

Fighting Speech with Speech: Combating Abuses of Section 527 Political Organizations with More Speech, Not Additional Regulation

By JAMES H. ODDIE*

VIETNAM, 1968—A young United States Navy Lieutenant pilots a swift boat¹ through the hostile waterways of the Mekong Delta. One day, while on patrol in the Bay Hap River, the craft comes under heavy enemy fire. A Green Beret named James Rasmussen goes overboard. The young Lieutenant, himself wounded, bleeding, and in a position directly in the line of enemy fire, rescues his fellow serviceman.² Or did he? That was the question raised by an obscure political organization in the weeks following the former Navy Lieutenant's nomination for President of the United States at the 2004 Democratic National Convention.

The group questioning Senator John Kerry's Vietnam War service, Swift Boat Veterans for Truth,³ was one of the many independent political organizations that raised and spent millions of dollars during

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1. Swift boats, officially named Patrol Crafts Fast or PCFs, operated in the shallow waterways of Southeast Asia during the Vietnam War. See, e.g., GlobalSecurity.org, Patrol Craft Fast (PCF) Swift Boat, <http://www.globalsecurity.org/military/systems/ship/pcf.htm> (last visited Sept. 19, 2005). Crews of the fifty-one foot long boats inspected the papers and cargos of civilian boats and carried combat troops in and out of hostile areas. *Id.*

2. See Michael Dobbs, *Swift Boat Accounts Incomplete: Critics Fail to Disprove Kerry's Version of Vietnam War Episode*, WASH. POST, Aug. 22, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A21239-2004Aug21.html>; see also John Kerry in Vietnam, http://www.johnkerry.com/about/john_kerry/service.html.

3. See Swift Vets and POWs for Truth, Home Page, <http://www.swiftvets.com/> (last visited Sept. 18, 2005).

the 2004 election.⁴ These organizations, known as § 527 political groups—named for the section of the Internal Revenue Code (“IRC” or “Code”)⁵ that sanctions their existence—can run advertisements and spend money as long as they do not advocate one candidate and do not coordinate with political parties.⁶ Democratic-oriented 527 groups, led by America Coming Together⁷ and the Media Fund,⁸ raised over \$321 million in their unsuccessful attempt to unseat President Bush in 2004,⁹ while Republican-oriented 527 political groups, led by the Progress for America Voter Fund,¹⁰ raised \$84 million in their efforts to re-elect President Bush.¹¹ Although out-raised and out-spent by nearly four to one, the Republican-oriented organizations appear to have spent their money more wisely. Indeed, at a cost of only \$546,000 and airing only on four cable television channels, the Swift Boat Veterans for Truth advertisement questioning John Kerry’s military service may well be the best remembered 527 group expenditure

4. See Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in *THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT* ch. 5, at 3 (Michael J. Malbin, ed., forthcoming Mar. 2006), http://www.campaignfinanceinstitute.org/studies/ElectionAfterReform/pdf/EAR_Chapter5_WeissmanHassan.pdf.

5. See I.R.C. § 527(a) (2000).

6. See *Buckley v. Valeo*, 424 U.S. 1, 79 (1976). (“[T]he words political committee . . . need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”). Section 527 organizations do not fall into this category, i.e., since they are not under candidate control and have a major purpose independent of nominating or electing a candidate, they are not political committees for the purposes of the Federal Election Campaign Act. See Heather L. Sidwell, Comment, *Taming the Wild West: The FEC’s Proposed Regulations to Bridle “527” Political Groups*, 56 ADMIN. L. REV. 939, 946 (2004) (“In order to avoid overbreadth, the Supreme Court in *Buckley v. Valeo* construed the definition of political committee narrowly to prevent incorporating groups engaged in purely ‘issue discussion.’”).

7. See America Coming Together, Act 2.0 Building for the Future, <http://ac-there.com/plan> (last visited Sept. 10, 2004) (discussing the organization’s primary purpose of building a long-term progressive grassroots infrastructure). This organization announced in August 2005 that it was ceasing operations. See Glen Justice, *Democratic Fund-Raiser Unit Is Curtailing Most Operations*, N.Y. TIMES, Aug. 4, 2005, at A14.

8. The Media Fund was established November 5, 2003 to “communicate with the public on issues that relate to the election of candidates for federal, state or local office or the legislative process in a manner that does not expressly advocate the election or defeat of a particular candidate.” The Media Fund, Political Organization Notice of Section 527 Status, Form 8871 (filed with the Internal Revenue Service November 6, 2003), available at <http://forms.irs.gov/politicalOrgsSearch/search/Print.action?formId=10700&formType=E71> (last accessed Sept. 19, 2005).

9. See Weissman & Hassan, *supra* note 4, at 3.

10. See Progress for America Voter Fund, Home Page, <http://www.pfavoterfund.com/> (last visited Sept. 10, 2005) (describing the organization as “a conservative issue advocacy organization”).

11. See *id.*

of the 2004 election.¹² The advertisement was strategically aired at precisely the right time to crush Senator Kerry's post-convention momentum.¹³

Within weeks of the swift boat advertisement controversy, proponents of campaign finance reform introduced legislation in Congress intended to regulate these § 527 political groups.¹⁴ Proponents of the proposed legislation contended that these groups should be subject to the same rules as other political action committees. Proponents further argued that § 527 groups have flourished in large part because they are not limited by the restrictions that the Bipartisan Campaign Reform Act of 2002¹⁵ ("BCRA") imposes on other political action committees.¹⁶ Thus, the proposed legislation attempted to close what some perceived as a loophole in the BCRA.¹⁷ Although § 527 reform failed to advance in the 108th Congress, proponents introduced the 527 Reform Act of 2005¹⁸ in the 109th Congress.

Even though the 2004 election is history, the impact of 527 groups continues in 2005. One major publication reported a media

12. 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, A7.

13. See Rasmussen Reports, Presidential Tracking Poll: Bush-Kerry, <http://www.rasmussenreports.com/Weekly%20Tracking%20Updates.htm>. Senator Kerry enjoyed a modest 2.0% lead in the July 29 Rasmussen weekly tracking poll taken immediately following the Democratic convention. *Id.* The lead expanded to 2.8% in the August 12 Rasmussen tracking poll. *Id.* The August 26 Rasmussen tracking poll, taken after two weeks of publicity for the Swift Boat advertisements, showed President Bush with a narrow 0.3% lead, which he expanded to 2.8% following the Republican convention the following week. *Id.* President Bush never relinquished the lead in the Rasmussen poll. *Id.* Bush bested Senator Kerry by 2.4% in the general election, 50.7% to 48.3%. See, e.g., Dave Leip's Atlas of U.S. Presidential Elections, 2004 Presidential Election Results, <http://www.uselectionatlas.org/> (follow "2004" hyperlink; then follow "National Results" hyperlink) (last visited Sept. 10, 2005).

14. See 150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) (introducing the 527 Reform Act of 2004, S. 2828, 108th Cong. (2004)).

15. Pub. L. No. 107-155, 2002 U.S.C.A.N. (116 Stat.) 81 (to be codified in scattered sections of 2 U.S.C.).

16. See 151 CONG. REC. S973 (daily ed. Feb. 3, 2005) (statement of Sen. Feingold).

17. See *id.* ("The soft money loophole was opened by FEC rulings in the late '70s. By the time we started work on the BCRA, the problem had mushroomed When we passed BCRA, I said we would have to be vigilant to make sure that the FEC enforced the law and that similar loopholes did not develop. That is what we have been doing for the past three years, and what are again doing today."); 150 CONG. REC. S576, S577 (daily ed. Feb. 4, 2004) (statement of Sen. McCain) ("After the success of *McConnell v. FEC*, we cannot sit idly by and allow this potentially massive circumvention of campaign finance laws. BCRA finally closed soft money loopholes, and . . . new ones should not and cannot be tolerated.").

18. S. 271, 109th Cong. (2005); H.R. 513, 109th Cong. (2005); see also 151 CONG. REC. S973 (daily ed. Feb. 3, 2005) (statement of Sen. Feingold).

group study noting \$70 million in political advertisement spending in the first half of the year alone.¹⁹ As § 527 groups increase their spending and advocacy, pressure will mount on Congress to regulate them before the 2006 election cycle begins in earnest.

This Comment contends that attempts to regulate § 527 organizations, primarily by imposing contribution limits, infringe on the basic First Amendment freedoms of speech, expression, and association. While preventing corruption, or even the appearance of it, has been held to be a compelling enough interest to limit political contributions in *Buckley v. Valeo*²⁰ and *McConnell v. FEC*,²¹ corruption concerns in relation to § 527 organizations do not rise to the levels faced in those cases. The requirement that § 527 organizations operate independently of candidates and political parties, without coordinating activities, diminishes the opportunity for corruption. Furthermore, fears of actual corruption, or even the appearance of corruption, are significantly reduced when an individual or advocacy group makes an independent expenditure rather than a direct contribution to a political candidate. Finally, the activity of § 527 political groups further removes political parties and corporate interests from the equation and brings political speech closer to the people. Even assuming, *arguendo*, that corruption concerns proved to be compelling enough, this reform legislation would not adequately prevent it because its proposed disclosure requirements duplicate those already in place today. The most likely result of imposing contribution limits is less political speech. The better alternative to additional regulation is to encourage advocacy groups to fight objectionable political speech with more political speech.

Part I of this Comment describes § 527 political groups and their place in the American campaign finance apparatus. Drawing a distinction between § 527 groups and political committees regulated by the Federal Election Commission ("FEC"), this Part also describes the cur-

19. Matthew Swibel, *Airing It Out*, FORBES, July 25, 2005, at 62 (citing study by TN-SMedia Intelligence-CMAG reporting a variety of spending including: \$8.3 million on social security, \$4.5 million on tort reform, \$4.4 on the battle over judicial nomination filibusters, \$1.5 million on the nomination of Attorney General Alberto Gonzalez, and \$75,000 on the nomination of John Bolton as Ambassador to the United Nations). Spending estimates for the November 2005 California Special Election exceed \$50 million and one conservative group anticipates spending \$18 million in an effort to ensure confirmation of President Bush's nominee to the United States Supreme Court. *Id.*

20. 424 U.S. 1 (1976) (upholding limits placed on contributions to presidential and congressional candidates imposed by Congress after the 1972 elections).

21. 540 U.S. 93 (2003) (upholding the prohibition of soft money contributions to national political parties). See *infra* note 61 (defining soft money).

rent regulatory structure under which § 527 political groups operate today and how they fit into the overall structure of America's campaign finance system.

Part II of this Comment discusses the 527 Reform Act of 2005, legislation introduced in Congress to regulate § 527 political groups as political committees, subject to the jurisdiction of the FEC. This proposed legislation also imposes restrictions on the types of funds organizations can use for voter mobilization or public communications as well as limiting contributions to \$25,000 per donor, per year for a § 527 political organization.

Part III of this Comment examines the key holding of *Buckley* that spending money is a form of political speech²² and explores why the United States Supreme Court upheld the BCRA's ban on soft money in *McConnell*.²³ The *Buckley* holding underlies all campaign finance regulation enacted over the last three decades.²⁴ Moreover, to justify campaign finance reform legislation in both *Buckley* and *McConnell*, the Supreme Court spoke of the government's interest in preventing corruption or even avoiding the appearance of corruption. This interest in reducing corruption loses merit as political speech moves further away from the candidates and political parties and closer to the citizenry through their political associations, such as § 527 organizations.²⁵ Finally, bringing § 527 groups under the FEC disclosure um-

22. See generally *Buckley*, 424 U.S. at 14–23 (1976).

23. See *McConnell*, 540 U.S. 93, 224 (“In the main we uphold BCRA’s two principal, complementary features: the control of soft money and the regulation of electioneering communications.”).

