The Supreme Court has ruled that outside spending poses no danger of corrupting our democracy, but the realities of the world created by *Citizens United* have shown the Court's profound mistake. Contributions to putatively independent groups can buy donors levels of access that average voters and constituents will never achieve. Documents from the Republican Governors Association revealed a price schedule telling corporate donors how much to give in order to be granted meetings with elected officials.[65] One political donor in an interview explained that a donor would give to a shadow party like Senate Majority "to 'get credit with' the party's elected officials, who saw lists of donors after the election."[66]

The lack of transparency in the majority of outside spending in competitive races leaves voters unable to evaluate the political messages they see. In order to decide how much to trust a message, voters need to know who the speaker is and what political agenda is being served. Moreover, dark money allows spenders who are hidden from the public but not from the political networks and candidates they back to gain secret influence. Voters who know that their elected representative is beholden to some special interest can vote her out, but secret donations disrupt such democratic responsiveness. As *Citizens United* put it in approving of disclosure as a constitutional way of regulating campaign spending, disclosure means that "citizens can see whether elected officials are in the pocket of so-called moneyed interests. . . . This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[67]

Single-candidate and single-party outside groups threaten to make a mockery of contribution limits and their prophylactic effect on corruption and influence buying. Outside groups' ability to fundraise in unlimited amounts makes them a tempting vehicle for evading the limits on direct contributions to candidates and parties.[68] Supposedly independent groups cooperate with the campaigns they support in many ways, walking right up to the line of illegal coordination. Campaigns reach out to donors who have maxed out and suggest they give to a friendly super PAC, or they share donors lists prior to publicly reporting the information.[69] The effect can be vividly observed in the donations to single-candidate super PACs, where most of the money comes from donors who hit the contribution limit to the candidate.

Ultimately, the Supreme Court must change course and reverse its decisions interpreting the Constitution to forbid common-sense regulations that give average people the opportunity to participate meaningfully in a representative democracy. In the meantime, Congress and federal agencies can ameliorate some of the troubling trends we observe. *Citizens United* allowed the creation of new legal mechanisms for big money to influence elections and elected officials, but it did not mandate them. Although the judicial branch is responsible for opening the door to secrecy and evasion of contribution limits through outside spending, the legislative and executive branches are responsible for failing to close that door to the extent Court decisions allow.

A. The DISCLOSE Act of 2014

Dark money as we know it would be eliminated by the DISCLOSE Act.[70] The bill, a less-expansive version of legislation that passed the House and came within one vote of breaking a Senate filibuster in 2010,[71] would require any entity that spends more than $10,000 on politics to disclose its donors. Under current law, disclosure requirements hinge on the legal form that an organization takes. Political committees are required to disclose all donors, but nonprofit groups organized under Section 501(c) of the tax code are not. Dark money exists because secretive donors use these groups to hide their identities. The DISCLOSE Act would eliminate that possibility by making disclosure triggered by a group's actions, rather than its tax status.

Furthermore, the DISCLOSE Act addresses the practice of shunting money through an intermediary organization to hide its source. As we have seen, some groups disclose their donors only to reveal that their biggest donor is a dark-money group whose own donors are hidden. For example, the super PAC

Government Integrity Fund Action Network is a super PAC working to elect Republican Tom Cotton in Arkansas. It reports that it receives all its money from the Government Integrity Fund, a social welfare group, and the latter group hides its donors.[72] The DISCLOSE Act would require that an organization giving more than $50,000 to another group knowing the money will be used for politics reveal its donors. The recipient organization would then be required to publicly report the underlying donors along with the money from the giving organization.

Finally, the legislation would reduce the tens of millions of dollars in election spending for which neither the source nor the spending is reported. Right now, it is impossible to know how much of this doubly dark money there is or where it came from. Under current federal law, ads that mention a candidate but stop short of calling for a particular vote are called "electioneering communications" and must be reported if they are aired within 30 days before a primary and 60 days before a general election.[73] Unreported spending falls outside those windows and is therefore a massive unknown variable in accounts of election spending. The DISCLOSE Act would expand the reporting period, dramatically decreasing the opportunities for unreported spending.

