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# The 527 Problem . . . and the *Buckley* Problem

Richard Briffault\*

## I. Introduction

In the world of campaign finance, 2004 was without a doubt the year of the 527 organization. No other aspect of campaign financing received as much press coverage or public attention as the rise of the 527s.<sup>1</sup> Expenditures by 527s—named after the section of the Internal Revenue Code under which they are organized<sup>2</sup>—active in federal elections amounted to at least \$405 million, accounting for more than one-tenth of total federal election spending and perhaps twenty to twenty-five percent of spending in the presidential campaign.<sup>3</sup> Federal Election Commission

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<sup>1</sup> See, e.g., Glen Justice, *Even with Campaign Finance Law, Money Talks Louder than Ever*, N.Y. TIMES, Nov. 8, 2004, at A16; Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12; Glen Justice & Kate Zernike, *'527' Groups Still Work at Raising Millions for Ads*, N.Y. TIMES, Oct. 16, 2004, at A10; Editorial, *The 527 Charade*, WALL ST. J., Aug. 31, 2004, at A12; Howard Kurtz, *Ads Aiming Straight for the Heart: Independent Groups Spend Millions on Hard-Hitting Spots*, WASH. POST, Oct. 27, 2004, at A16; James V. Grimaldi & Thomas B. Edsall, *Super Rich Step into Political Vacuum: McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 17, 2004, at A1; E.J. Dionne, *Playing with Fire on 'Soft Money'*, WASH. POST, Mar. 16, 2004, at A21; Mark Hosenball et al., *The Secret Money War*, NEWSWEEK, Sept. 20, 2004, at 22 (“This year the game has been defined, and dominated by, three numbers: 527.”). Of thirty-one stories appearing in the *New York Times* under the heading “The 2004 Election: Campaign Finance” during 2004, sixteen dealt in whole or in part with 527s; no other topic was covered by more than two or three articles.

<sup>2</sup> 26 U.S.C. § 527 (2000). Most political organizations that participate in federal election campaigns—including candidate campaign committees, political party committees, and political action committees that make contributions to federal candidates—are “political organizations” within the meaning of 26 U.S.C. § 527(e)(1). Many of these committees, such as candidate and party committees and committees making contributions to federal candidates, have registered as Federal Election Campaign Act (“FECA”) “political committees” and are fully subject to federal campaign law. In contemporary campaign finance parlance, however, the term “527 organization” is applied more narrowly to those groups that are independent of federal candidates and parties and that do not make contributions to federal candidates, but are otherwise active in federal elections and organized under section 527.

<sup>3</sup> For an estimate of 527 spending, see Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT* (Michael Malbin ed., forthcoming). The Federal Election Commission (“FEC”) reports that total spending on the 2004 presidential election came to a little over \$1 billion. See Press Release, FEC, 2004 Presidential Campaign Financial Activity Summarized (Feb. 3, 2005), <http://www.fec.gov/press/press2005/20050203pressum/20050203pressum.html>. That summary does not count spending by 527s on the presidential election. Using the FEC’s numbers, 527s accounted for twenty-six percent of spending on the presidential election.

(“FEC”) Chairman Scott E. Thomas recently observed that “[t]here is little doubt that 527 organizations . . . had a major impact on the 2004 federal elections,”<sup>4</sup> and Representative Mike Pence has called the 2004 election the “[s]ummer of 527s.”<sup>5</sup> Indeed, probably the most famous political communication of the past year was the anti-Kerry advertisement sponsored by the Swift Boat Veterans and POWs for Truth (“Swift Boat”), a 527 organization.<sup>6</sup> Of course, celebrity is not the same thing as popularity. The rise of the 527s drew extensive critical commentary, with many observers contending that contributions to and expenditures by 527s were little more than evasions of the recently enacted Bipartisan Campaign Reform Act of 2002 (“BCRA”)<sup>7</sup> and re-creations of the soft money problem that BCRA was supposed to have eliminated.<sup>8</sup> Indeed, in the aftermath of the controversy surrounding the Swift Boat ad in late August 2004, President Bush denounced 527s (although not the content of the Swift Boat ad itself) and called for their elimination.<sup>9</sup>

As a result of their emergence as major campaign finance vehicles, 527 organizations also became the subject of regulatory and legislative attention. 527s are required to make certain financial disclosures to the Internal Revenue Service (“IRS”),<sup>10</sup> but unless a 527 chooses to register

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Other accounts, which include 527s’ spending in presidential campaign finances, place presidential campaign spending at \$2.2 billion, with 527s thus accounting for a little under a fifth of the total. *Hearing to Examine and Discuss S. 271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code*, 109th Cong. (2005) [hereinafter *Hearing on S. 271*] (testimony of Scott E. Thomas, FEC Chairman), available at <http://rules.senate.gov/hearings/2005/ThomasTestimony.pdf>; see Thomas B. Edsall & James V. Grimaldi, *On Nov. 2, GOP Got More Bang for Its Billion, Analysis Shows*, WASH. POST, Dec. 30, 2004, at A1.

<sup>4</sup> *Hearing on S. 271*, *supra* note 3, at (testimony of Scott E. Thomas, FEC Chairman).

<sup>5</sup> *The Regulation of 527 Organizations and the 527 Fairness Act: Hearing on H.R. 1316 Before the House Comm. on House Admin.*, 109th Cong. (2005) (testimony of Rep. Mike Pence).

<sup>6</sup> The Swift Boat ad campaign “will go down in history for its stunning effectiveness.” John J. Miller, *What the Swifties Wrought*, NAT’L REV., Nov. 29, 2004, at 18. One postelection survey found that seventy-five percent of voters were aware of the Swift Boat organization’s allegations against Senator Kerry, and when asked which of the ads financed by 527 groups had the biggest impact “the Vietnam vets were cited almost as much as all the other 527 groups combined.” *Id.* at 20.

<sup>7</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified as amended primarily in scattered sections 2 U.S.C. (Supp. II 2004)).

<sup>8</sup> See, e.g., Editorial, *The Soft Money Boomerang*, N.Y. TIMES, Dec. 29, 2004, at A20.

<sup>9</sup> In response to questions about his views on the Swift Boat ads, the president replied, “I don’t think we ought to have 527’s . . . . I can’t be more plain about it and I wish—I hope my opponents join me in saying—condemning these activities of 527’s. I think they are bad for the system.” Elizabeth Bumiller & Kate Zernike, *President Urges Outside Groups to Halt All Ads*, N.Y. TIMES, Aug. 24, 2004, at A1.

<sup>10</sup> See 26 U.S.C. § 527(j) (2002).

with the FEC as a “political committee” under the Federal Election Campaign Act (“FECA”),<sup>11</sup> it is not subject to FECA’s requirements, limitations, and prohibitions—in particular, FECA’s disclosure rules,<sup>12</sup> the ban on the use of corporate and union funds in federal election campaigns,<sup>13</sup> and the ceiling on the size of individual contributions to political committees.<sup>14</sup> BCRA sharply restricted the ability of political parties to accept and use money not subject to FECA’s requirements—so-called nonfederal or “soft” money<sup>15</sup>—and the Supreme Court upheld BCRA’s restrictions in *McConnell v. FEC*<sup>16</sup> in late 2003. As a result, individuals and organizations interested in committing more funds to the 2004 election than FECA or BCRA allow became interested in exploiting the opportunities provided by section 527. As the 527s emerged as significant players in the 2004 campaign, many reformers and some partisans called on the FEC to apply BCRA’s soft-money restrictions to these entities as well.<sup>17</sup>

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<sup>11</sup> Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–456 (2000).

<sup>12</sup> See, e.g., 2 U.S.C. §§ 433–434 (2002).

<sup>13</sup> *Id.* § 441b(a). The term “treasury” funds refers to contributions provided by a corporation or union directly, as opposed to contributions made by a political action committee (“PAC”)—technically a “separate, segregated fund”—created by the corporation or union. Corporations and unions can create such PACs, determine their spending strategies, pay their administrative costs, and cover the expenses they incur in soliciting voluntary contributions from persons affiliated with the corporation (such as officers and directors) or the union (union members). The PACs can make contributions to federal candidates, but only from donations voluntarily provided from the people affiliated with the corporation or union, and not from the money directly provided from the corporate or union sponsor.

<sup>14</sup> *Id.* § 441a(f). The limit on individual contributions to political committees, other than committees controlled by candidates or committees of political parties, is \$5000 per calendar year. *Id.* § 441(a)(1)(C).

<sup>15</sup> In campaign finance parlance, “hard money” is money subject to FECA’s restrictions and requirements. “Soft money” refers to money that can have an impact on federal elections, but that—due either to federal statutes, FEC regulations, or court decisions—is not subject to FECA. This includes money attributable to the so-called nonfederal share of activities undertaken to support federal and state candidates together, such as voter registration, voter identification and mobilization, and generic party spending; money spent on party administrative costs; and money spent on election communications not clearly related to federal candidates within the meaning of applicable federal law.

<sup>16</sup> *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>17</sup> See Complaint from the Ctr. for Responsive Politics, Democracy 21 & the Campaign Legal Ctr. Against Am. Coming Together, the Media Fund, & the Leadership Forum, to the FEC (January 15, 2004) (claiming that these 527 organizations intended to violate FECA by spending soft money in the 2004 election); Letter from the Ctr. for Responsive Politics, Democracy 21 & the Campaign Legal Ctr. Against Am. Coming Together, the Media Fund, & the Leadership Forum, to the FEC (March 16, 2004) (urging immediate adoption of rules concerning section 527 groups); Complaint from Bush-Cheney ‘04 & the Republican Nat’l Comm., to the FEC (May 31, 2004) (alleging that such 527 groups as the Media Fund, America Coming Together, America Votes, and MoveOn.org were illegally using soft money to aid the Kerry campaign); see also Thomas B. Edsall,

On March 11, 2004, the FEC issued a Notice of Proposed Rulemaking (“NPRM”) that presented a series of alternative rules for classifying many 527s as “political committees” under FECA.<sup>18</sup> The NPRM drew more than 150,000 comments—more than any other proposed rule in the FEC’s history.<sup>19</sup> On May 13, 2004, the FEC by a series of 2-4 and 3-3 votes failed to adopt any rules concerning the 527s and instead voted to defer consideration of the issue for ninety days.<sup>20</sup> At its August 19 meeting, the commission grappled with two alternative final rule proposals for treating 527s as FECA political committees, but neither proposal was able to gain the requisite votes of four of the six commissioners.<sup>21</sup>

With the FEC having decided not to act, the forum for the debate over the regulation of 527 activities shifted to Congress. In September 2004, Senators McCain and Feingold, the principal Senate sponsors of BCRA, introduced a bill to regulate 527s.<sup>22</sup> That bill died with the 108th Congress but was revised and resubmitted in February 2005 as S. 271, the 527 Reform Act of 2005, with the surprising cosponsorship of Senator Trent Lott, the former Republican majority leader and current chair of the Senate Rules and Administration Committee, and formerly a critic of campaign finance reform. Revised and reported out of the Senate Rules and Administration Committee in May 2005 as S. 1053, the Senate bill takes an aggressive approach to 527 regulation.<sup>23</sup> The House Committee on

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*Proposed Rules for ‘527’ Groups Lead to Some Unusual Alliances*, WASH. POST, Apr. 14, 2004, at A23.

<sup>18</sup> Political Committee Status, 69 Fed. Reg. 11,736, 11,736 (proposed Mar. 11, 2004) (notice of proposed rulemaking).

<sup>19</sup> See Heather L. Sidwell, *Taming the Wild West: The FEC’s Proposed Regulations to Bridle ‘527’ Political Groups*, 56 ADMIN. L. REV. 939, 940 (2004).

<sup>20</sup> See FEC, Minutes of an Open Meeting 5–6 (May 13, 2004) (Agenda Doc. No. 04-51), <http://www.fec.gov/agenda/2004/approve04-45.pdf>.

<sup>21</sup> See FEC, Minutes of an Open Meeting (Aug. 19, 2004) (Agenda Doc. No. 04-77), <http://www.fec.gov/agenda/2004/approve04-76.pdf>. The commission did adopt a number of rules limiting the ability of entities already registered as political committees to use nonfederal (or “soft”) money for voter drives and certain election-related advertising. See Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 68 Fed. Reg. 68,056 (Nov. 23, 2004). On January 12, 2005, Emily’s List, a political organization that supports female candidates who support abortion rights, filed a suit against the FEC in the United States District Court for the District of Columbia challenging these new rules. *Emily’s List v. FEC*, Civ. A. No. 05-49 (D.D.C. filed Jan. 12, 2005). The district court denied Emily’s List’s motion for a preliminary injunction against these regulations. See *Emily’s List v. FEC*, No. 05-49 (D.D.C. Feb. 25, 2005) (order denying preliminary injunction), available at <http://www.dcd.uscourts.gov/opinions/2005/Kollar-Kotelly/2005-CV-49~14:1:5~3-1-2005-a.pdf>.

<sup>22</sup> See S. 2828, 108th Cong. (2004). The companion House bill was H.R. 5127, 108th Cong. (2004), introduced on the same day by Representatives Shays and Meehan.

<sup>23</sup> See S. 271, 109th Cong. (2005). The other cosponsors are Senators Lieberman (D-CT), Snowe (R-ME), Collins (R-ME), Salazar (D-CO), and Jeffords (I-VT).

During the course of the Senate Rules and Administration Committee’s mark-up, the

Administration reported out a substantially similar 527 Reform Act, H.R. 513, in July 2005.<sup>24</sup>

As with all measures regulating campaign financing, the 527 Reform Act raises significant constitutional questions. Oddly, the most important question has little to do with 527s per se or whether their activities are sufficiently federal-election related that they can be subject to federal campaign finance regulation—the issue that shaped the debates over the “soft money” and “issue advocacy” regulated by BCRA. Rather, the key question is whether individual contributions to any political committee—527 or not—that does not make contributions to a candidate but instead makes only expenditures can be subject to limitation. Since 1974, FECA has limited individual donations to political committees to \$5000 per calendar year,<sup>25</sup> well under one percent of the sums given by the principal donors to the most important 527 groups last year. Applying the limit on individual donations to 527 committees could thus significantly affect their operations.<sup>26</sup> However, the constitutionality of limiting contributions to

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527 Reform Act attracted numerous amendments, primarily aimed at easing the restrictions in other campaign finance laws. As placed on the Senate legislative calendar, S. 1053 reaches well beyond 527 regulation and includes provisions dealing with the prices television broadcast stations and cable or satellite television services can charge federal candidates, *see* S. 1053, § 4; exempting public communications over the Internet from FEC regulation, *see id.* § 5; increasing the contribution limits for political action committees, *see id.* § 6; enabling leadership PACs—that is, political action committees controlled by federal candidates or officeholders—to make unlimited transfers to national party committees, *see id.*, and eliminating certain restrictions on solicitations by corporations, unions, and trade associations, *see id.* This Article does not address any of the non-527 provisions of the 527 Reform Act.

As a result of the adoption of these amendments, Senator Schumer (D-NY), an original cosponsor of S. 271, withdrew his sponsorship of the bill, complaining that 527 reform was in danger of becoming a “Trojan horse” for undermining campaign finance reform. *See* Suzanne Nelson, *Markup Alters Face of Senate 527 Bill*, ROLL CALL, Apr. 28, 2005. Even as he withdrew his support, Senator Schumer secured passage of an amendment that significantly scaled back the bill’s coverage by exempting 527s that engage solely in “voter drive activity” from FECA regulation. *See id.*

<sup>24</sup> H.R. 513, 109th Cong. (2005). In the House, as in the Senate, 527 regulation stimulated legislative efforts to loosen other campaign finance restrictions. The 527 Fairness Act of 2005, H.R. 1316, sponsored by Representatives Pence and Wynn, would do nothing to regulate 527s but would instead relax or eliminate limits on individual donations, on party expenditures on behalf of candidates in general elections, and on state and local party expenditures for voter registration drives. H.R. 1316 has been criticized as likely to “gut existing controls.” *See Hard Politics and Soft Money*, N.Y. TIMES, May 10, 2005, at A16. Unlike in the Senate, where changes to other campaign finance restrictions were added to the 527 Reform Act, the House Administration Committee reported out both a relatively clean version of H.R. 513 and H.R. 1316 as separate bills. The differences between S. 1053 and H.R. 513 make it uncertain whether Congress will adopt a 527 regulatory measure.

<sup>25</sup> 2 U.S.C. § 441a(a)(1)(C) (2000).

<sup>26</sup> Precisely how much 527 regulation limits 527 activities depends on the specifics of any legislation Congress enacts. S. 271, as introduced in early February, would have

committees that engage only in independent expenditures and do not contribute to or coordinate their expenditures with candidates or political parties has heretofore received scant and inconclusive judicial consideration and has never been carefully analyzed by the Supreme Court.<sup>27</sup> Some statements by the Court support the claim advanced by reform advocates that such limits are constitutional. But, as I suggest below, such limits are in profound tension with the basic thrust of the Court's campaign finance doctrine since the foundation of modern campaign finance law in *Buckley v. Valeo*<sup>28</sup> thirty years ago.

In *Buckley* and later cases, the Court determined that contribution caps are justified by the important government interest in preventing large contributions from corrupting officeholders and in preventing the demoralizing effects of the appearance of such corruption. It is far from clear, however, that large donations to 527s present such a danger of corruption, at least in the way that the Court has heretofore defined corruption. So too, although 527 regulation advocates have analogized the 527s to political parties and rely on *McConnell*'s vindication of BCRA's

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significantly affected the operations of most 527s. As it emerged out of the Senate Rules and Administration Committee as S. 1053 in May, the bill's scope was reduced by the exemption of 527s engaged exclusively in so-called "voter drive activity," which the bill defined to include voter registration activity, voter identification, and get-out-the-vote activity. See S. 1053, § 2. As a result, regulation would be focused on 527s that engage in public communications or a combination of public communications and voter drives.

<sup>27</sup> The only case that addressed the constitutionality of FECA's limits on individual contributions to committees that make independent expenditures upheld those limits. *Mott v. FEC*, 494 F. Supp. 131, 135–37 (D.D.C. 1980) (treating the constitutionality of limits on contributions to committees that make independent expenditures as favorably resolved by the Supreme Court in *Buckley v. Valeo*). On the other hand, the United States Court of Appeals for the Fourth Circuit held unconstitutional a North Carolina statute that imposed a similar monetary ceiling on individual donations to independent expenditure committees, *N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 435 (4th Cir. 2003), although that decision, which dealt with a number of different campaign finance questions, was vacated by the Supreme Court for reconsideration in light of *McConnell*. *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007, 1007 (2004). In a case involving limits imposed by a municipal ordinance, the Ninth Circuit appears to have embraced two contradictory positions. The court held that the constitutionality of such limits is subject only to rational basis review and not strict scrutiny, but then determined that because the measure would force the plaintiff membership organization to drastically cut its dues (to bring them under the municipal donation cap) and then expand its membership in order to participate in local elections, the ordinance would be subject to strict judicial scrutiny. *Lincoln Club v. City of Irvine*, 292 F.3d 934, 938–39 (9th Cir. 2002). Two unreported federal court decisions invalidated on constitutional grounds local ordinances that limited contributions to committees that make independent expenditures. See John C. Eastman, *Strictly Scrutinizing Campaign Finance Restrictions (and the Courts that Judge Them)*, 50 CATH. U. L. REV. 13, 23–24 (2000); see also *Landell v. Sorrell*, 382 F.3d 91, 144 (2d Cir. 2004) (remanding for district court consideration the question whether the State of Vermont has a sufficiently strong governmental interest in regulating contributions to political organizations that make only independent expenditures).