24. See generally *McConnell*, 540 U.S. 93; *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986); *Buckley*, 424 U.S. at 1; *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 53 (D.D.C. 1999).

25. The regulation and political activities of organizations organized under § 501(c) of the IRC are not in the scope of this Comment and are not the target of the 527 Reform Act of 2005. See 151 CONG. REC. S973 (daily ed. Feb. 24, 2005) (statement of Sen. Feingold) (stating that nothing in the 527 Reform Act of 2005 “will affect legitimate 501(c) advocacy groups”); S. 271, 109th Cong. § 4(3) (2005); see also *Regulation of Sec. 527 Political Interest Organizations: Hearing on S. 271 Before the S. Comm. on Rules and Administration*, 109th Cong. 5 (2005) (statement of Frances R. Hill, Professor, Univ. of Miami Sch. of Law), <http://rules.senate.gov/hearings/2005/HillTestimony.pdf> (noting that neither section 501(c)(3) nor 501(c)(4) organizations are “organized for the primary purpose of influencing the outcome of elections”). But see *Regulation of Sec. 527 Political Interest Organizations: Hearing on S. 271 Before the S. Comm. on Rules and Administration*, 109th Cong. 3 (2005) (statement of Robert F. Bauer, Chair, Political Law Group), <http://rules.senate.gov/hearings/2005/BauerTestimony.pdf> (noting that the Bipartisan Campaign Reform Act of 2002 was just “one stage in a multi-stage program of regulating money in politics” and that proposed legislation regulating 527 political groups “is the next phase . . . [and] is certain not to be the last”). Mr. Bauer also noted that

brella is not necessary given the disclosure requirements already placed upon them by the Internal Revenue Service (“IRS”).

Part IV of this Comment purports that if the true goal of the 527 Reform Act is merely to limit unpopular speech, a better alternative to the 527 Reform Act is to fight offensive speech with more political speech. No amount of disclosure, contribution limits, or other regulations would have effectively rebutted the charges made in the Swift Boat Veterans for Truth advertisement. Only more political speech could have blunted the advertisement’s effectiveness and challenged its truthfulness.

I. Regulation of Political Groups Under Section 527 of the Internal Revenue Code

A. Section 527 Organizations Defined

Section 527 of the IRC exempts political organizations from federal income taxes.²⁶ Congress enacted § 527 in 1975 specifically to exempt contributions to political organizations and candidates from federal income tax.²⁷ The IRC defines a political organization as any “association, fund, or other organization . . . organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”²⁸ The Code further defines exempt functions as “influencing or attempting to influence the selection, nomination, [or] election . . . of any individual to any Federal, State, or local public office”²⁹

[b]y empowering the FEC to determine whether an organization is an IRC § 527 “political organization,” the bill would surely encourage complaints to the FEC that various organizations, particularly 501(c)s, were operating as 527s, not as 501(c)s. In light of the reform community’s distrust of 501(c) advocacy and voter mobilization programs, this is not by any means a remote possibility.

Id. at 8; PUBLIC CITIZEN’S CONGRESS WATCH, *THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS 5–7* (2004), available at <http://www.stealthpacs.org/documents/mainreport.pdf> (calling for the IRS, FEC, and Congress to improve disclosure of 501(c) organizations’ election activities); Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 287 (2004) (calling for enhancing the disclosure requirements for 501(c) organizations).

26. See I.R.C. § 527(a) (2000).

27. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359 (11th Cir. 2003); see also David D. Storey, Comment, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167, 176 (2002) (noting that donations to section 527 political organizations are exempt from the gift tax).

28. I.R.C. § 527(e)(1) (2000).

29. *Id.* § 527(e)(2).

Thus, any organization whose primary purpose is to raise and spend money in order to influence an election qualifies as a valid political organization under § 527 and is entitled to tax-exempt status.³⁰ This includes political parties, as well as federal, state, and local political action committees and candidate committees.³¹ Some § 527 groups, however, like Swift Boat Veterans for Truth, can avoid having to comply with the Federal Election Campaign Act of 1971 (“FECA”)³² as well as regulation by the FEC.³³ Thus, it is not the tax laws that apply to these particular § 527 organizations that are important, but the campaign finance laws that do *not* apply to them that are the most significant.³⁴

B. Avoiding Regulation by the FEC

The FEC defines a “political committee” as one that makes contributions and expenditures for the purpose of influencing elections.³⁵ Under FECA, political committees must register with the FEC, adhere to strict disclosure requirements, and comply with contribution and

30. See *id.* § 527(c)(3); see also Storey, *supra* note 27, at 175.

31. See I.R.C. § 527(e). A hypothetical federal candidate committee might be “Jane Doe for United States Senate,” while a hypothetical local committee might be “Susan Smith for Mayor.” Senator Barbara Boxer’s “PAC for a Change” is an example of a federal political action committee.

32. See generally Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 1972 U.S.C.C.A.N. (86 Stat.) 3 (codified as amended at 2 U.S.C. §§ 431–55 (2000)).

33. Any political organization operating under § 527 must register with the IRS. I.R.C. § 527(i) (2000). One exception to this requirement exists for an organization that does not reasonably anticipate \$25,000 or more in gross receipts during a taxable year. *Id.* § 527(i)(5)(B) (allowing small political organizations to function without burdening them with disclosure and reporting requirements). A second exception exempts state or local candidate committees as well as state and local party committees from the registration requirement. *Id.* § 527(i)(5)(C) (granting these committees, such as the Texas Republican Party or the Alameda County Democratic Central Committee, tax-exempt status without the need for registration with the IRS). An organization falling under § 527 must disclose its expenditures and contributions to the IRS. See generally *id.* § 527(j). Exceptions to the disclosure requirements apply to state and local candidate committees, state and local party committees, qualified state or local political organizations, and organizations that do not reasonably anticipate gross receipts of \$25,000 or more during any taxable year. *Id.* § 527(j)(5)(B)–(D). A “qualified State or local political organization” is a political organization that influences, or attempts to influence, only state or local elections and is subject to state laws requiring disclosure of expenditures and contributions. *Id.* § 527(e)(5)(A). In short, a political organization that uses dues, contributions, or fund-raising proceeds for the purpose of influencing elections can treat those sources of income as tax-exempt. See *id.* § 527(c)(3).

34. Michael C. Dorf, *Why “Swift Boat Veterans for Truth” and Other “527” Organizations Can’t Be Silenced*, FINDLAW’S LEGAL COMMENT., Sept. 1, 2004, <http://writ.news.findlaw.com/dorf/20040901.html>.

35. ROBERT F. BAUER, *MORE SOFT MONEY HARD LAW* 58–59 (2004).

expenditure limits.³⁶ *Buckley* noted that “the words ‘political committee’ . . . need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”³⁷ Currently, an organization falls under § 527 provisions, rather than FECA, if it does not fall within that definition.³⁸ These § 527 organizations are not subject to the contribution limits set forth in FECA.³⁹ Nor are these 527 groups subject to FEC contribution and expenditure reporting requirements that political committees are subject to, although the larger ones must disclose contributions and expenditures to the IRS.⁴⁰

As originally enacted, § 527 did not contain any disclosure requirements because it was believed that tax-exempt political organizations were covered under the FECA disclosure rules.⁴¹ One year after the enactment of § 527, however, *Buckley v. Valeo*⁴² “effectively eliminated disclosure requirements for anything other than express advocacy.”⁴³ Thus, in order for § 527 organizations to avoid FEC regulation, they must keep in mind the magic words of *Buckley* and avoid “expressly advocating” the election or defeat of a federal candidate.⁴⁴ For example, organizations may send out a voter guide con-

36. *Id.* at 59.

37. *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

38. See discussion *supra* note 6 and accompanying text.

39. See 2 U.S.C. § 441a(a) (2000) (dollar limits on contributions).

40. See *infra* Part III.D. Organizations that reasonably expect annual gross receipts in excess of \$25,000 must comply with the disclosure requirements. I.R.C. § 527(j)(5)(B)–(D).

41. See *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1359–60 (11th Cir. 2003). In *Mobile Republican Assembly*, the court quoted the following statement made by Senator Carl Levin in 2000:

Congress . . . assumed that [section 527] . . . organizations would be filing with the FEC under the campaign finance laws for the obvious reason that the language for both coverage by the IRS and coverage by the FEC were the same—“influencing an election.” . . . [I]t was assumed that section 527 didn’t need to require disclosure with the IRS, since the FEC disclosure was considerably more complete.

Id. at 1359 n. 1 (internal citation omitted).

42. 424 U.S. 1 (1976).

43. *Mobile Republican Assembly*, 353 F.3d at 1360. In *Mobile Republican Assembly*, the Eleventh Circuit court interpreted *Buckley* as holding that under FECA, “expenditures” only included “‘express advocacy’ that explicitly called for the election or defeat of a particular candidate within a specific election.” *Id.* at 1359–60. See also *infra* Part III.A.1 (discussing *Buckley*).

44. The Code of Federal Regulations defines express advocacy as any communications urging the election or defeat of a clearly identified candidate. 11 C.F.R. § 100.22 (2005). Clearly identified is defined as “the candidate’s name, nickname, photograph, or drawing . . . [or if] the identity of the candidate is otherwise apparent through an unambiguous reference . . . or through an unambiguous reference to his or her status as a candi-

taining candidates' voting records and their pictures.⁴⁵ This would be perfectly valid under § 527 as long as the organization never expressly advocates the election or defeat of one of the candidates.⁴⁶

II. The 527 Reform Act of 2005 Aims to Regulate 527 Political Organizations

A. Failure of the FEC to Adopt Proposed Regulations Regulating Section 527 Political Groups in Advance of the 2004 Election

The FEC published a Notice of Proposed Rulemaking on March 11, 2004, which proposed to regulate § 527 political groups as "political committees."⁴⁷ Included in these proposed regulations were numerous proposals and questions surrounding regulating § 527 political groups. Proponents of additional regulation argued that the integrity of the political process was at stake and that § 527 political groups should be subject to the same strict reporting, contribution limits, and source prohibitions as political committees.⁴⁸ Conversely, opponents of the proposed regulations contended that the allegations of circumventing the law were greatly exaggerated.⁴⁹ The FEC voted on May 13, 2004 to postpone consideration of the proposed rules for at least ninety days,⁵⁰ thus ensuring that no new restrictions on § 527 political groups would be in place for the 2004 general election.⁵¹

date" 11 C.F.R. § 100.17. See also *McConnell v. FEC*, 540 U.S. 93, 126 (2003) ("[T]he use or omission of 'magic words' such as 'Elect John Smith' or 'Vote Against Jane Doe' marked a bright statutory line separating 'express advocacy' from 'issue advocacy.'").

45. See 11 C.F.R. § 114.4(c)(5) (2005). A corporation or labor union producing a voter guide:

[M]ust not act in cooperation, consultation, or concert with or at the request or suggestion of the candidates, the candidates' committees or agents regarding the preparation, contents and distribution of the voter guide, and no portion of the voter guide may expressly advocate the election or defeat of one or more clearly identified candidate(s) or candidates of any clearly identified political party.

Id. § 114.4(c)(5)(i).

46. Storey, *supra* note 27, at 175–76.

47. See Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). The FEC considered whether "it should revise current regulations to reflect that certain communications and certain voter drive activities have the purpose of influencing federal elections." *Id.* at 11,738.

48. See Sidwell, *supra* note 6, at 950.

49. See *id.* at 950–51.

50. Julia Malone, *Election 2004: FEC Rejects New 'Soft Money' Limits*, ATLANTA J. & CONST., May 14, 2004, at A3.

51. *Id.* The FEC eventually considered the rules; however, it adopted only regulations affecting solicitation and the allocation of expenses. See 11 C.F.R. § 100.57 (2005) (solicitation); 11 C.F.R. § 106.6 (allocation).