B. Internal Revenue Service Rulemaking on Nonprofit's Political Activities

In 2013, the IRS issued a notice of proposed rulemaking designed to clarify the rules that apply to political spending by certain nonprofits.[74] The nonprofit form is being used to hide the sources of hundreds of millions of dollars in election spending; virtually all dark money in elections is spent by or funneled through a nonprofit organization.[75] Currently, nonprofits are allowed to spend money on politics as long as that is not their primary purpose.[76] But the IRS uses a fuzzy "facts and circumstances" test to decide what counts as political activity and how much is too much. This allows groups to organize under a tax status intended to promote social welfare, shared business interests, or other purposes, but act as de facto political committees with hidden donors.

The IRS proposal would address these problems by promulgating clear rules. After a multitude of comments on the first draft, the IRS decided to revise the proposal and give the public another opportunity to weigh in after the revision.[77] More than two-thirds of organizations weighing in supported the IRS effort, and many offered suggestions to improve the proposal.[78] The right set of rules will have the power to end the abuse of the nonprofit form by clarifying the activities that are deemed political activity and placing a clear upper limit on the amount that nonprofits may spend on such activity.[79]

C. Securities and Exchange Commission Rulemaking on Corporate Political Activity

The SEC is considering a petition for a rulemaking that would require publicly traded companies to disclose their spending on politics.[80] Direct corporate treasury spending has not dominated election spending in the years since *Citizens United*, likely because of business concerns about negative consumer reactions to political controversy.[81] But corporations contribute to trade associations that make political expenditures without revealing the sources of the money. The major player in this category is the U.S. Chamber of Commerce, which spent $36 million on the 2012 elections.[82] In our sample of nine races, the Chamber has spent $12.4 million in favor of Republicans. As a 501(c)(6), the Chamber does not disclose its donors, but it counts major corporations among its membership.

Because the sources of dark money remain hidden, we have no idea how much of it is driven by corporations, including businesses seeking to protect their bottom line by influencing public policy with election spending. A political spending disclosure rule from the SEC would change that by revealing corporate spending on elections.

D. The Empowering Citizens Act and Strengthened Coordination Rules

Legislation introduced in the House would limit the ability of single-candidate groups to make a mockery of contribution limits by collaborating with candidates.[83] The comprehensive Empowering Citizens Act would, among other things, clamp down on candidate-specific groups and create a public campaign financing system for congressional races. A standalone bill including only the rules concerning coordination between candidates and outside groups has also been introduced.[84]

Under current law, outside groups are given wide latitude to collaborate with the candidates they support. "Coordination" is prohibited,[85] but the legal definition is so narrow that it does not capture many of the ways that outside groups can operate as arms of a campaign.[86] For example, both presidential candidates in 2012 were buoyed by super PACs that were run by their former staff.[87] Mitt Romney spoke at fundraisers for the super PAC that supported him, and top Obama staff appeared at events for the super PAC devoted to the president's reelection.[88] In our Senate sample, Thom Tillis and the single-candidate super PAC supporting him share a fundraising vendor.[89] And as prior analyses have noted, several candidate-specific groups in these nine states are run by individuals who formerly worked for the candidate supported by the group.[90]

The weaker the coordination rules are, the more nominally independent groups are able to cooperate with candidates and give their donors the chance to evade contribution limits with unlimited donations. The pending bills would beef up the rules by defining common methods of collaboration as coordinated activity subject to contribution limits, including where:

- the group is established or run by former aides or consultants to the candidate;
- the group uses a vendor that is also used by the campaign for services like messaging, strategy, policy, fundraising, or polling; or
- the candidate or his or her agents solicit funds for the group or share fundraising lists with it.

E. Public Campaign Financing

The sheer amount of outside money in competitive elections is threatening to reduce the relative importance of campaigning by the candidates themselves, as well as the political parties they belong to. Outside spending lacks both transparency and accountability, as outside groups with bland names engage in mudslinging that no candidate has to answer for. Public campaign financing has the power to increase the ability of candidates to control their own campaigns, giving them resources to get their message out and respond to outside group attacks.

Public financing legislation has been introduced in Congress. Both the Empowering Citizens Act[91] and the Government by the People Act[92] would offer candidates matching funds for money raised from small donors. A small-donor matching system would encourage candidates to fundraise form the average people who will become their constituents. This would give everyone the chance to make their voice heard in politics, rather than just the moneyed special interests who have taken advantage of the new opportunities to spend big money on elections.

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[20] *See* TOKAJI & STRAUSE, *supra* note 9 (using the term "buddy PACs").

[21] *Cf.* Maguire, *supra* note 17 ("And this is a dark money landmark year for another reason: the birth of the single-candidate 501(c) organization.").

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