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David D. Storey

*Indiana University School of Law*

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# The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform

DAVID D. STOREY\*

## INTRODUCTION

Standing idle in the center of Washington, the campaign finance regulatory machine is a pitiable sight. After years of being overworked and undermaintained, the machine, riddled with holes, stands as a monument to good intentions mired in poor resolve. For the past three decades, supporters and opponents of campaign finance reform have debated and studied the perplexing issues, but no consensus has ever been reached, and the regulatory machine has slowly deteriorated. Loophole after loophole has been punched into the system, but few, if any, repairs have been made. Reformers cry for an overhaul, yet they have forgotten to grease the joints. Hence, after three decades of bickering, filibusters, and neglect, the campaign finance regulatory machine has come to a grinding halt. Congress has repeatedly grappled with the machine but has had little success in resuscitating it. Yet, in the summer of 2000, Congress may have found the grease that will get the campaign finance regulatory machine moving again.

In June 2000 Congress ratified an amendment to § 527<sup>1</sup> of the Internal Revenue Code, which closed a former loophole that allowed some types of interest groups, including Political Action Committees (“PACs”), to engage anonymously in issue advocacy during political campaigns.<sup>2</sup> “Issue advocacy,” as was originally defined by the Supreme Court in *Buckley v. Valeo*,<sup>3</sup> involves expressing one’s views on a political issue without directly advocating the election of a specific candidate.<sup>4</sup> Under the old § 527 rules, certain qualifying PACs were permitted to conduct issue advocacy completely anonymously and were thus called “stealth PACs.”<sup>5</sup> Under the new version of § 527, stealth PACs must now, if certain requirements are met,

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\* J.D. Candidate, 2002, Indiana University School of Law—Bloomington; B.S., 1998, Indiana University. I wish to thank my wife, Tara, for her love and for her uncanny ability to give me perspective. I also thank my family and friends for their help and friendship over the years and especially my parents for the immeasurable love and support they have provided through all my endeavors. Finally, I thank Kim Smith and all of my other student editors for their hard work on this Note.

1. Act to Amend the Internal Revenue Code of 1986, Pub. L. No. 106-230, 114 Stat. 477, 479 (2000) (codified at 26 U.S.C.A § 527(j) (West Supp. 2001)).

2. See Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387 (2000), for an in-depth discussion of the former § 527 loophole.

3. 424 U.S. 1 (1976).

4. *Id.* at 43-44, 44 n.52 (setting forth examples of what kinds of words used by supporters would constitute express advocacy, including “vote for,” “elect,” “Smith for Congress,” or other similar words).

5. Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 268 (2000).

disclose to the Internal Revenue Service (“IRS”) information about the origin and destination of PAC funds.<sup>6</sup> Proponents of campaign finance reform are hoping that this additional disclosure will decrease the attractiveness of stealth PACs, and therefore limit the negative impact that stealth PACs and anonymous issue advocacy are feared to have on the electoral process.

Revised § 527 is a far cry from being a comprehensive campaign finance reform measure. The old version of § 527 was merely a rusted joint on the vast campaign finance machine, but, as this Note will discuss, the lubrication of that joint may ultimately have a significant impact on the reform process because it may just be enough to get the campaign finance regulatory machine running again. Part I of this Note will present a brief overview of how campaign finance law has evolved over the past three decades and how politicians and political groups, capitalizing on an anomaly in the tax code, have developed what have come to be known as stealth PACs. Part II of this Note will then examine how § 527 disclosures are likely to affect stealth PACs, and more generally, how amended § 527 may affect campaign finance reform. Finally, this Note will discuss why amending § 527 and utilizing small reparative measures instead of attempting a complete campaign finance overhaul may be the best path to achieving significant long-term reform.

#### PART I: THE EVOLUTION OF CAMPAIGN FINANCE LAW AND STEALTH PACS

Following Senator John McCain’s campaign finance reform crusade, which propelled finance reform into the political limelight, it is no wonder that “campaign finance reform” is now a household term. McCain and fellow senator, Russ Feingold, have been toiling away for several years trying to get a comprehensive campaign finance reform bill passed,<sup>7</sup> but the cold truth is that very little reform has been achieved.<sup>8</sup> It is true that in the first half of 2001 the Senate approved a comprehensive reform measure introduced by Senators McCain and Feingold,<sup>9</sup> but that measure has many hurdles yet to clear before it is law.<sup>10</sup> Thus, as of the publication of this Note, there has been virtually no reform in spite of years of discussion about reform.

The lack of reform, however, is not the result of a lack of effort or ideas. In fact, after three decades of vigorous debate and disagreement, many broad reform theories have come about.<sup>11</sup> Some suggest that federal elections should be publicly funded (the

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6. 26 U.S.C.A. § 527(j)(3) (West Supp. 2001).

7. The first version of the bill was the Bipartisan Campaign Reform Act of 1997, S. 25, 105th Cong. (1997), and the current version of the bill pending (as of the time of publication of this Note) in Congress is S. 27, 107th Cong. (2001).

8. Harold E. Ford, Jr. & Jason M. Levien, *A New Horizon for Campaign Finance Reform*, 37 HARV. J. ON LEGIS. 307, 312-13 (2000) (stating that all of McCain’s and Feingold’s efforts have been “thwarted by procedural maneuvers”).

9. Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. (2001).

10. Albert R. Hunt, *An Inside-Outside Alliance for Campaign Finance Reform?*, WALL ST. J., June 7, 2001, at A23 (discussing the major obstacles ahead of the bill, such as getting enough votes in the House and avoiding a presidential veto).

11. See MONEY AND POLITICS: FINANCING OUR ELECTIONS DEMOCRATICALLY (Joshua Cohen & Joel Rogers eds., 1999) [hereinafter MONEY AND POLITICS] (setting out and explaining several reform theories).

so-called “clean money option”),<sup>12</sup> while others believe that the only path to reform is to reverse the Supreme Court’s landmark decision, *Buckley v. Valeo*,<sup>13</sup> and still others believe that we should even go so far as to amend the United States Constitution.<sup>14</sup> Regardless of which theory one supports—and the three this Note has mentioned are only the very beginning—it is clear that because of the sheer volume of rhetoric and disagreement on the issue, campaign finance law is in a state of confusion and disarray that has paralyzed the reform movement.<sup>15</sup>

### A. Campaign Finance Law: The Basics

Campaign finance law, as we know it today, started off as the ambitious Federal Election Campaign Act of 1971 (“FECA”),<sup>16</sup> which was passed after it was reported that President Nixon’s reelection campaign had raised millions of dollars in illegal corporate funds.<sup>17</sup> The FECA was the start of comprehensive campaign finance regulation, but it was the Supreme Court’s decision in *Buckley v. Valeo*<sup>18</sup> that marked the beginning of the long struggle to achieve effective and constitutionally permissible campaign finance laws.

*Buckley*, in which the Supreme Court held that some of the FECA’s federal election spending limitations were unconstitutional,<sup>19</sup> is one of the most controversial decisions in our nation’s history.<sup>20</sup> The Court was dealing with several issues of first impression in a “highly nuanced area [of law] in which Congress [had] scarcely ever legislated.”<sup>21</sup> This combination of judicial and congressional unfamiliarity laid the perfect groundwork for a complex decision that has been a continuous source of debate and legal mischief.<sup>22</sup>

12. David Donnelly et al., *Going Public*, in MONEY AND POLITICS, *supra* note 11, at 3, 20.

13. Douglas Phelps, *Setting Limits*, in MONEY AND POLITICS, *supra* note 11, at 49, 58. For a discussion of *Buckley v. Valeo*, see *infra* text accompanying notes 18–46.

