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Direct Democracy and Indirect Regulations: The Brewing Conflict between Federal Campaign Finance Law and State Ballot Measure Campaigns

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DIRECT DEMOCRACY AND INDIRECT REGULATION: THE BREWING CONFLICT BETWEEN FEDERAL CAMPAIGN FINANCE LAW AND STATE BALLOT MEASURE CAMPAIGNS

Margaret G. Perl[†] and Kimberly A. Demarchi^{††}

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The most recent federal campaign finance reform legislation—the Bipartisan Campaign Finance Reform Act (BCRA)—was enacted in response to concerns about apparent

† Attorney, Office of General Counsel - Federal Election Commission. The views expressed in this article do not represent the views of the Office of General Counsel, the Federal Election Commission, or the United States Government. Thank you to my family for their continued support at home, without which this article would not be possible.

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loopholes in existing federal law.¹ Specifically, BCRA sought to reduce or eliminate the use of so-called “soft money”—funds not subject to the source and amount restrictions imposed on direct campaign contributions—to influence federal elections.² To achieve this goal, BCRA substantially expanded the scope of federal regulation to include activities that relate to or could affect federal elections, such as communications about persons who are federal candidates during the period leading up to an election, as well as voter registration and get-out-the-vote activities.³

As the scope of federal regulation expands, it increasingly comes into contact and conflict with state-level election activity. To the extent that federal regulations affect the activities of political actors in state candidate elections, they have only moderate impact because most states regulate the source and amount of contributions to candidate elections in a way that echoes the requirements of federal law. Expanding federal regulation in this area therefore does not require substantial modifications in the behavior of those who attempt to influence state elections that occur in tandem with federal elections.

However, state ballot measures pose a very different problem. In the twenty-four U.S. states with the power of initiative or referendum,⁴ citizens have the constitutional right to vote directly on proposed constitutional and statutory amendments. Also, citizens in the states with initiative have the power to propose amendments themselves. Perhaps because there is no equivalent federal authority, federal law has never particularly focused on this area of state election activity. The Internal Revenue Service even treats state political committees organized to support ballot measures in a different category of tax exemption than political committees organized to support either federal or state candidates.⁵

With the expansion of federal regulation, state-level ballot measure activities are now within the ambit of federal regulation. But under existing Supreme Court precedent, contributions to

1. *See infra* Part II.

2. *Id.*

3. *Id.*

4. M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 11 (2003).

5. Judith E. Kindall & John Francis Reilly, *Election Year Issues*, 2002 EXEMPT ORGS. CONTINUING PROF'L EDUC. TEXT 402, available at <http://www.irs.gov/pub/irs-tege/eotopici02.pdf>.

ballot measure campaigns cannot be limited by source or amount.⁶ Consequently, tensions have resulted from this new interaction between federal regulation and state citizens' exercise of their retained legislative power.

This article explores the tensions between the federal desire to stamp out political activity that evades campaign finance reform efforts and the deference due in our federalist system to states whose citizens have chosen to retain legislative power over initiatives and referenda. We proceed by setting forth a brief history of the initiative and referendum power and of federal campaign finance law,⁷ followed by a more in-depth description of the expansive provisions in BCRA and their impact on ballot measure activities.⁸ We conclude with recommendations about how to balance the competing interests and concerns of federal regulators and state citizens involved in direct democracy.⁹

I. THE NATURE OF AND JUSTIFICATION FOR DIRECT DEMOCRACY IN THE STATES

Both initiative (citizens' power to propose constitutional or statutory amendments) and referendum (citizen ratification of legislative measures) are forms of direct democracy. Direct democracy has existed in the United States since colonial times, when town hall meetings in New England colonies served as forums for citizen-proposed ordinances.¹⁰ Some of the Framers expressed strong opposition to direct democracy, favoring instead a republican structure of government to filter and diminish the factionalism they feared was inherent in purely democratic rule.¹¹ Others believed that some forms of direct democracy were a necessary recognition of their shared theory that the people were sovereign and that the existence of government was justified only

6. See *infra* Part II.

7. *Id.*

8. See *infra* Part III.

9. See *infra* Part IV.

10. WATERS, *supra* note 4, at 3; K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 WAKE FOREST L. REV. 221, 230 (2005).