B. Introduction of the 527 Reform Act

The failure of the FEC to regulate § 527 political groups as political committees, and the controversy generated by the Swift Boat Veterans for Truth, prompted Senator John McCain and Representative Christopher Shays, believing that § 527 organizations were engaging in illegal activities, to introduce legislation in Congress to achieve the same goal.⁵² McCain's bill, the 527 Reform Act of 2005 ("527 Reform Act"),⁵³ would require all § 527 political groups to "register as political committees with the FEC and comply with federal campaign finance laws unless they are involved in non-federal election activities."⁵⁴ Senator McCain's proposed legislation seeks to accomplish three things. First, it seeks to bring § 527 political groups under the umbrella of FECA, subjecting them to federal campaign finance laws and regulation by the FEC.⁵⁵ Second, it seeks to establish new rules for political committees that make expenditures on activities in both federal and non-federal races.⁵⁶ Finally, it seeks to limit contributions to the non-federal account (which can include the soft money traditionally raised

52. See 150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) (introducing the 527 Reform Act of 2004 (S. 2828) claiming that 527 political groups were illegally spending soft money in an attempt to influence Federal elections—S. 2828 was not acted on by the 108th Congress).

53. S. 271, 109th Cong. (2005), H.R. 513, 109th Cong. (2005). S. 271 was amended by the Senate Committee on Rules and Administration and reported to the Senate as S. 1053. 151 CONG. REC. S5296 (daily ed. May 17, 2005) (statement of Sen. Lott) (reporting S. 1053). The most significant amendments increase the contribution limits for political action committees from \$5000 to \$7000, S. 1053, 109th Cong. § 6(a)–(c) (2005), prevent the FEC from regulating political activity on the Internet, *id.* § 5, and exempt voter drive activity by § 527 organizations, both partisan and non-partisan, from FEC regulation, *id.* § 2(b). See also Common Cause, 527 Groups, <http://www.commoncause.org> (follow "527" Reform" hyperlink) (last visited Sept. 20, 2005) (noting that the "reform community does not support the amended version of S. 271").

54. 151 CONG. REC. S973 (daily ed. Feb. 3, 2005) (statement of Sen. Feingold) (introducing S. 271). Sen. McCain originally introduced this legislation in the 108th Congress, but Congress did not act on it, and he and Sen. Feingold reintroduced it in the 109th Congress. See also 527 Reform Act of 2005, H.R. 513, 109th Cong. (2005) (containing language identical to S. 271). This companion legislation was introduced on February 2, 2005 in the House of Representatives by Rep. Christopher Shays. H.R. 513 was not amended by the House Administration Committee and thus remains identical to S. 271. See H.R. REP. NO. 109-181, at 1–6 (2005); Common Cause, *supra* note 53.

An alternative bill, the 527 Fairness Act of 2005, calls for no additional regulation of 527 groups and seeks to level the playing field by removing contribution limits on individuals and certain expenditure limits on political parties. See generally 527 Fairness Act of 2005, H.R. 1316, 109th Cong. (2005). While the 527 Fairness Act of 2005 desires a result similar to the one advocated in this Comment, this legislation is not within the scope of this Comment.

55. See 527 Reform Act of 2005, S. 271, 109th Cong. § 2 (2005).

56. S. 271 § 3.

from unions or corporations) of § 527 political organizations to \$25,000 per year per donor.⁵⁷

1. Bringing 527 Political Groups Under FECA

The proposed legislation adds “any applicable 527 organization” under the definition of political committee defined in FECA.⁵⁸ An applicable 527 organization under the 527 Reform Act is broadly defined as any organization “described in § 527 of the Internal Revenue Code” that is not exclusively engaged in non-federal election activity.⁵⁹ The effect of this designation would require § 527 political groups engaged in federal election activity to register with the FEC as political committees.⁶⁰ This would restrict their funding of expenditures to federal hard money contributions, even those expenditures that do not engage in express advocacy.⁶¹ Ultimately, this legislation prohibits § 527 political groups from raising and spending soft money for any federal election activity.⁶²

2. Extending Allocation Rules to 527 Political Groups

These proposed rules also require that at least half of funds expended on voter mobilization or public communications be from the organization’s federal account (composed of hard money—traditionally raised from individuals).⁶³ This “at least 50% rule” impacts both political committees regulated by the FEC today as well as § 527 groups that would fall under the FEC umbrella should the legislation

57. *Id.*

58. S. 271 § 2 (amending 2 U.S.C. § 431(4)).

59. *Id.* (describing non-federal activities as those in connection with (1) non-federal candidate elections, (2) state and local ballot initiatives, referenda, constitutional amendments, bond issues, or ballot issues, or (3) the nomination, selection, confirmation, or appointment of non-elected offices, such as judges).

60. Political organizations that have gross receipts less than \$25,000 are exempt from the registration requirements of I.R.C. § 527(i), as well as the provisions of the 527 Reform Act requiring registration with the FEC and compliance with federal campaign finance laws. *See* 151 CONG. REC. S973 (daily ed. Feb. 3, 2005) (statement of Sen. Feingold). *See also* I.R.C. § 527(i)(5)(b) (2004).

61. Contributions intended for use in federal elections that are subject to FECA’s disclosure requirements, source limitations, and amount limitations are known as “federal” or “hard” money contributions. *McConnell v. FEC*, 540 U.S. 98, 122 (2003); *EMILY’s List v. FEC*, 362 F. Supp. 2d 43, 46 n.1 (D.D.C. 2005) (mem.). “Nonfederal funds are also referred to as ‘soft money,’ which consists of funds that are raised outside of the source and amount limitations imposed by FECA, and are not intended for use in conjunction with federal elections.” *Id.* at 46 n.2.

62. 151 CONG. REC. S973 (daily ed. Feb. 3, 2005) (statement of Sen. Feingold).

63. S. 271 § 3.

be adopted.⁶⁴ In addition, the new rules would require organizations to pay 100% of voter mobilization or public communication expenditures from federal (hard money) funds when referring solely to federal candidates.⁶⁵

The proposed rules also significantly increase the amount of hard money that must be used in other circumstances. The “at least 50% rule” would apply to voter mobilization and public communications that refer to (1) one or more federal candidates in combination with one or more non-federal candidates, (2) a political party, even if no references to federal or non-federal candidates, and (3) a political party and only clearly identified non-federal candidates, even in the absence of a clearly identified federal candidate.⁶⁶ Finally, the 527 Reform Act extends the application of the controversial allocation rules the FEC adopted in late 2004, requiring allocation of at least 50% of administrative expenditures⁶⁷ to a political action committee’s (“PAC’s”)⁶⁸ federal account, to 527 political groups as well.⁶⁹

64. *Id.* § 3(a). This section amends FECA, thus subjecting all political committees regulated by the FEC to its provisions. *Id.* Under this bill, § 527 organizations would also fall under FECA’s jurisdiction, thus subjecting these organizations to these rules as well. *Id.* § 2.

65. *Id.* § 3 (“100 percent of the expenses for public communications or voter drive activities that refer to one or more clearly identified Federal candidates, but do not refer to any clearly identified non-Federal candidates, shall be paid with funds from a Federal account, with regard to whether the communication refers to a political party.”).

66. *Id.*

67. Administrative expenses include office supplies, utilities, rent, and salaries for individuals “not attributable to a clearly identified candidate.” 11 C.F.R. § 106.6(b)(1)(i) (2005).

68. A PAC being defined as a “segregated fund that a corporation, labor union, or political organization can create to collect voluntary contributions from individuals—but not corporate funds—and pass them on to candidates.” E. JOSHUA ROSENKRANZ, *BUCKLEY STOPS HERE: THE REPORT OF THE TWENTIETH CENTURY FUND/WORKING GROUP ON CAMPAIGN FINANCE LITIGATION* 24–25 (1998). Prior to 1974, the lack of individual contribution limits to political candidates decreased the incentive to contribute to a political action committee. After the 1974 amendments to the FECA, candidate contribution limits and higher allowable donations to PACs made them an increasingly attractive vehicle for campaign funds. See, e.g., Richard Briffault, *The Federal Election Campaign Act and the 1980 Election*, 84 COLUM. L. REV. 2083, 2095–96 (1984) (reviewing HERBERT E. ALEXANDER, *FINANCING THE 1980 ELECTION* (1983) and ELIZABETH DREW, *POLITICS AND MONEY* (1983)).

69. S. 271 § 3. See 11 C.F.R. §§ 100.57, 106.6 (2005); see also Glen Justice, *National Briefing Washington: Group Sues over Campaign Finance Rules*, N.Y. TIMES, Jan. 12, 2005, at A18 (reporting that EMILY’s List, a Democratic-leaning PAC, filed suit to block the implementation of new allocation rules codified in 11 C.F.R. § 106.6 (2005)). See Plaintiff’s Application for a Preliminary Injunction, *EMILY’s List v. FEC*, 362 F. Supp. 2d 43 (D.D.C. 2005) (No. 05-49(CKK)). Judge Kollar-Kotelly denied the request for a preliminary injunction on grounds that EMILY’s List was unlikely to prevail on the merits of their case. *EMILY’s List*, 362 F. Supp. 2d at 59.

From 1991 through the enactment of the BCRA, political parties functioned under allocation rules similar to those § 527 organizations function under today.⁷⁰ Unions and corporations were allowed to contribute soft money to political parties that they could partially use for voter registration and voter mobilization activities to influence federal elections.⁷¹ Congress altered the allocation rules for party committees with the BCRA by preventing national party committees from raising or spending any soft money on generic voter mobilization activities and severely restricted the ability of state party committees to do so.⁷² Supporters of the 527 Reform Act complain that after the BCRA, unions now contribute union dues to § 527 organizations they control that in turn, fund voter registration and voter mobilization efforts aimed at influencing federal elections.⁷³ Since unions are generally prohibited from making contributions and expenditures in federal elections,⁷⁴ supporters allege that this flow of union money to § 527 organizations circumvents campaign finance laws.⁷⁵

3. Limiting Contributions to 527 Political Groups

Today, an individual can give an unlimited amount to 527 political groups—witness billionaire George Soros’s total contributions of \$24 million in the 2004 election cycle.⁷⁶ Under the 527 Reform Act, contributions would be limited to \$25,000 per year.⁷⁷ This limit applies to a committee’s federal election activity *and* non-federal activity.⁷⁸ This would severely restrict the amount of money a § 527 organization can raise to finance voter mobilization activities and elec-

70. EMILY’s List, 362 F. Supp. 2d at 47.

71. *Id.*

72. *Id.* State party committees are permitted to fund generic voter mobilization activities with an allocation of federal funds and “limited, regulated nonfederal funds.” *Id.* (citing 4 U.S.C.A. § 441i(b)(2) (West 2005)). These limited, regulated nonfederal funds are also known as Levin funds. See C.F.R. § 300.31 (2005) (defining Levin funds).

73. CAMPAIGN LEGAL CENTER, QUESTIONS AND ANSWERS CONCERNING S. 271, THE 527 REFORM ACT OF 2005, at 2 (2005), <http://www.campaignlegalcenter.org/attachments/1360.pdf>.

74. *McConnell v. FEC*, 540 U.S. 93, 116–17 (2003) (discussing the history of Congress’s attempts to limit the influence of unions on federal elections).

75. CAMPAIGN LEGAL CENTER, *supra* note 73, at 2.

76. Weissman & Hassan, *supra* note 4, at 14 (summarizing contributions of 527 donors from information disclosed to the IRS).