<sup>28</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

tight limits on contributions to the parties to justify comparable limits on 527s, the 527s are not parties, and they do not have the same relationship to candidates that the parties enjoy. It is not clear that donations to 527s categorically present the same dangers of corruption as donations to the parties, although it may be that certain 527s have sufficiently close ties to one party or the other that they can be subjected to the rules that apply to parties.

The real vice of the large individual donations to the 527s is that they permit a tiny group of Americans—the “wealthiest of the wealthy” in the words of Senator McCain<sup>29</sup>—to play an enormous role in the electoral process, a role that mocks the political equality that is a bedrock value of our democratic system. *Buckley*, however, rejected the protection of political equality as a basis for limiting the role of money in election campaigns. Since *Buckley*, campaign finance restrictions have been analyzed almost exclusively in terms of the corruption rationale. Yet, it is uncertain that the contribution-prevention paradigm, even as revised and expanded in *McConnell*, can encompass the activities of 527s as a class. Indeed, with the restriction on contributions to 527s, the corruption-prevention paradigm begins to merge with the inequality-limitation paradigm rejected in *Buckley*. If Congress goes forward with 527 regulation, the Court may be forced to consider whether the enormous inequalities posed by large and unlimited individual donations constitute the kind of danger to our democratic political process that Congress may address with contribution limitations.

This Article reviews the emergence and current dimensions of the 527 problem and the constitutional questions raised by the regulation of 527 organizations. Part II traces the origins of section 527 and examines the rise of the 527s as major and controversial campaign finance players in the 2004 presidential election. Part III examines the constitutional questions posed by the application of FECA to 527 organizations and analyzes how 527 regulation would fare under current constitutional doctrine. Part IV concludes by examining the challenge that the 527s and 527 regulation pose to the corruption-prevention paradigm that has shaped our campaign finance jurisprudence. I suggest that the issues raised by the restriction of large contributions to 527 organizations require a broader approach to campaign finance regulation, one that more effectively links campaign finance law to the needs and values of democratic elections, including the vindication of equality concerns.<sup>30</sup> This approach acknowledges some of the benefits that 527s can confer, including the role they may have played

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<sup>29</sup> *Hearing on S. 271, supra* note 3 (testimony of Sen. John McCain).

<sup>30</sup> As Judge Guido Calabresi recently observed, the failure to address inequality concerns “has been, since *Buckley*, the huge elephant—and donkey—in the living room in all discussions of campaign finance reform.” *Landell v. Sorrell*, 406 F.3d 159, 161 (2d. Cir. 2005) (Calabresi, J., concurring in the denial of rehearing en banc).

in the enormous increase in voter mobilization and turnout in the last election. I also suggest, however, that democratic values are offended and democracy undermined when campaign finance laws permit a tiny number of the superwealthy to play an enormous role in the electoral process.

## II. *The Rise of the 527s*

### A. *Section 527 from 1975 to 2002*

Like FECA itself, section 527 of the Internal Revenue Code was a product of intense attention to campaign finance practices in the Watergate era. Prior to the 1970s, the Internal Revenue Code was silent with respect to the tax status of political contributions and the tax treatment of political organizations. In practice, the IRS treated political contributions as gifts, and organizations that received campaign contributions and no other income were not required to file income tax returns.<sup>31</sup> In the late 1960s, however, the IRS became aware of instances in which political organizations were generating taxable investment income, or were receiving appreciated property in lieu of cash, and it required tax returns in those situations.<sup>32</sup> In 1974, following hearings it had conducted the previous year, the IRS issued a revenue ruling to clarify the tax treatment of political organizations.<sup>33</sup> The IRS concluded that political organizations would be treated like corporations and required to submit a corporate tax return and pay tax at the corporate rate, but that campaign contributions would not be includible in gross income and that campaign expenditures would not be deductible. The revenue ruling undermined its own promise of clarity, however, when it indicated that the IRS would also determine the tax status of individual political organizations on a case-by-case basis.

In 1975, Congress eliminated the need for such ad hoc decision making by creating a new provision of the tax code—section 527—expressly for political organizations.<sup>34</sup> Under section 527, a political organization—defined as a “party, committee, association, fund or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions for making expenditures, or both, for an exempt function”<sup>35</sup>—is not subject to taxation on its “exempt function” income. The critical concept—“exempt function”—was defined as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a

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<sup>31</sup> See S. REP. NO. 93-1357 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7501–02.

<sup>32</sup> *Id.*

<sup>33</sup> Rev. Rul. 74-21, 1974-1 C.B. 14 (1975).

<sup>34</sup> H.R. 421, 93d Cong., 88 Stat. 2108 (1975).

<sup>35</sup> 26 U.S.C. § 527(e)(1) (2000).

political organization.”<sup>36</sup> In other words, campaign contributions were not taxable income for a political organization receiving such contributions.<sup>37</sup> In addition, Congress provided that donations to 527 organizations would not be treated as gifts taxable to the donor.<sup>38</sup>

Congress assumed that for tax purposes all entities engaging in political campaign activities—including candidate campaign committees, political party committees, and political action committees that make contributions directly to candidates—would take the form of 527 political organizations. Noting that some tax-exempt entities organized under section 501(c) of the Internal Revenue Code were engaged in political activity, Congress anticipated that

a section 501(c) organization that is permitted to engage in political activities would establish a separate organization that would operate primarily as a political organization and directly receive and disburse all funds related to [campaign] activities.<sup>39</sup> In this way, the campaign-type activities would be taken entirely out of the section 501(c) organization, to the benefit of both the organization and the administration of the tax laws.<sup>40</sup>

As initially enacted, section 527 asked relatively little of the organizations to which it applied. It included no requirements concerning the reporting or disclosure of the officers and directors of the organization, or its donations or expenditures. If the organization had nonexempt-function income of less than \$100, it had no duty to file at all.<sup>41</sup> Section 527 was enacted just months after the 1974 amendments to FECA, which applied extensive disclosure requirements to the “political committees” regulated by that Act. The trigger for disclosure under FECA—contributions or expenditures over \$1000 in a calendar year “for the purpose of influencing any election for Federal office”—was similar to section 527’s definition of “exempt function,” albeit FECA is limited to

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<sup>36</sup> *Id.* § 527(e)(2). Exempt function income includes campaign contributions, membership dues, and proceeds from a political fundraising or entertainment event or proceeds from the sale of political campaign materials. *See id.* § 527(c)(3).

<sup>37</sup> A 527 organization is taxable on nonexempt income, such as investment income. *Id.* § 527(f)(1)–(2).

<sup>38</sup> *Id.* § 2501(a)(5).

<sup>39</sup> Tax-exempt organizations under section 501(c)(4) (social welfare), section 501(c)(5) (labor unions), and section 501(c)(6) (business leagues and trade associations) may engage in election-related activity without jeopardizing their tax exemption, provided such activity is not their primary activity. Section 501(c)(3) organizations—which receive contributions that are both tax-deductible to the donor and tax-exempt for the recipient—are absolutely barred from election-related activity.

<sup>40</sup> S. REP. NO. 93-1357 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7506.

<sup>41</sup> *See id.*, reprinted in 1974 U.S.C.C.A.N. at 7505 (“[A] political organization is not subject to tax and is not required to file a return unless its gross income exceeds its directly connected deductions by more than \$100.”).

federal elections, and section 527 picks up committees active in state and local elections. Congress simply assumed that as 527 organizations are defined in terms of their receipt and use of income to influence elections, the 527s active in federal elections would be subject to FECA so that further regulation under the Internal Revenue Code would not be necessary.<sup>42</sup> Section 527 simply recognized that as the political activities of the entities regulated by FECA “are the heart of the democratic process,”<sup>43</sup> contributions to them should be exempt from tax.

Of course, the “congressional assumption that section 527 organizations would be subject to FECA proved to be erroneous”<sup>44</sup> when the Supreme Court in *Buckley v. Valeo* substantially narrowed the scope of FECA’s disclosure requirement. FECA applied the duty to disclose to persons and organizations making “expenditures” above a threshold level each year. FECA in turn defined “expenditure” as the use of money or other valuable assets “for the purpose of . . . influencing” a federal election. *Buckley* expressed the concern that this “could be interpreted to reach groups that engage purely in issue discussion.”<sup>45</sup> To avoid the vagueness and overbreadth problems posed by FECA’s relatively open-ended definition of “expenditure,” the Court construed the statute narrowly. *Buckley* held that the disclosure requirement would apply “to organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”<sup>46</sup> With respect to all other organizations, the disclosure requirement would “reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>47</sup> In a footnote, the Court indicated this construction would restrict the statute “to communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”<sup>48</sup> These became notorious as the “magic words” of “express advocacy.” Advertisements that clearly promoted or opposed a federal candidate but avoided the “magic words” of express advocacy were considered to be “issue advocacy,” whether or not they actually included the discussion of any issues. Such issue advocacy was exempt from FECA disclosure.<sup>49</sup>

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<sup>42</sup> See Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 390 (2000); see also 146 CONG. REC. S6044 (June 29, 2000) (statement of Sen. Carl Levin).

<sup>43</sup> S. REP. NO. 93-1357, reprinted in 1974 U.S.C.C.A.N. at 7502.

<sup>44</sup> Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 624 (2003).

<sup>45</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 80.

<sup>48</sup> *Id.* at 44 n.52.

<sup>49</sup> On the rise of issue advocacy and the role of the magic words standard, see Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751,

Moreover, although *Buckley* applied the express advocacy test to the expenditures of only those organizations whose “major purpose” is not the nomination or election of federal candidates, the FEC effectively reversed the Court’s approach and—for organizations other than candidate committees, political party committees, and committees making contributions to candidates—looked to whether an organization’s expenditures constitute express advocacy in determining whether the organization’s “major purpose” was influencing a federal election. During the late 1980s and 1990s, a wide range of individuals, organizations, and interest groups learned to exploit the Court’s limited definition of “express advocacy” and the central role of “express advocacy” in determining the scope of federal regulation of organizations participating in federal elections.<sup>50</sup>

Many of these campaign participants claimed the status of tax-exempt entities under section 501(c). Section 501(c)(4), (5), and (6) organizations may spend money on election-related activities without forfeiting their tax-exempt status so long as electioneering is not the “primary purpose” of the organization. Some campaign participants also sought the benefit of section 527 status because that section did not have the no-“primary purpose” limitation. There was, however, uncertainty as to whether the forms of campaign participation like issue advocacy that were considered to be beyond the scope of election regulation under FECA constituted “influencing an election” within the meaning of section 527’s “exempt function” requirement. As a result, it appears that section 527 was used primarily by candidate and party committees, political action committees that made donations to candidates, and independent committees that engaged in express advocacy.

The legal climate changed again in the late 1990s. In a series of letter rulings obtained by politically active tax-exempt organizations, the IRS held that activities like issue-advocacy advertising and the distribution of scorecard-type voter guides to candidates’ voting records fell within section 527’s definition of “exempt function.”<sup>51</sup>

As Professor Hill has explained,

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1755–63 (1999). The Court subsequently applied the “express advocacy” definition of expenditure to the statutory limitation on corporate spending in federal elections. *See* *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 245–50 (1986).

<sup>50</sup> *See* Briffault, *supra* note 49, at 1760 (noting that between \$135 and \$150 million was spent on issue advocacy in the 1996 federal elections, and between \$275 million and \$340 million was spent on issue advocacy in the 1998 federal elections).

<sup>51</sup> *See* Hill, *supra* note 42, at 387, 390–94; *see also* Frances R. Hill, McConnell and the Code: Exempt Organizations and Campaign Finance, 45 EXEMPT ORG. TAX REV. 71, 88 (2004). A prime mover in the expansion of section 527 to cover voter mobilization and issue advocacy was the Sierra Club. *See* Richard Kornylak, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230, 245 (2001).

[a]ll of these arguments rested on the assertion that the ballot measure or legislative lobbying or issue advocacy or voter registration or voter mobilization at issue was not nonpartisan but in fact was undertaken for the purpose of influencing the outcome of elections or that such activities would have the result of influencing election outcomes. The organizations went to extraordinary lengths to support their innovative arguments. The board of one organization passed a resolution affirming that the organization intended to influence the outcome of an election. Another organization[] secured an opinion letter from a political scientist stating that the activities would have the result of influencing the outcome of an election.<sup>52</sup>

In the late 1990s, politically active interest groups flourished in the regulatory gap between the Internal Revenue Code and FECA. These organizations were able to argue successfully both that their issue advocacy and other electoral activities were sufficiently election-related to qualify for section 527 tax-exempt treatment, but not sufficiently election-related to trigger FECA's disclosure requirements and other rules.<sup>53</sup> These politically active organizations could enjoy tax-exempt status, sidestep FECA's limitations and requirements, avoid section 501(c)'s primary purpose cap on campaign activities, and benefit from the gift tax exemption for donations to 527 organizations, to boot.<sup>54</sup> Section 527 quickly became the campaign finance vehicle of choice for many interest groups in the late 1990s.

Public concern with the use of section 527 to fund issue advocacy while avoiding disclosure of the identity of the donors sponsoring the issue ads came to a head in early 2000. During the 2000 presidential primaries, a hitherto unknown 527 organization calling itself Republicans for Clean Air spent \$2.5 million on advertisements sharply criticizing the environmental record of Republican candidate Senator John McCain and praising McCain's opponent, Governor George W. Bush. As the organization avoided the magic words of express advocacy, it was not required to

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<sup>52</sup> *Hearing on S. 271, supra* note 3 (testimony of Frances R. Hill).

<sup>53</sup> Frances Hill refers to this as "statutory arbitrage, the use of one statute to create a legal basis for circumventing another." *See* Hill, *McConnell and the Code, supra* note 51, at 86.

<sup>54</sup> *See* Hill, *Probing the Limits, supra* note 42, at 389 (noting that the appeal of 501(c)(4) to potential big contributors waned while the appeal of 527 grew "when contributors realized that their contributions would be subject to gift tax if they exceeded the annual gift tax limitation of \$10,000"). *Accord* David D. Storey, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 *IND. L.J.* 167, 176 (2002) ("The most important tax benefit of which § 527 political organizations are able to take advantage is that donations to the organization are not subject to gift tax. This is not true for other forms of organizations such as the popular § 501(c)(4) tax-exempt groups.").

register as a political committee or disclose its sources of funding. Eventually, the media learned that the ads had been paid for by Sam and Charles Wyly, Texas billionaire brothers and major donors to the Bush campaign.<sup>55</sup>

Congress reacted with surprising swiftness to the publicity surrounding the activities of this “stealth PAC” and in mid-2000 amended section 527 to impose new reporting and disclosure requirements.<sup>56</sup> Political organizations that wish to utilize the section 527 exemption are now required to register and report the names and addresses of their officers, directors, and principal employees to the IRS.<sup>57</sup> Once registered, the 527 organization must periodically report the names and addresses of contributors of \$200 or more per year, and the amounts they have donated; it must also periodically report the amounts, dates, and purposes of expenditures of \$500 or more per year.<sup>58</sup>

The 527 disclosure legislation was the first campaign finance reform measure passed by Congress in a generation, and as such, was an important development in campaign finance law, prefiguring the more comprehensive regulation adopted in BCRA two years later. The 2000 law had several limitations, however.

First, Congress declined to apply the new disclosure requirements to electorally active 501(c) organizations and limited its regulatory focus to 527s.

Second, Congress tied disclosure to the tax code and, arguably, made disclosure a condition for tax-exempt treatment rather than an absolute requirement.<sup>59</sup> This was no doubt because of congressional skittishness over the First Amendment implications of forcing disclosure of issue advocacy contributions and expenditures. With *Buckley* as the Court’s last definitive statement of the constitutional contours of the definition of election-related speech, Congress may have been reluctant to directly require disclosure of the donors to and the amounts spent on speech other than express advocacy and may have concluded that disclosure had a better

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<sup>55</sup> See Tobin, *supra* note 44, at 614–16.

<sup>56</sup> Act to Amend the Internal Revenue Code of 1986 to Require 527 Organizations to Disclose Their Political Activities, Pub. L. No. 106-230, 114 Stat. 477 (2000). As subsequently amended by Pub. L. No. 107-276, 116 Stat. 1929 (enacted Nov. 2, 2002), section 527 organizations with anticipated receipts of less than \$25,000 per year, organizations that already file with the FEC, and organizations engaged solely in state and local electoral activity that report and disclose their contributions and expenditures under a qualifying state law regime need not file with the IRS. See *id.* § 2 (codified at 26 U.S.C. § 527(e)(5), (j)(5)(C)).

<sup>57</sup> See 26 U.S.C. § 527(i). An organization meets this requirement by filing Form 8871—the Political Organization Notice of Section 527 Status—with the IRS.

<sup>58</sup> *Id.* § 527(j)(2). The organization makes this disclosure by filing Form 8872—the Political Organization Report of Contributors and Expenditures.