14. Douglas Phelps, *Setting Limits*, in MONEY AND POLITICS, *supra* note 11, at 49, 58.

15. As one commentator has put it, “[c]ampaign finance reform is a nightmare: Legal scholars are confounded by it, regulators are constantly under fire for failing to implement it, and Congress usually does everything it can to avoid it.” Deirdre Davidson, *Campaign Reform Law: A Flawed Fix*, LEGAL TIMES, July 24, 2000, at 1.

16. Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–455 (2000). The FECA has subsequently been amended several times since its original enactment in 1971, with the most significant amendments occurring in 1974 and 1979. For a complete overview of the evolution of campaign finance laws and summaries of the 1974 and 1979 FECA amendments, see CAMPAIGN FINANCE REFORM: A SOURCEBOOK 27–60 (Anthony Corrado et al. eds., 1997).

17. DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 13 (1990).

18. 424 U.S. 1 (1976).

19. *Id.* at 44–51.

20. For a complete analysis of the *Buckley* decision and how it has affected campaign finance law, see E. JOSHUA ROSENKRANZ, TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION, BUCKLEY STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM (1998).

21. *Id.* at 25.

22. See Daniel R. Ortiz, *The Reform Debate: Politics and the First Amendment*, in

Many contentious issues and legal principles arose out of the *Buckley* decision. The most profound and probably most debated legal principle to come out of *Buckley* is that political spending is equivalent to speech and therefore protected by the First Amendment.<sup>23</sup> This oft-discussed idea has had a significant impact on all areas of campaign finance reform.<sup>24</sup> But, the key parts of the *Buckley* decision, for purposes of this Note, include the Court's discussion of the distinction between expenditures and contributions,<sup>25</sup> as well as the Court's analysis of issue versus express advocacy.<sup>26</sup>

The Court in *Buckley* ruled that the limitations on independent expenditures made by persons not associated with a candidate's campaign were unconstitutional, but that limitations on the contributions made directly to the candidate's campaign were constitutional.<sup>27</sup> Therefore, contributions made directly to a candidate could be limited, but money spent independently by an individual in favor of a candidate could not be limited. This distinction stemmed primarily from the Court's view that the likelihood that a person or a group making expenditures on behalf of, but independent of, a candidate were unlikely to cause the type of quid pro quo corruption that was feared to be a possibility when the person or group made the contribution directly to the candidate.<sup>28</sup> Thus, the Court apparently believed that if a person makes a large *direct contribution* to a candidate, then there is a high likelihood that that candidate's later in-office decisions will favor that contributor's ideological viewpoint.<sup>29</sup> However, if the money is in the form of an *independent expenditure*, then the candidate and the candidate's decisions are less likely to be influenced by the person making the expenditure because *there is no direct connection between the candidate and the money*.<sup>30</sup> The Court then modified this independent expenditure and direct contribution distinction with its discussion of the forms of advocacy.<sup>31</sup>

The Court, in order to correct potential constitutional vagueness problems with the FECA,<sup>32</sup> narrowed the definition of expenditure as used throughout the FECA by distinguishing express advocacy from issue advocacy.<sup>33</sup> The Court stated that in order to avoid constitutional vagueness, the FECA rules, including the FECA disclosure rules, only applied to expenditures that were for "communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office."<sup>34</sup> This ruling became the foundation of the issue advocacy and express

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CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 16, at 95 (discussing the range of legal debate about the *Buckley* decision).

23. See *Buckley*, 424 U.S. at 14-19; see also ROSENKRANZ, *supra* note 20, at 32-37.

24. The First Amendment issues are well beyond the scope of this Note and further discussion would merely be tangential.

25. *Buckley*, 424 U.S. at 44-51.

26. *Id.* at 44.

27. *Id.* at 44-51.

28. *Id.* at 46-47.

29. See *id.* at 46-47.

30. See *id.*

31. *Id.* at 43-44, 78-80.

32. See generally Hasen, *supra* note 5, at 276-84 (discussing and analyzing in detail the potential constitutional conflicts in the FECA confronted by the Court in *Buckley v. Valeo*).

33. *Buckley*, 424 U.S. at 43-44, 78-80.

34. *Id.* at 44 & n.52 (setting out what some have dubbed the "magic words" that must be

advocacy distinction that would later play a major role in the development of stealth PACs and what Professor Richard Hasen has called “sham issue advocacy.”<sup>35</sup>

As discussed previously, the FECA rules placing limits on independent expenditures on behalf of candidates were deemed unconstitutional.<sup>36</sup> Yet, notwithstanding the unconstitutionality of the limits on independent expenditures, the Court held that the disclosure rules relating to expenditures were permissible.<sup>37</sup> The key word to note is “expenditures.” By using the term “expenditures,” which had already been defined by the Court as only including express advocacy and not issue advocacy, the Court upheld the FECA disclosure rules, but at the same time, significantly narrowed their scope.<sup>38</sup> Hence, the disclosure rules of the FECA do not apply to issue advocacy advertisements, and thus, the FECA disclosure rules do not apply to PACs that engage in advertising campaigns or similar political communications so long as they never use the magic words that indicate express advocacy such as “Vote for Smith,” or “Don’t vote for Jones.”<sup>39</sup> However, if the PAC is expressly advocating the election of a candidate, then the PAC, regardless of whether the expenditures on the advertising are completely independent of the candidate, must make certain disclosures to the Federal Elections Commission (“FEC”).<sup>40</sup> The issue advocacy loophole in the disclosure law, coupled with later legal developments, has been a springboard for wealthy individuals and PACs to engage in the devious practice of electioneering.<sup>41</sup>

The Court took a more lenient stance on disclosure for three main reasons. First, the disclosure requirements help to ensure that voters are informed about the candidates, in that if the voters know who supports the candidate financially, then the voters will have a better idea of where the candidate stands on important issues.<sup>42</sup> Second, disclosure helps to deter corruption “by exposing large contributions and expenditures to the light of publicity.”<sup>43</sup> Third, the Court viewed disclosure rules more favorably than expenditure limitations because disclosure aids in the administration and enforcement of contribution limits by the FEC.<sup>44</sup> These three underlying benefits of disclosure served, in the Court’s eyes, a substantial

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used for the communication to qualify as express advocacy, including direct pleas such as “vote for,” “elect,” or “cast your ballot for”).

35. Hasen, *supra* note 5, at 265 (defining “sham issue advocacy” as “advertising intended to influence the outcome of elections but lacking words of express advocacy”).

36. *See supra* text accompanying note 27.

37. *Buckley*, 424 U.S. at 84.

38. *See id.* at 79-80, 84.

39. Hasen, *supra* note 5, at 267.

40. *Id.*

41. Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1752 (1999) (discussing how supporters of candidates in the 1996 congressional elections engaged in electioneering by creating poignant issue advertisements to sway the election in favor of their candidate).

42. *Buckley*, 424 U.S. at 66-67 (stating that 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”).

43. *Id.* at 67.

44. *Id.* at 67-68.

governmental interest that outweighed the burden placed on individual rights.<sup>45</sup> Thus, the FECA's disclosure rules, though only applicable to groups conducting express advocacy, are a fixture on the campaign finance landscape that candidate supporters, and especially PACs, must find a way around which to maneuver.