77. 527 Reform Act of 2005, S. 271, 109th Cong. § 3 (2005); see also 150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) (“To put it in simple terms, a George Soros could give \$25,000 per year as opposed to \$10 million . . .”).

78. See S. 271 § 3. The 527 Reform Act also treats “committees which are directly or indirectly established, financed, maintained, or controlled by the same person or persons . . . as one account.” *Id.*

tioneering communications for use in both federal and non-federal elections.

The swift boat group registered with the IRS in April, 2004.⁷⁹ Their first public exposure was in early August.⁸⁰ At that time, the group had raised \$850,000—\$700,000 of this amount coming from only two donors.⁸¹ FEC Commissioner David Mason testified that had the proposed contribution limits been in place at the time, they “very likely would have effectively muzzled this group.”⁸² Considering the uproar over the content of the swift boat advertisement and the timing of the proposed legislation, a strong case can be made that the legislation’s intent is to regulate this group’s message.⁸³

III. Corruption Concerns Surrounding Section 527 Political Groups Do Not Rise to the Levels Faced in *Buckley* and *McConnell*

A. Political Speech Forms the Foundation of the First Amendment

1. *Buckley v. Valeo* Protects Political Spending as Speech

Political speech forms one of the core freedoms protected by the First Amendment.⁸⁴ The Supreme Court recognized this in *Mills v. Alabama*,⁸⁵ declaring that:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussion of candidates, structures and forms of government, the manner in which

79. *Regulation of Sec. 527 Political Interest Organizations: Hearing on S. 271 Before the S. Comm. on Rules and Administration*, 109th Cong. 5 (2005) (statement of David M. Mason, Commissioner, Federal Election Commission), <http://rules.senate.gov/hearings/2005/MasonTestimony.pdf> [hereinafter Mason Statement].

80. *Id.*

81. *Id.*

82. *Id.* (“[I]t is a very real possibility that the Swift Boat group might never have gotten off the ground with a paid media effort had it had to rely on individual donations of no more than \$5,000. As it was, the group took three months to raise the seed money, less than \$50,000 of which was permissible for a Federal political committee, for its initial media buy.”).

83. If Congress is found to be regulating the content of speech, then the regulation is subject to strict scrutiny. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPALS AND POLICIES* § 11.2.1 at 904 (2d ed. 2002). A strict scrutiny analysis is not in the scope of this Comment. See also *infra* note 113 and accompanying text.

84. CHERMERINSKY, *supra* note 83, § 11.3.6.3 at 1032–33 (“If there is a hierarchy of protected speech, political speech occupies the top rung.”).

85. 384 U.S. 214 (1966).

government is operated or should be operated, and all such matters relating to political processes.⁸⁶

Ten years later, the Court applied this holding to political contributions and spending in the landmark case of *Buckley v. Valeo*.⁸⁷ James L. Buckley, then a United States Senator, and a number of political candidates challenged the constitutionality of the 1974 amendments made to FECA (“1974 Act”).⁸⁸ Congress amended FECA in 1974 in response to the Watergate scandal.⁸⁹ At the time, these amendments to FECA were viewed as “the most comprehensive reform legislation [ever] passed by Congress concerning the election of the President, Vice-President, and members of Congress.”⁹⁰

The 1974 Act established contribution limits of \$1,000 to any single candidate per election (and an overall contribution limit of \$25,000 for any one contributor).⁹¹ Congress also limited independent expenditures by groups and individuals on behalf of a clearly identified candidate to \$1,000 per year and imposed spending limits on various federal candidates as well as political parties’ spending on their national conventions.⁹² It also required the reporting and disclosure of contributions and expenditures over certain thresholds.⁹³ PACs, which were virtually unheard of until after FECA, were allowed to contribute \$5,000 per election.⁹⁴ Finally, the 1974 Act created the

86. *Id.* at 218–19; CHEMERINSKY, *supra* note 83, § 11.3.6.3, at 1033.

87. 424 U.S. 1, 14 (1976).

88. *Id.* at 6–8.

89. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 1974 U.S.C.A.N. (88 Stat.) 1263 (codified as amended at 2 U.S.C. §§ 431–455 and I.R.C. §§ 9001–9042). President Nixon received 142 contributions in excess of \$50,000 in his 1972 re-election bid, including \$2 million from W. Clement Stone. ROSENKRANZ, *supra* note 68, at 23. Nixon also received \$750,000 in illegal donations from twelve corporations. *Id.* Nixon’s secretary Rosemary Woods kept a secret list of Nixon’s largest contributors. *Id.* The chairman of a corporation owning an oil refinery under investigation by the Interior Department secretly contributed over \$200,000 to the presidential campaigns of both Nixon and Democratic Senator Henry Jackson, Chairman of the Senate Interior Committee at the time. *Id.* Contributions to congressional candidates were similarly excessive with thirty-five contributors providing \$1.4 million. *Id.*

90. *Buckley v. Valeo*, 424 U.S. 1, 7 (1976) (alteration in original) (internal citation omitted).

91. *Id.* See also ROSENKRANZ, *supra* note 68, at 25 (noting that contributions to *all* federal candidates, national parties, and PACs were aggregated in determining the \$25,000 cap). Contributions to the national committees of the political parties were capped at \$20,000 per year for individuals and \$15,000 for PACs. *Id.*

92. *Buckley*, 424 U.S. at 7.

93. *Id.*

94. ROSENKRANZ, *supra* note 68, at 24; see also discussion *supra* note 68 (defining PAC).

system of public funding for presidential elections (via a check box on individual income tax returns) and established the FEC.⁹⁵

The Court upheld all the provisions of the 1974 Act except for the expenditure limits.⁹⁶ While both contribution and expenditure limits involved fundamental First Amendment rights, the Court found that the expenditure limits were a much more significant imposition on those rights.⁹⁷ The Court also rejected the government's argument of an interest in "equalizing the relative ability . . . to influence the outcome of elections."⁹⁸ The idea that limiting campaign spending by a wealthier group to enhance the speech of a less financially capable group was found to be "wholly foreign to the First Amendment."⁹⁹

The legacy of *Buckley*, that "political spending is equivalent to speech and [is] therefore protected by the First Amendment,"¹⁰⁰ has shaped the landscape of campaign finance debate for the last quarter-century.¹⁰¹ The Court's distinction between expenditures and contributions, and its analysis of issue advocacy versus express advocacy, form the underpinnings of the campaign finance regulatory system in place today.¹⁰² *Buckley* led to a virtual explosion in the growth of political action committees.¹⁰³ Soft money contributions, in the form of donations from unions, corporations, and wealthy individuals who exceeded their maximum permissible federal contribution limits, soared—as did the clamor for increased regulation of these contribu-

95. *Buckley*, 424 U.S. at 7.

96. *Id.* at 23.

97. *Id.*

98. *Buckley*, 424 U.S. at 48.

99. *Id.* at 48–49.

100. Storey, *supra* note 27, at 170; *see also* CHEMERINSKY, *supra* note 83, § 11.3.6.3, at 1034.

101. *See* Storey, *supra* note 27, at 170.

102. *See id.* Issue advocacy came to prominence during the debate over then-First Lady Hillary Clinton's health care proposal. The memorable "Harry and Louise" television advertisements were the first significant issue advertisements and had a profound impact on the eventual demise of Mrs. Clinton's plan. *See* Swibel, *supra* note 19, at 62. The Health Insurance Association of America ran advertisements criticizing the Clinton healthcare plan. Ryan Ellis, Comment, "Electioneering Communication" Under the Bipartisan Campaign Reform Act of 2002: A Constitutional Reclassification of "Express Advocacy," 54 CASE W. RES. L. REV. 187, 194 (2003). The advertisements featured a fictitious couple named Harry and Louise lamenting about the plan's effect on them. *Id.* These advertisements were targeted at members of the congressional committee responsible for considering the plan and encouraged citizens to contact their representatives. *Id.*

103. *See, e.g.,* Adam Winkler, McConnell v. FEC, *Corporate Political Speech, and the Legacy of the Segregated Fund Cases*, 3 ELECTION L. J. 361, 365 (2004) (reporting the growth of corporate-affiliated PAC spending in federal elections from \$1.4 million in 1968 to \$37 million in 1980).

tions.¹⁰⁴ This clamor energized reform efforts that culminated with the passage of the BCRA in 2002.¹⁰⁵

2. *McConnell v. FEC* and the Bipartisan Campaign Reform Act of 2002

The BCRA aimed to curb the expansive growth of political action committees by attempting to reduce the influence of soft money in federal elections.¹⁰⁶ The BCRA accomplished this in a number of ways, beginning with the prohibition of soft money contributions to political parties.¹⁰⁷ It supported this prohibition with a number of provisions designed to prevent the national parties from creatively circumventing the soft money ban.¹⁰⁸ The BCRA also prohibited the use of soft money to sponsor broadcast advertisements within sixty days of a general election.¹⁰⁹

Senator Mitch McConnell, along with a number of interest groups, challenged the BCRA in court. The Supreme Court, however, upheld many key provisions of the Act in *McConnell v. FEC*.¹¹⁰ The Court subjected the soft money ban to less rigorous scrutiny than the strict scrutiny applied to the expenditure limits in *Buckley*.¹¹¹ Although the Court detailed their recent history of applying this “less rigorous scrutiny” standard,¹¹² it also cited *Buckley* in noting that contribution

104. See, e.g., *McConnell v. FEC*, 540 U.S. 93, 123–24 (2003); see also discussion *supra* note 61 (defining soft money).

105. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 2002 U.S.C.A.N. (116 Stat.) 81 (to be codified in scattered sections of 2 U.S.C.).

106. See 150 Cong. Rec. S576, (daily ed. Feb. 4, 2004) (statement of Sen. McCain) (noting that he and Sen. Feingold introduced the BCRA “to limit the influence of special interests on Federal campaigns”); see also Joshua Downie, Note, *McConnell v. FEC: Supporting Congress and Congress’s Attempt at Campaign Finance Reform*, 56 ADMIN. L. REV. 927 (2004).

107. See 2 U.S.C.A. § 441i(a) (West 2004).

108. Downie, *supra* note 106, at 929 (noting that the BCRA prohibits (1) state and local parties from using soft money for federal election activities, (2) political parties from using tax-exempt organizations, i.e., 527 organizations, engaging in electioneering activities as a conduit for soft money, (3) federal candidates and officeholders from raising and spending soft money, as well as limiting their involvement in doing so in state and local elections, and (4) non-federal candidates from soliciting and spending soft money on public communications promoting or attacking federal candidates).

109. See Sidwell, *supra* note 6, at 943 n.22.

110. 540 U.S. 93, 224 (2003) (upholding the soft money ban and electioneering communications regulation provisions); *id.* at 233 (upholding provisions requiring clear identification of a candidate or committee and their authorization, or lack thereof, of certain electioneering communications); *id.* at 233, 246 (reversing the district court and upholding a requirement that broadcasters “keep publicly available records of politically related broadcasting requests” as constitutional).

111. *Id.* at 141.

112. *Id.* at 138 n.40.

limits would burden free speech “if they are so low as to ‘preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.’”¹¹³ This standard of less rigorous scrutiny “shows proper deference to Congress’s ability to weigh competing constitutional interests in an area in which it enjoys particular expertise.”¹¹⁴ Under this less rigorous scrutiny standard, the Court reasoned that the importance of avoiding corruption outweighed the burdens imposed on the First Amendment right to free speech.¹¹⁵ As the next Part of this Comment examines, the validity of this reasoning is weaker in the context of § 527 organizations.