11. See, e.g., THE FEDERALIST NO. 10, at 61–62 (James Madison) (Jacob E. Cooke ed., 1961). For a more complex and detailed account of the views of the Founders on direct and popular democracy, see Alan Gibson, *Democracy and the Founders' Constitution: Toward a Balanced Assessment*, in UNDERSTANDING THE FOUNDING: THE CRUCIAL QUESTIONS 46–90 (2007).

by the consent of the governed.¹² To that end, the Framers determined that ratification of the U.S. Constitution should be by the citizens of the several states sitting in convention, rather than by the state legislatures.¹³

Adoption of direct democracy in the states began with the ratification of the Massachusetts Constitution by statewide referendum.¹⁴ By 1857, Congress required that every new state entering the union incorporate the requirement that state constitutional changes would be made by legislative proposal referred to the people for ultimate adoption, and today, every state has a legislative referendum process that permits the legislature to refer constitutional and statutory measures to the voters for final approval.¹⁵ Twenty-four states also permit popular referendums, in which the voters may, by petition, refer measures already passed by the legislature to the people for them to accept or reject.¹⁶

Citizen initiatives, in which citizens can propose constitutional and statutory provisions to be adopted by popular vote, arose later in our history. The initiative, along with other measures including direct election of senators, primary elections, secret ballots, and recall, was part of a package of reforms promoted by the Populist

12. WATERS, *supra* note 4, at 3 (citing Thomas Jefferson's support for the power of legislative referendum in his state's constitution); *see also* THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961):

As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived; it seems strictly consonant to the republican theory, to recur to the same original authority . . . whenever it may be necessary to enlarge, diminish, or new-model the powers of government

For an overview of political science research rebutting some of the critiques levied by classical political theorists against direct democracy, see Ian Budge, *Direct Democracy*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 595, 596–97 (R. A. W. Rhodes et al. eds., 2006).

13. U.S. CONST. art. VII; *see also* DuVivier, *supra* note 10, at 229–30 (noting that the Framers' choice of ratification by convention indicates that their choice of a republican form of government did not represent a repudiation of popular sovereignty).

14. WATERS, *supra* note 4, at 3. An earlier attempt to include a requirement of conventions to amend the Georgia Constitution failed. *Id.* For a general history of state constitutional tradition of direct democracy, see G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, in DEMOCRACY: HOW DIRECT?, 87–99 (Eliott Abrams ed., 2002).

15. WATERS, *supra* note 4, at 3, 11; DuVivier, *supra* note 10, at 230–31. For a detailed account of the circumstances in which citizens in each state obtained the power of initiative, referendum, or both, see WATERS, *supra* note 4, at 37–453.

16. WATERS, *supra* note 4, at 11.

and Progressive movements that rose to prominence around the turn of the twentieth century.¹⁷ The Progressives and Populists can certainly be seen as self-interested in their support for the popular initiative, which provided them with a mechanism to adopt their reform platform despite the opposition of the state legislatures they were trying to reform. Nonetheless, by creating a permanent mechanism for direct citizen sponsorship of laws, they created a mechanism that would likewise benefit future generations in resolving issues on which legislative action failed. The use of the initiative in the intervening century has borne out their wishes, resulting in the adoption of measures that were unlikely to secure legislative approval, such as expanding suffrage, imposing legislative term limits, providing for campaign finance reforms and publicly funded elections, establishing citizen redistricting commissions, and imposing limits on taxation.¹⁸ The initiative was also used to address controversial social issues including minority languages, civil rights, the death penalty, physician-assisted suicide, and abortion.¹⁹ Many see progress from these measures, but the initiative has been critiqued as permitting majority biases to trample on individual rights.²⁰ As the use of initiatives and referenda have become more frequent and expenditures on campaigns for and against such ballot measures have increased, critics of direct democracy have also raised concerns about the corrupting influence of money on the process, citing large influxes of money from single donors, including corporate and labor union sources.²¹

These most recent controversies highlight a key difference between state ballot measure campaigns and candidate elections at the federal level. Federal law prohibits the expenditure of corporate or union treasury funds to influence an election and

17. *Id.* at 3; Catherine Engberg, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569, 573 (2001).

18. WATERS, *supra* note 4, at 7. For a detailed, interstate analysis and comparison of the issues addressed by state ballot measures, see *id.* at 481–520.

19. *Id.* at 7.

20. See Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 442 (1998). See generally Derrick A. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978).