*B. Development of PACs and Soft Money*

PACs have played a significant role in American politics since the mid-1940s.<sup>46</sup> Labor unions were the first groups to form PACs because wartime rules disallowed direct union contributions to candidates.<sup>47</sup> Thus, unions were forced to form separate groups, which they referred to as PACs, to handle the contributions.<sup>48</sup> The number of PACs grew slowly over the years, but they were not recognized as a powerful campaign finance vehicle until Congress enacted the 1974 amendments to the FECA.<sup>49</sup> The 1974 amendments placed restrictions on the amount of money individuals could contribute to candidates, but allowed higher limits for PACs.<sup>50</sup> The new restrictions on individual contributions forced corporations, which historically had contributed to candidates by having the wealthy owners do so directly, to use PACs and their higher contribution limits as their primary method of influencing politics.<sup>51</sup> Section 441b of the FECA expressly prohibits a corporation or labor union from donating funds directly to a candidate for federal office,<sup>52</sup> but allows a separate segregated fund in the form of a PAC to be used.<sup>53</sup> Thus, corporations and labor unions have developed PACs as one way of advancing their agendas.

Following the 1974 amendments to the FECA and the statutory validation of corporate and labor union PACs, the number of PACs increased from 608 at the end of 1974 up to a staggering 4,009 just ten years later in 1984.<sup>54</sup> PACs are primarily organized to promote and advance some political, ideological, or business issue that comports with the committee's underlying agenda; PACs achieve this promotion either by giving money directly to the candidates or by engaging in issue advocacy.<sup>55</sup> Thus, PACs must consider any rules that limit these activities.

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45. *Id.* at 68.

46. See THOMAS GAIS, *IMPROPER INFLUENCE: CAMPAIGN FINANCE LAW, POLITICAL INTEREST GROUPS, AND THE PROBLEM OF EQUALITY* 5 (1996).

47. *Id.* at 5-6.

48. *Id.*

49. 2 U.S.C. §§ 431-455 (2000).

50. MAGLEBY & NELSON, *supra* note 17, at 73-74; see also Robert Biersack & Paul S. Herrnson, *Introduction* to *AFTER THE REVOLUTION: PACS, LOBBIES, AND THE REPUBLICAN CONGRESS* 1, 4-5 (Robert Biersack et al. eds., 1999).

51. MAGLEBY & NELSON, *supra* note 17, at 73-74.

52. 2 U.S.C. § 441b(a) (2000).

53. *Id.* § 441b(b)(2).

54. Biersack & Herrnson, *supra* note 50, at 4; see also GAIS, *supra* note 46, at 6 (analyzing similar data that show the tremendous growth in the number of PACs during the late 1970s and early 1980s); MAGLEBY & NELSON, *supra* note 17, at 73-75 (providing similar quantified analysis).

55. MAGLEBY & NELSON, *supra* note 17, at 77.

The basic source of legislation affecting PACs is the FECA,<sup>56</sup> which places basic monetary restrictions and disclosure requirements on PACs and individuals. PACs are restricted from making annual aggregate campaign contributions in excess of \$5000 to any one candidate,<sup>57</sup> but as discussed earlier, this does not restrict PACs from engaging in issue advocacy,<sup>58</sup> which if done properly may be as effective as direct campaign contributions.<sup>59</sup> PACs are also subject to the FECA's comprehensive disclosure requirements set out in § 434.<sup>60</sup> Primarily, qualifying PACs must file monthly and yearly reports with the FEC containing information about contributions made to political candidates, as well as information about the identity of contributors that donated more than \$200.<sup>61</sup> Hence, PACs may be subject to substantial disclosure rules if they are involved in federal elections. However, the major shortcoming of the FECA is that it does not require disclosure by any individuals, groups, or PACs engaging in pure issue advocacy,<sup>62</sup> and these exempt parties may fund their issue advocacy entirely with soft money received from wealthy individuals, corporations, or labor unions.<sup>63</sup> Thus, this creates a major loophole in the law that can be used by PACs to advance their agendas and a way for corporations and labor unions to affect elections without having to establish separate segregated funds that are subject to the FECA restrictions and disclosure rules.

"Soft money" is simply a term describing all money used in relation to political campaigns that does not fall under the major restrictions of the FECA.<sup>64</sup> The FECA places dollar limits on contributions made directly to candidates,<sup>65</sup> and it also places source restrictions on money contributed by disallowing labor unions and corporations from making any direct contributions to federal election candidates.<sup>66</sup> Money contributed in accordance with these FECA restrictions is called "hard money."<sup>67</sup> However, PACs engaged solely in issue advocacy do not need to use hard money. They can pay for issue advocacy entirely with soft money derived from

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56. 2 U.S.C. §§ 431-455 (2000).

57. *Id.* § 441a(a)(2)(A).

58. *See supra* text accompanying notes 36-39.

59. *See* Briffault, *supra* note 41, at 1751 (giving an example of an issue advertisement aired on television toward the end of a congressional race that depicted the opposition candidate as a spouse-abusing hypocrite); Michael Trister, *The Rise and Reform of Stealth PACs*, AMERICAN PROSPECT, Sept. 25, 2000, at 32, 32 (discussing the PAC Republicans for Clean Air, funded solely by two Texans, that surfaced during the 2000 Republican presidential primary and attacked candidate John McCain's environmental record so that the PAC's candidate, George W. Bush, looked better in the public's eye).

60. 2 U.S.C. § 434 (2000).

61. *Id.* § 434(b).

62. This is the result of the Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the Court said that expenditures made for issue advocacy are exempt from the FECA rules on disclosure. *See supra* text accompanying notes 36-39.

63. For a detailed discussion of soft money and its origins, see Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620 (2000).

64. *See id.* at 628.

65. 2 U.S.C. § 441a (2000).

66. *Id.* § 441b.

67. Briffault, *supra* note 63, at 628.



sources such as wealthy individuals, corporations, or labor unions.<sup>68</sup> Therefore, corporations and labor unions can contribute large sums of money out of their general treasuries to PACs engaged solely in issue advocacy and not be in violation of the FECA.<sup>69</sup> If PACs focus their energies on issue advocacy, they can completely evade the FECA's hard money restrictions. Hence, PACs wanting to take advantage of this limitless, unrestricted supply of soft money, which has the ability to influence elections, have looked for ways to do so most effectively.

### *C. The Section 527 Loophole and the Creation of Stealth PACs*

In order for groups such as PACs to be truly effective with their issue advocacy, they must be able to convince the voting public of two things: first, that the ideal they are advertising is a good one to support; and second, that the advertisement is legitimate. Convincing the public to support the ideal is an age-old political problem, which is, of course, the main goal of these groups. However, legitimacy is a threshold that must be safely crossed before a group can ever convince the public of anything.

As to legitimacy, the PAC must chiefly be able to hide any questionable or dubious ties that it has to certain parties that would especially benefit from the election of a candidate aligned with the PAC's agenda.<sup>70</sup> In other words, in order for a PAC's issue advertisement to be convincing, the PAC must try to avoid any stigma, of the type discussed by the Supreme Court in *Buckley v. Valeo*, of "real or apparent corruption."<sup>71</sup> The appearance of corruption in an issue advertisement would likely taint the advertisement in the public's view, and thus severely decrease the advertisement's effectiveness. Therefore, it is crucial that an issue advertisement appear legitimate, as opposed to a contrived drama designed by a group that is closely linked to a candidate who is made to look appealing by the advertisement. In sum, if the issue advertisement appears legitimate, there will be little appearance of corruption because the public will not think that there is a connection between the candidate cast in a favorable light by the issue advertisement and the group sponsoring the advertisement.