<sup>59</sup> See Tobin, *supra* note 44, at 633–36.

chance of passing constitutional muster if placed in the tax code and tied to the provision of a tax break. *McConnell* subsequently demonstrated that such caution was unnecessary, but there was no way Congress could have known that in 2000. By placing 527 disclosure in the tax code, the 2000 law brought a new actor into the campaign finance system, the IRS, whose experience with and interest in enforcing campaign disclosure is far less than that of the FEC. Although the specific disclosures required of 527 organizations are similar to that required of FECA political committees, there have been complaints that the IRS is less focused on getting campaign finance information to the public in a timely fashion.<sup>60</sup>

Finally, and most obviously, the 2000 law deals only with disclosure. Congress did not apply FECA's restrictions on the amounts or sources of campaign contributions to 527s. That is the issue raised by the proposed 527 Reform Act of 2005.<sup>61</sup>

#### B. *527s in the 2004 Election*

With disclosure of 527 organization activities not required before July 2000, there is little solid information concerning the scope of 527 activities prior to the 1999–2000 election cycle, and even the data for that election is necessarily incomplete. The first election cycle for which significant financial information concerning 527 contributions and expenditures is available is 2001–02. According to the Campaign Finance Institute, in 2001–02 there were eighty-eight entities organized under section 527 that participated in federal elections and raised in excess of \$200,000 in contributions; together, these organizations raised \$151 million.<sup>62</sup> So-called “leadership PACs”—committees established by congressional leaders and other politicians to raise money to spend on political activities other than their own campaigns—accounted for forty-six committees and roughly \$35 million in contributions and expenditures.<sup>63</sup> The remainder (less than half the committees but most of the money) was raised and spent by organizations unattached to candidates or officeholders.<sup>64</sup>

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<sup>60</sup> See U.S. GEN. ACCOUNTING OFFICE, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS'S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED: REPORT TO THE HONORABLE BILL THOMAS, CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES (2002). The 2002 amendments to 527 were intended to make disclosure more timely and transparent. In particular, any organization that receives contributions, or makes expenditures, in excess of \$50,000 in a calendar year must file electronically, and the IRS must make those reports available for public inspection on the Internet within forty-eight hours of filing. See 26 U.S.C. § 527(j)(7), (k)(1). The IRS also claims to have stepped up its enforcement. See *IRS to Crack Down on Section 527 Groups that Do Not Meet Disclosure Requirements*, 73 U.S.L.W. 2106 (Aug. 24, 2004).

<sup>61</sup> S. 1053, 109th Cong. (2005).

<sup>62</sup> See Weissman & Hassan, *supra* note 3, at 2.

<sup>63</sup> See *id.*

<sup>64</sup> See *id.* at 2–3.

In 2004, donations to and expenditures by 527 organizations exploded. Eighty organizations raised more than \$200,000 apiece, for a total of \$405 million.<sup>65</sup> This amount is more than one-tenth of the nearly \$4 billion spent on all elections in 2004.<sup>66</sup> As 527 spending was concentrated heavily in the presidential election, however, the 527 share of presidential campaign spending is more relevant. Recent estimates place total spending in the 2004 presidential campaign at somewhere between \$1.7 and \$2.2 billion, indicating that 527s accounted for around one-fifth of the total.<sup>67</sup>

A central question in the debate over 527s concerns their relationship to the political parties and to the soft money system targeted by BCRA. Prior to BCRA's enactment, a large and steadily growing portion of federal election funds took the form of "soft money"—that is, donations to (1) the "non-federal" or mixed federal-nonfederal accounts of the national political parties and (2) the state political parties for activities that aided federal candidates but were treated as outside of FECA's scope and not subject to FECA's restrictions because they did not involve direct contributions to, coordinated expenditures with, or express advocacy in support of party candidates. From \$45 million in 1988, soft money donations to the parties

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<sup>65</sup> See *id.* at 2.

<sup>66</sup> In a series of press releases, The FEC provided information about federal election spending in the 2004 election cycle. See Press Release, FEC, Congressional Candidates Spend \$912 Million Through Late November (Jan. 3, 2005), <http://www.fec.gov/press/press2004/20050103canstat/20050103canstat.html>.0428051613; Press Release, FEC, Party Financial Activity Summarized for the 2004 Election Cycle (Mar. 2, 2005), <http://www.fec.gov/press/press2005/20050302party/Party2004final.html> (stating that the two major parties spent \$1.41 billion on federal elections in the 2003-04 election cycle); Press Release, FEC, 2004 Presidential Campaign Financial Activity Summarized (Mar. 3, 2005) (stating that the presidential candidates received \$1.016 billion and an additional \$245 million was spent on independent expenditures, electioneering communications, and internal communications of membership concerning the presidential race). The total reported to the FEC is, thus, \$3.583 billion. The \$405 million that the Campaign Finance Institute reports spent by 527s brings the total to not quite \$4 billion. That figure probably overstates the actual total since there were transfers between party committees and candidate committees, so that the aggregate total probably overcounts some funds, but that is unlikely to significantly affect the order of magnitude.

<sup>67</sup> The higher figure comes from journalists Thomas Edsall and James Grimaldi, writing in the *Washington Post*. See Thomas B. Edsall & James V. Grimaldi, *On Nov. 2, GOP Got More Bang for Its Billion, Analysis Shows*, WASH. POST, Dec. 30, 2004 at A1. The lower figure is based on the FEC findings, which report total receipts by presidential candidates at \$1,016.5 million, with an additional \$245 million in independent expenditures, electioneering communications, and internal communications of membership organizations concerning the presidential election. See Press Release, FEC, 2004 Presidential Campaign Finance Activity Summarized, *supra* note 66. If the \$405 million in 527 spending reported by the Campaign Finance Institute is added to the FEC's \$1,261.5 million, the aggregate spending on the presidential election is at least \$1.666 billion.

527 organizations are likely to be important in future elections. As of June 30, 2005, the thirty largest 527s had already raised \$48.3 million, compared with \$78.5 million for all of 2003, the last off-year in the election cycle. See Alexander Bolton, *527s Outstrip 2004 Cycle's Pace*, THE HILL, Aug. 17, 2005, at 5.

rose to \$495 million in 1999–2000, or forty percent of total party fundraising.<sup>68</sup> Soft money enabled corporations and unions to contribute treasury funds to federal election activities and enabled wealthy individuals to contribute far more than the statutory ceilings on contributions to party committees allowed. BCRA flatly barred all soft money donations to the national party committees, while prohibiting state and local party committees from paying for a defined set of “federal election activities” that include voter registration and mobilization activities in connection with federal elections, the salaries of party workers who devote a defined portion of their time to federal election activities, and electioneering communications that promote or oppose clearly identified federal candidates.

BCRA thus effectively shut down party soft money after the 2002 election. 527 organizations became an important campaign finance force in the 2004 elections. This set of facts leads naturally to two questions: (1) To what extent did contributions to 527s replace soft money donations to party committees?, and (2) What role, if any, did the political parties play in creating and supporting the 527s?

### *1. Did 527 Money Replace Party Soft Money?*

Much of the commentary on the rise of the 527s has assumed, consistent with the postulates of the “hydraulic theory,” that campaign finance laws only shift money around but do not succeed in limiting money.<sup>69</sup> From this perspective, the rise of the 527s must be attributable to the efforts of soft money donors to avoid BCRA’s restrictions.<sup>70</sup> Although the rise of the 527s immediately follows the fall of party soft money, the data on 527 finances indicate that 527 contributions were not a straightforward substitution for soft money previously given to the parties.

First, the growth in 527 finances was far smaller than the party soft money eliminated by BCRA, suggesting that either some of the old soft money merely became “hard”<sup>71</sup> or that, hydraulic theory to the contrary

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<sup>68</sup> See Richard Briffault, *Soft Money Reform and the Constitution*, 1 ELEC. L.J. 343, 345 (2002).

<sup>69</sup> See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1707–08 (1999).

<sup>70</sup> As Senator Lott put it, “[W]e’ve allowed newly created 527s to perform the same activities that the political party committees once did and in fact, are on track to raise more money than political parties ever raised. We’ve simply shifted the money from one side of the street to the other.” *Hearing on S. 271*, *supra* note 3 (emphasis omitted) (opening statement of Chairman Trent Lott).

<sup>71</sup> BCRA raised FECA’s limits on individual donations to candidates and parties, which had not been changed since 1974. In 2004, individuals could give \$2000 per election to a candidate; the prior limit on individual donations had been \$1000. The cap on donations to the national parties was increased from \$20,000 to \$25,000. The limits were also, for the first time, indexed for inflation. Due to increases in the cost of living, the FEC

notwithstanding, some money actually left the system. The two major parties had received \$495 million in soft money in 1999–2000, or roughly \$90 million more than the \$405 million given to 527s in 2003–04. Moreover, 527s had received contributions of \$150 million in 2001–02, so that the growth in contributions was just \$255 million, or only slightly more than half the political party soft money in the 2000 election cycle. More importantly, soft money receipts had doubled between the 1988 and 1992 presidential elections, trebled from 1992 to 1996, and doubled again from 1996 to 2000.<sup>72</sup> Extrapolating from prior growth rates, it is quite possible that soft money contributions would have approached or surpassed \$1 billion in 2004—or nearly four times the additional funds given to 527s. Thus, although BCRA no doubt displaced some party soft money to the 527s, a lot of the money apparently dropped out of the system.

Second, one type of soft money—corporate treasury funds—virtually disappeared.<sup>73</sup> Corporate contributions had been a leading source of soft money, but business corporations provided 527s with only \$30 million last year, or \$2 million less than they had provided to 527s in 2001–02.<sup>74</sup> This suggests, as some observers have speculated, that corporations contributed to party soft money accounts primarily to obtain access to federal officials, rather than to actually influence who won federal elections. With federal officials not involved in 527s or 527 fundraising, corporations had less incentive to contribute and scaled down their participation in federal elections accordingly.<sup>75</sup>

Labor unions were a better illustration of the hydraulic theory. Labor support for 527s rose by \$40 million (from \$54 million to \$94 million)

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recently announced that the individual contribution limits in the 2005–06 election cycle would be \$2100 per election; individual donations to party national committees can rise to \$26,700 per year; and the aggregate cap on all federal campaign contributions for individuals over the two-year election cycle is now \$101,400, up from \$95,000. See Press Release, FEC, New Federal Contribution Limits Announced (Feb. 3, 2005), <http://www.fec.gov/press/press2005/20050203limits1.html>.

<sup>72</sup> See Briffault, *supra* note 68, at 345.

<sup>73</sup> See Annys Shin, *Cutting into the Checks: New Campaign Finance Rules Prompt Businesses to Sharply Curtail Donations*, WASH. POST, Sept. 13, 2004, at E1.

<sup>74</sup> Weissman & Hassan, *supra* note 3, at 11.

<sup>75</sup> See Shin, *supra* note 73, at E11 (“[Pre-BCRA corporations] were giving to candidates and their parties because that’s direct giving. They get direct credit. When they put it in 527s, some businesses don’t see the same return.” (internal quotations omitted)).

To be sure, part of the drop in corporate donations may be attributable to BCRA’s lifting of the limits on individual donations. See *id.* at E1. Moreover, corporations may have redirected some of their campaign funds from donations to other organizations and focused instead on campaign-related activities aimed at their own employees. See Robert Bauer, *527 Activity by the Numbers*, <http://www.moresoftmoneyhardlaw.com/articles/20050216.cfm> (posted Feb. 16, 2005). Such “internal communications” are exempt from FECA’s restrictions on corporate campaign activity.

between 2002 and 2004.<sup>76</sup> This change was largely the result of significant increases in contributions by just three unions—the Service Employees International Union (which by itself accounted for nearly half of all union contributions and nearly all of the increase in union activity), the American Federation of State, County, and Municipal Employees, and the AFL-CIO. Other unions reduced their 527 participation from 2002 to 2004.<sup>77</sup> The increase in labor support for 527s effectively replaced the \$30 million that labor unions contributed to the parties in the 2000 election and the nearly \$36 million contributed in 2002.<sup>78</sup>

Third, even when 527s replaced the parties as campaign finance vehicles, it was not simply a matter of old money finding new venues. The real source of the explosion of 527 activity was contributions from individuals, especially very large contributions by individuals. Most of this money had not been in the pre-BCRA soft money system at all, but instead entered the electoral process in 2004 for the first time. A total of 1882 individuals made contributions to 527s of \$5000 or more apiece, and they gave an aggregate of \$256 million.<sup>79</sup> Although the median donation was only \$12,000, the mean contribution was \$135,805—twenty-seven times the statutory ceiling on individual donations to FECA political committees—because of the dominant role of a small number of extremely large donors.<sup>80</sup> Indeed, there were twenty-four individuals or couples who each gave \$2 million or more. This handful of megadonors collectively gave a staggering \$142.5 million.<sup>81</sup> To put this number in context, it is roughly equal to the aggregate of \$149.2 million in public funds provided to the two presidential nominees for the general election campaign. The \$142.5 million in 527 funds, however, came from just two dozen megadonors, while the \$149.2 million in public funds came from the entire American public.

Beyond the top two dozen megadonors, a somewhat larger group of 113 donors—superdonors—gave \$250,000 or more.<sup>82</sup> Of this larger group, 73 had been active in the former soft money system and had given a total of \$50 million in soft money to party committees over the 2000 and 2002

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<sup>76</sup> Weissman & Hassan, *supra* note 3, at 11.

<sup>77</sup> *Id.*

<sup>78</sup> CTR. FOR RESPONSIVE POLITICS, SOFT MONEY FOR LABOR IN 2002, <http://www.opensecrets.org/softmoney/softindus.asp?cycle=2002&ind=P> (total soft money contributions by labor unions in 2002 election cycle was \$35.9 million) (last visited May 15, 2005); CTR. FOR RESPONSIVE POLITICS, SOFT MONEY FOR LABOR IN 2000, <http://www.opensecrets.org/softmoney/softindus.asp?cycle=2000&ind=P> (total soft money contributions by labor unions in 2000 election cycle was \$30.4 million) (last visited May 15, 2005).

<sup>79</sup> Weissman & Hassan, *supra* note 3, at 13.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

elections (and an additional \$4 million to 527s in 2002). These 73 superdonors, however, provided \$157 million to 527s in 2004, or three times their level of support for the parties in 2000 and 2002 combined.<sup>83</sup> To be sure, most former individual soft money donors did not make large donations to 527s,<sup>84</sup> but for those who did, the 527s were not merely a substitute for the parties but a vehicle for dramatically increasing their level of giving.<sup>85</sup>

In short, 527 organizations were a partial replacement for party soft money, but they were also something different. The 527s were clearly far less attractive to corporations than political party committees had been. On the other hand, 527s were far more attractive to superwealthy individuals. This may have something to do with a key difference between 527s and political parties, a difference that relates to the differences between these organizations and federal candidates. Under the soft money system, parties were closely allied with their candidates. Federal candidates and officeholders raised soft money for the parties.<sup>86</sup> Preferential access to federal candidates and officeholders was dangled as an incentive and reward for large donations.<sup>87</sup> Federal officeholders sat on the party House and Senate fundraising committees.<sup>88</sup> Soft money thus provided big donors with special opportunities to seek influence with elected officials. This was clearly a major part of soft money's appeal to some big donors, especially corporate donors. If 527 committees lack the same nexus to the candidates that party committees have, then some of the appeal of soft money is gone for those donors.<sup>89</sup> On the other hand, the 527 committees active in the 2004 election were strongly ideological. Their aim was less to advance an industry goal than to elect—or defeat—a presidential candidate because of his views or his record. This focus may be less appealing to businesses but far more attractive to wealthy individuals participating in politics in order to advance their ideological views.

Of course, the argument that the differences between 527s and political parties led to differences in contribution patterns assumes that parties and 527s are not only different but also separate from each other. If 527s are simply agents, arms, or extensions of the parties—in much the same way that BCRA assumes that, for federal election purposes, state and local

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<sup>83</sup> *Id.* at 16.

<sup>84</sup> *Id.* at 17.

<sup>85</sup> *Id.*

<sup>86</sup> *See, e.g.,* *McCConnell v. FEC*, 540 U.S. 93, 146–47 (2003).

<sup>87</sup> *Id.* at 151–52.

<sup>88</sup> *Id.* at 155.

<sup>89</sup> This argument also applies even if the reason for corporate donations is not so much to win access as a response to officeholder demands for contributions as a condition for access, e.g., “political extortion.” *See* Robert H. Sitkoff, *Politics and the Business Corporation*, 26 *REGULATION* 30, 34–35 (Winter 2003–2004).

parties are merely agents of the national parties—then this argument fails. What then was the relationship between the parties and the 527s in 2004?

## 2. *Were 527s Arms of the Parties?*

The party role in the 527 organizations is somewhat ambiguous. Although both parties appear to have been scrupulous in avoiding formal or direct party involvement in 527 activities, individuals and groups closely affiliated with the parties played a major role in the formation, organization, management, and finances of the 527s. The parties' "leading paid consultants and active notables were involved, in varying degrees, in the creation, operation or funding of several prominent 527 groups."<sup>90</sup>

The Democratic Party, which had been far more dependent on soft money than the Republicans,<sup>91</sup> was the first to begin to look for alternatives to party soft money. Before BCRA took effect, the Democratic National Committee ("DNC") began to consider the formation of an organization outside the party and unconstrained by BCRA that could participate in the 2004 election.<sup>92</sup> Then-Chairman McAuliffe established a task force on BCRA that included Harold Ickes, a former deputy chief of staff to President Clinton and a member of the DNC's Executive Committee; Minyon Moore, DNC chief operating officer; Josh Wachs, DNC chief of staff; Joe Sandler, DNC counsel; Michael Whouley, a leading Democratic consultant; and former Clinton White House officials John Podesta and Doug Sosnik.<sup>93</sup> The party soon formally separated itself from this effort, but individuals affiliated with the party, leaders of interest groups—like the Sierra Club, Emily's List, and major labor unions—and those who had in the past collaborated with the Democrats were centrally involved in the formation and operation of the two principal Democratic-oriented 527s, America Coming Together ("ACT") and the Media Fund. Former President Clinton played a key early fundraising role for ACT and the Media Fund.<sup>94</sup> Ickes became the head of the Media Fund and was also prominently involved with America Votes, which raised funds for both the Media Fund and ACT.<sup>95</sup> Leaders of both ACT and the Media Fund

were quite visible soliciting party donors and hobnobbing with the

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<sup>90</sup> Weissman & Hassan, *supra* note 3, at 6.

<sup>91</sup> See Briffault, *supra* note 68, at 345 (noting that in 1999–2000, soft money accounted for almost fifty percent of Democratic Party receipts but only a little more than one-third of Republican Party receipts).

<sup>92</sup> See Harold Meyerson, *Numbers Game*, AM. PROSPECT, Mar. 2004, at 11 ("The 527s are best understood as the Democrats' way to stay even with the Republicans in the wake of the enactment of McCain-Feingold.").

<sup>93</sup> Weissman & Hassan, *supra* note 3, at 6.

<sup>94</sup> *Id.* at 8.