21. See generally DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000); PETER SCHRAG, *PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE* (1998).

imposes caps on the amount any particular contributor can give directly to a candidate campaign or to other groups that make expenditures to influence candidate elections, such as political action committees and political parties.²² The United States Supreme Court struck down attempts to impose such “source” and “amount” restrictions on state ballot measure campaigns, finding that in the absence of the quid-pro-quo corruption argument that applies in the candidate election context, such restrictions cannot be supported in the face of the First Amendment’s protections of political speech.²³ California’s recent attempt to impose amount restrictions on contributions to ballot measure committees actually controlled by candidates likewise was struck down on constitutional grounds, despite legitimate concerns that such candidates are well-positioned to use the unrestricted funds raised by a committee they control for the benefit of their re-election campaigns.²⁴

The lack of source and amount restrictions on contributions to committees that support or oppose ballot measures does not mean that contributions to ballot measure campaigns are wholly unregulated. Rather, campaign finance regulation in the ballot measure arena exists largely in the form of disclosure requirements

22. 2 U.S.C. §§ 441a, 441b (Supp. 2005). See *infra* Part II for a more detailed discussion of these restrictions.

23. *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking down limitations on contributions to ballot measure committees); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978) (striking down prohibition on corporate contributions to ballot measure campaigns). After the Supreme Court’s decision in *McConnell v. FEC*, 540 U.S. 93 (2003), several commentators suggested that the constitutionality of contribution limitations to ballot measures might have been revitalized. See, e.g., Richard L. Hasen, *Rethinking the Constitutionality of Contribution & Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005). However, those commentators were writing before the Court’s subsequent decision in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), which seems to tip the balance in favor of the First Amendment where policy, rather than candidates, are the subject of discussion.

24. *Citizens to Save Cal. v. Cal. Fair Political Practices Comm’n*, No. 05AS00555 (Cal. Super. Ct. Mar. 23, 2005), http://www.saccourt.com/geninfo/News_Media/Docs/0555FINAL%20RULING.pdf (preliminarily enjoining rule that would impose amount restrictions on candidate-controlled committees on both First Amendment and statutory grounds). The preliminary injunction was upheld by the California Court of Appeals, but that court did not reach the constitutional issue, holding instead that the rule exceeded the Commission’s authority under the relevant statute. *Citizens to Save Cal. v. Cal. Fair Political Practices Comm’n*, 145 Cal. App. 4th 736, 739 (2006). The case has now been settled. Press Release, California Fair Political Practices Commission, FPPC Agrees to Settlement in Citizens Case (May 21, 2007), www.fppc.ca.gov/index.html?id=48&show=detail&prid=648 (last visited Dec. 23, 2007).

that include listing major funding sources on campaign literature, and filing regular and special campaign finance reports listing contributions and expenditures.²⁵ States have also imposed limitations on the content of ballot measures, in the form of subject matter restrictions and single-subject rules designed to eliminate logrolling of special interest provisions with generally popular, unrelated measures.²⁶ Moreover, ballot measure campaigns are subject to a variety of procedural requirements more onerous than those imposed on candidates, including petitioning requirements, approval by legislative bodies (for some measures), and distribution of public information about proposed measures in the form of publicity pamphlets and pro/con arguments sent to every eligible voter.²⁷ Nonetheless, the differences between this type of regulation and the source and amount restrictions imposed by federal law lead to conflict when the activity regulated by federal law intersects with political activity focused on state ballot measures.

II. A BRIEF HISTORY OF MODERN FEDERAL CAMPAIGN FINANCE LAW AND ITS GRADUAL ENTANGLEMENT IN STATE ELECTIONS

The Federal Election Campaign Act (FECA),²⁸ the statutory backbone of federal campaign finance law, was enacted as a post-Watergate reform targeted at corruption of public officials through

25. See Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors & Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 295 (2005). Even some disclosure regulations have come under successful constitutional attack. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (requiring identification of anonymous pamphleteer unconstitutional); *ACLU v. Heller*, 378 F.3d 979 (9th Cir. 2004) (discussing constitutionality of requirement that funding sources be disclosed on face of campaign literature). But see *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1107 (9th Cir. 2002) (upholding California's requirement of disclosure of contributions and expenditures); Elizabeth Garrett, *McConnell v. FEC & Disclosure*, 3 ELECTION L.J. 237, 243–44 (2004). There are those who advocate this type of regulation—unlimited contributions coupled with extensive disclosure requirements—even in the candidate election context as a better solution to what they see as the intractable problem of money in politics. See Richard Briffault, *Public Funding and Democratic Elections*, 148 U. PA. L. REV. 563, 564–65 (1999) (summarizing major schools of thought on campaign finance reform). We do not address those arguments here.