A key method for PACs to hide any questionable ties to a candidate and avoid the appearance of corruption is for the PAC to keep its contributors anonymous. Hence, if a PAC has a large paper products manufacturer as its major soft money contributor, and this information remains anonymous, then the PAC named Citizens Against the Use of Plastics would appear completely legitimate. If it is disclosed, however, that the main contributor of a group advertising the benefits of paper bag use over plastic is a large paper products manufacturer, then the issue advertisement loses credibility and will not be as effective. Furthermore, disclosure of the fact that a large corporation paid for the advertisement may clue the public into a questionable connection between the candidate that the advertisement favors and the corporation

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68. Trevor Potter, *Issue Advocacy and Express Advocacy*, in CAMPAIGN FINANCE REFORM: A SOURCEBOOK, *supra* note 16, at 238.

69. *See id.* at 227, 238.

70. *See* Trister, *supra* note 59, at 32 (discussing the fact that stealth PACs are used to blur the connection between the wealthy parties funding the advertisements and the candidates the advertisements benefit).

71. *Buckley v. Valeo*, 424 U.S. 1, 46 (1976).

funding the advertisement. Hence, PACs want anonymity, and up until the summer of 2000, PACs had found that anonymity in § 527 of the tax code, which allowed PACs to accept huge donations that were not subject to gift tax, while simultaneously avoiding the FECA disclosure rules because the money was applied only to issue advocacy.<sup>72</sup>

Section 527 of the Internal Revenue Code was originally enacted in 1974 to help clear up issues that had arisen regarding how candidates had to account for campaign contributions for personal tax purposes.<sup>73</sup> And the use of § 527 organizations as campaign finance vehicles was given little thought.<sup>74</sup> Section 527 permits a “political organization,”<sup>75</sup> which includes “a party, committee, association, fund, or other organization,”<sup>76</sup> to be generally exempt from taxes<sup>77</sup> so long as the organization is “operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”<sup>78</sup> An “exempt function” is then defined as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . . .”<sup>79</sup> In sum, a PAC is a valid § 527 organization if its primary purpose is to take in and spend money for the purpose of getting a person elected to public office.

At first blush it may appear that a § 527 organization is inherently subject to the FECA regulations and disclosure rules because the group, to qualify for § 527 tax status, must have as its purpose the goal of getting specific candidates elected.<sup>80</sup> However, the key is that the IRS has permitted activities that do not qualify as express advocacy—that is, the magic words from *Buckley* have not been used<sup>81</sup>—to qualify as exempt functions under § 527.<sup>82</sup> Therefore, PACs can send out literature, such as leaflets or “voter guides,” that indicate the congressional voting records of candidates in key parts of the country in an effort to influence voters in the area, and the PAC will qualify as a § 527 organization.<sup>83</sup> Yet, regardless of the fact that for tax purposes the PACs are attempting to influence elections, they are not subject to any FECA limitations because the PAC never expressly advocates the election of one of the

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72. Trister, *supra* note 59, at 32.

73. Hill, *supra* note 2, at 389-90.

74. *Id.*

75. 26 U.S.C. § 527(e)(1) (1994).

76. *Id.*

77. *See infra* text accompanying notes 89-93.

78. 26 U.S.C. § 527(e)(1).

79. *Id.* § 527(e)(2).

80. *Id.*

81. *See supra* text accompanying note 39.

82. *See, e.g.,* Hill, *supra* note 2, at 390-94 (discussing in detail the types of activities that qualify as “exempt functions” under the tax code, such as the distribution of voter guides and congressional voting record summaries); *see also* Priv. Ltr. Rul. 97-25-036 (June 20, 1997) (indicating that grass roots lobbying efforts by a political group were enough to qualify as exempt functions even though the group did not expressly advocate the election or defeat of specific candidates).

83. Priv. Ltr. Rul. 97-25-036 (June 20, 1997).

candidates.<sup>84</sup> Exactly what level of issue advocacy qualifies as an exempt function under § 527 is not entirely clear and may be subject to significant IRS rulings and regulation.<sup>85</sup> However, it does appear from initial IRS rulings that publishing the voting records of select members of Congress and showcasing certain pictures of the members will be enough to qualify, in the IRS's view.<sup>86</sup> Thus, as long as the § 527 organization avoids express advocacy but engages in significant issue advocacy, it will avoid the FECA monetary limits and disclosure rules while still qualifying as a § 527 organization. Moreover, because the PAC qualifies as a § 527 political organization, it will enjoy certain tax benefits.<sup>87</sup>

#### *D. Tax Status Benefits and Their Importance to Political Groups*

Depending on how a political group is organized, certain tax statuses may be claimed by the group.<sup>88</sup> Each status offers its own unique benefits, and those tax benefits, or lack thereof, may prove vital to a political group. The most important tax benefit of which § 527 political organizations are able to take advantage is that donations to the organization are not subject to gift tax.<sup>89</sup> This is not true for other forms of organizations such as the popular § 501(c)(4) tax-exempt groups.<sup>90</sup> Hence, donors of money to social welfare groups, unions, and trade associations organized for tax purposes as a § 501(c)(4) tax-exempt entity must pay gift tax on donations that exceed the annual gift tax limitation of \$10,000.<sup>91</sup> Therefore, because the groups and PACs interested in engaging in serious issue advocacy are seeking donations well above the \$10,000 limit,<sup>92</sup> the § 527 gift tax-exemption is a very important benefit because gift taxes can in fact be very high.<sup>93</sup> Furthermore, there are other tax benefits that groups enjoy from organizing as a § 527 organization instead of as § 501(c)(3) or § 501(c)(4) organizations.<sup>94</sup>

Groups and PACs organized as a § 501(c)(3) organization generally include any

84. See *supra* text accompanying notes 36-40 (discussing the idea that PACs must expressly advocate the election of a candidate to be subject to the FECA disclosure rules).

85. For an introduction to the basic parameters, see Hill, *supra* note 2, at 390-94.

86. *Id.*

87. *Id.* at 387-88 (stating that § 527 organizations are exempt from gift tax).

88. *Id.* (discussing the different tax statuses available to political groups).

89. 26 U.S.C. § 2501(a)(5) (1994) (stating that § 527 organizations are specifically exempt from gift taxes).

90. Hill, *supra* note 2, at 388-89.

91. *Id.* at 389; see also Trister, *supra* note 59, at 34.

92. See Hill, *supra* note 2, at 388 (recounting that one § 527 political organization, the Republican Majority Issues Committee, is reported to be targeting donors interested in giving between \$500,000 and \$3 million to the group); see also Briffault, *supra* note 63, at 630-31 (discussing the huge amounts of soft money floating around the political system, and the fact that 390 individuals or organizations donated \$100,000 or more in soft money in 1997-98).

93. 26 U.S.C.A. § 2001(c) (West Supp. 2001) sets out the tax rates for gifts over the \$10,000 exemption amount, and if the gift is very large the tax rate imposed may well exceed even the highest rates imposed on ordinary income.