<sup>95</sup> ACT spokesman Jim Jordan's "last job before joining up with the 527 was as Kerry's campaign manager." Hosenball et al., *supra* note 1, at 25.

party and presidential campaign during the Democratic National Convention in Boston. They set themselves up on the second floor of the Four Seasons Hotel, down the hall from the DNC Finance Division which catered to large donors. . . . [S]uch conspicuous cohabitation undoubtedly burnished the groups' perceived identification with the party and the presidential campaign.<sup>96</sup>

The Republicans were initially slower to act. The Republican Party had been less dependent on soft money than the Democrats. Moreover, in the spring of 2004, the Republicans also actively supported the campaign finance reform strategy of persuading the FEC to subject the 527s to BCRA's soft money rules.<sup>97</sup> Only when it became clear, in May 2004, that the pro-Democratic 527s were raising far more money than had been anticipated and that the FEC would not restrict 527 activities before August, if at all, did the Republican National Committee ("RNC") and the Bush-Cheney campaign get into the act. In a joint statement on May 13, 2004, RNC Chair Ed Gillespie and Bush-Cheney Campaign Chairman Marc Racicot declared that the FEC's postponement of rulemaking gave a "green light" to 527 participation in "this year's Federal elections, and, in particular, the presidential race."<sup>98</sup>

As with the pro-Democratic 527s, active partisans played a major role in the founding, management, and funding of the pro-Republican 527s. The most prominent Republican-oriented 527, the Progress for America Voter Fund ("PFA-VF"), which raised nearly half of all the money raised by Republican 527s, was founded by Tony Feather, the political director of the 2000 Bush-Cheney campaign and a partner in Feather, Larson & Synhorst, a campaign consulting firm that worked closely with the RNC.<sup>99</sup> PFA-VF was originally headed by Chris LaCivita, former political director of the National Republican Senatorial Committee, who had also served as

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<sup>96</sup> Weissman & Hassan, *supra* note 3, at 8; *see also* Jim Rutenberg & Glen Justice, *A Delegate, a Fund-Raiser, and a Very Fine Line*, N.Y. TIMES, July 29, 2004, at A1 ("Ickes's four-star road show provides the most vivid example yet of how he and leaders of groups like his have all year been flouting the new fund-raising laws."). Although a major player during the 2004 election, ACT was unable to sustain itself afterwards and closed down operations in mid-2005. *See* Glen Justice, *Democratic Fund-Raiser Unit Is Curtailing Most Operations*, N.Y. TIMES, Aug. 4, 2005, at A14.

<sup>97</sup> *See* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 58 n.6 (2004) (describing the combination of Republican National Committee and campaign-reformer support for FEC regulation of 527s as a "coalition of strange bedfellows"); Sidwell, *supra* note 19, at 951 (describing claims that the Republican National Committee supported the regulations because they "would harm the Democratic party").

<sup>98</sup> *See* Weissman & Hassan, *supra* note 3, at 10 (quoting Gillespie and Racicot).

<sup>99</sup> *See id.* at 9. As Weissman & Hassan note, the Feather, Larson & Synhorst web site featured a tribute from President Bush's chief political advisor, Karl Rove. *Id.*

an adviser to Bush-Cheney 2000 and had held “key roles in the floor operations of the 1996 and 2000 Republican conventions.”<sup>100</sup> Later in the campaign, LaCivita became “better known as senior strategist for the pro-Bush 527 group, Swift Boat Vets and POWs for Truth.”<sup>101</sup> PFA-VF was effectively run by a political consulting firm that was active in the Bush campaign, and hired “traditional Republican fundraisers,” who, like their Democratic-oriented counterparts, attended their party’s national convention and “succeeded in enlisting not only funds, but also fundraising assistance from two of President Bush’s most ardent financiers.”<sup>102</sup> Although the RNC was careful to avoid soliciting money for pro-Republican 527s, PFA-VF “considered the [Gillespie-Racicot] statement an official blessing that was central to their fundraising.”<sup>103</sup>

Beyond the political biographies of the prime movers behind the 527s, each of the major 527 organizations was clearly committed to one side or the other in the 2004 presidential election. Whereas donors of party soft money often gave to opposing candidates,<sup>104</sup> and some independent political committees have in the past sought to raise issues that did not directly promote any particular party, the Campaign Finance Institute had no difficulty in classifying each of the top eighty 527 organizations as either “Democratic oriented” or “Republican oriented.”<sup>105</sup> Their principal donors had a history of making party soft money donations, and most of these donors had actually focused their contributions on supporting a particular party rather than making access-oriented donations to both parties.<sup>106</sup> Moreover, 527 campaign activities provided vital aid to the national parties and their presidential candidates.

Indeed, some commentators have credited the Democratic 527s with providing the Democrats and their candidates with critical assistance, particularly in the period from March to July 2004, when Senator Kerry, having nailed down the nomination, had to wait until the Democratic convention to receive his public funding and, in the meantime, was the target of a massive Bush ad campaign. In this period, spending “by The Media Fund, AFL-CIO and MoveOn countered the Bush media blitz in

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 10. In addition, and controversially, the Bush-Cheney campaign’s chief outside counsel, Benjamin L. Ginsberg, also served as counsel for the Swift Boat group. See Elisabeth Bumiller, *Lawyer for Bush Quits over Links to Kerry’s Foes*, N.Y. TIMES, Aug. 26, 2004, at A1; Dan Balz & Thomas B. Edsall, *Lawyer Quits Bush-Cheney Organization*, WASH. POST, Aug. 26, 2004, at A1.

<sup>103</sup> Weissman & Hassan, *supra* note 3, at 10; see also Jeanne Cummings, *Republicans Tap Rich Donors to Form Group Targeting Kerry*, WALL ST. J., Aug. 25, 2004, at A1.

<sup>104</sup> *McConnell v. FEC*, 540 U.S. 93, 148 (2003) (“[I]n 1996 and 2000, more than half of the top 50 soft-money donors gave substantial sums to *both* major national parties.”).

<sup>105</sup> See Weissman & Hassan, *supra* note 3, tbl. A-2.

<sup>106</sup> See *id.* at 14–15.

March[,] . . . kept the race close, and denied Bush a knock-out punch.”<sup>107</sup> Democratic 527s were also critical to the Democratic “ground war” and undertook massive voter registration, voter identification, and voter mobilization efforts, which contributed to a substantial increase in Democratic turnout.<sup>108</sup> On the Republican side, perhaps the two ad campaigns that gave President Bush the greatest boost—the Swift Boat ad and “Ashley’s Story,” about the meeting of the daughter of a World Trade Center victim with the President—were financed by 527s.<sup>109</sup>

Although the 527s were founded, staffed, and financed by partisans and spent their money in an utterly partisan fashion, they nevertheless operated, at least formally, independently of the parties. Whereas federal officeholders and federal candidates were central to party soft money fundraising, no one has claimed that federal officeholders, candidates, or party officials raised funds for the 527s. Nor has any 527 critic claimed that 527s and parties or candidates coordinated their spending in the sense that party officials or candidate representatives spoke with the 527 leaders and told them what their ads would say or what their voter mobilization programs would do. Indeed, some campaign observers have contended that the Democratic 527s’ efforts had limited effects because they were not coordinated with their party and its candidate. As a result, Senator Kerry was unable to control the timing and placement of 527 advertisements, and “the 527s proved ineffective in helping Kerry deliver a consistent and timely message in his advertising.”<sup>110</sup> The Democratic 527s failed to respond to the devastating Swift Boat ads, and even the 527 communications in the March-July period have been criticized for being too anti-Bush, and not positive biographical ads that would have introduced Kerry to the nation.<sup>111</sup> So too, the 527-led Democratic voter drives were ultimately less successful than the Republican get-out-the-vote effort, which was handled by the GOP itself.

Of course, it may simply be that the Democratic 527s suffered from their own decisions and mistakes rather than legal constraints, as the activities of the pro-Republican 527s, particularly the Swift Boat Veterans, demonstrate that 527s can give powerful support to a candidate while still operating independently of the candidate’s campaign. Some observers concluded that, although they were outspent by more than three-to-one, the pro-Republican 527s had considerable impact, even though the pro-

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<sup>107</sup> Press Release, Ctr. for the Study of Elections and Democracy, *527s Had a Substantial Impact in the Ground and Air Wars in 2004, Will Return* (Dec. 16, 2004), <http://www.publicintegrity.org/docs/527/pdf2.pdf>.

<sup>108</sup> *Id.*

<sup>109</sup> Edsall & Grimaldi, *supra* note 3, at A7. “Ashley’s Story” was sponsored by the Progress for America Voter Fund. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

Republican 527s were subject to and presumably abided by the same laws as the pro-Democratic 527s.<sup>112</sup> Since the end of the campaign, notwithstanding the GOP's earlier effort to get the FEC to regulate 527s as political committees, "many in President Bush's party now see so-called 527 groups as a potential asset, not a threat."<sup>113</sup>

In short, the relationship between the 527s and the parties is complex. The principal 527s were founded in order to provide a vehicle for wealthy individuals and labor unions to participate in presidential politics in the aftermath of BCRA's suppression of party soft money. The 527s were blessed by the party organizations, staffed and financed by partisans, and were completely partisan in their orientation. Yet, they appear to have maintained the formal separation from the party committees—and especially from the parties' candidates—that the law requires. Their activities ran parallel to, and strongly supported, the party of their choice, but that support seems to have been independent and not coordinated. The 527s functioned as allies, not agents or arms, of the parties. As I indicate below, to the extent that the 527s maintain such a formal independence from the parties and candidates, it will be difficult, consistent with current constitutional doctrine, to restrict individual contributions to these organizations.

### *III. The Constitutional Questions Posed by Applying FECA to 527 Organizations*

#### *A. Defining a 527 as a FECA Political Committee*

The basis for the current exclusion of most 527s from FECA "political committee" status is the FEC's interpretation of *Buckley*'s narrow reading of "expenditure" to apply only to express advocacy. FECA section 431 defines political committee as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year."<sup>114</sup> After *Buckley*, it was assumed that "expenditure" in the statutory sense was limited by the Constitution to

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<sup>112</sup> Jeanne Cummings, *Those 527 Fund-Raisers Prove Resilient*, WALL ST. J., Dec. 6, 2004, at A4.

<sup>113</sup> *Id.* Indeed, as of June 30, 2005, the most successful 527 in 2005 was the Republican Governors Association, which had raised more than \$9 million. The eight pro-Republican groups among the top thirty 527s in the first half of 2005 raised \$18.2 million. The nineteen labor or pro-Democratic groups raised \$28 million. See Bolton, *supra* note 67.

<sup>114</sup> 2 U.S.C. § 431(4)(A) (2002). FECA also defines "political committee" to include the political action committees—technically, "separate segregated funds"—established by corporations and labor unions, and local political party committees that are active in federal elections, but those provisions are not relevant to this analysis. See 2 U.S.C. § 431(4)(B), (C).

express advocacy and that “contribution” in the statutory sense was limited to contributions that funded express advocacy expenditures. Thus, a committee that engaged solely in issue advocacy or in electoral activities like voter registration, voter mobilization, or voter education that did not use the magic words of express advocacy in support of or opposition to a candidate was not making FECA “expenditures,” so that even if it spent more than \$1000, it was not a “political committee.”

*McConnell*, however, transformed the constitutional landscape. The Court held that the express advocacy test was merely a judicial gloss on the statute and not a mandated “first principle of constitutional law.”<sup>115</sup> Moreover, the Court determined that “the unmistakable lesson from the record in this litigation” is that “*Buckley*’s magic-words requirement is functionally meaningless,”<sup>116</sup> and it upheld two broader definitions of election-related speech that Congress had adopted in BCRA. First, in order to prevent the national political parties (and their donors) from using state and local political parties to circumvent the ban on political party soft money, Congress determined that state and local party spending on a statutorily defined set of “federal election activity” must comply with FECA’s contribution restrictions and prohibitions.<sup>117</sup> Among the state and local party activities that must comply with federal law are those that include “public communications” that promote, support, attack, or oppose<sup>118</sup> (“PASO”)<sup>119</sup> clearly identified candidates for federal office. *McConnell* found that such communications “undoubtedly have a dramatic effect on federal elections.”<sup>120</sup>

Second, BCRA also extended FECA’s disclosure requirements and the statutory ban on corporate and union treasury funds to a new category of federal campaign activity—“electioneering communication”—defined as broadcast ads that refer to a clearly defined federal candidate and are aired in that candidate’s constituency within sixty days before a general election or thirty days before a primary.<sup>121</sup> The Court agreed with Congress that such ads can, consistent with the First Amendment, be treated as election related, concluding that the statutory definition of electioneering

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<sup>115</sup> *McConnell v. FEC*, 540 U.S. 93, 190 (2003).

<sup>116</sup> *Id.* at 193.

<sup>117</sup> 2 U.S.C. § 431(20)(A).

<sup>118</sup> *See id.* § 431 (20)(A)(iii).

<sup>119</sup> As the FEC has observed, although PSAO would be a literally more accurate shorthand for BCRA’s test, PASO is more pronounceable and thus “has emerged as a convenient acronym for ‘promote, support, attack or oppose.’” Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,062 n.2 (Nov. 23, 2004).

<sup>120</sup> *McConnell*, 540 U.S. at 169.

<sup>121</sup> 2 U.S.C. § 434(f)(3)(A)(i) (disclosure); *id.* § 441b(b)(2) (limits on corporate and union treasury funds).

communication is neither vague nor unduly broad.<sup>122</sup>

BCRA's requirement concerning the disclosure of "electioneering communication" applies to all participants in federal elections.<sup>123</sup> Even without new legislation, it applies to all 527s, even those that have not registered as political committees. The ban on the use of corporate and union treasury funds to pay for electioneering communications applies to 527s as well. The Court's First Amendment analysis also clearly indicates that the electioneering communication test could be used to classify 527 committees as political committees and thus require committees that engage in electioneering communications above the statutory threshold to register as political committees under FECA. Due to the tight temporal window for regulating electioneering communications, however, this would provide for the coverage of only a limited portion of 527s. Many of the Democratic 527s were active by the spring and early summer of 2004, and the Swift Boat ad aired in August 2004, or before the start of the sixty-day statutory period.

BCRA's definition of state and local party "federal election activity," particularly the PASO test of "public communication," provides a more solid foundation for regulating political organizations. It is not wedded to a narrow time period, and it reflects the common-sense judgment that "any public communication that promotes or attacks a clearly identified federal candidate directly affects the election in which he is participating."<sup>124</sup> *McConnell* also found that PASO avoids vagueness: "These words 'provide explicit standards for those who apply them' and 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.'"<sup>125</sup> PASO public communications could thus be used as a basis for determining whether a 527 organization's activities are "expenditures" that trigger its classification as a FECA political committee.

To be sure, Congress in BCRA narrowly aimed the PASO test at political parties and did not apply it to political committees generally. It could be argued that such a broad approach is more appropriate for parties since, virtually by definition, most party activities are aimed at the election of candidates, so that party communications that specifically promote or oppose candidates can be treated as election related, whereas communications discussing candidates that are issued by other organizations really might be aimed at political issues rather than at the candidates themselves. Indeed, the Court bolstered its approval of the PASO test by finding that the vagueness claim was "particularly"

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<sup>122</sup> *McConnell*, 540 U.S. at 194, 207.

<sup>123</sup> 2 U.S.C. § 434(f)(3)(A).

<sup>124</sup> *Id.* at 170.

<sup>125</sup> *Id.* at 170 n.64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)).

inapposite in the state and local party context “since actions taken by political parties are presumed to be in connection with election campaigns.”<sup>126</sup> But the Court also reiterated its determination that PASO is neither unconstitutionally vague nor overbroad outside the party setting when it upheld the provision of BCRA prohibiting state and local candidates and officeholders from using soft money to pay for PASO statements concerning federal candidates.<sup>127</sup>

In February 2004, the FEC in an advisory opinion determined that it could use the PASO test to determine which expenditures of a political committee are subject to FECA’s restrictions and requirements.<sup>128</sup> Under FEC rules, political committees are subject to FECA restrictions only with respect to their federal expenditures and the federal share of their mixed federal-nonfederal expenditures. Prior to BCRA and *McConnell*, the commission had applied *Buckley*’s express advocacy test to determine which expenditures are subject to FECA. In Advisory Opinion 2003-37, the commission, relying on *McConnell*, determined that it would henceforth apply the PASO test in deciding which committee expenditures had to be supported by federal funds and which could be funded by nonfederal funds.<sup>129</sup> The advisory opinion was subsequently superseded by a rule that similarly classified political committee PASO disbursements as “expenditures” for purposes of federal contribution restrictions.<sup>130</sup>

The advisory opinion’s approach shaped the FEC’s principal proposed

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 184. BCRA also used the PASO standard in its backup definition of “electioneering communications,” which would have applied to the disclosure duty of all political committees and to the ban on corporate and union expenditures. To be sure, the back-up definition, like the primary definition, was limited to broadcast, cable, and satellite communications, and also included the important qualifier that the communication be “suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.” 2 U.S.C. § 434(f)(3)(A)(ii). These restrictions were clearly intended to secure the constitutionality of an expanded definition of electioneering communication at a time when “express advocacy” was still the constitutional standard and the Supreme Court’s receptivity to the PASO standard could not have been predicted.

<sup>128</sup> Op. FEC 2003-37 (2004), available at <http://ao.nictusa.com/ao/no/030037.html>.

<sup>129</sup> *Id.*

<sup>130</sup> 11 C.F.R. § 106.6(f) (2004). Advisory Opinion 2003-37 provoked an outcry among many special-interest organizations, with Emily’s List leading the effort to repeal it. Emily’s List later brought suit to challenge the replacement rule. The U.S. District Court for the District of Columbia denied Emily’s List’s motion for a preliminary injunction to block application of the rule. See *Emily’s List v. FEC*, 362 F. Supp. 2d 43, 46 (D.D.C. 2005). Part of the concern about the opinion no doubt derived from the fact that it was requested by a sham organization—Americans for a Better Country (“ABC”)—that was a vehicle for an initial Republican effort to secure restrictions on the activities of Democratic-oriented political committees. See Harold Meyerson, *Numbers Game*, AM. PROSPECT 11, 12 (Mar. 2004) (referring to the ABC request as a “diabolically clever ploy” from a “fake 527” which asked for an opinion concerning a set of proposed activities that “were plainly culled from press accounts of the Democratic 527s”).

rule for determining which 527 organizations ought to be classified as FECA political committees. The draft final rules submitted by the FEC's general counsel to the commission in August 2004 essentially proposed that the PASO test be used to determine whether a political organization's disbursements are federal "expenditures" and then concluded that if a majority of an organization's disbursements are federal expenditures it would be treated as a FECA political committee.<sup>131</sup> This approach essentially tracked the Supreme Court's analysis in *Buckley* that an organization "the major purpose of which is the nomination or election of a candidate"<sup>132</sup> can be treated as a "political committee" by using a PASO analysis of the organization's disbursements and finding that if a majority of disbursements pass the PASO test, then the "major purpose" of the organization is the election or defeat of a federal candidate.<sup>133</sup> This proposed rule received the affirmative votes of three of the six members of the FEC and thus failed to win the majority necessary for adoption. The recently submitted 527 Reform Act of 2005, however, goes well beyond the general counsel's proposal and provides that many 527 organizations that participate in federal elections will be treated as FECA political committees, even if their activities are not primarily aimed at federal elections.<sup>134</sup> The bill simply provides that any organization that has requested section 527 status for tax purposes shall be treated as a FECA political committee, with certain exceptions. These exceptions include the committees of state and local candidates; state and local political parties; organizations aimed at activities other than influencing federal elections—such as influencing state elections or appointments to non-elective office; and, an important exemption added during Senate Rules Committee mark-

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<sup>131</sup> See FEC, Minutes of an Open Meeting 38 (Aug. 19, 2004) (Agenda Doc. No. 04-75), <http://www.fec.gov/agenda/2004mtgdoc04-75.pdf>.