B. The Corruption Argument Loses Credibility as Political Speech Moves from the Political Parties and Candidates Towards Independent Political Groups and Associations

Individuals who donate money to § 527 political groups are exercising two of the most basic constitutional rights: the right to freedom of expression and the right of free political association. Both of these rights are enshrined in the First Amendment.¹¹⁶ Taken together, these rights support the belief that § 527 political groups are just extensions of the right of individuals to “band together and pool their resources to support a common message.”¹¹⁷ *Buckley* recognized, however, that this speech can be regulated to prevent corruption.¹¹⁸ *McConnell* continued to recognize the importance of campaign finance regulation in preventing both actual corruption and the appearance

113. *Id.* at 135 (quoting *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)). If Commissioner Mason’s assertions, Mason Statement, *supra* note 79 and accompanying text, are accurate, then the ability of the Swift Boat Veterans for Truth to produce and run their advertisement would have been severely burdened if they were unable to accumulate the contributions necessary to fund their efforts timely enough to have the desired effect. While this argument could push potential analysis of this legislation into strict scrutiny (by regulating the content of a political message), a strict scrutiny analysis is not in the scope of this Comment.

114. *McConnell*, 540 U.S. at 137 (2003). The Court also noted that this standard of review “provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.” *Id.*

115. *Id.* at 136.

116. See U.S. CONST. amend. I. (“Congress shall make no law . . . abridging the freedom of speech, or . . . the right of the people peaceably to assemble . . .”).

117. *Dorf*, *supra* note 34; see also *infra* note 218 and accompanying text (Justice Scalia’s quote).

118. See *Buckley v. Valeo*, 424 U.S. 1, 27 (1976); see also *Dorf*, *supra* note 34.

of corruption.¹¹⁹ As this speech becomes further separated from the candidates and the political parties, however, this rationale loses much of its strength.

Buckley upheld FECA's first contribution limits to avoid both the dangers of actual corruption as well as the appearance of corruption when the "disturbing examples surfacing after the 1972 election" were fresh in their memory, demonstrating that the problem of corruption was "not an illusory one."¹²⁰ *Buckley* held that a limitation on a person's contributions survived First Amendment scrutiny because it involved "little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."¹²¹ *McConnell* noted numerous abuses related to soft money fundraising, including the infamous White House coffees during the Clinton Administration¹²² and the Republican Party's major donor programs,¹²³ and the access to elected offi-

119. *McConnell*, 540 U.S. at 136–38. Corruption in context of campaign finance reform being "the overt or implicit exchange of legislative votes in return for campaign contributions; or, more subtly, the determination of a legislative agenda on the basis of contributions; or, in some cases, even the mere 'appearance of corruption.'" BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM, 123 (2001).

120. *Buckley*, 424 U.S. at 27; see, e.g., discussion *supra* note 89 (detailing these examples).

121. *Buckley*, 424 U.S. at 21 (noting that "transformation of contributions into political debate involves speech by someone other than the contributor").

122. *McConnell*, 540 U.S. at 130 & n.28. A five-volume Senate Committee on Government Affairs report investigating possible illegal or improper activities by the Democratic National Committee ("DNC"), the Republican National Committee ("RNC"), and others during the 1996 election described this program:

Between January 11, 1995 and August 23, 1996, the White House hosted 103 coffees. Most lasted at least an hour, and the President attended the vast majority of them. Approximately 60 of these were DNC-sponsored coffees, 92 percent of the guests at which were major Democratic Party contributors. These guests made contributions during the 1996 election cycle of \$26.4 million, an average contribution of over \$54,000 per person, with one-third of their total donations, some \$7.7 million, given within a month of the donor's attendance at a White House coffee. For example, the five persons attending a coffee on May 1, 1996, in the Oval Office itself each contributed \$100,000 to the DNC one week later.

1 S. REP. NO. 105-167, at 41 (1998).

123. *McConnell*, 540 U.S. at 130–31 & n.30. The minority views of the Senate report described the Republican programs:

The Republican National Committee's two principal donor programs are Team 100, which requires "an initial contribution of \$100,000 upon joining, and \$25,000 in the subsequent 3 years," and the Republican Eagles, which requires members to contribute \$15,000 annually. To recruit members, the RNC's promotional materials promised that participants in the Team 100 and Eagles programs would receive special access to high-ranking Republican elected officials, including governors, senators, and representatives.

cial that these fund raising schemes provided the donor.¹²⁴ The Court also noted how advertisements paid for the political parties using soft money were often coordinated with, and even controlled by, candidates' campaigns.¹²⁵

A significant characteristic of § 527 groups is that they function independently from candidates and political parties. Federal regulations forbid coordination of expenditures between § 527 organizations and candidates or political parties—to do so would violate the definition of an independent expenditure.¹²⁶ If § 527 groups coordinate with the political parties or candidates on an advertisement, then the cost of the advertisement is considered an in-kind contribution to the political party¹²⁷ or candidate¹²⁸ and cannot exceed their statutory contribution limits. Coordination by the Bush campaign with the Swift Boat Veterans on their advertisements would have resulted in the Bush campaign receiving a \$546,000 in kind donation—far in excess of the limits proscribed in FECA.¹²⁹

5 S. REP. NO. 105-167, at 7968 (1998) (footnotes omitted).

124. *McConnell*, 540 U.S. at 130–31 (citing 1 S. REP. NO. 105-167; 2 S. REP. NO. 105-167; 5 S. REP. NO. 105-167); see also *id.* at 147 (“For their part, lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums of soft money to national committees not on ideological grounds, but for the express purpose of securing influence over federal officials.”).

125. *Id.* at 131 (citing 1 S. REP. NO. 105-167).

126. See 11 C.F.R. § 100.16 (2005). The regulation reads:

(a) The term independent expenditure means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents. A communication is “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents” if it is a coordinated communication under 11 CFR 109.21 or a party coordinated communication under 11 CFR 109.37.

(b) No expenditure by an authorized committee of a candidate on behalf of that candidate shall qualify as an independent expenditure.

(c) No expenditure shall be considered independent if the person making the expenditure allows a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents to become materially involved in decisions regarding the communication as described in 11 CFR 109.21(d)(2), or shares financial responsibility for the costs of production or dissemination with any such person.

Id.; see also *id.* §§ 109.21(b), 109.37(b).

127. See *id.* § 109.37(b) (party coordinated communication).

128. See *id.* § 109.21(b) (candidate coordinated communication).

129. See 2 U.S.C. § 441a(a) (2000) (contribution limits for federal candidates).

Many pundits felt that the superior financial advantage of Democratic-leaning 527 groups would give the Democratic Party a significant advantage in the 2004 election.¹³⁰ These pundits, however, forgot that these groups were legally required to operate independently from the Kerry campaign. The inability of the § 527 groups to coordinate their message with the Kerry campaign clearly indicates that significant spending, even of soft money, will not always influence the election in the way it is intended to. The head of the Media Fund, a Democratic-leaning 527 organization, noted in a post-election interview that “the federal election law prohibiting communication with the Kerry campaign created insurmountable obstacles in crafting effective, accurate responses to anti-Kerry ads.”¹³¹ Even Senator Kerry’s media advisor complained that the Democratic-oriented 527 media groups “didn’t do what we wanted done.”¹³²

Candidates and parties become less accountable for political speech as it becomes more distant from them.¹³³ If the parties and candidates are less accountable, then they are also less beholden to the individuals contributing to the organizations engaging in that speech. A candidate less beholden to individuals is also less subject to real or perceived corruption. Restrictions on the ability of political parties and candidates to coordinate or influence the advocacy decisions of § 527 groups allows them to actually advocate independently, further reducing the potential for corruption.

C. Independent Advocacy Presents Significantly Less Potential for Corruption than Direct Contributions

The hallmark of § 527 organizations is issue advocacy using uncoordinated, independent expenditures. The potential for corruption presented by these types of independent expenditures is appreciably less than that presented by direct contributions.

In *Buckley*, the Supreme Court rejected FECA’s original definition of “expenditure” as unconstitutionally vague.¹³⁴ Instead, the Court adopted a narrower construction of the term expenditure to mean,

130. See, e.g., Editorial, *Reversal of Campaign Fortunes*, WASH. TIMES, OCT. 31, 2004, at B02.

131. Edsall & Grimaldi, *supra* note 12, at A7 (paraphrasing comments by Harold Ickes, former White House Deputy Chief of Staff in the Clinton Administration and head of the Media Fund).

132. *Id.* (quoting Senator Kerry’s media advisor Tad Devine).

133. Dorf, *supra* note 34.

134. *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (interpreting the definition of expenditure in FECA as money spent “‘for the purpose of . . . influencing’ the . . . election of candidates for federal office”). See also 2 U.S.C. § 431(9)(A)(i) (2000).

for FECA purposes, “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”¹³⁵ This has become known as the “express advocacy” test.¹³⁶ The express advocacy test applies when a communication includes “the candidate’s name, nickname, photograph, or drawing . . . or [if] the identity of the candidate is otherwise apparent through an unambiguous reference . . . or through an unambiguous reference to his or her status as a candidate”¹³⁷ In distinguishing between express advocacy and issue advocacy, the United States Supreme Court ruled in *Buckley* that FECA could limit the amount of contributions made directly to a candidate, but found its limits on independent expenditures by persons unconnected with a candidate’s campaign unconstitutional.¹³⁸

The Court opined that the potential for corruption was high when an individual made a large direct *contribution* to a candidate, increasing the chances that the candidate, once in office, would adopt policies advocated by that large contributor.¹³⁹ Conversely, the Court felt that individuals making large independent *expenditures* on a candidate’s behalf would be less likely to influence the candidate once in office.¹⁴⁰

McConnell reaffirmed the special place of § 527 political groups noting that they remained “free to raise soft money to fund voter registration, GOTV [get out the vote] activities, mailings, and broadcast advertising (other than electioneering communications).”¹⁴¹ The Court concluded, “this disparate treatment does not offend the Con-

135. *Buckley*, 424 U.S. at 80 (footnote omitted).

136. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986); *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 53 (D.D.C. 1999).

137. 11 C.F.R. § 100.17 (2004).

138. *Buckley*, 424 U.S. at 29 (“We find that . . . the weighty interests served by restricting the size of financial contributions to political candidates are sufficient to justify the limited effect upon First Amendment freedoms caused by the \$1,000 contribution ceiling.”). *Id.* at 51 (“We conclude that [the] . . . independent expenditure limitation is unconstitutional under the First Amendment.”); see also Storey, *supra* note 27, at 170.

139. *Buckley*, 424 U.S. at 45; see also Storey, *supra* note 27, at 170. Section 527 organization donors, however, are more ideologically motivated:

Ideological givers—such as George Soros on the Democratic side and the Wylie brothers, Sam and Charles, on the Republican side—truly believe that it is in the best interest of themselves and the country to get certain people elected. This is opposed to a donor who believes in supporting someone who he thinks can help him once in office, whether the candidate is a Republican or Democrat.

Larry Noble, Remarks, *Campaign Finance and 527 Organizations*, 56 ADMIN. L. REV. 821, 823 (2004).

140. *Buckley*, 424 U.S. at 45; see also Storey, *supra* note 27, at 170.

141. *McConnell v. FEC*, 540 U.S. 93, 187–88 (2003).

stitution”¹⁴² because Congress could legitimately distinguish between political parties and interest groups when regulating campaign finance:

Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the Legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders.¹⁴³

Thus, as *McConnell* makes clear, because interest groups do not have the influence that political parties possess, the potential for corruption is much less.

D. The Corruption Argument Loses Credibility as the Activity of § 527 Political Groups Brings Political Speech Closer to the People

The potential for corruption also decreases as political contributions move away from the political parties and candidates towards § 527 organizations and other political associations. Post-BCRA, these associations finance and perform many of the functions previously funded by political parties—i.e., voter registration, get out the vote, and voter mobilization. Whereas soft money donations supported the party operations, § 527 organizations rely on direct donations specifically raised for these types of activities.