94. See generally James R. Sutton, *Nonprofits & Politics Issues Are OK, Candidates Aren't*, BUS. L. TODAY, Sept./Oct. 2000, at 57 (providing a good synopsis of the basic tax rules).

corporations, funds, or foundations operated exclusively for religious, charitable, or educational purposes, or some other narrowly defined similar purpose.<sup>95</sup> These groups may engage in very limited forms of issue advocacy in the form of publicizing the voting records of members of Congress on issues important to the charity, but the basic rule is that § 501(c)(3) organizations cannot get directly involved in campaigns, and if they do become directly involved or if their issue advocacy goes too far, then they may lose their exempt status altogether.<sup>96</sup> Section 501(c)(4) organizations, on the other hand, are permitted to have limited involvement in political campaigns so long as they primarily are engaged in nonpolitical activities.<sup>97</sup> If the § 501(c)(4) organization becomes substantially involved in political campaigns, then it may be subject to a special excise tax.<sup>98</sup> Hence, both § 501(c)(3) groups and § 501(c)(4) groups must be careful as to how much they are involved in elections. This limitation on the political involvement of PACs does not affect § 527 organizations because they are required to be primarily organized to be involved in elections.<sup>99</sup>

In spite of the limitations discussed above, § 501(c)(3) and § 501(c)(4) organizations do have their benefits. One of the key benefits of a § 501(c)(3) organization is that donations to it may be tax deductible, but this benefit is subject to many restrictions.<sup>100</sup> Another benefit enjoyed by both § 501(c)(3) and § 501(c)(4) organizations is that the identities of the parties making contributions do not have to be disclosed, and thus the donor list remains anonymous.<sup>101</sup> Finally, § 501(c)(3), § 501(c)(4), and also § 527 organizations are all allowed to receive donations from any type of source, such as individuals, corporations, or labor unions, and are not limited as to the amount of donations they are permitted to receive.<sup>102</sup> Thus, a group interested in supporting a political cause or candidate must carefully weigh its options before making a choice as to how to organize itself for tax purposes.

In sum, taxes are crucial to any political group, and each political group must make its choice as to which form of tax entity it will be. The groups have the above-discussed basic options of being a § 501(c)(3), § 501(c)(4), or § 527 organization, and each form of tax entity has its costs and benefits. But as politicians, corporations, labor unions, and others realized in the late 1990s, the § 527 organization was in the perfect position to blow the soft money and issue advocacy loopholes of the FECA wide open.<sup>103</sup> Section 501(c)(3) and § 501(c)(4) organizations were nice soft money appetizers that whet each group's appetite, but they were nothing compared to the soft money feast that § 527 organizations offered. Section 527 organizations were able to solicit huge donations from anonymous wealthy special interests, including individuals, corporations, trade associations, and unions, and then use those funds to

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95. 26 U.S.C. § 501(c)(3) (1994).

96. Hill, *supra* note 2, at 389; *see also* Sutton, *supra* note 94, at 58.

97. 26 U.S.C. § 501(h) (1994 & Supp. V 1999); *see also* Trister, *supra* note 59, at 34.

98. Trister, *supra* note 59, at 34.

99. 26 U.S.C. §§ 527(e)(1)-(2) (1994).

100. 6 U.S.C. § 170(c)(2)(B) (2000). Charitable contribution deductions are also subject to many IRS regulations; thus, the benefit of a tax deduction is by no means guaranteed. *See, e.g.*, Treas. Reg. § 1.170-1 (as amended in 2001) (setting out several detailed rules applicable to charitable contribution deductions).

101. Hill, *supra* note 2, at 389.

102. *Id.*

103. *See id.* at 388.

sponsor issue advertisements all over the country in an effort to influence local, state, and federal elections.<sup>104</sup>

The ability of § 527 political organizations to solicit and use large amounts of soft money from any source whatever and to not be required to disclose the source of the funds earned the groups the nickname “stealth PACs.”<sup>105</sup> The groups act like PACs in many ways because they have an underlying agenda that they are trying to advance by engaging in issue advocacy with the goal of getting candidates elected that are sympathetic to the groups’ causes.<sup>106</sup> Yet, the groups are stealth PACs because they were formerly not required to disclose any information about the source of the soft money to the FEC or any other agency.<sup>107</sup> Furthermore, the groups are not subject to the FECA source restrictions, monetary limitations, or disclosure rules<sup>108</sup> with which regular PACs engaged in direct contribution activities and express advocacy must generally comply.<sup>109</sup> Therefore, these new stealth PACs could run advertisements across the country in key geographical areas and attempt to disparage the reputations of candidates that did not support their cause without even having to inform the public who was paying for the advertisements. Hence, the paper products manufacturers could get together and donate huge sums of money to Citizens Against the Use of Plastics, which engages extensively in “sham issue advocacy”<sup>110</sup> in order to get candidates aligned with the group’s ideology elected, and the voting public would be none the wiser. Thus, § 527 stealth PACs, funded by wealthy special interests, had the potential to significantly influence the voting public and elections by posing as groups sincerely concerned with specific issues.<sup>111</sup> This, however, changed in the summer of 2000.

#### PART II: THE § 527 AMENDMENT AND ITS EFFECT ON CAMPAIGN FINANCE REFORM

The amendment to § 527 has been a hotly debated congressional decision and very unpopular with some parties.<sup>112</sup> Moreover, it is not yet clear what the amendment’s overall impact will be. This part of the Note will discuss how the new version of § 527 will likely affect stealth PACs, and it will also examine the costs and benefits of new § 527. Finally, this part of the Note will conclude by explaining why amending § 527 was a good decision and why the amendment should serve as a model for future campaign finance reform.

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104. Trister, *supra* note 59, at 32.

105. *Id.*; see also Hasen, *supra* note 5, at 268.

106. See Frank Sorauf, *Political Action Committees*, in *CAMPAIGN FINANCE REFORM: A SOURCEBOOK*, *supra* note 16, at 125-26.

107. Hasen, *supra* note 5, at 268.

108. Hill, *supra* note 2, at 388-89.

109. See *supra* text accompanying notes 56-61.

110. Hasen, *supra* note 5, at 265. (“Sham issue advocacy” is the term that was coined by Professor Richard Hasen to describe advertisements posing as issue advertisements but actually intended to influence the outcome of elections.)

111. See Trister, *supra* note 59, at 32 (discussing a § 527 organization, established by a special interest group, that used its anonymity to influence the 2000 presidential election).

112. See *infra* text accompanying notes 138-40 (setting out several major complaints).

*A. Origin and Parameters of the New § 527*

Senator John McCain, intent on initiating some form of campaign finance reform after returning from his unsuccessful run for the 2000 Republican presidential nomination, introduced, with the help of Senator Joseph Lieberman, the amendment to § 527 on June 7, 2000.<sup>113</sup> To avoid a potential Republican minority filibuster, McCain and Lieberman introduced the narrow measure as an attachment to the filibuster-proof Defense Department authorization bill.<sup>114</sup> The Republican minority then tried to thwart the effort by introducing its own amendment that broadened the scope of the legislation to require disclosure by other organizations not organized under § 527, such as labor unions and trade associations.<sup>115</sup> The reformers, however, realized that the broader form of the amendment was a “poison pill” intended to make the amendment ineffective in the long run.<sup>116</sup> Thus, the broader form of the amendment never received enough support, and the form of the amendment passed by the House and the Senate was the narrow § 527 version introduced by McCain and Lieberman.<sup>117</sup>

The amendment requires § 527 political organizations to file monthly reports with the IRS,<sup>118</sup> and during election years the organizations must also file quarterly, preelection, and postelection reports.<sup>119</sup> Organizations that are required to report under the FECA as a political committee and smaller § 527 organizations that take in less than \$25,000 in gross receipts in a tax year are exempt from filing under § 527.<sup>120</sup> For § 527 organizations that are required to file, the reports must contain basic information about the inflows and outflows of cash, including the names of donors contributing more than \$200<sup>121</sup> and the names of persons receiving amounts in excess of \$500.<sup>122</sup> These reports must be made available to the public,<sup>123</sup> and they are also published on the IRS’s web site.<sup>124</sup> Overall, the reporting requirements of the amended § 527 are significant and are now a major concern for some groups engaged in issue advocacy.