<sup>132</sup> *Buckley v. Valeo*, 424 U.S. 1, 79 (1975); see also Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 352 (2004) (looking to *Buckley*'s "major purpose" test to determine which political organizations may be subject to FECA regulation).

<sup>133</sup> The draft final rule would also have classified as a political committee any political organization that publicly declares, in statements by the organization's decision makers or in formal filings with government agencies, that influencing a federal election is its major purpose. See FEC, *supra* note 131, at 37–38.

<sup>134</sup> As initially introduced, the bill essentially followed the proposed definition of political committee put forward by FEC Commissioners Scott E. Thomas and Michael E. Toner in 2004. See FEC, Minutes of an Open Meeting, at 2 (Agenda Doc. No. 04-75-A) (August 19, 2004), <http://www.fec.gov/agenda/2004mtgdoc04-75a.pdf>. That proposal received their affirmative votes but no others. See also *Hearing on S. 271, supra* note 3 (testimony of Scott E. Thomas, Chairman, FEC) (describing S. 271 as "somewhat similar" to the Thomas-Toner proposal). An important amendment put forward by Senator Schumer and adopted during the Senate Rules Committee mark-up excludes from coverage any 527s whose electoral activities "relate exclusively" to voter drive activity and which do not engage in any broadcast, cable, or satellite communications. See S. 1053, 109th Cong. § 2 (2005).

up, organizations engaged solely in “voter drive activity.”<sup>135</sup> The PASO test is deployed only to assure that an organization that engages in both federal election and other 527 activity (that is, influencing state elections or nominations for appointive office) will be considered a political committee if it spends at least \$1000 on PASO public communications concerning a federal candidate in the year before the election for the office the candidate is seeking.<sup>136</sup>

As the 527 Reform Act continues to move through the legislative process, the precise scope of the 527s subject to regulation is likely to remain a moving target, but the actions of Congress thus far suggest that treatment of at least some 527s as “political committees” within FECA is likely to raise two kinds of constitutional questions: (1) Does such regulation unduly trench on non-election-related political activity, and thus violate the First Amendment, by requiring organizations that are better seen as “issue-focused”<sup>137</sup> to register as political committees and abide by federal campaign law?; (2) Does 527 regulation violate principles of federalism by requiring organizations that are primarily engaged in state electoral activity, but also undertake some federal election activity, to register with the FEC and abide by federal campaign law? 527 regulation can probably overcome both objections with respect to the duty to register as political committees. But the consequences of treating 527s as political committees may raise more serious constitutional difficulties.

### *1. Drawing the Elections/Politics Line*

As I have indicated in previous work, a crucial distinction in federal campaign finance law is the elections/politics line.<sup>138</sup> The First Amendment protects most political speech from regulation and treats political spending as political speech, but it permits the regulation of election-related political spending.<sup>139</sup> The “express advocacy” doctrine emerged out of the Supreme Court’s first effort to draw the elections/politics line in a manner that would protect political speech from vague and overbroad election laws.<sup>140</sup> *McConnell*’s retreat from express advocacy and its acceptance of both the PASO test and the sixty-day rule for electioneering communication reflects the Court’s understanding of the failures of the express advocacy test and the need for a rule that permits

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<sup>135</sup> See S. 1053, 109th Cong. § 2 (defining “Voter drive activity” to include voter registration drives, voter mobilization drives, and get out the vote drives).

<sup>136</sup> *Id.*

<sup>137</sup> This is Professor Foley’s term. See Foley, *supra* note 132, at 351–56.

<sup>138</sup> Briffault, *supra* note 49, at 1751.

<sup>139</sup> See *id.* at 1753. For some of the reasons that election-related spending can be regulated in a manner consistent with the First Amendment, see *id.* at 1763–76.

<sup>140</sup> See *id.* at 1754.

more effective election regulation.<sup>141</sup>

From this perspective, S. 1053's and H.R. 513's incorporation of section 527 into the definition of a political committee probably passes constitutional muster. Section 527 applies only to an entity "organized and operated primarily for the purpose of directly or indirectly"<sup>142</sup> "influencing or attempting to influence"<sup>143</sup> elections or nominations to office. In other words, section 527 organizations are by definition engaged in activities intended to influence elections. An organization that has registered as a 527 has "self-declared" that its goals are primarily electoral rather than politics more broadly defined.<sup>144</sup> In effect, S. 1053 "[takes] such organizations at their word and respect[s] their decision to identify themselves as political organizations."<sup>145</sup> Organizations that are primarily focused on nonelectoral politics are likely to organize under section 501(c), rather than section 527.

Indeed, the Supreme Court in *McConnell* recognized the presumptively electoral nature of 527s. BCRA section 323(d) prohibits political parties from soliciting funds for or making donations to all 527 organizations (other than state and local candidate committees and state and local party committees), but with respect to 501(c) organizations, BCRA limited party support only to 501(c)s that make expenditures in connection with federal office.<sup>146</sup> *McConnell* explained the distinction in the treatment of 527s and 501(c)s by finding that "[s]ection 527 'political organizations' are, unlike § 501(c) groups, organized for the express purpose of engaging in partisan political activity."<sup>147</sup> In effect, as FEC

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<sup>141</sup> *McConnell v. FEC*, 540 U.S. 93, 126–29, 193–94 (2003).

<sup>142</sup> 26 U.S.C. § 527(e)(1).

<sup>143</sup> *Id.* § 527(e)(2).

<sup>144</sup> *See Hearing on S. 271, supra* note 3 (testimony of Sen. Russell D. Feingold) ("Our bill covers groups that have self-declared themselves as 527s, meaning that they are partisan, political organizations.").

<sup>145</sup> *Id.* (testimony of Prof. Frances R. Hill). Critics of S. 271 expressed concern that the bill's definition of political committee as "any applicable 527 organization," followed by its definition of "applicable 527 organization" as an organization "described in section 527 of the Internal Revenue Code," S. 271, 109th Cong. § 2 (2005), raised the possibility that an organization that fits the "description" of a 527 but that has chosen not to register as a 527—and to forego the tax benefits of 527 status—might still be subject to regulation as a political committee. *See Hearing on S. 271, supra* note 3 (testimony of David M. Mason, Comm'r, FEC). This criticism always seemed overstated, as section 527 states that "an organization shall not be treated as an organization described in this section" unless the organization "has given notice . . . that it is to be so treated." 26 U.S.C. § 527(i)(1)(A). This provision confirms the argument of the bill's proponents that 527 status, and thus political committee status, is self-imposed. *See id.* (testimony of Sen. Feingold). S. 1053 completely eliminates the issue by defining "applicable 527 organization" as one that "has given notice to the Secretary of the Treasury under section 527(i) . . . that it is to be treated as an organization described in section 527." *See* S. 1053, 109th Cong. § 2 (2005).

<sup>146</sup> 2 U.S.C. § 441a(d) (2002).

<sup>147</sup> *McConnell v. FEC*, 540 U.S. 93, 174 n.67 (2003). The Court upheld the restriction

Commissioner Mason suggests, 527 status, with its implicit satisfaction of a “primary” electoral purpose test, is a “proxy” for *Buckley*’s “major purpose” test and thus satisfies First Amendment concerns.<sup>148</sup>

## 2. Federalism

Although the proposed 527 Reform Act exempts 527s that are exclusively devoted to state and local elections, it will regulate some committees whose activities are primarily state or locally oriented, so long as those committees spend more than \$1000 in a federal election year on PASO public communications with respect to federal candidates, or on voter drives with respect to federal candidates so long as the committee does not engage solely in voter-drive activity. The voter-drive provision, in particular, could pick up state-election organizations active in states that hold their state elections at the same time as federal elections—which is the vast majority of states.<sup>149</sup> To be sure, S. 1053 permits a 527 political committee that participates in both federal and nonfederal elections to set up a separate, segregated fund for its nonfederal election purposes, and that fund can, subject to certain allocation rules, receive nonfederal funds that do not comply with FECA’s limits, which it can use for its nonfederal electoral activity.<sup>150</sup> S. 1053, however, would regulate even the nonfederal fund of a 527 political committee by barring such a fund from receiving corporate or union contributions or individual donations greater than \$25,000<sup>151</sup>—a number apparently derived from FECA’s statutory cap on individual donations to national political parties.<sup>152</sup> And even if the nonfederal election component of a political organization is far greater than the federal component, the organization would still be required to register with the FEC.

S. 1053 may thus regulate some organizations primarily focused on

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on party aid to 527s and 501(c)s, although it interpreted the ban on party donations to apply only to funds not raised in compliance with FECA. *See id.* at 178–80.

<sup>148</sup> *Hearing on S. 271, supra* note 3 (testimony of David M. Mason); *see also id.* (testimony of Scott E. Thomas, Chairman, FEC) (“527s, by virtue of their chosen tax status, can be presumed to pass the ‘major purpose’ test”); *Nat’l Fed’n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1331 (S.D. Ala. 2002) (“The ‘primary’ purpose of an organization is plainly no different than its ‘major’ purpose.”), *rev’d on other grounds sub nom. Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003).

<sup>149</sup> The only states that hold their state elections in odd-numbered years are Kentucky, Louisiana, Mississippi, New Jersey, and Virginia.

<sup>150</sup> S. 1053, § 2.

<sup>151</sup> *Id.*

<sup>152</sup> *See* 2 U.S.C. § 441a(a)(1)(B) (2002). BCRA amended FECA to provide for the indexation of most contribution limits. As a result, for 2005–06, the limit on individual donations to national party committees is \$26,700. *See* Press Release, FEC, New Federal Contribution Limits Announced (Feb. 3, 2005), <http://www.fec.gov/press/press2005/20050203limits1.html>.

state or local elections solely because their activities are concurrent with a federal election. To that extent, it would undo the 2002 amendment to section 527, which exempted qualified state or local political organizations from having to file reports of their receipts and disbursements with the IRS so long as they file similar reports with a state agency.<sup>153</sup>

It is not clear if this federalism effect is of constitutional magnitude. Although the 2002 amendments to section 527 exempted qualified state or local political organizations from IRS reporting requirements, the 2000 amendment to section 527, which first added registration and reporting requirements, did regulate state and local committees. Moreover, Congress in BCRA determined that both PASO public communications concerning federal candidates and voter drives in connection with an election in which a federal candidate is on the ballot are “federal election activity”<sup>154</sup> and applied federal contribution rules to state and local political parties’ “federal election activity.”<sup>155</sup> The court found that such activity could have an effect on federal elections<sup>156</sup> and that federal regulation of such activity did not violate any “constitutional principles of federalism.”<sup>157</sup> S. 1053 may require some 527 organizations whose interests and activities are primarily state or local rather than federal to register with the FEC, but so long as those organizations’ activities have some impact on federal elections, requiring them to register with the FEC as political committees is constitutional.

The constitutional questions raised by the classification of 527 organizations as FECA political committees go beyond the issue of whether such committees can be required to register with the FEC. Under current law, FECA political committee status has three consequences: (1) disclosure, (2) prohibition on the use of corporate and union treasury funds, and (3) limitation on the size of individual contributions. The first presents little constitutional difficulty and would have little impact. The second would have greater consequences because labor unions—but not corporations—supplied a significant fraction of 527 funds in 2004, but it also presents little constitutional difficulty under current doctrine. The real issue is the limitation on the size of individual contributions. Enforcement of FECA’s individual contribution limits last year would have eliminated a majority of 527 funds. Moreover, the constitutionality of that limitation presents an unresolved and difficult question.

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<sup>153</sup> 26 U.S.C. § 527(e)(5)(A) (2002); *see also* *Hearing on S. 271, supra* note 3 (testimony of Comm’r Mason).

<sup>154</sup> 2 U.S.C. § 431(20)(A)(i)–(iii) (2002).

<sup>155</sup> *Id.* § 441i(b)(1).

<sup>156</sup> *McConnell v. FEC*, 540 U.S. 93, 166–70 (2003).

<sup>157</sup> *Id.* at 186.

### B. Disclosure

Treating a 527 organization as a FECA political committee would subject it to FECA's disclosure requirements, including FEC oversight and enforcement. This would not be a dramatic departure from the status quo, as 527s are currently subject to disclosure under the Internal Revenue Code. The Code sets a higher threshold for the disclosure of expenditures than does FECA, and some observers have complained that the IRS is less effective at monitoring the adequacy of disclosure, enforcing the law, and assuring that campaign information is publicly available in a timely fashion.<sup>158</sup> To be sure—as the mountain of information provided last year concerning 527 fundraising, contributions, expenditures, voter drives, and advertising indicates—current disclosure rules and practices seem to have been reasonably effective. Still, as FEC Commissioner David M. Mason has observed, “[t]here is clearly some appeal to getting politically-active groups to report to the same agency, on the same schedule, and with the same details (itemization thresholds). Doing so would improve the quality and utility of disclosure.”<sup>159</sup>

There appears to be little constitutional difficulty in applying FECA reporting and disclosure requirements to 527 political committees. *McConnell* easily upheld BCRA's extension of disclosure requirements beyond express advocacy to include “electioneering communications.” Indeed, enhanced disclosure received eight affirmative votes on the Court; most of BCRA's other provisions received no more than five. Chief Justice Rehnquist and Justices Scalia and Kennedy, all of whom dissented from much of *McConnell*, agreed with the majority that disclosure advances the important public interest in an informed electorate.<sup>160</sup> Certainly, the FEC

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<sup>158</sup> See U.S. GEN. ACCOUNTING OFFICE, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS'S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED: REPORT TO THE HONORABLE BILL THOMAS, CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES (2002) (Rep. No. 02-444).

<sup>159</sup> *Hearing on S. 271*, *supra* note 3 (testimony of David M. Mason).

<sup>160</sup> *McConnell*, 540 U.S. at 321. Only Justice Thomas dissented from BCRA's requirement of disclosure concerning electioneering communications. Justice Thomas focused on the tension between *Buckley*'s prior validation of disclosure and the Court's 1995 decision in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), invalidating a state law that required disclosure of the identity of the author of a leaflet addressing a ballot proposition. Justice Thomas contended that *McIntyre* effectively overturned *Buckley*'s determination that disclosure of the sources of campaign expenditures is a constitutionally sound mechanism for informing the voters. *McConnell*, 540 U.S. at 275–76 (Thomas, J., concurring in part and dissenting in part). Although, as Justice Thomas acknowledged, “*McIntyre* purported to distinguish *Buckley*,” he concluded that *McIntyre* sub silentio overturned *Buckley*'s acceptance of the voter-information rationale for disclosure. *Id.* at 276. The Court's emphatic validation of the disclosure of electioneering communication without reference to *McIntyre* suggests that it is the force of the latter decision which has been sharply curtailed, at least in the context of candidate elections. *Accord* *Majors v. Abell*, 361 F.3d 349, 351 (7th Cir. 2004).

can require 527s, like all other entities that engage in independent spending, to disclose contributions and expenditures for electioneering communications that refer to clearly identified federal candidates and that are broadcast within BCRA's sixty- or thirty-day windows.<sup>161</sup> So too, given the Court's finding that the PASO standard is neither vague nor overbroad, the FEC could surely require disclosure of 527 PASO communications and of the contributions that fund them. And, of course, section 527 currently requires comparable disclosures for virtually all 527s that S. 1053 and H.R. 513 would cover except qualified state or local political organizations—and even those organizations were covered by the 2002 amendments to section 527.<sup>162</sup> The Eleventh Circuit rejected the principal challenge to the constitutionality of section 527's disclosure requirements.<sup>163</sup>

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<sup>161</sup> See 2 U.S.C. § 434(f)(1) (Supp. II 2002) (referring to "every person"); *id.* § 434(f)(3)(A)(i) (defining "electioneering communication").

<sup>162</sup> See 26 U.S.C.A. § 527(e)(5) (West Supp. 2004) (defining "qualified organization"); *id.* § 6033(f)(1) (extending reporting requirements to those organizations).

<sup>163</sup> *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361 (11th Cir. 2003). To be sure, the Eleventh Circuit relied on the Anti-Injunction Act in concluding that it lacked jurisdiction to issue declaratory and injunctive relief against the 527 disclosure requirement. See *id.* at 1362, 1362 n.6. It vacated the holding of the district court, which had found that the Anti-Injunction Act did not bar the action and determined that amended section 527 was constitutional insofar as it required disclosure of contributions to 527 organizations, but that the disclosure requirement was unconstitutional with respect to expenditures by 527s. See *id.* at 1360 (discussing district court's conclusion regarding the Anti-Injunction Act); *Nat'l Fed'n of Republican Assemblies v. United States*, 218 F. Supp. 2d 1300, 1354–55 (S.D. Ala. 2002) (discussing constitutional conclusions), *rev'd on other grounds sub nom.* *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003). The court's constitutional analysis of the disclosure of expenditures was flawed in several ways. First, the court assumed that the same standard of review applies to the disclosure of independent expenditures as to the limitation of independent expenditures, *Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1335, a position refuted by both *Buckley* and, after the district court's decision, *McConnell*, see *McConnell*, 540 U.S. at 194–202 (analyzing BCRA's disclosure requirements); *Buckley v. Valeo*, 424 U.S. 1, 39–51, 74–82 (1976) (invalidating limits on independent expenditures but upholding disclosure of such independent expenditures). Second, the court found that Congress's decision to apply disclosure to 527s but not to 501(c)s violated the equal protection component of the Fifth Amendment, *Nat'l Fed'n of Republican Assemblies*, 218 F.2d at 1343–44, a position clearly inconsistent with *McConnell*'s subsequent recognition of the significant differences in the political activities of 527s and other tax-exempt organizations, see *McConnell*, 540 U.S. at 174 nn.66–67. Finally, the court's finding that amended 527(j)'s regulation of committees engaged in state and local electoral advocacy violated the Tenth Amendment, *Nat'l Fed'n of Republican Assemblies*, 218 F. Supp. 2d at 1352, is at odds with *McConnell*'s dismissal of the asserted Tenth Amendment problem presented by BCRA, see *McConnell*, 540 U.S. at 186–87. At the very least, then, the *Republican Assembly* litigation confirms the constitutionality of requiring the disclosure of contributions to 527 committees. The flaws in the district court's analysis of the constitutionality of the expenditure-disclosure requirement tend to confirm the constitutionality of that requirement as well.