Buckley led to the explosion of soft money in politics as groups that were engaged *solely* in issue advocacy became exempt from the 1974 Act’s disclosure requirements. The only regulation they were subject to was § 527 of the IRC, which for nearly twenty-five years after *Buckley*, subjected them to practically no regulation at all, while granting them the same tax-exempt status as the political organizations and candidates registering with and reporting to the FEC. In addition, political parties and candidates were allowed to receive soft money contributions until the enactment of the BCRA outlawed these soft money contributions.¹⁴⁴ *McConnell* upheld this soft money ban, invoking *Buckley*’s constitutional contribution limits, noting that the BCRA’s “restrictions have only a marginal impact on the ability of contributors, candidates, officeholders, and parties to engage in effective polit-

142. *Id.* at 188.

143. *Id.*

144. *See* discussion *supra* notes 89–91 and accompanying text.

ical speech.”¹⁴⁵ The BCRA also prohibited national, state, and local party committees from soliciting funds for, or directing donations, to § 527 political organizations.¹⁴⁶ *McConnell* upheld this restriction as a valid attempt to avoid circumvention of the BCRA’s soft money ban.¹⁴⁷ The potential for corruption noted in *McConnell*, when political parties raise and collect funds on behalf of § 527 organizations, no longer exists now that this practice is prohibited.¹⁴⁸

Conversely, “hard money,” or direct contributions to a candidate or political party, is subject to the strict disclosure requirements of FECA.¹⁴⁹ National party committees, state and local party committees, and federal candidate committees all have to register with and report to the FEC. Federally registered PACs (including union and corporate PACs) that engage in federal election activity—expressly advocating the election or defeat of a federal candidate—are also required to register with the FEC and adhere to their disclosure requirements. By its very nature, hard money, with its contribution limits and source restrictions, is more difficult to raise.¹⁵⁰ One could argue that the sponsors of the BCRA, via the soft money ban, hoped that this difficulty would lead to less overall money in politics, thus resulting in less spending.¹⁵¹

145. *McConnell v. FEC*, 540 U.S. 93, 138 (2003) (citing *FEC v. Beaumont*, 539 U.S. 146, 161 (2003)). The Court noted that while the BCRA

prohibits national parties from receiving or spending nonfederal money, and . . . state party committees from spending nonfederal money on federal election activities, neither provision in any way limits the total amount of money parties can spend. Rather, they simply limit the source and individual amount of donations. That they do so by prohibiting the spending of soft money does not render them expenditure limitations.

Id. at 139 (citation and footnote omitted). This logic sounds vaguely similar to logic used in *Buckley* that limiting contributions did not restrain a person’s political communications. See *supra* note 119 and accompanying text.

146. 2 U.S.C.A. § 441i(d) (West 2004); see also RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW SUBSTANCE & PROCEDURE § 20.51 (3d ed. Supp. 2005).

147. *McConnell*, 540 U.S. at 178; ROTUNDA & NOWAK, *supra* note 146, § 20.51.

148. See *McConnell*, 540 U.S. at 178–79.

149. See Storey, *supra* note 27, at 173.

150. A quick way to remember the definition of hard money is that it is “hard” to raise.

151. See H.R. REP. NO. 107-131, pt. 1, at 48 (2001) (“There simply is too much special-interest money from too few sources flowing into party committees in the form of soft money Increased reliance on soft money shows no signs of abating, and is of particular concern.”); *id.* at 49 (“Given the vast number of uses to which political parties may legally put soft money, and the relative ease with which they can raise soft money compared to hard money, it is not surprising that parties have developed a significant dependence on a handful of super-wealth soft money contributors to finance their political and administrative operations.”).

The Supreme Court found in *Buckley* that no governmental goal was sufficient to justify the 1974 Act's campaign expenditure limits.¹⁵² According to the Court, the only government purpose FECA limits served was reducing the "skyrocketing costs of political campaigns."¹⁵³ In the Court's view, the government did not have "the power to determine that spending to promote one's political views is wasteful, excessive, or unwise."¹⁵⁴ The goal of reducing campaign spending, however noble, does not justify restrictions of political speech.

Moreover, judging from the 2004 election, the BCRA may have actually had the opposite effect financially. Parties and candidates raised record sums of hard money, all from individuals and subject to FECA limitations. Nevertheless, the total amount of soft money raised and spent in the 2004 election cycle actually *decreased* from the 2002 election cycle,¹⁵⁵ and that cycle did not even contain a presidential election. The BCRA has thus resulted in more individuals getting involved in the process through their direct contributions to candidates and political parties. Consider that it now takes 200 donors contributing \$100 per person in 2004 to replace a \$20,000 check that one union, corporation, or rich donor could have written in 2000, and it is not surprising that the political parties reported an increase in the number of small donors in 2004.¹⁵⁶

152. *Buckley v. Valeo*, 424 U.S. 1, 55 (1976). Among the suggested interests noted were limiting rapidly increasing campaign costs, reducing increased candidate dependence on large contributions, reducing the incentive to circumvent contribution limits, and equalizing the financial resources of federal candidates. *See id.* at 56–58.

153. *Id.* at 57.

154. *Id.* (noting that it was the "people . . . and candidates . . . who must retain control over the quantity and range of debate on public issues in a political campaign"). Spending limits for presidential candidates who accept public financing, however, were upheld. *See generally id.* at 85–109 (dispensing with a multitude of appellant arguments challenging the constitutionality of Subtitle H of the Act on First and Fifth Amendment grounds).

155. Weissman & Hassan, *supra* note 4, at 3 (comparing Pre-BCRA *party* soft money in 2002 of \$591 million to *total* Federal 527 Soft Money of \$254 million in 2004—a resulting decrease of \$337 million in total soft money).

156. COMM. FOR ECON. DEV., BUILDING ON REFORM: A BUSINESS PROPOSAL TO STRENGTHEN ELECTION FINANCE 13 tbl. 1 (2005), *available at* http://www.ced.org/docs/report/report_cfr2005.pdf (last visited Sept. 20, 2005) (noting that hard money raised by the Democrats increased from \$212.9 million in 2000 to \$580.7 million in 2004 while Republicans saw an increase from \$361.9 million in 2000 to \$632.5 million in 2004). The Democrats increased their direct mail small donors seven-fold from 2000 to 2004. *Id.* at 14. The Republicans experienced an increase of one million new donors over 2000—and that was only through the beginning of 2004. *Id.* The Democratic Congressional Campaign Committee saw the number of new donors double from the 2002 to 2004 election cycle while the Republicans saw an increase of more than 700,000 new donors for their Senate and Congressional Campaign Committees. *Id.* The first eighteen months of the 2004 election cycle saw small donors (those contributing \$200 or less) funding the national political

While the BCRA reduced the ability of soft money to influence candidates and parties, it also reduced the parties' ability to spend money on voter mobilization and other federal election activities. This left the various 527 political organizations with the responsibility of registering and mobilizing voters sympathetic to their goals and agendas for the 2004 election. This added responsibility necessitated the raising and spending of tremendous amounts of money.¹⁵⁷ Thus, as a consequence of the BCRA, § 527 organizations have assumed many of the traditional roles that political parties and candidates held prior to 2004. In doing so, these organizations have brought millions of people into the process that might otherwise have felt powerless in the face of political parties thought to be beholden to soft money contributors like unions and large corporations. Democrats increased their vote totals from 2000 to 2004 by 6.8 million, while President Bush increased his vote totals from 2000 by almost 10.5 million.¹⁵⁸ The addition of nearly seventeen million new voters since the enactment of the BCRA and the explosion of § 527 groups is strong evidence that the current system is not broken.¹⁵⁹

Section 527 groups can claim some credit for this increase in direct political participation. Senator McCain's noble goals of resurging grassroots activism and increased hard money contributions to the political parties¹⁶⁰ should not be prematurely halted by limiting the ability of § 527 groups to help mobilize and turn out these newly excited voters. Unions, corporations, and rich donors may not like it; how-

parties in the amount of \$272 million—more the twice the amount they contributed for the comparable period during the 2000 election cycle. *Id.*

157. *See id.* at 15–16.

158. Edsall & Grimaldi, *supra* note 12, at A7.

159. *Cf.* H.R. REP. NO. 109-181, at 55 (2005) (alleging in the Minority Views that the House version of the 527 Reform Act “turns back [the] highest voter participation gains over [the] last 35 years”). The minority views noted that:

H.R. 513 would restrict many 527 organizations that played a critical role in increasing civic participation by registering, educating, and mobilizing millions of voters for the 2004 November general election. Voter turnout reached unprecedented highs as nearly 126 million voters participated in the 2004 elections. An estimated 15 million additional voters participated in the 2004 election over the November 2000 election. Many were previously unregistered or disengaged, and they have now reengaged in the political process. Congress should be encouraging and supporting this kind of increase in voter participation, rather than obstructing it.

Id.

160. *See* 150 CONG. REC. S576, S577 (daily ed. Feb. 4, 2004) (statement of Sen. McCain) (“[B]oth the Democratic and Republican national parties are reporting a resurgence in grassroots support and significant increases in new hard money donors.”). Sen. McCain was discussing the BCRA and the FEC's efforts to implement the legislation. *Id.*

ever, it is preferable in our democracy for our elected officials to be beholden to the ordinary voter and small donor. The activity of 527 political groups, such as American Coming Together and the Swift Boat Veterans for Truth, is exactly the intended result of campaign finance reform—that is, removing political parties and corporate interests from the equation and bringing political speech closer to the people.¹⁶¹

E. Disclosure Requirements for Section 527 Political Groups Are Nearly Identical to Those Required by FEC-Regulated Political Committees

Commissioner Mason testified that “[t]oday the activities of the 527 organizations at issue are almost wholly transparent: they register with the government and disclose their funding, spending, and key organizational features.”¹⁶² This has not always been the case. Disclosure requirements were first imposed on political committees and candidates with the 1974 FECA amendments. *Buckley* upheld these disclosure requirements. Even applying the strict scrutiny required in First Amendment cases, the Court held that the “governmental interests sought to be vindicated by the disclosure requirements . . . [were] of . . . [substantial] magnitude”¹⁶³ and identified three categories of those interests. First, the disclosure rules assisted voters in evaluating candidates seeking federal office by providing them with details on where a candidate’s funds came from and how they were spent.¹⁶⁴ Second, these requirements deterred “actual corruption” and avoided the “appearance of corruption by exposing large contributions and expenditures to the light of publicity.”¹⁶⁵ Finally, *Buckley* found that the

161. See generally H.R. REP. NO. 107-131 (Part I), at 48–52 (2001), as reprinted in 2002 U.S.C.C.A.N. 120–24.

162. Mason Statement, *supra* note 79, at 6. Commissioner Mason worried that regulation of 527 organizations would migrate a significant amount of money from 527 organizations to 501(c) organizations that are not subject to disclosure requirements. *Id.*; see also discussion *supra* note 25.

163. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (acknowledging “that there are governmental interests sufficiently important to outweigh the possibility of infringement [on the exercise of First Amendment rights], particularly when the ‘free functioning of our national institutions’ is involved” (internal citation omitted)).

164. *Id.* at 66–67 (stating disclosure “allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches”).