The groups primarily affected by the new disclosure requirements of § 527 are the ones that were formed under § 527 and are engaged in extensive issue advocacy. To avoid the § 527 disclosure rules, groups may reorganize under § 501(c)(4) of the tax code and still get the benefit of anonymity,<sup>125</sup> but as was discussed earlier, § 501(c)(4) organizations are limited as to the amount of involvement they may have in political

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113. Trister, *supra* note 59, at 34-35 (recounting the events surrounding the passage of the § 527 amendment).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. 26 U.S.C.A. § 527(j)(2)(B) (West Supp. 2001).

119. *Id.*

120. *Id.* § 527(j)(5)(A), (C).

121. *Id.* § 527(j)(3)(B).

122. *Id.* § 527(j)(3)(A).

123. Trister, *supra* note 59, at 34-35.

124. Section 527 organizations’ electronically filed notices and reports are available at [http://eforms.irs.gov/search\\_result.asp](http://eforms.irs.gov/search_result.asp) (last visited Dec. 17, 2001).

125. Trister, *supra* note 59, at 35.

campaigns, are subject to gift tax, and may be assessed a special excise tax if they get too involved in election advocacy.<sup>126</sup> Thus, reorganizing under § 501(c)(4) may not be an option for all groups.

Wealthy individuals or for-profit businesses may just avoid the disclosure rules altogether by continuing their issue advocacy activities but never adopting any formal tax form.<sup>127</sup> This option is available to wealthy individuals and for-profit businesses because they are simply engaging in pure issue advocacy, as permitted by the Supreme Court in *Buckley*,<sup>128</sup> and are not engaged in any taxable events like receiving donations and making expenditures. Hence, § 527 disclosure rules may not affect a lucky few, but organizations that operate like independent issue advocacy businesses, taking in revenues from donors and spending them on issue advertisements, may sorely miss the benefits of anonymity offered by former § 527.

### *B. Costs and Benefits of the New § 527 Disclosure Rules*

The new § 527 disclosure rules require organizations that were formerly allowed to conduct extensive issue advocacy and keep their donors' identities—and thus their true agendas—a secret to now reveal who in fact contributed the large sums of cash to pay for the advertisements.<sup>129</sup> The Supreme Court discussed the importance of disclosure in *Buckley*.<sup>130</sup> The Court noted that disclosure helps to ensure a more informed electorate, helps to deter corruption, and helps the FEC enforce other FECA rules.<sup>131</sup> Overall, what the court was attempting to convey, and what many other observers have expressed, is that disclosure is essential to fair elections, and more fundamentally, disclosure is vital to an effective democracy.<sup>132</sup> Therefore, it is in the best interests of the country as a whole to have more disclosure like the type now provided by § 527.

Opponents of § 527 dislike more disclosure for obvious reasons. If a stealth PAC is required to disclose the identity of its key donors, then its issue advocacy may lose its credibility. For example, if the fictitious PAC, Citizens Against the Use of Plastics, was forced to disclose that the PAC's major contributor is the logging or

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126. See *supra* text accompanying notes 91-98.

127. Trister, *supra* note 59, at 35.

128. 424 U.S. 1, 44 (1976).

129. Trister, *supra* note 59, at 32.

130. 424 U.S. at 66-68.

131. *Id.*; see also *supra* text accompanying notes 42-44.

132. See *Buckley*, 424 U.S. at 67. The Court, in fact, quoted Justice Brandeis's words: "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." *Id.* (citation omitted). Another well-informed observer stated, "I believe that democracy works better the more citizens know. Complete information, or at least nearly complete information, is a prerequisite to good decision making. So let's disclose as much as possible and right away." JEFFREY H. BIRNBAUM, *THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA* 263 (2000). "Sham issue advocacy is intended to influence election results, and therefore, it should be subject to disclosure requirements just like other election-related spending . . . . Preserving the integrity of our electoral process justifies the rare and minimal intrusion [on groups engaged in valid issue advocacy]." Hasen, *supra* note 5, at 283-84.

paper industry, then the public's take on an advertisement that shows plastics as the downfall of the human race may be much more skeptical. But, if the voting public is not aware of who is sponsoring the advertisement, then it will likewise be unaware of the potential danger of corruption that lies beneath. If the advertisement describing the use of plastics as a detriment to our environment showcases one of two congressional candidates as being pro plastics, then the public will be led to believe that this supposedly valid PAC that is concerned for our environment has uncovered a decidedly anti-environmental candidate. Yet, in reality, the PAC may actually just be a front for the logging and paper industry, and the candidate that the issue advertisement casts in a favorable light might actually be a well-connected businessman from a timber-rich area of the state. Hence, the possibility for corruption and devious electioneering looms large without adequate disclosure of § 527 organizations.<sup>133</sup>

PACs and their supporters interested in engaging in issue advocacy may argue that they are just presenting information to the public and that the source of such information should not matter. However, the problem is that the public is being fooled into believing that these official sounding groups, for example "Republicans for Clean Air,"<sup>134</sup> are actually concerned with the issue in the advertisement. In truth, the groups are most concerned with getting a certain candidate elected, and they just use the issue advertisement as a deceptive means to an end.<sup>135</sup> Therefore, the stealth PACs are essentially conducting express advocacy without using the express words "Vote for Smith."<sup>136</sup> Moreover, the groups are conducting express advocacy without being subject to the disclosure rules that the Supreme Court said were so important to avoiding corruption and ensuring a well-informed electorate.<sup>137</sup>

Opponents to the § 527 amendment have, in fact, passionately criticized the measure for many reasons. Attorney Mark Braden, former chief counsel to the Republican National Committee, called it "legislation at its worst."<sup>138</sup> David Rivkin, Jr., a constitutional and regulatory law expert, has said that the § 527 amendment is "fundamentally constitutionally deficient" because it impairs an individual's First Amendment right to anonymously engage in political speech.<sup>139</sup> Finally, the Commissioner of the FEC himself, Bradley Smith, has criticized the measure for being overly broad, ineffective, and just another example of heavy-handed government regulation in an area of the law that needs less regulation.<sup>140</sup> Obviously, opponents to the new tax disclosure rules believe that amending § 527 was an unnecessary and incorrect decision. However, as the next section discusses, this does

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133. Hasen, *supra* note 5, at 267-68 (stating that the issue advertisements are not about issues but about electioneering).

134. Trister, *supra* note 59, at 32.

135. *Id.* (discussing the group Republicans for Clean Air and the wealthy individuals behind it that were apparently closely connected to George W. Bush, the beneficiary of the issue advertisements).

136. Hasen, *supra* note 5, at 267.

137. *Buckley*, 424 U.S. at 66-68.

138. Davidson, *supra* note 15, at 1.

139. Deirdre Davidson, *Soft-Money Showdown*, LEGAL TIMES (Washington D.C.), Sept. 18, 2000, at 4.

140. See Bradley A. Smith, *Regulation and the Decline of Grassroots Politics*, 50 CATH. U. L. REV. 1, 10-11 (2000).



not appear to be the case. The amendment to § 527 was both a necessary and proper decision, as well as an important first step toward long-term campaign finance reform and, especially, soft money reform.

*C. The Right Decision: Why Amending § 527 Was the Correct Choice*

Campaign finance reform came to a standstill in the late 1990's. In fact, the amendment of § 527 was the first significant reform measure to close a finance loophole in over two decades.<sup>141</sup> Campaign finance reform proponents have debated theory upon theory about how to most effectively reform campaign finance,<sup>142</sup> but no theory has ever come to fruition because legal wrangling and political maneuvering have thwarted the reform movement's efforts.<sup>143</sup> Reformers and many nonreformers agree that soft money is at the heart of America's campaign finance troubles,<sup>144</sup> but Congress cannot seem to pass a reform bill that curbs the use of soft money.<sup>145</sup> Many also agree that stronger enforcement of the current laws is needed, but as several commentators have noted, and as one writer put bluntly, "[t]he Federal Election Commission is the most ineffective agency in Washington."<sup>146</sup> Thus, before the amendment to § 527, campaign finance reform was paralyzed on all fronts, and soft money and PACs were mangling the American political process. Opponents to the change may argue that it was a poor decision, but for many reasons, that is simply not true.