*C. The Ban on the Use of Corporate or Union Treasury Funds*

As FECA political committees, 527s would be prohibited from using corporate and union treasury funds.<sup>164</sup> This ban on corporate and union participation in federal election campaigns is longstanding.<sup>165</sup> In *Austin v. Michigan State Chamber of Commerce*,<sup>166</sup> in 1990, the Supreme Court emphatically upheld a state prohibition on corporate electoral spending—the first time the Court sustained a limitation on campaign expenditures. As the Court explained, corporations benefit from a “unique state-conferred corporate structure” that enables them to accumulate large sums of money.<sup>167</sup> These financial resources reflect the success of the corporation’s activities and not the extent of the support for its political ideas. Limits on corporations are constitutionally justifiable “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . . [are not] converted into political ‘war chests’”<sup>168</sup> Corporate election spending could be prohibited to control “the corrosive and distorting effects of immense aggregations of wealth” that could “unfairly influence elections when . . . deployed in the form of independent expenditures.”<sup>169</sup> *McConnell* reaffirmed *Austin* and other precedents upholding limits on corporate participation in elections, and sustained BCRA’s extension of that ban from express advocacy to the more

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<sup>164</sup> 2 U.S.C. § 441b (Supp. II 2002). Federal law does permit corporations and unions to establish separate, segregated funds, consisting of contributions voluntarily donated to the fund by persons affiliated with the corporation (such as shareholders, executives, and administrative personnel) or union (union members). Such a fund—colloquially, a PAC—may make donations to federal candidates, parties, and FECA political committees, subject to federal contribution limits. The corporation or union can pay for the administrative and solicitation costs of its PAC and determine who will receive its contributions, but the parent corporation or union cannot supply the PAC with the money that can be used to make a contribution. See 2 U.S.C. § 441b(b)(2) (2002).

<sup>165</sup> The first federal campaign finance law, the Tillman Act of 1907, barred federally chartered corporations from making campaign contributions and barred all corporations from making contributions in connection with an election for federal office. See ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 1–8* (1988). Congress in 1943 prohibited labor unions from using their treasury funds to make contributions to federal candidates or other expenditures in connection with a federal election. The ban on union activity was adopted as a war measure, with a sunset provision effective six months after the end of the war. The ban, however, was made permanent by the Taft-Hartley Act of 1947. See *id.* at 152–65.

<sup>166</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 652 (1990).

<sup>167</sup> *Id.* at 660.

<sup>168</sup> *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

<sup>169</sup> *Austin*, 494 U.S. at 660. The Court had previously held that ideological not-for-profit corporations that do not engage in business activities and do not receive business contributions could not be subject to spending limits because their resources “reflect popular support for the[ir] political positions.” *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 258 (1986).

broadly defined category of “electioneering communications.”<sup>170</sup> Presumably, the Court would have little difficulty in finding that the ban on corporate participation in federal elections could also be extended to bar federal 527s from using corporate funds to influence federal elections.

From the perspective of 527 regulation, perhaps the more significant aspect of *McConnell*'s treatment of “electioneering communications” is one that has received little attention—its validation of FECA's restrictions on unions. Corporations contributed relatively little money to 527s. The corporate share of 527 contributions in 2003–04 was less than ten percent, and total corporate contributions actually declined between 2001–02 and 2003–04.<sup>171</sup> But labor unions accounted for nearly one-quarter of 527 funds, and labor support for 527s grew significantly.<sup>172</sup> Federal law has long treated union money like corporate money and has prohibited union contributions and expenditures in federal elections.<sup>173</sup> But prior to *McConnell* the Court had not, in the post-*Buckley* era, considered the constitutionality of restrictions on unions. It is not exactly clear how *Austin*'s rationale for limiting corporate money applies to unions, which are membership organizations that do not amass economic resources in the marketplace. Arguably, unions benefit from legal rules requiring the payment of union dues or agency fees, so that their treasury funds are not strictly attributable to the extent of member or employee support for their political activities. On the other hand, unlike corporate shareholders, union duespayers have the right to withhold the portion of their dues used for political activity,<sup>174</sup> although there may be practical obstacles to the vindication of that right.

Regardless of the uncertain connection between the *Austin* rationale and union campaign finance practices, *McConnell* noted that “Congress’ power to prohibit corporations and unions from using funds in their treasuries” for federal electoral purposes “has been firmly embedded in our law,” thus tacitly but emphatically validating the restrictions on unions as well.<sup>175</sup> *McConnell* did not discuss how or why unions are like corporations. The Court, like the unions that attacked BCRA's “electioneering communication” provision, focused solely on the

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<sup>170</sup> *McConnell v. FEC*, 540 U.S. 93, 203–04, 209 (2003).

<sup>171</sup> See Weissman & Hassan, *supra* note 3, at 11.

<sup>172</sup> *Id.*

<sup>173</sup> The restriction on unions dates to 1943. See Mutch, *supra* note 165.

<sup>174</sup> See, e.g., *Communications Workers v. Beck*, 487 U.S. 735, 735–36 (1988).

<sup>175</sup> *McConnell*, 540 U.S. at 203. The Court determined that “[t]he ability to form and administer separate segregated funds . . . has provided corporations and unions with a constitutionally sufficient opportunity to engage” in electoral speech. *Id.* The Court did not discuss the administrative burdens that requiring corporate and union electoral activities to take the PAC form impose, nor did it discuss the significance of the fact that barring the use of treasury funds may reduce the amount of corporate- or union-related money available for campaigns.

constitutionality of the extension of the expenditure ban from express advocacy to electioneering communications.<sup>176</sup> The constitutionality of the underlying restriction on union express-advocacy spending was simply assumed.

The application of FECA's ban on union treasury funds to 527s could have a significant effect on union participation in federal electoral politics<sup>177</sup> and could also provoke unions to directly challenge the constitutionality of equating unions with corporations—a challenge they chose not to mount in *McConnell*. But unless and until the Court reverses course and reconsiders either the constitutional parity of corporations and unions or the constitutional underpinnings of *Austin* itself, the extension of the corporate and union funding ban to 527 political committees is likely to pass constitutional muster.

#### *D. The Limit on Individual Donations*

The most serious consequence of classifying a 527 as a FECA political committee would be the application of FECA's limit on individual contributions. FECA caps individual donations to political committees other than candidate or party committees to \$5000 per year.<sup>178</sup> This limit, unlike the statutory ceilings on contributions to candidates and to party committees, is not adjusted for inflation and has not been increased since 1974. In the 2004 election, the principal 527s received \$256 million from individuals in amounts above the \$5000 cap, or about sixty-three percent of these 527s' funds.<sup>179</sup> These contributions averaged around \$135,000 or twenty-seven times the statutory cap.<sup>180</sup> Applying the FECA individual contribution limit would dramatically limit 527 fundraising and could drastically curtail their operations.

Applying this cap also raises a difficult constitutional question—a question that also applies to the donation cap on all noncandidate, nonparty political committees that engage exclusively in independent expenditures and do not make contributions to candidates or parties, or coordinated expenditures with candidates or parties.

The difficulty emerges out of the tension within the central holding of *Buckley v. Valeo*: The First Amendment permits the government to limit campaign finance activities in order to prevent the corruption of officeholders and the appearance of the corruption of officeholders, but not to equalize the influence of different individuals or groups to affect the

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<sup>176</sup> See *id.* at 203–09.

<sup>177</sup> Not surprisingly, unions are strongly opposed to 527 regulation. See *Hearing Concerning the Regulation of 527 Organizations and the 527 Fairness Act (H.R. 1316) Before the Comm. on House Admin., 109th Cong. (2005)* (testimony of Laurence Gold).

<sup>178</sup> 2 U.S.C. § 441a(a)(1)(C) (2000).

<sup>179</sup> See *Weissman & Hassan, supra* note 3, at 11.

<sup>180</sup> *Id.* at 13.

outcome of elections. Contributions to candidates can thus be limited because a large contribution raises the danger “of a political quid pro quo” and “public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions” undermines confidence in our system of government.<sup>181</sup> So too, contributions to organizations that make contributions to candidates, and expenditures that such organizations coordinate with the candidates they support, can be limited to prevent circumvention of the limit on contributions to candidates.<sup>182</sup> But candidate expenditures and independent expenditures—that is, expenditures for campaign activities aimed at the voters that are not coordinated with any candidate—may not be limited because they present no danger of corruption.<sup>183</sup> And the “governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections” cannot support a limit on campaign speech.<sup>184</sup> If the First Amendment prohibits any limitation on how much money an independent political committee can spend on an independent-expenditure campaign, how can it permit limits on donations to committees that make only independent expenditures? In other words, if George Soros’s direct expenditure of \$23 million on anti-Bush or pro-Kerry ads is constitutionally protected, how does he forfeit that protection if he combines his \$23 million with \$20 million from Peter Lewis and maybe another \$100 million from some slightly smaller fry in a fund that takes out essentially the same ads and supports the same voter drives?

*Buckley* upheld FECA’s limit on donations to candidates,<sup>185</sup> its limit on donations by political committees to candidates,<sup>186</sup> and its aggregate limit on all contributions an individual can make to candidates and political committees in a calendar year.<sup>187</sup> It did not, however, specifically discuss the limits on donations to political committees. Arguably, the Court may have resolved the issue when it upheld the aggregate annual cap, because that implicitly limits total individual donations to particular committees. *Buckley* determined that the annual aggregate limit

serves to prevent evasion of the \$1000 contribution limitation [on individual donations to candidates] by a person who might

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<sup>181</sup> *Buckley v. Valeo*, 424 U.S. 1, 26–27 (1975).

<sup>182</sup> See *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 184–85 (1981) (upholding limit on donations to committee that makes contributions to candidates); *FEC v. Colo. Republican Fed. Campaign Comm. (Colo. Republican II)*, 533 U.S. 431, 464–65 (2001) (upholding limit on coordinated expenditures).

<sup>183</sup> *Buckley*, 424 U.S. at 47; see also *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 500–01 (1984); *Colo. Republican Fed. Campaign Comm. v. FEC (Colo. Republican I)*, 518 U.S. 604, 608 (1996).

<sup>184</sup> *Buckley*, 424 U.S. at 48–49.

<sup>185</sup> *Id.* at 23–35.

<sup>186</sup> *Id.* at 35–36.

<sup>187</sup> *Id.* at 38.

otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party.<sup>188</sup>

This analysis clearly assumes, however, that donations to political committees could be limited because such committees function as conduits passing along the donations to candidates. As a result, this statement left open the question of whether a limit can be imposed on donations to committees that are not conduits because they make only independent expenditures.

Two Supreme Court decisions provide support for the argument that if an independent expenditure does not present a danger of corrupting or appearing to corrupt officeholders, then contributions to a political committee that makes only independent expenditures cannot be limited. Five years after *Buckley*, in *California Medical Ass'n v. FEC (CalMed)*, the Court upheld the application of FECA's limit on donations to a political committee in a case involving contributions by a trade association to its own PAC.<sup>189</sup> There would seem to be little danger that a trade association could corrupt its own PAC; however, the plurality opinion by Justice Marshall emphasized that the limit on donations to political committees prevented circumvention of the limit on direct contributions to candidates.<sup>190</sup> The key fifth vote was provided by Justice Blackmun, who, in a concurring opinion, agreed that the limit on donations to a political committee could be upheld "as a means of preventing evasion of the limitations on contributions to a candidate."<sup>191</sup> Justice Blackmun, however, went on to suggest that "a different result would follow" if the donation cap "were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates," because "a committee that makes only independent expenditures poses no . . . threat" of corruption or the appearance of corruption.<sup>192</sup> In his view the pooling of contributions to fund independent expenditures was constitutionally protected.

Although technically dictum in *CalMed*, Justice Blackmun's position was bolstered by another decision later that year, *Citizens Against Rent Control v. City of Berkeley (CARC)*, in which the Court invalidated a municipal cap on contributions to committees formed to support or oppose ballot propositions.<sup>193</sup> Having previously ruled that ballot proposition

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<sup>188</sup> *Id.*

<sup>189</sup> *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 184–85 (1981).

<sup>190</sup> *Id.* at 197–99.

<sup>191</sup> *Id.* at 203 (Blackmun, J., concurring).

<sup>192</sup> *Id.* (Blackmun, J., concurring).

<sup>193</sup> *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981).

campaigns do not present a danger of corruption because they do not involve the election of a candidate,<sup>194</sup> the Court easily struck down the limit on a contribution to a ballot proposition committee as a “significant restraint on the freedom of expression of groups and those individuals who wish to express their views through committees” unjustified by the interest in preventing corruption.<sup>195</sup>

*CARC* is significant in underscoring the connection between contribution limits and the prevention of corruption. One strand of *Buckley* emphasized that limits on contributions are to receive less exacting judicial scrutiny than limits on expenditures because contributions are a lower order of speech than expenditures.<sup>196</sup> An expenditure aimed at the voters directly involves the communication of political ideas, whereas a contribution to a candidate “serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”<sup>197</sup> In other words, the critical political expression conveyed by the contribution is the fact of the donor’s support for a candidate. The amount contributed may be limited because that does not interfere with the “symbolic expression of support evidenced by a contribution.”<sup>198</sup> Nonetheless, as *CARC* confirms, contribution limits do infringe on freedom of speech and, especially, on the freedom of a donor to associate with like-minded donors in order to “pool[] their resources to amplify their voices.”<sup>199</sup> There must be some “legitimate governmental interest significant enough to justify its infringement of First Amendment rights.”<sup>200</sup> As the Court recently restated the test, even though strict scrutiny is not applied to contribution restrictions, “a contribution limit involving significant interference with associational rights” must still satisfy “the lesser demand of being closely drawn to match a sufficiently

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<sup>194</sup> See *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

<sup>195</sup> *Citizens Against Rent Control*, 454 U.S. at 299.

<sup>196</sup> *Buckley v. Valeo*, 424 U.S. 1, 21 (1976).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* Professor Eastman has argued that there is a much stronger constitutional interest in the amount of a donation to a noncandidate committee than there is in a donation to a candidate. According to Professor Eastman, the “principal message expressed by a contribution . . . is one of support for the candidate’s election to office,” but “the principal message expressed by a contribution to a noncandidate committee is agreement with and furtherance of that committee’s views.” Eastman, *supra* note 27, at 35–36. In other words, unlike donors to candidates, donors to committees want to do more than just signify their support for the committee; they want to further the committee’s activities. If so, that would subject restrictions on donations to independent political committees to more exacting judicial scrutiny than donations to candidates. Such a reading is consistent with the Court’s invalidation of the contribution restrictions in *CARC*. It is not required by *CARC*, however, because the contributions in *CARC* concerned a ballot proposition election and thus raised no danger of candidate corruption.

<sup>199</sup> *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 495 (1985).

<sup>200</sup> *Citizens Against Rent Control*, 454 U.S. at 299.

important interest.”<sup>201</sup> That interest has consistently been the prevention of corruption and the appearance of corruption.

*CalMed* and *CARC* together indicate that in order to avoid circumvention of the limits on contributions to candidates it is constitutional to limit the size of individual donations to political committees, including 527s, that make contributions to federal candidates or coordinate their expenditures with federal candidates and also engage in independent expenditures. This position is clearly confirmed by *McConnell*, which upheld BCRA’s limits on contributions to the political parties. The First Amendment does not require that the contribution limits on donations to political committees be limited to funds that the committees will use for contributions to or coordinated expenditures with candidates. As the Supreme Court has observed, such an approach “ignores the practical difficulty of identifying and directly combating circumvention under actual political conditions.”<sup>202</sup> The uses of specific contributions are “very hard to trace,”<sup>203</sup> so that Congress may require that all funds that flow into organizations that make contributions to or coordinate expenditures with candidates are subject to dollar limits in order to avoid circumvention of the limits on donations to candidates. But if, as is the case for many if not most 527s, a political committee makes no contribution to a candidate at all, the anticircumvention argument does not apply. The Blackmun concurrence in *CalMed* and the majority decision in *CARC* together suggest that it would be unconstitutional to limit donations to a political committee whose spending does not present a danger of corruption.

To be sure, proponents of applying the individual donation limits to independent expenditure 527s and other political committees can argue that the Blackmun concurrence in *CalMed* is mere dictum,<sup>204</sup> while *CARC* dealt with a ballot proposition election, and the Court has consistently held that spending in ballot proposition elections enjoys greater protection, and is less subject to restriction, than spending in candidate elections.<sup>205</sup>

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<sup>201</sup> *FEC v. Beaumont*, 539 U.S. 146, 162 (2003) (quotations omitted).

<sup>202</sup> *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2000).

<sup>203</sup> *Id.*

<sup>204</sup> See Memorandum from Professor Daniel R. Ortiz, John Allen Love Professor of Law, Univ. of Va., to Democracy 21 & the Campaign Legal Ctr. 1–2 (Mar. 7, 2005) [hereinafter Ortiz Memo] (on file with author).

<sup>205</sup> Compare *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (invalidating limit on corporate spending in ballot proposition election), with *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 655 (1990) (upholding limit on corporate spending in ballot proposition election). See also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (invalidating disclosure requirement in a ballot proposition election). Of course, this difference is due to the asserted absence of a corruption concern in a ballot proposition election because there are no candidates to corrupt. As a result, *CARC* remains relevant to a campaign finance practice in a candidate election—such as independent

Moreover, they can argue that a footnote in *McConnell* resolves the question.<sup>206</sup>

In response to Justice Kennedy's dissenting argument that Congress can limit only contributions made directly to candidates and not contributions to parties, the *McConnell* majority returned to *Buckley*'s affirmation of FECA's limits on aggregate individual donations, cited *CalMed*, and then asserted that "[i]t is no answer to say that such limits were justified as a means of preventing individuals from using parties and political committees as pass-throughs to circumvent FECA's \$1000 limit on individual contributions to candidates" because, as the Court noted, FECA's donation limits would also curtail the funds available to political committees not only for contributions to candidates, but also for independent expenditures.<sup>207</sup> "If indeed the First Amendment prohibited Congress from regulating contributions to fund the latter, the otherwise-easy-to-remedy exploitation of parties as pass-throughs (e.g., a strict limit on donations that could be used to fund candidate contributions) would have provided insufficient justification for such overbroad legislation."<sup>208</sup> In other words, according to the *McConnell* footnote, *Buckley* implicitly but definitively upheld the constitutionality of the limits on contributions to political committees, even if such a contribution limit is not fully supported by the anticorruption rationale.

Yet, it is not clear that even the *McConnell* footnote and its reading of *Buckley* would sustain limits on donations to committees that spend exclusively on independent expenditures. The committees at issue in *Buckley* and *CalMed* made contributions to federal candidates as well as engaged in independent expenditures. The Court might have been concerned about slippage between the two activities so that money given for independent advocacy might somehow wind up paying for contributions. As previously noted, the Court has permitted restrictions on contributions to organizations that both contribute to (or coordinate expenditures with) candidates and engage in independent expenditures because of "the practical difficulties of identifying and directly combating circumvention under actual political conditions."<sup>209</sup> A cap on all donations to such an organization would advance the goal of preventing circumvention of the limits on gifts to candidates. But it is not clear that

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spending—that the Court has determined presents no danger of corruption. See generally Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005) (arguing that recent Supreme Court decisions undermine the older precedents that treat ballot proposition elections differently from candidate elections).