165. *Id.* at 67 (recalling Justice Brandeis’s advice: “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” (internal citation omitted)). But see ROSENKRANZ, *supra* note 68, at 27 (arguing that “a candidate’s unlimited demand for

“recordkeeping, reporting, and disclosure requirements . . . [were] an essential means of gathering the data necessary to detect violations of . . . contribution limitations.”¹⁶⁶

FECA’s disclosure rules, while upheld in *Buckley*, were significantly narrowed in scope. *Buckley* construed “expenditures” for the purpose of disclosure the same way it construed “expenditures” for the purpose of advocacy.¹⁶⁷ Thus, disclosure of expenditures was only required for “spending that is unambiguously related to the campaign of a particular federal candidate.”¹⁶⁸ Disclosure for individuals and non-candidate groups or PACs was only required for “contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and . . . expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate.”¹⁶⁹

After nearly a quarter of a century of political organizations operating under § 527 with “limited public scrutiny,”¹⁷⁰ Congress finally adopted disclosure requirements for tax-exempt political organizations.¹⁷¹ In addition to requiring political organizations to register with the Secretary of the Treasury,¹⁷² legislation enacted in 2000 im-

money . . . exposes the candidate to mounting dangers of corruption with each solicitation”).

166. *Buckley*, 424 U.S. at 67–68.

167. *Id.* at 80.

168. *Id.*

169. *Id.*

170. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360 (11th Cir. 2003).

171. *Id.* The impetus to this new requirement may well have been an issue advertisement aired by the spurious “Republicans for Clean Air” against Senator McCain days before the South Carolina primary in his race for the 2000 Republican nomination for President. The advertisement stated:

Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush’s clean air laws will reduce air pollution more than a quarter million tons a year. That’s like taking [five] million cars off the road. Governor Bush, leading so each day dawns brighter.

Holman, *supra* note 25, at 247 (citing CRAIG HOLMAN & LUKE McLOUGHLIN, *BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS* 25 (2001)). The public assumed that the advertisement was produced by a pro-environment group, however, as an issue advertisement, no disclosure with either the IRS or the FEC was required. *Id.* Only later did the public learn that the advertisement was paid for by two individuals—Texas billionaires Charles and Sam Wyly, long-time contributors to and friends of George Bush. *Id.* at 247–48.

172. I.R.C. § 527(i) (2000).

posed limited disclosure requirements for contributions and expenditures.¹⁷³ Organizations were now required to disclose the “name and address . . . of all contributors which contributed an aggregate amount of \$200 or more to the organization during the calendar year and the amount . . . of the contribution.”¹⁷⁴ For disbursements, disclosure of “the amount . . . of each expenditure made to a person if the aggregate amount of expenditures to such person during the calendar year equals or exceeds \$500 and the name and address of the person” was required.¹⁷⁵ Failure to make the required disclosures results in the organization “pay[ing] the highest corporate tax rate on ‘the amount to which the failure relates.’”¹⁷⁶ This rule applies to both contributions *and* disbursements—subjecting the non-disclosing organization to tax on “the amount of money coming in as well as the amount of money going out.”¹⁷⁷ While an organization can refuse to disclose information about contributions and expenditures, the financial incentive to comply is substantial.¹⁷⁸

A United States district court in Alabama found § 527(j) of the IRC unconstitutional for precisely this reason.¹⁷⁹ The Court of Appeals for the Eleventh Circuit, however, reversed this decision on appeal in *Mobile Republican Assembly v. United States*.¹⁸⁰ The Eleventh Circuit court held the “section 527(j) form[ed] part of the overall tax scheme”¹⁸¹ and noted that if a “political organization [was] uncomfortable with the disclosure of expenditures or contributions[, it] may

173. See Pub. L. No. 106-230, 2002 U.S.C.C.A.N. (114 Stat.) 477 (amending I.R.C. § 527, adding sections 527(i) and 527(j)).

174. I.R.C. § 527(j)(3)(B) (2000) (amended 2002, 2003) (requiring additional disclosure of the occupation and name of employer for individuals who make contributions). Compare with I.R.C. § 527(j)(3)(B) (West 2004) (including the requirement for the date and purpose of the expenditure added by the 2002 amendment).

175. I.R.C. § 527(j)(3)(A) (2000) (amended 2002, 2003) (requiring additional disclosure of the occupation and name of employer for individuals receiving expenditures); see also Pub. L. No. 106-230, 2000 U.S.C.C.A.N. (114 Stat.) 477. Compare with I.R.C. § 527(j)(3)(A) (West 2004) (including the requirement for the date and purpose of the expenditure added by the 2002 amendment).

176. *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1360 (11th Cir. 2003) (citing I.R.C. § 527(j)(1) (2000)).

177. *Id.* at 1361.

178. The highest corporate tax rate in effect for tax year 2005 is 39%. See I.R.C. § 11(b)(1) (West 2005).

179. See *Nat'l Fed'n of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273, 1286 (S.D. Ala. 2001) (concluding that “subsection (j) of [the code] . . . was a penalty rather than a tax”). *Id.*

180. 353 F.3d 1357 (11th Cir. 2003).

181. *Id.* at 1361.

simply decline to register under section 527(i) and avoid these requirements altogether.”¹⁸²

Following the initial finding that § 527(j) was unconstitutional, Congress amended it.¹⁸³ The amendment required disclosure of the date and purpose of expenditures as well as the date for contributions.¹⁸⁴ Generally, § 527 political groups are required to file disclosure forms quarterly¹⁸⁵ during an election year and semi-annually¹⁸⁶ in non-federal election years. Additionally, during election years, an organization must file a twenty-day pre-election report¹⁸⁷ and a thirty-day post-election report.¹⁸⁸ An organization can also elect to file their disclosure reports on a monthly basis.¹⁸⁹ These disclosure forms follow a similar schedule as those filed by political committees regulated by the FEC.¹⁹⁰ Since the 2002 amendment, § 527 organizations disclose to the IRS the same contribution information, on a nearly identical schedule, that political organizations regulated by the FECA disclose to the FEC.

The risk of corrupting candidates and political parties was mitigated by the disclosure regime implemented by the 1974 FECA amendments. Today § 527 organizations operate under disclosure requirements nearly identical to those of political action committees; their contributions and expenditures exposed to the same light of publicity. While preventing corruption may be a legitimate government interest, bringing § 527 organizations under FEC control makes it a moot issue as this would expose no more or no less corruption than the current disclosure system exposes today. Both political committees and § 527 organizations operate equally transparently—the only difference being the government agency that collects their disclo-

182. *Id.*

183. *Id.* at 1360 n.2; *see also* Pub. L. No. 107-276, 2002 U.S.C.C.A.N. (116 Stat.) 1929.

184. *See* I.R.C. § 527(j) (3) (2004). The amendments to section 527 exempted from the disclosure requirements “organizations focused solely on state and local elections and subject to comparable requirements under state law.” *Mobile Republican Assembly*, 353 F.3d at 1360 n.2 (citing to Pub. L. No. 107-276, § 2, 2002 U.S.C.C.A.N. (116 Stat.) 1929).

185. I.R.C. § 527(j) (2) (A) (i) (I) (West 2004).

186. *Id.* § 527(j) (2) (A) (ii).

187. *Id.* § 527(j) (2) (A) (i) (II) (covering information through the twelfth day prior to the election and due no later than the twelfth day prior to the election).

188. *Id.* § 527(j) (2) (A) (i) (III) (covering information through the twentieth day after the election and due no later than the thirtieth day after the election).

189. *Id.* § 527(j) (2) (B).

190. *See generally* 2 U.S.C. § 434(a) (2000) (detailing the filing period coverage and due dates for the various committee types covered by the FECA).

sure data.¹⁹¹ The fear of corruption is also diminished by the fact that donor and expenditure information is available in the public domain.¹⁹²

F. The Ineffective Solution: “The 527 Reform Act”

The 2004 Presidential campaign may long be remembered for the role that § 527 organizations played. Democratic-leaning § 527 organizations produced political advertisements critical of President Bush long before the Democratic nominee was known.¹⁹³ These advertisements were perfectly legal and did not raise corruption concerns, since they did not advocate the election of an individual candidate for President.¹⁹⁴ The so-called Swift Boat Veterans for Truth organization produced political advertisements raising questions about Senator Kerry’s Vietnam War experience that were similarly legal, albeit questionably factual, since they too did not advocate the election of an individual candidate for President.¹⁹⁵ These swift boat advertisements generated the most controversy, primarily due to the inability to prove or disprove the allegations they contained.¹⁹⁶

The swift boat advertisements cost \$546,000—a paltry sum by campaign spending standards.¹⁹⁷ The 527 Reform Act will not prevent fifty people from donating \$25,000 each to a § 527 organization to

191. See 2 U.S.C. § 434 (2000) (outlining the reporting requirements for political committees); I.R.C. § 527(j) (2000) (describing the IRS filing requirements).

192. The IRS maintains an on-line political organization filing and disclosure database. See Internal Revenue Serv., Political Organization Filing and Disclosure, <http://www.irs.gov/charities/political/article/0,,id=109644,00.html> (last visited Sept. 6, 2005).

193. For example, the MoveOn.org Voter fund aired an advertisement critical of President Bush’s Medicare plan on CNN and other networks in early 2004. See Press Release, MoveOn.org Voter Fund, MoveOn.org Voter Fund Calls for Justice Dept. Investigation of Administration’s Illegal Use of Government Funds For Bush “Re-Election Ads” (Feb. 26, 2004), available at <http://www.moveonvoterfund.org/cbsrelease.html> (last visited Sept. 19, 2005) (noting that CBS refused to air the advertisement during the 2004 Super Bowl). The group also spent \$500,000 airing an advertisement in June 2004 featuring a worker who “goes from good benefits to flipping burgers” in Ohio, a state the organization claimed lost 270,000 jobs during the Bush Administration. Press Release, MoveOn.org Voter Fund, MoveOn Voter Fund Launches \$500,000 Ad Campaign in Ohio (June 24, 2004), available at <http://www.moveonvoterfund.org/flippingburgers/pressrelease.pdf> (last visited Sept. 19, 2005). The Media Fund spent \$10 million on television advertisements by early April 2004—nearly four months prior to the nominating conventions. Dan Fost, *Liberals in Organizing Frenzy to Prove Left Is Right*, S.F. CHRON., Apr. 4, 2004, at A6.

194. See *supra* Part I.B.

195. See generally Dobbs, *supra* note 2, at A18 (noting “significant flaws and factual errors” in both Senator Kerry’s and the Swift Boat Veterans’ accounts of the Bay Hap River incident while attempting to reconstruct the events of that day).

196. *Id.*

197. See *supra* note 7 and accompanying text (cost of advertisement).

produce a similar advertisement in the future. The contribution limitation, however, may have prevented the production of one of the positive issue advocacy advertisements of the 2004 campaign. The Republican-oriented 527 group, Progress for America, spent \$17 million recounting “Ashley’s story”—the story of Bush’s meeting with an eleven-year-old girl whose mother died in the September 11th attack on the World Trade Center.¹⁹⁸

The 527 Reform Act will not prevent a similar advertisement in the future from raising issues that have a dramatic impact on a candidate’s campaign. The simple truth of the swift boat advertisement controversy is that the issues raised by it were primarily political, and no new law should prevent the swift boat-type issue advocacy from being raised in the future.

IV. Fighting Speech with More Political Speech

The swift boat advertisements drew a strong rebuke from Senator McCain, leading to his introduction of the 527 Reform Act of 2004¹⁹⁹ less than two months after the advertisements first aired in battleground states across the country.²⁰⁰ Senator McCain’s approach, to regulate § 527 political groups like any other political committee, is one approach to the issue. Proponents of increased regulation feel that their approach is the best way to reduce irresponsible advertisements.²⁰¹ A final evaluation of the effectiveness of Swift Boat Veterans’ advertisement, however, belongs in a political context, not in a regulatory one. Treating the organization like other federally registered political action committees would not have diminished its effectiveness. It was Senator Kerry’s response to the charges raised in the advertise-

198. Edsall & Grimaldi, *supra* note 12, at A7.

199. See 527 Reform Act of 2004, S. 2828, 108th Cong. (2004).

200. The first swift boat media buy was on August 4, 2004. See Mason Statement, *supra* note 79, at 1. Senator McCain introduced the 527 Reform Act of 2004 on September 22, 2004. 150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) (introducing the 527 Reform Act of 2004, S. 2828, 108th Cong. (2004)).