First, while it is not clear why Congress originally permitted § 527 organizations to qualify as tax-exempt entities, it seems that when § 527 was enacted into the tax code in the mid-1970s, Congress assumed that § 527 political organizations would be subject to the FECA disclosure requirements, so no disclosure needed to be provided for in the tax code.<sup>147</sup> This assumption was proved incorrect in the late-1990's when, following a couple of IRS private letter rulings, politically active groups including unions, corporations, nonprofits, and many more realized that they

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141. Trister, *supra* note 59, at 32.

142. *See supra* text accompanying notes 11-14.

143. *See* Joseph Lieberman, *Introduction: Campaign Finance*, 49 CATH. U. L. REV. 5, 6-7 (1999) (discussing how campaign finance reform bills have twice passed the House of Representatives vote only to be filibustered in Senate each time); *see also* Trister, *supra* note 59, at 34-35 (discussing the political tactics, such as filibuster, used by Republican senators to kill past reform bills).

144. *See* BIRNBAUM, *supra* note 132, at 252 (pointing out that eliminating soft money is usually considered to be the first key step in any theory of reform); *see also* MAGLEBY & NELSON, *supra* note 17, at 206 (discussing how soft money creates instability in any system of campaign finance spending limits, such as the FECA, thus, soft money needs to be controlled); Briffault, *supra* note 63, at 657-58 (positing that "the corruption danger posed by soft money is manifest"); Thomas E. Mann, *A Plea for Realism*, in MONEY AND POLITICS, *supra* note 11, at 74, 77 (stating that soft money is one of the most egregious flaws in our current campaign finance system).

145. Currently there is legislation pending before Congress that eliminates soft money, but as of the publication of this Note that legislation has not been signed into law. *See* S. 27, 107th Cong. (2001).

146. BIRNBAUM, *supra* note 132, at 15.

147. Hill, *supra* note 2, at 390; *see also* Sutton, *supra* note 94, at 59; Lieberman, *supra* note 143, at 8.

could use § 527 to engage in disclosure-free issue advocacy and enjoy the benefits of § 527 tax status.<sup>148</sup> Thus, the IRS rulings on the issue inappropriately stretched the law to allow for the use of § 527 status by groups that Congress did not originally intend to benefit from it. The IRS misinterpreted the law, and Congress amended § 527 to correct that misinterpretation.

Second, Congress does not allow for tax subsidization of political groups not conforming to election laws.<sup>149</sup> Congress decided when it enacted the FECA that if groups wanted to participate directly in the political process, then they must conform to election laws so that the system would maintain its integrity and avoid succumbing to corruptive influences.<sup>150</sup> As a result, Congress has since permitted certain special tax statuses only to groups that either conformed with the election laws or that did not engage substantially in the political process.<sup>151</sup> Thus, § 501(c)(3) and § 501(c)(4) organizations were permitted special tax status because they are not permitted to participate substantially in the political process, and if they do they will have their status revoked or a special tax imposed.<sup>152</sup> Section 527 organizations were given favorable tax status by Congress because Congress originally assumed that § 527 groups would be subject to the FECA disclosure rules.<sup>153</sup> This assumption, however, was incorrect, and § 527 organizations found a loophole in the law that permitted them to engage in extensive political advocacy while not being required to comply with election or campaign finance laws.<sup>154</sup> Therefore, following its long-held principle of not subsidizing groups actively participating in political campaigns and not complying with election laws, Congress changed the law so that § 527 organizations must now disclose their activities to the IRS.<sup>155</sup> Amending the tax law was a back-door solution to the § 527 loophole problem, but still a fundamentally correct one based on a sound and long-standing congressional principle.

A final reason why the § 527 amendment was a sensible decision is that not only did it possibly eliminate stealth PACS, but it may also serve as a mold for future reform efforts that will eventually result in the elimination of soft money. The amendment to § 527 repaired one loophole in the law that developed as a result of a culmination of the judicial interpretation of the FECA by the Court in *Buckley*<sup>156</sup> and the IRS's interpretation of what types of groups qualified for § 527 exemption. Thus, after these unforeseen changes in the law, a loophole developed, which Congress has now repaired. Congress did not attempt to pass a filibuster-prone overhaul of the FECA to fix this one loophole, nor did Congress attempt to repair several loopholes at once.<sup>157</sup> Instead, Congress enacted a focused and narrow piece of legislation, and because Congress took a narrow and focused approach, the legislation was passed

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148. *See supra* text accompanying notes 80-83.

149. *See Lieberman, supra* note 143, at 8.

150. *See id.*

151. *Id.*

152. *See supra* text accompanying notes 91-98.

153. Hill, *supra* note 2, at 390.

154. Lieberman, *supra* note 143, at 8.

155. Act of July 1, 2000, Pub. L. No. 106-230, § 2, 114 Stat. 477, 479-80 (codified as amended at 26 U.S.C. § 527(j) (2000)).

156. 424 U.S. 1 (1976); *see also supra* text accompanying notes 26-41.

157. *See Trister, supra* note 59, at 34-35.

and the loophole closed.<sup>158</sup> This narrow and reparative legislation may be a strong indication of what types of reform measures could realistically be implemented in the future.

*D. Section 527: A Model for Future Reform*

One of the primary purposes of the § 527 amendment was to help reduce the amount of soft money flowing into the political system by eliminating an especially attractive soft-money-guzzling campaign finance vehicle.<sup>159</sup> Soft money, as most will agree, is a giant campaign finance problem.<sup>160</sup> Labor unions dump millions of dollars in soft money into the political arena each election cycle.<sup>161</sup> Other groups, then, do the exact same thing to counter the labor unions.<sup>162</sup> This monetary jousting is ultimately severely detrimental to candidates, voters, and the entire political process.<sup>163</sup> As Senator Russell Feingold, a major supporter of campaign finance reform and cosponsor of the Bipartisan Campaign Finance Reform Act,<sup>164</sup> wrote, soft money “enhances the influence of the wealthy few over the political process and contributes to the erosion of the one-person/one-vote principle on which our electoral system is based.”<sup>165</sup> Hence, soft money appears to be a large problem indeed.

Despite the size of the soft money problem, no comprehensive legislation curbing or eliminating its use has made it through Congress.<sup>166</sup> Reformers have tried to pass legislation that would eliminate soft money,<sup>167</sup> but they have had no success. A stubborn few simply refuse to be weaned. Yet, it is clear that reform is necessary.<sup>168</sup> But with a political and legislative stalemate in place, broad, comprehensive reform

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158. *Id.*

159. See Hill, *supra* note 2, at 387-88 (discussing the emergence of § 527 organizations as a high octane campaign finance vehicle).

160. See *supra* text accompanying note 144.

161. BIRNBAUM, *supra* note 132, at 227-28.

162. See *id.* (stating that Republicans need huge amounts of soft money to counteract the effects of unions and their soft money spending).

163. See *id.* at 20 (stating that large soft money contributions by corporations, unions, and the wealthy few gives them access to political leaders that the individual voter cannot get, and thus, the rich few are jading our political leaders and making them care more about millionaires than they do about the average American); see also Charles E. M. Kolb & Christopher Dreibelbis, *Campaign Finance Reform: A Business Perspective*, 50 CATH. U. L. REV. 87, 97 (recounting that large soft money contributions from a select few wealthy interest groups increase the possibility of corruption, and the possibility of special interest groups and their political agendas overpowering candidates and their good judgment while in office).