<sup>206</sup> See Ortiz Memo, *supra* note 204, at 1.

<sup>207</sup> *McConnell v. FEC*, 540 U.S. 93, 152 n.48 (2003).

<sup>208</sup> *Id.*

<sup>209</sup> *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 462 (2000).

the *McConnell* footnote's reading of *Buckley* and *CalMed* resolves the question of limits on donations to committees that engage solely in independent spending.<sup>210</sup>

More importantly, the *McConnell* footnote was written in the course of the Court's analysis of BCRA's application of contribution limits to the activities of political parties. Indeed, a central question in the emerging debate over 527 regulation is whether 527s can be regulated just like political parties. Much of the impetus for the regulation of 527s results from the sense that with political party soft money now largely eliminated by BCRA, the 527s have taken over the financing role formerly played by parties and, so, ought to be subject to the same rules as apply to parties. Treating 527s as comparable to parties, Senator Lott has called for limits on donations to the 527s in order to maintain a "level playing field."<sup>211</sup> As Senator McCain put it, "[s]ection 527 groups need to play by the rules that candidates, political parties and all other political committees play by."<sup>212</sup>

But are 527s just like political parties? Looking to their electoral purpose, Professor Foley contends that they are:

Political committees—even those that operate independently from parties and their candidates—share an essential feature with political parties: they exist to win elections. . . . They are not merely ideological organizations that happen to participate in election-specific activities incidental to their ideological mission. Rather their reason for being is specifically electoral: their central mission is to secure the election or defeat of a candidate.<sup>213</sup>

Professor Ortiz stresses the power 527s, even those engaging solely in independent expenditures, can exercise in elections. Quoting one of the Supreme Court's statements about parties, he notes that 527s share with parties the "capacity to concentrate power to elect" candidates.<sup>214</sup> Their activities "can have a great impact on a candidate's election. . . . Nothing suggests, in fact, that 527 . . . spending is much less effective than spending

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<sup>210</sup> Professor Ortiz argues that *McConnell*'s validation of BCRA's limits on donations to the national political parties and to state party federal election activities also support limits on donations to 527 organizations because the BCRA limits apply to party activities that go beyond contributions to or coordinated expenditures with candidates and include independent expenditures. Ortiz Memo, *supra* note 204, at 3–4. But again, because these party organizations do make contributions to, or coordinate expenditures with, candidates, they present a greater danger of circumvention than that posed by committees that only engage in independent activities.

<sup>211</sup> *Hearing on S. 271*, *supra* note 3 (statement of Chairman Trent Lott).

<sup>212</sup> *Id.* (statement of Sen. John McCain); *accord id.* (testimony of FEC Chairman Scott E. Thomas) ("[T]he bill will force these entities to play by the same rules as other partisan groups.").

<sup>213</sup> Foley, *supra* note 132, at 345.

<sup>214</sup> Ortiz Memo, *supra* note 204, at 8 (quoting *Colo. Republican II*, 533 U.S. at 455).

by the candidates and parties themselves.”<sup>215</sup> Professor Malbin argues that with individual donations to candidate and party committees subject to statutory limits, “big 527 donors today are positioned to garner more attention and consideration from parties and candidates.”<sup>216</sup> Professors Foley and Ortiz agree that, given the large and growing electoral role of the 527s and the benefits they provide to candidates, large donations to these committees will “create influence over and access to federal candidates,”<sup>217</sup> thereby justifying regulation in order to prevent corruption.

But 527s and other independent-expenditure political committees do differ from political parties in significant ways. As the Supreme Court explained in *McConnell*, “federal candidates and officeholders enjoy a special relationship and unity of interest” with their parties.<sup>218</sup> Most federal candidates run for office on party ballot lines, and the party line itself provides the candidate with a unique electoral benefit. Members of Congress sit in party caucuses, and the Congress, including its committees, is organized on party lines. The president is a partisan who was nominated by his party, ran on a party line, and is the de facto head of his party. Prior to BCRA, candidates and officeholders were actively involved in raising party funds, explaining to potential donors how contributions to the parties could benefit candidates’ campaigns.<sup>219</sup> *McConnell* found that this had a direct effect on the legislative process.<sup>220</sup> In raising soft money, party leaders dangled before potential contributors access to federal executive and legislative officeholders as an inducement to contribute.<sup>221</sup> Moreover, as the Court found, “[t]he national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates.”<sup>222</sup> This “close connection and alignment of interests” between parties and candidates means that “large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used.”<sup>223</sup> So too, “the close ties between federal candidates and state party committees,”<sup>224</sup> reflected in national party direction of soft funds to the state parties and federal candidates fundraising for state parties,<sup>225</sup> support

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<sup>215</sup> *Id.* at 10.

<sup>216</sup> *Hearing on S. 271, supra* note 3 (testimony of Michael J. Malbin, Exec. Director of the Campaign Finance Institute).

<sup>217</sup> Ortiz Memo, *supra* note 204, at 10; *see* Foley, *supra* note 132, at 346.

<sup>218</sup> *McConnell v. FEC*, 540 U.S. 93, 145 (2003).

<sup>219</sup> *See generally id.* at 146–49.

<sup>220</sup> *See id.* at 150.

<sup>221</sup> *See id.* at 150–52.

<sup>222</sup> *Id.* at 155.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 161.

<sup>225</sup> *See id.* at 164 n.60.

special regulation of the federal election activities of the state parties.

The 527s, by contrast, have no comparable ties to candidates. They do not control lines on state ballots. They are not the basis for the organization of Congress. Federal candidates and officeholders do not sit on their boards. No federal candidates or officeholders were involved in 527 fundraising, and opportunities for special access to federal officials were not provided in exchange for large donations. To be sure, many of the principal organizers and leaders of the 527s have long track records of committed partisanship or ongoing business ties to current party organizations, and the 527s used their funds consistently to support the candidates of one party or the other. But that is not quite the same thing as the structural and institutional interconnection that marks the candidate-party relationship.

Ultimately, the argument that Congress may treat 527 committees like parties for the purpose of the limit on individual donations boils down to two closely related points. First, donations to 527s can be limited because 527 spending benefits candidates, the candidates are “vividly” aware of the megadonations that fund such spending,<sup>226</sup> and thus, “large-dollar contributions to political committees present risks of improper influence that are essentially the same as large-dollar contributions to political parties.”<sup>227</sup> Second, donations to independent-expenditure political committees can be limited to prevent circumvention of the limits on donations to candidates and parties.

With respect to the first point, the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. Indeed, *McConnell* clearly held that benefit (even benefit followed by gratitude and temptation) is not sufficient to justify a campaign restriction. In upholding BCRA’s donations to state and local parties for federal election activity, the Court gave great weight to the benefits these activities provide federal candidates.<sup>228</sup> This led Chief Justice Rehnquist, in dissent, to assert that the Court’s rationale would necessarily apply to “[n]ewspaper editorials and political talk shows [that] benefit federal candidates and officeholders every bit as much as a generic voter registration drive conducted by a state party.”<sup>229</sup> The majority, however, responded that benefit to a candidate alone could not justify campaign finance regulation: “We agree with the Chief Justice that Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their

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<sup>226</sup> Ortiz Memo, *supra* note 204, at 6.

<sup>227</sup> Foley, *supra* note 132, at 346.

<sup>228</sup> *McConnell*, 540 U.S. at 166–71.

<sup>229</sup> *Id.* at 355 (Rehnquist, C.J., dissenting).

activities conferred a benefit on the candidate.”<sup>230</sup> Rather, “[t]he close relationship of federal officeholders and candidates to their parties” limited the scope of the benefit principle and “answer[ed] . . . the Chief Justice’s concerns.”<sup>231</sup>

The anticircumvention argument runs up against a similar difficulty. To be sure, *McConnell* significantly extended the anticircumvention rationale, picking up not only the national political parties and state and local political parties, but also political-party support for politically active tax-exempt organizations (including 527s),<sup>232</sup> and expenditures of state and local candidates and officeholders on public communications that promote or oppose a clearly identified candidate for federal office.<sup>233</sup> In so doing, the Court relied on the long history of candidate and donor circumvention of the restrictions on contributions to candidates and deferred to Congress’s judgment concerning which organizations or individuals are likely to emerge as “the next conduits” for the soft-money funding of election-related ads.<sup>234</sup>

But, as the term “conduit” implies,<sup>235</sup> every single one of these measures involved transactions through the parties and thus, bearing in mind the structural connection between parties and candidates, a link to federal candidates. BCRA’s provisions concerning tax-exempt organizations focused on direct party solicitation for, or donations to, the tax-exempt organizations, thereby clearly triggering the anticircumvention rationale. The state and local candidates are presumably running on the same ballot lines as their fellow partisan federal candidates, and officeholders are likely to be party members. Party membership provides the link directly connecting state candidates to federal candidates. Moreover, the BCRA restriction affects only funds used to pay for the PASO public communications of state and local candidates and officeholders. The Senate’s 527 Reform Act, which does not rely on any structural connection to parties or candidates, sweeps far broader, picking up and capping all contributions, regardless of the activity funded.

Descriptively, it seems correct to say that the movement of some individual funds from party soft-money accounts to 527s was a direct response to BCRA and represents the continuing efforts of wealthy individuals to deploy their funds in federal elections. Given the absence of a direct nexus to federal candidates or to intermediary organizations connected to federal candidates, however, it is not clear that this is

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<sup>230</sup> *Id.* at 156–57 & n.51.

<sup>231</sup> *Id.* at 156 n.51.

<sup>232</sup> *Id.* at 174–81.

<sup>233</sup> *Id.* at 184–85.

<sup>234</sup> *Id.* at 185.

<sup>235</sup> *Cf.* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 461 (2000) (referring to a political party committee as “a funnel from donors to candidates”).

“circumvention” of the limits on donations to candidates and parties in the sense used in *McConnell*.

The “benefit” and anticircumvention arguments both operate on the assumption that the key factor supporting limits on donations to 527s is that the 527s’ expenditures are, in Professor Foley’s term, “election-focused,” and thus can have an impact on the election.<sup>236</sup> But *Buckley* rejected election-relatedness as a test for limiting campaign money and instead looked for a connection to candidates in order to support a finding that the donation raised a danger of corruption. To find that donations to independent committees can be limited because they have an impact on the election—and to infer the possibility of corruption from the mere fact of electoral impact with connection to a candidate—is in deep tension with *Buckley*’s rejection of spending limits for independent expenditures. The proponents of limiting individual contributions to 527 committees are no doubt right in arguing that those contributions have an impact on the election and have the potential to win the gratitude of candidates, but the same can be said for the independent spending that *Buckley* protected from limitation. The real consequences posed by megadonations to 527 committees may justify limits on individual donations, but the validation of those limits may well require a reconsideration of *Buckley*.

#### *IV. Regulating 527s and Reconsidering Buckley*

It is not clear why the question of the constitutionality of the limits on individual donations to independent committees remained relatively dormant until now. Perhaps it is because from the late 1980s through 2002, political-party soft-money accounts were more attractive to large contributors. Perhaps also prior to the founding of the many new 527s active last year, most political committees made contributions to candidates and parties rather than independent expenditures, or at least coupled their independent spending with donations, thus clearly permitting limits on donations to the committees. With the 527s accepting huge individual contributions for use solely on spending campaigns formally independent of candidates and parties, the issue will be joined if and when the FEC or Congress applies the FECA limits to these organizations.

Section D of Part III indicated that such a restriction is likely to face a serious constitutional challenge. In this Part, I suggest that there are a range of theories, which increasingly depart from *Buckley*’s approach to campaign finance regulation, that provide support for the constitutionality of limits on donations to committees that make only independent expenditures. The least radical of these would rely on, but stretch, *McConnell*’s anticircumvention rationale and would succeed if there is evidence that the parties or the candidates, not just the donors, are treating

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<sup>236</sup> See Foley, *supra* note 132, at 342.

527s as devices for circumventing the soft money limits and establishing a connection between large donors and candidates. The other two would require reconsideration of one or another of the basic components of *Buckley*—the determination that independent spending is not corrupting, or even more fundamentally, that the prevention of corruption is the only constitutionally acceptable rationale for limiting campaign money. I conclude this Part by suggesting that a serious reconsideration of *Buckley* is in order, because, as demonstrated by the analysis of how *Buckley* applies to 527s, *Buckley* fails adequately to address some of the most critical considerations implicated by campaign finance and campaign finance regulation.

A. *527-Party Coordination*

Although there appears to be no formal structural or institutional connection between 527s and parties comparable to the nexus between parties and candidates, the FEC or Congress could find that the web of informal contacts between the parties and the 527s—the roles of past and present party officials in 527 operations and fundraising; the use of the same pollsters, media consultants, strategists, and other vendors; and the attendance of 527 officials at the party conventions—constitutes a sufficient factual predicate for finding 527-party coordination and thus treating the 527s as adjuncts to their parties. As Commissioner Mason has observed, “[v]irtually all of the non-FEC registered 527 groups discussed in connection with this legislation [S. 271], and some individuals associated with those groups, are the subject of complaints to the FEC regarding their activities in 2004.”<sup>237</sup> The investigations into these complaints might very well show the kind of conduct by parties and 527s that would support a finding that their activities are coordinated.

In response to BCRA, the FEC in 2003 significantly revised its rules governing coordination to permit a finding of coordination even in the absence of a formal agreement between a party and a nonparty committee.<sup>238</sup> If a 527’s activities promoting or opposing a federal candidate were undertaken at the “request or suggestion” of a candidate’s representative or party or party official,<sup>239</sup> or following “substantial

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<sup>237</sup> *Hearing on S. 271, supra* note 3 (testimony of Comm’r David M. Mason).

<sup>238</sup> In BCRA, Congress directed the FEC to repeal its preexisting rules governing the definition of coordinated expenditures and required the commission to promulgate new regulations that “shall not require agreement or formal collaboration to establish coordination.” Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (codified as amended at 2 U.S.C. § 441a(a) (Supp. II 2004)). In *McConnell*, the Supreme Court agreed that formal agreement with a candidate is not necessary in order for an expenditure to be treated as coordinated, *McConnell*, 540 U.S. at 221–23, and upheld those provisions of BCRA.

<sup>239</sup> 11 C.F.R. § 109.21(d)(1) (2004).

discussion”<sup>240</sup> between party officials or candidate representatives and the 527, such activities may be considered coordinated with the candidate or party. So too, if the candidate or party and the 527 used common vendors in the development of media strategy, polling, fundraising, the content of a public communication, voter lists, or other media or political activities; or the 527 used a former employee or independent contractor of the candidate or party, and the common vendor or former employee or contractor used information gleaned from the candidate’s or party’s campaign in his or her work for the 527, that could be a basis for a finding of coordination.<sup>241</sup> Given the web of connections linking candidate committees, party committees, consultants, and 527s, it would not be surprising if some coordinated expenditures occurred.

The Supreme Court has consistently treated coordinated expenditures as “disguised contributions”<sup>242</sup> that raise the same dangers of corruption and the appearance of corruption as contributions and thus can be limited. Clearly, consistent with *CalMed*, individual contributions to 527s and other political committees that make coordinated expenditures with candidates or parties can be limited.

Limiting contributions to a 527 on a finding that the 527 coordinated its activities with a candidate or party would be faithful to current doctrine, but it is not clear that this would support restrictions on contributions to all 527s active in federal elections as a class. Again, Congress could presumably adopt additional criteria for determining which 527s should be treated as linked to parties or candidates or as alter egos for candidates or parties. These might include whether present or past party officials, or candidate committee officials, are involved in the direction of the 527, or whether the 527 is institutionally linked to a political committee that makes contributions to candidates or parties.<sup>243</sup> Even assuming that Congress or the FEC could develop a set of criteria for establishing the kind of party-527 ties that would sustain regulation of the 527s as de facto agents or arms of the parties, however, it is not clear that this would be sufficient to support a categorical regulation of all federally active 527s. Collaborative relationships might exist for some 527s, but not others, including some that

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<sup>240</sup> *Id.* § 109.21(d)(3).

<sup>241</sup> *Id.* § 109.21(d)(4)–(5).

<sup>242</sup> *Buckley v. Valeo*, 424 U.S. 1, 47 (1975); *accord* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 455 (2000).

<sup>243</sup> The Campaign Finance Institute found that twenty-nine of the eighty largest 527 organizations in 2004 were sponsored by a parent organization that also sponsored a political committee that “provide[s] or channel[s] hard money contributions to candidates and parties.” *Hearing on S. 271, supra* note 3 (testimony of Michael Malbin).

A finding of party-527 coordination seems particularly likely for 527s composed of state party officials. As of mid-2005, the most financially successful 527 in 2005 was the Republican Governors Association, which had raised \$9 million. The Republican State Leadership Committee had raised another \$3.1 million. *See* Bolton, *supra* note 67.

faithfully track the party line without interactions with party organizations.

Looking to coordination might catch some 527s, but this approach would entail a close examination of the operations of particular committees rather than a categorical application of the hard-money cap. Possibly, if a congressional or FEC investigation determined that all or nearly all of the 527s active in federal elections were coordinating their activities with candidates or parties, a categorical approach could be sustained.<sup>244</sup> But at the present time, with the proponents of 527 limits making the case for regulation primarily in terms of the scope of 527 activities rather than on the coordination of 527s with the parties or candidates, it is uncertain whether a coordination theory would provide a sufficient basis for a general regulation of 527s.

### *B. Independent Expenditures and Corruption*

Following the arguments of Professors Foley, Ortiz, and Malbin, Congress or the FEC could determine that large contributions to 527s as a group raise the danger of corruption—not because of particular ties between candidates or parties and the 527s, but simply because candidates and elected officials will inevitably be aware of megadonations, will benefit from and be grateful for them, and, as with large direct contributions to a candidate or party, will be tempted to reciprocate with favorable government decisions, or at least preferential access. As I have already suggested, the concern that large donations to the 527s will have a gravitational pull on candidates and officeholders, comparable to large donations to the candidates or parties, underlies much of the drive to regulate donations to these organizations. In effect, this approach takes the view that large donations to 527s raise an objective danger of corruption or the appearance of corruption, whatever the specifics of a 527's relationship to a candidate or party (or the lack of such a relationship).