201. While introducing S. 2828, Senator McCain complained:

[S]ome organizations, registered under section 527 of the Internal Revenue Code, have had a major impact on this year’s presidential election by raising and spending illegal soft money to run ads attacking both President Bush and Senator Kerry. The use of soft money to finance these activities is clearly illegal under current statute, and the fact that they have been allowed to continue unchecked is unconscionable.

150 CONG. REC. S9527 (daily ed. Sept. 22, 2004) (statement of Sen. McCain) (introducing the 527 Reform Act of 2004, S. 2828, 108th Cong. (2004)). One can infer that Senator McCain hoped that “attack” advertisements would not be “allowed to continue unchecked” under this legislation.

ment, or the lack thereof, combined with the tremendous amount of free replays of the advertisement on mainstream news programs, exposure that only increased with Senator Kerry's silence, that damaged the Senator's campaign.²⁰² After so much exposure, no amount of disclosure, spending allocation, or contribution limits would have prevented the damage—only more political speech could have stopped the bleeding. The best way to fight any abuses of the system, therefore, is with more political speech, not additional regulation.

Rather than run to the courts or the FEC when angry about the lies being spread by Swift Boat Veterans for Truth or when distressed by the allegations by MoveOn.org²⁰³ or *Fahrenheit 9/11*,²⁰⁴ a more effective approach to counter or correct propaganda is to take Professor Michael Dorf's advice and create a new § 527 organization.²⁰⁵ As far

202. See, e.g., Edsall & Grimaldi, *supra* note 12, at A7 (noting that the first Swift Boat advertisement "was exceptionally cost-effective: most voters learned about it through free coverage in mainstream media and talk radio").

203. MoveOn.org is actually a federally-registered PAC, not a 527 organization operating outside of FECA. See MoveOn.org: Democracy in Action, <http://www.moveon.org/about.html> (last visited Sept. 10, 2005). The organization also operates a 501(c)(4) organization called MoveOn.org Civic Action. *Id.* MoveOn.org did operate a 527 organization, the MoveOn.org Voter Fund, during the 2004 election cycle. See MoveOn.org Voter Fund, Home Page, <http://www.moveonvoterfund.org/> (last visited Sept. 19, 2005) (stating that the organization "primarily runs ads exposing President Bush's failed policies in key 'background' states").

204. FAHRENHEIT 9/11 (Dog Eat Dog Films 2004).

205. Dorf, *supra* note 34 (remembering Justice Brandeis's memorable remark that "the fitting remedy for evil counsels is good ones") (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Commissioner Mason commented on the content of the Swift Boat Veterans for Truth advertisement:

I know that the Swift Boat group and its ads were controversial, but their message appeared to be salient with a significant portion of the public, and any preference to mute a group because of distaste for its message, or its popularity or lack thereof, is not a valid reason for government regulation. Indeed it is the unpopular and politically objectionable speech that needs constitutional protection.

Mason Statement, *supra* note 79, at 5; cf. *Doe v. Cahill*, No. 266, 2005, 2005 WL 2455266 (Del. Oct. 5, 2005). In a libel action against four anonymous defendants for statements posted on an internet weblog, the Delaware Supreme Court suggested an alternative form of extrajudicial relief:

Besides the legal remedies available to a plaintiff wronged by internet defamation, the potential plaintiff has available a very powerful form of extrajudicial relief. The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The plaintiff can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a

fetched as this idea may seem, it actually happened during the 2004 election cycle—both on large and small scales.

A group of neighbors on a Minneapolis, Minnesota block, incensed at the falsehoods promulgated by the Swift Boat Veterans group, formed their own § 527 political group called GeorgeTheMenace.org.²⁰⁶ The group initially formed to saturate their neighborhood with Kerry lawn signs, but ended up launching a website and creating a thirty-second advertisement.²⁰⁷ One member of the group, while noting how the rules could be abused, observed: “if you can make an argument for 527s, it would be for small groups like us.”²⁰⁸

Within a few weeks after the Swift Boat Veterans started their advertising campaign, the 527 group Texans for Truth registered with the IRS.²⁰⁹ This group raised \$350,000 in the first ten days of its existence and unveiled a television advertisement critical of President Bush’s service record with the Alabama National Guard.²¹⁰

Another group formed in Wisconsin and called themselves Football Fans for Truth.²¹¹ Their purpose was to inform voters of alleged football-related misstatements by Senator Kerry, such as referring to Green Bay’s Lambeau Field as “Lambert Field” and referring to the archrival Ohio State Buckeyes while campaigning in Michigan.²¹²

These are just some examples of the strength of the marketplace of ideas. Whether or not Football Fans for Truth, Swift Boat Veterans for Truth, Texans for Truth, MoveOn.org, Progress for America Voter Fund, or GeorgeTheMenace.org influence voters, the right of individ-

result of an anonymous defendant’s allegedly defamatory statements made on an internet blog or in a chat room.

Id. at *10.

206. John McCormick, *With a 527, Little Guys Can Behave Just Like Big Spenders; Fed-Up Neighbors Make Anti-Bush Ad*, CHI. TRIB., Oct. 18, 2004, at 15.

207. *Id.*

208. *Id.*

209. Howard Witt & John McCormick, *Agile ‘527’ Groups Lead Well-Funded Hit-Run War*, CHI. TRIB., Sept. 10, 2004, at 1.

210. *Id.*

211. Tom Clementi, *TV Campaigning Leaves Us Tuned Out*, POST-CRESCENT (Appleton, Wis.), Sept. 26, 2004, at 12C, available at LEXIS Newspaper Stories, Combined Papers; David R. Guarino, *Web Site Founder Fields Kerry’s Sports Gaffes*, BOSTON HERALD, Sept. 21, 2004, at 7, available at 2004 WLNR 1130429; see also Dane Smith, *The Sport of Politics: Who’s Got Game?*, STAR-TRIB. (Minneapolis), Oct. 28, 2004, at 1A, available at 2004 WLNR 17488818 (noting that while “no corresponding 527 appears to have been formed for Kerry . . . there is a satirical Cheerleaders for Truth Web site, which claims to be mobilizing ‘faith-based pompoms for George Dubya Bush’”).

212. Clementi, *supra* note 211, at 12C.

uals to collectively form political committees like them is rooted deeply in the First Amendment as is their sacred right to “retain control over the quantity and range of debate on public issues in political campaigns.”²¹³

Justice Scalia warned in his *McConnell* opinion that “a law limiting the amount a person can spend to broadcast his political views is a direct restriction on speech.”²¹⁴ He views legislation targeting the money used to fund speech as a direct attack on such speech, drawing an analogy to targeting “the paper on which a book is printed or the trucks that deliver it to the bookstore.”²¹⁵ Justice Scalia, incredulous that a Court that protected “virtual child pornography,” “tobacco advertising,” “sexually explicit cable programming,” and the “dissemination of illegally intercepted communications” could not find a law protecting “the right to criticize the government” constitutional.²¹⁶ He also noted that included in the umbrella of freedom of speech is the “freedom to associate with others for the dissemination of ideas—not just by singing or speaking in unison, but by pooling financial resources for expressive purposes”²¹⁷

Justice Scalia felt that the BCRA infringed on speech deserving of First Amendment protection. This does not bode well for a potential constitutional challenge to regulations like the 527 Reform of Act of 2005. Here, the risk of corruption argument is even less powerful than it was with the BCRA. If an originalist like Justice Scalia felt the BCRA’s corruption argument was not compelling enough to restrict First Amendment speech protections, it is not likely that he and other similar minded Justices would find the less powerful argument surrounding the 527 Reform Act compelling enough to uphold it.²¹⁸ Per-

213. *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

214. *McConnell v. FEC*, 540 U.S. 93, 254 (2003) (Scalia, J., concurring in part and dissenting in part).

215. *Id.* at 252.

216. *Id.* at 248 (“This is a sad day for the freedom of speech.”). *See generally* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (virtual child pornography); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) (tobacco advertising); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (illegally intercepted communications); *United States v. Playboy Entm’t Group, Inc.* 529 U.S. 803 (2000) (sexually explicit cable programming).

217. *McConnell*, 540 U.S. at 255.

218. Professor Chemerinsky notes that while an originalist, Justice Scalia defines originalism differently than the traditional definition of following “the literal text and the specific intent of [the Constitution’s] . . . drafters.” CHEMERINSKY, *supra* note 83 § 1.4 at 19. Professor Chemerinsky notes that:

Justice Antonin Scalia . . . focuses on finding the “original meaning” of constitutional provisions. Justice Scalia says that original meaning is to be found in the historical practices and understandings of the time, not the views of the docu-

haps the strongest hint of Justice Scalia's potential opinion on a challenge to this legislation is his point that "it is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' . . . and to abridge the rest."²¹⁹

The Supreme Court in *Buckley* reaffirmed the First Amendment principle that the political debate must be controlled not by the government, but by "the people—individually as citizens and candidates and collectively as associations and political committees . . ." ²²⁰ Section 527 organizations epitomize the right of citizens to form associations, pool their resources, and advocate their political beliefs. Any abuses or disagreements with any of these beliefs need to be counteracted with more political speech, not with regulation that limits political speech. Perhaps Justice Brandeis said it best: "without free speech and assembly discussion would be futile . . . with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . ." ²²¹ If one believes the swift boat advertisements were noxious doctrine, then more speech, not more regulation, provides the best protection against the dissemination of the advertisements' ideas.

Conclusion

The activity of § 527 political groups is exactly the intended result of campaign finance reform—removing parties and corporate interests from the equation and bringing political speech closer to the people. Furthermore, the best way to fight abuses of the system is with more speech, not additional regulation. Political organizations formed by individual citizens lie at the nexus of the two most basic liberties afforded citizens of the United States: the freedom of speech and the freedom of free association. Congress has succeeded in limiting the amount of contributions individuals can make to political candidates and eliminating direct soft money contributions to candidates

ment's drafters. As with other forms of originalism, Justice Scalia believes the Constitution's meaning is fixed and unchanging.

Id. (footnotes omitted). Section 527 organizations, soft money, and political action committees did not exist when the First Amendment was ratified, yet Justice Scalia found the BCRA's restrictions on political campaign financing to be a violation of the First Amendment. See *supra* notes 214–17 and accompanying text.

219. *McConnell*, 540 U.S. at 261.

220. *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

221. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); see also CHEMERINSKY, *supra* note 83, § 11.1.2 at 895–96.

and national parties—efforts historically blessed by the judiciary in *Buckley* and *McConnell*.

As soft money has moved away from the candidates and parties into tax-exempt § 527 groups, the primary impetus for campaign finance reform, corruption, or even the appearance of corruption, has dissipated. Groups of citizens banding together to produce a political message or mobilize voters to support a candidate who agrees with them on a particular issue involves no overt or explicit exchange of votes in exchange for political contributions. These groups are supporting the candidate because of their view on an issue, not to influence that view.

New legislation proposed to regulate § 527 political groups as political organizations, impose contributions limits on their donors, and subject them to soft money restrictions will not prevent groups like Swift Boat Veterans for Truth from airing advertisements of questionable accuracy or content. The proper response to irresponsible or ideologically offensive advertisements is more political speech, not additional regulation. In the spirit of this country's heritage, the political issues of the country must be decided on the political battlefields, including the nation's airwaves, not in a bureaucrat's office or courtroom.