164. S. 27, 107th Cong. (2001).

165. Russell Feingold, *Modest Reform?*, in MONEY AND POLITICS, *supra* note 11, at 33, 34.

166. Again, as of the publication of this Note, no legislation eliminating soft money has been signed into law, but there is legislation pending that would do just that. See S. 27, 107th Cong. (2001).

167. See *supra* notes 141-43 and accompanying text.

168. “What isn’t in dispute anymore is that *something* must be done. . . . Corporations, labor unions, narrow interest groups, and wealthy individuals are buying their way into our government at a pace that threatens to destroy the democracy that we all hold so dear.” BIRNBAUM, *supra* note 132, at 21 (emphasis in original).

may be impossible. That is why Congress's amendment to § 527 may prove to be such an important piece of legislation. It has created movement. The § 527 amendment has kick-started the campaign finance machine that has been standing rusted and idle for several years.

The amendment of § 527 was a relatively small change in campaign finance law. Congress closed one loophole. Stealth PACs are no longer permitted to use § 527 of the tax code to their financial benefit and remain completely anonymous.<sup>169</sup> Political groups formed under § 527 must disclose their donors and their financial activities.<sup>170</sup> This does not solve the soft money problem and is not a comprehensive reform measure, but it is a first step. Because § 527 of the tax code was amended, there will be fewer opportunities to subversively use soft money to fund sham issue advertisements<sup>171</sup> that have the potential to mislead the public and corrupt candidates. Thus, by amending § 527, Congress did not solve all of the campaign finance problems, but it was the first time in two decades that something this significant had been done.

Campaign finance reformers like John McCain, Russ Feingold, and numerous others have long been calling for broad, significant, and immediate reforms like the complete elimination of soft money.<sup>172</sup> However, many members of Congress and other politicians have been unwilling to commit to such far-reaching reforms.<sup>173</sup> Perhaps the reason for this unwillingness to commit is that the reforms sought are simply too broad, too sudden, or too close to home. In the past decade, politicians have become accustomed to using soft money and issue advertisements as tools that supplement their other campaign efforts.<sup>174</sup> Hence, it is no wonder that these same politicians have been resistant to massive change. Politicians, incumbents, and challengers alike, realize that the only way to get into and stay in office is to raise large sums of money.<sup>175</sup> Thus, any legislation that is intended to abruptly take away a large source of money, and possibly a politician's political life, is going to meet strong opposition.<sup>176</sup> Campaign finance reforms should be small measures designed to solve specific problems. Attempts to eradicate soft money have failed because they have simply been too drastic and too threatening to politicians and their livelihood. Small measures are less threatening and thus are more likely to be viewed favorably.

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169. See *supra* text accompanying notes 118-23.

170. See *supra* text accompanying notes 118-23.

171. See Hasen, *supra* note 5, at 265.

172. Russell Feingold, *Modest Reform?*, in *MONEY AND POLITICS*, *supra* note 11, at 33, 33-34.

173. See *supra* notes 166-68 and accompanying text.

174. See Briffault, *supra* note 63, at 630-31 (discussing the explosive growth of soft money over the past decade, and how it has come to play a critical role in congressional elections).

175. "The simple fact is this: money not only fuels campaigns, it often decides them. Big money largely designates who runs, who wins, what issues are raised, how they are framed, and finally, how legislation is drafted." CECIL HEFTEL, *END LEGALIZED BRIBERY: AN EX-CONGRESSMAN'S PROPOSAL TO CLEAN UP CONGRESS 3* (1998).

176. See Hunt, *supra* note 10, at A23 (stating that House GOP Whip Tom DeLay has publicly vowed to kill campaign finance reform); see also Trister, *supra* note 59, at 34-35 (discussing the difficulty reformers had in passing minor legislation that did not even directly take away money from the candidates).

The amendment to § 527 is a perfect example of a less-threatening, small measure that closed one specific loophole through which soft money was being discretely funneled. Consequently, the measure passed through Congress on its first try, while broader reform efforts have been met with filibusters.<sup>177</sup> Hence, perhaps the solution to America's campaign finance problems is not a broad, sweeping reform, but rather a series of incremental, reparative reforms that fix loopholes in the system and maintain the system's basic operations.<sup>178</sup> America's source of campaign finance regulation, the FECA, is not a worthless and antiquated system of campaign finance laws. In fact, it still embodies the ideals that Congress and the American people have always thought would prevent corruption in politics and elections. The FECA and the campaign finance system, however, have fallen into a severe state of disrepair and have become dilapidated and ramshackle versions of their former selves. But by no means is the FECA or the current campaign finance system a lost cause.<sup>179</sup> If a few loopholes are repaired and regular legislative maintenance is performed, the FECA and our current campaign finance system could serve as an effective regulatory device.

Overall, the amendment to § 527 is a solid first step toward campaign finance reform. But in order to eventually eliminate soft money and the threat of political corruption that accompanies soft money, Congress must try to build on § 527 with similar incremental, reparative actions that keep up with, and ideally keep one step ahead of the loopholes that inevitably emerge in campaign finance laws. Perhaps the next change should be to require disclosure by other tax groups, such as § 501(c)(3) and § 501(c)(4) organizations that are, in substance, being used as a vehicle of issue advocacy designed to promote select, individual candidates and not legitimate issues. Another option may be to amend the FECA rules to require more disclosure in issue advertisements. But, regardless of which area Congress views as the next campaign finance loophole that needs mending, it is clear that Congress must capitalize on the momentum that it has gained from enacting the § 527 amendment by continuing to make small repairs to the system. Congress needs to focus on closing more loopholes and incrementally moving toward more significant reforms. A broad overhaul of the campaign finance system is not needed and probably is not even currently possible, but a few small, realistic repairs and regular maintenance should get the campaign finance system back in working order.

Moreover, even if a large piece of legislation such as the McCain-Feingold bill<sup>180</sup> is eventually passed and soft money eliminated, one major campaign finance law change every thirty years is simply not a means of maintaining the effectiveness of our campaign finance regulatory machine. Congress must make frequent and regular repairs.

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177. *See supra* text accompanying notes 113-17.

178. *Cf.* Bruce Ackerman, *The Patriot Option*, in *MONEY AND POLITICS*, *supra* note 11, at 70, 71-73 (stating that the creation of innovative regulatory methods, such as his idea for a national campaign finance voucher system that would essentially put the power of financing federal elections in the hands of the voters, is the best way to achieve campaign finance reform).

179. "[T]here are flaws in our campaign finance laws—oversights, really—that would require minimal effort to repair." Lieberman, *supra* note 143, at 9.

180. S. 27, 107th Cong. (2001).

## CONCLUSION

Section 527 is a small part of the vast campaign finance regulatory system. Yet, it serves as an excellent example of how campaign finance law has gone awry over the past three decades. Section 527 shows that laws originally enacted under the FECA can be altered over the years by judicial or administrative interpretations, and if Congress does not keep up with regular maintenance and loophole repair, then the laws eventually become meaningless, and the regulatory machine breaks down. Hence, § 527 is a model for future reform. As loopholes develop and abuses occur, Congress can, instead of attempting to pass a sweeping reform that will probably end in filibuster, develop legislation that is narrow enough to be passed but broad enough to have its intended reparative effect. In the end, no matter how ingenious or well-engineered, a regulatory system, like a machine, must be maintained. Proper maintenance is essential to proper function.