This approach, however, is directly at odds with *Buckley's* determination that independent expenditures do not present a danger of corruption. *Buckley* specifically rejected the claim that restrictions on the independent expenditures of individuals and groups advance the anticorruption goal by preventing circumvention of FECA's contribution limits. In the Court's view, "[t]he absence of prearrangement and

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<sup>244</sup> *McConnell* relied on extensive congressional factfinding, including a six-volume report by the Senate Committee on Governmental Affairs summarizing the results of an investigation of campaign finance practices in the 1996 federal elections, *McConnell v. FEC*, 540 U.S. 93, 129–32 (2003), as well as a lengthy record concerning the interconnections of candidates and officeholders with their political parties, *id.* at 146–73, to support BCRA's tight restrictions on party soft money. Although its report is considerably less extensive, the House of Representatives Committee on House Administration submitted a report accompanying H.R. 513 that relies on journalists' accounts to document close interactions among parties and 527s. *See* H.R. REP. NO. 109-181, at 6–9 (2005).

coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.<sup>245</sup> As a result, independent expenditures cannot be considered corrupting. And, returning to the argument detailed in Part III.D, if independent expenditures cannot be considered corrupting, it is hard to see how the contributions that fund noncorrupting independent expenditures can be considered corrupting.

Justifying limits on contributions to independent-expenditure political committees in terms of *Buckley*'s anticorruption goals thus will ultimately require the Court to reconsider this part of *Buckley*.<sup>246</sup> After all, if a \$23 million contribution by George Soros to the Media Fund to pay for anti-Bush ads is considered corrupting, why wouldn't a direct expenditure by Soros of the same amount of money for identical ads be just as corrupting? Treating a contribution to an independent spender as corrupting because of the benefit a candidate receives from the spending would certainly mean that the spending would be presumptively corrupting, and subject to limitation as well.

One component of the reconsideration of this part of *Buckley* need not challenge the Court's basic framework for dealing with campaign finance law. Part of the basis for *Buckley*'s rejection of the argument that independent expenditures can be corrupting was the Court's quasi-empirical determination that spending without "prearrangement and coordination" is unlikely to benefit a candidate and therefore unlikely to make officeholders feel obliged, and so not be corrupting.<sup>247</sup> *Buckley*'s seat-of-the-pants empiricism has always seemed shaky, and election observers have long been able to show that independent spending can benefit candidates and that candidates are aware of, and grateful for, such spending.<sup>248</sup> In *McConnell* the Court relied on the post-*Buckley* experience with campaign finance practice to reject *Buckley*'s finding that "express advocacy" was the proper line for defining what constitutes election-related speech without calling into question *Buckley*'s more fundamental determination that some election-related/non-election-related distinction is necessary.<sup>249</sup> So too, the Court could find that, based on the post-*Buckley* experience, independent expenditures provide candidates with sufficient

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<sup>245</sup> *Buckley*, 424 U.S. at 47.

<sup>246</sup> Since *Buckley*, the Court has consistently adhered to the invalidation of limits on independent expenditures. See, e.g., *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 492 (1984); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1995).

<sup>247</sup> See *Buckley*, 424 U.S. at 47.

<sup>248</sup> See, e.g., ELIZABETH DREW, *POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION* 133–145 (1983).

<sup>249</sup> *McConnell*, 540 U.S. at 190–91.

benefit that they are grateful for the expenditures and inclined to reward the independent spenders with preferential access, if not government decisions, without disturbing *Buckley*'s basic commitment to the corruption-prevention model of campaign finance law.

Even if the Court were to find that an independent expenditure provides a benefit to a candidate, however, that is not enough to overcome the constitutional protection for independent expenditures and the contributions that fund them. As previously noted, *McConnell* rejected a benefit-to-the-candidate test as sufficient to trigger regulation of independent activity. *McConnell* expanded the definition of corruption and loosened the nexus between donor and candidate necessary to establish corruption. But it still required some showing of a nexus, which the presumptive corruption argument would eliminate. Thus—although there is considerable plausibility to the argument that in practice a contribution to a committee that funds spending that ultimately benefits a candidate could, in turn, give rise to an officeholder's willingness to provide special benefits to that donor—treating a large contribution to an independent committee as presumptively corrupting even in the absence of evidence of ties between the committee and a party or candidate would require the adoption of the very benefit standard just rejected in *McConnell*. Moreover, whereas *McConnell* was able to determine that *Buckley*'s express advocacy test was “the product of statutory interpretation rather than a constitutional command,”<sup>250</sup> *Buckley*'s conclusion that “the independent expenditure ceiling fails to serve any substantial government interest in stemming the reality or appearance of corruption in the electoral process” and that “it heavily burdens core First Amendment protection”<sup>251</sup> clearly is a constitutional determination. Finding that an independent expenditure's benefit to the candidate is a basis for regulation on an anticorruption theory would require the explicit overturning of precedent that *McConnell*'s acceptance of the regulation of “electioneering communications” was able to avoid.

Beyond the tension with *Buckley*'s holding, the anticorruption argument limiting independent spending has a certain Rube Goldberg quality. As the argument goes, large independent expenditures in support of or opposition to candidates can influence elections by benefiting one candidate and harming the other. The benefited candidate will be grateful for the expenditure and thus, if elected, be more inclined to grant the spenders (and those who pay for the spending) governmental favors or at least preferential access. On inspection, though, the impact of the spending on the election is doing all the work in the analysis. In the absence of some coordination between the spender and the candidate, the gratitude and

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<sup>250</sup> *McConnell*, 540 U.S. at 192.

<sup>251</sup> *Buckley*, 424 U.S. at 47–48.

corrupting effects are simply presumed. But, if that is the case, Occam's Razor suggests that we cut out the unnecessary part of the argument and turn to its logical core: the problem with high levels of independent spending financed by megadonations from individuals is that they allow the superwealthy to play an unduly large role in our elections.

Indeed, the proponents of 527 regulation acknowledge that the critical issue presented is, in the words of Senator Feingold, that they enable "very rich individuals to continue to be able to give millions of dollars for ads and GOTV [get out the vote] drives" and thus permit "wealthy individuals" to "drown[] out" the voices of average citizens.<sup>252</sup> Similarly, Senator McCain cited the concern that "political power in this country does not lie solely in the hands of big corporations, labor unions, and the wealthiest of the wealthy."<sup>253</sup> Because *Buckley* rejected arguments from inequality and instead required that restrictions on campaign activities be based on the prevention of corruption and the appearance of corruption, proponents of 527 regulation have asserted that large donations to 527s raise the danger of undue influence over officeholders. But finding such undue influence in the absence of "prearrangement and coordination" is tantamount to treating a high level of spending in an election as generating undue influence over officeholders. Moreover, as the comments of both Senators McCain and Feingold suggest, the central issue presented by the activities of the 527s last year is whether the ability of a tiny number of extremely wealthy individuals to spend enormous sums on the election is inconsistent with our system of democratic elections. But to frame the question that way, let alone to answer it in the affirmative, requires reconsideration of *Buckley*'s fundamental premise—that campaign finances may be limited solely to deal with the ancillary effects of campaign contributions on the integrity of government decisions, not because of the effects of large contributions and expenditures on elections themselves. The rise of the 527s, however, suggests that the ability of Congress to deal with gross economic inequalities in regulating our elections is a question that cannot, and should not, be forever avoided.

### C. *527s, Economic Inequality, and Democratic Elections*

*Buckley* flatly rejected the argument that the interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections"<sup>254</sup> can justify limiting campaign spending. In language that quickly became famous—or notorious—the Court categorically rejected the inequality concern, holding that "the concept that government may restrict the speech of some elements of our society in order to enhance the

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<sup>252</sup> *Hearing on S. 271, supra* note 3 (testimony of Sen. Russell Feingold).

<sup>253</sup> *Id.* (testimony of Sen. John McCain).

<sup>254</sup> *Buckley*, 424 U.S. at 48.

relative voice of others is wholly foreign to the First Amendment.”<sup>255</sup>

Yet, political equality, regardless of wealth, is a bedrock principle of our electoral system. The right to vote cannot be limited based on wealth, income, or the failure to pay a tax, such as a poll tax or a property tax.<sup>256</sup> Nor can the right to be a candidate for office be conditioned on the payment of a fee.<sup>257</sup> The “one person, one vote” doctrine nicely captures the centrality of equality to our elections. Nor can the political equality principle be entirely cabined to the act of voting. The election includes not just the process of casting and counting ballots, but also the campaigning that precedes the election and helps shape voter decisions. Political equality has implications for the “fair and reasonably equal opportunity” for citizens to attempt to influence the deliberations and decisions of their fellow voters.<sup>258</sup>

To be sure, equality concerns play out differently in the campaign finance context than in other areas of election law. When the right to vote or to be a candidate was at stake, a concern for political equality was used to strike down laws limiting participation. But in the campaign finance setting, equality would be used to limit spending by the wealthy and thus control the political consequences of economic inequalities. Although *Buckley* rejected economic inequality as a basis for limiting campaign spending, the Court accepted a version of this concern in *Austin* when it sustained a state law restricting corporate election expenditures. *Austin* found the limit justified by a compelling interest in controlling “the corrosive and distorting effects of immense aggregations of wealth” that could “unfairly influence elections when . . . deployed in the form of independent expenditures.”<sup>259</sup> To be sure, *Austin* found that corporate spending poses a unique danger of corruption because corporations enjoy a “unique state-conferred corporate structure” that enables them to accumulate large sums of money.<sup>260</sup> A corporation’s financial resources reflect the success of the corporation’s commercial activities and not the extent of support for its political ideas. Limits on corporations are thus justifiable “to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization . . .

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<sup>255</sup> *Id.* at 48–49.

<sup>256</sup> *See, e.g.,* Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966); City of Phoenix v. Kolodziejewski, 399 U.S. 204 (1970).

<sup>257</sup> *See, e.g.,* Bullock v. Carter, 405 U.S. 134, 149 (1972); Lubin v. Panish, 415 U.S. 709, 715 (1974). *But cf. Buckley*, 424 U.S. at 49 n.55 (dismissing the relevance of cases invalidating wealth tests for voting or candidacy to the campaign finance context).

<sup>258</sup> *See* Ronald Dworkin, *The Curse of American Politics*, 43 N.Y. REV. BOOKS, Oct. 17, 1996, at 19.

<sup>259</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990).

<sup>260</sup> *Id.* at 659–60.

[are] not converted into political ‘war chests.’”<sup>261</sup> Yet, *Austin*’s attempt to limit its concern with large campaign war chests to corporations is unpersuasive. It is hard to see why the corporation’s state-granted advantages make its speech any more corrupting than the speech of wealthy individuals or noncorporate groups. Moreover, as Justice Scalia pointed out in his *Austin* dissent, corporations are not alone in receiving special advantages from the state.<sup>262</sup> Other business associations—as well as billionaire individuals who benefit from inheritance laws or obtain their wealth from investments in corporations—may build up campaign war chests “that have little or no correlation to the public’s support for the[ir] political ideas.”<sup>263</sup> Although the Court has doctrinally bracketed corporations and unions as special cases, the only justification for these spending limits that the Court has articulated sounds a lot more like the inequality rationale than the anticorruption concern.

To be sure, the role of economic inequality in justifying campaign finance limits is far from straightforward. Money is not the only source of inequality among individuals or interest groups. As FEC Commissioner Bradley Smith has explained, a wide range of factors—including “talent, physical and personal attributes, luck of time and place”—in addition to wealth assure that “a relatively small number of individuals will always have political influence far exceeding that of their neighbors.”<sup>264</sup> Equalizing giving and spending will not equalize participation, given that people can participate in election campaigns in a wide variety of ways, including volunteering their time, their communicative or organizational skills, or even their celebrity to rally support for a candidate.<sup>265</sup> Nor is equalizing financial influence an achievable goal without a dramatic transformation of our campaign finance system. The only way to accomplish true equality in a world in which some voters would have little or no resources to commit to campaigns would be to totally eliminate private funding. After all, even FECA’s \$5000 cap on donations to political committees effectively enables a very small number of people to give a great deal more money than most people. Moreover, there can be multiple equalities in an election, including the equality of candidate funding as well as the equality of citizen spending. Independent spending can sometimes reduce inequalities among candidates. President Bush was

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<sup>261</sup> *FEC v. Nat’l Right to Work Comm.*, 459 U.S. 197, 207 (1982).

<sup>262</sup> *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

<sup>263</sup> *Id.* at 660.

<sup>264</sup> BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 207 (2001).

<sup>265</sup> As Professor Pildes notes, the equality argument “sometimes rests on the quixotic vision that political influence can somehow be equalized or, even more naïvely, that ending the disproportionate influence of money would somehow itself ensure equal political influence.” Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 150 (2004).

poised to dramatically outspend Senator Kerry in the months before the party conventions. Heavy spending by the pro-Democratic 527s helped achieve a measure of parity between the two major candidates. Moreover, large contributions and expenditures by a few can sometimes facilitate greater participation by the many. Indeed, much of the dramatic increase in voter turnout in the 2004 election has been attributed, at least in part, to the 527 voter drives that were financed by huge private donations.

The role of other sources of individual influence notwithstanding, money is surely a unique campaign resource. "It buys goods and it also buys human energy, skills and services. . . . [I]t is the common denominator in the shaping of many of the factors comprising political power, because it buys what is not or cannot be volunteered."<sup>266</sup> So too, although total equality of financial influence may be unattainable, the extreme deviation from equality that occurs when two dozen individuals can pump \$150 million dollars into an election, and thus have a special impact on the preelection debate, is a flagrant challenge to the political equality norm. Nor should reducing inequality replace prevention of corruption as the single paradigm for campaign finance. Instead, constraining the political effects of economic inequality should be one of a number of factors taken into account in determining the constitutionality of campaign finance regulation.

Campaign finance regulation, like democracy itself, implicates a host of competing and interacting concerns. These include freedom of speech, association, and participation; voter education and information; voter mobilization; candidate competition; controlling the potential for corruption inherent in private contributions; and protecting political equality from the consequences of economic inequality.<sup>267</sup> The rules governing campaign finance should be informed by an awareness of the complex needs of electoral democracy. No one of these concerns should stand as the sole or exclusive measure of campaign finance law. Rather, all should be taken into account in assuring that our campaign finance laws are consistent with a commitment to democratic elections. *Buckley* falls short as a basis for constitutional doctrine because it frames the constitutionality of campaign finance regulation largely in terms of the implications for free speech, and it found in the danger of corruption the principal constitutional

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<sup>266</sup> HERBERT E. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS, AND POLITICAL REFORM 3 (2d ed. 1980).

<sup>267</sup> See also ASS'N OF THE BAR OF THE CITY OF N.Y., COMM'N ON CAMPAIGN FIN. REFORM, DOLLARS AND DEMOCRACY: A BLUEPRINT FOR CAMPAIGN FINANCE REFORM 83–95 (2000) (listing political participation, voter information, voter equality, competitive elections, prevention of the undue influence of campaign financing on governance, amelioration of the burdens of fundraising, and effective administration and enforcement as basic principles of campaign finance regulation).

basis for limiting campaign speech.<sup>268</sup> This is much too limited a view of the concerns at stake in campaign funding.<sup>269</sup>

*McConnell* hints at a potential judicial willingness to frame the campaign finance issue more broadly, in terms of the needs of democratic elections.<sup>270</sup> Instead of treating campaign finance restrictions as a threat to freedoms of speech and association and therefore a challenge to constitutional values, *McConnell* gave great weight to the interests in fair, informed democratic decision making it found to be advanced by contribution limitations, disclosure requirements, and restrictions on corporate and union treasury funds. The Court noted that “contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate.”<sup>271</sup> As Justice Breyer had previously suggested, the Court found that campaign finance law involves not one set of constitutional principles, but the reconciliation of “competing constitutional interests”<sup>272</sup>—not just freedom of speech, but free speech and government integrity. To be sure, equality arguments were not before the *McConnell* Court. But *McConnell*’s democracy-centered approach to campaign finance regulation may signal a new willingness to consider equality—or, at least, to give some weight to the gross deviations from equal participation that result when a handful of donors are able to make multimillion dollar contributions—as part of a broader analysis of the proper elements of a constitutional campaign finance system in a democratic society.

Limiting individual contributions to 527s may be just the statutory move necessary to force reconsideration of the Court’s campaign finance framework.<sup>273</sup> The 527s do not fit easily within *Buckley*’s anticorruption paradigm, at least as the Supreme Court has defined corruption until now. Their vice is that they enable superwealthy individuals—“the wealthiest of

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<sup>268</sup> *Buckley v. Valeo*, 424 U.S. 1, 64–67 (1975). *Buckley* also looked to the interest in voter information to justify disclosure of campaign contributions and receipts. *Id.*

<sup>269</sup> As Judge Guido Calabresi recently observed, analyzing campaign finance regulation solely in terms of the prevention of “corruption” is “surely impoverished, for it does not deal with what is at least as important, and, perhaps, at the very heart of the problem.” See *Landell v. Sorrell*, 406 F.3d 159, 163 (2d Cir. 2005) (Calabresi, J., concurring in the denial of rehearing en banc).

<sup>270</sup> *McConnell v. FEC*, 540 U.S. 93, 136–37 (2003).

<sup>271</sup> *Id.* at 137.

<sup>272</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 403 (2000); see *McConnell*, 540 U.S. at 137; see also Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002).

<sup>273</sup> Reconsideration of *Buckley* may also be forced by the recent decision of the Second Circuit holding, in the context of spending limits imposed by the State of Vermont on statewide and state legislative elections, that the First Amendment does not preclude mandatory spending limits. See *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *petition for reh’g en banc denied*, 406 F.3d 159 (2d Cir. 2005).

the wealthy,” in the words of Senator McCain<sup>274</sup>—to deploy massive sums in pursuit of their electoral goals. To be sure, there ought to be a place for independent contributions and expenditures, even by the superwealthy. In the last election they helped maintain spending parity among the presidential candidates and played a vital role in increasing voter turnout. With the government doing little to register, educate, and mobilize voters, the activities of these megadonors actually performed the useful public function of energizing our democracy. The current statutory cap of just \$5000 on individual donations to political committees—first adopted in 1974 and not adjusted for inflation since—may very well be too low in light of the public benefits of such private spending.<sup>275</sup>

But unlimited megadonations create the possibility of radically uneven wealth-based influence on elections and can undermine public belief that ours is a democratic system. The rise of the 527s is not—or not simply—an evasion of BCRA’s soft money limits, because the shift from parties to independent committees reduced the role of candidates and officeholders in soliciting these funds and led to changes in both who is contributing outside FECA’s limits and how much they are contributing. Rather, by enabling a handful of individuals to commit literally millions of dollars to the election campaign, the rise of the 527s is a challenge to the political equality at the heart of democracy. By the same token, the rise of the 527s is also a challenge to the Supreme Court to break with *Buckley*’s rejection of equality as a component of campaign finance law and to see that dramatic funding inequalities present a compelling problem that Congress can address.

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<sup>274</sup> *Hearing on S. 271, supra* note 3 (testimony of Sen. John McCain).

<sup>275</sup> *See id.* (testimony of FEC Chairman David M. Mason) (suggesting a \$100,000 cap).