26. WATERS, *supra* note 4, at 18–20 (survey of state restrictions on subject matter and frequency of initiative and referendum matters).

27. *Id.* at 20–26 (survey of state provisions on petitioning requirements and publication of voter guides).

28. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified at 2 U.S.C. § 431, et seq. (2000)).

campaign donations and advertising. The legislation was an ambitious combination of contribution limitations, expenditure limitations, public financing for Presidential candidates, reporting requirements, and the creation of a new independent agency—the Federal Election Commission (FEC)—to enforce the law and administer a vast public disclosure system.²⁹ This scheme focused on the activities of candidates for federal office and political parties with regard to federal elections, and had minimal effect on state or local elections.³⁰ The U.S. Supreme Court issued a mixed judgment on the constitutionality of these reforms in *Buckley v. Valeo*,³¹ which still generates controversy and sparks policy debates thirty years later.

While *Buckley* upheld the constitutionality of contribution limits, disclosure requirements, and public financing system, it struck down all limitations on expenditures by candidates and independent groups.³² The Court also limited the reach of some of the most important provisions in FECA to address constitutional vagueness concerns. First, the definition of “political committee” (the trigger for contribution limitations and reporting requirements for political parties and organizations) was limited to those groups that not only passed the statutory threshold of making expenditures or receiving contributions of \$1000 or more, but whose “major purpose” was “the nomination or election of a candidate.”³³ In addition, *Buckley* limited the reach of the term

29. The FECA was substantially amended after the 1972 presidential election. Pub. L. No. 93-443, 88 Stat. 1263 (1974). It was these 1974 amendments that were challenged as unconstitutional in *Buckley v. Valeo*. See generally Mark Alexander, *Campaign Finance Reform: Central Meaning and New Approach*, 60 WASH. & LEE L. REV. 767, 805 (2003); Hasen, *supra* note 233, at 887–89.

30. See 2 U.S.C. § 441b(a) (2000) (prohibiting national banks from making contributions or expenditures in connection with any election to *any political office*); *id.* § 441c(a)(1) (prohibiting government contractors from making any contribution to any political party, committee, or candidate for public office or to any person *for any political purpose or use*); *id.* § 441e(a)(1) (prohibiting foreign nationals for making contributions in connection with any election to *any political office*). The constitutionality of these sections were not challenged in *Buckley v. Valeo*. See *infra* note 32.

31. 424 U.S. 1 (1976).

32. *Buckley*, 424 U.S. at 58–59 (upholding contribution limitations but striking down various expenditure limitations); Hasen, *supra* note 233, at 888.

33. *Buckley*, 424 U.S. at 79. For further discussion of the “major purpose” test and how the definition of political committee continues to be a source of debate in campaign finance law circles, especially with the rise of “527 organizations” active in the 2000 and 2004 Presidential elections, see generally Lloyd H. Mayer, *The Much Maligned 527 and Institutional Choice*, 87 B.U. L. REV. 625 (2007)

“independent expenditure” to apply only to communications that “in express terms advocate the election or defeat” of a federal candidate.³⁴ Communications that fell short of this “express advocacy” standard could not be subject to FECA’s reporting or funding requirements.³⁵

Campaign finance reform advocates argued that the *Buckley* distinctions were stretched into massive loopholes by FEC regulations and lax enforcement in the 1990s, allowing more “soft money” into candidate campaigns and political parties.³⁶ “Soft money” is the colloquial phrase referring to money that is not subject to FECA’s contribution limits, source prohibitions, and reporting requirements (compliant funds are referred to as “hard money”).³⁷ Moreover, a dramatic increase in advertising from outside groups during the 1996 and 2000 elections that was targeted at candidates, yet did not qualify as express advocacy, increased the demand for additional reforms.³⁸ The push for

(describing the “problem” of 527 organizations and proposing various solutions under campaign finance and tax law).

34. *Buckley*, 424 U.S. at 44. This holding, accompanied by a footnote listing particular words and phrases that would constitute such “express advocacy” such as “vote for” or “vote against,” is referred to as the “magic words” test. *Id.* at n.52; see *McConnell v. FEC*, 540 U.S. 93, 193 (2003). The continued viability of this standard was questioned by *McConnell v. FEC*, in which the Court stated, “[i]ndeed, the unmistakable lesson from the record in this litigation, as all three judges on the District Court agreed, is that *Buckley*’s magic-words requirement is functionally meaningless.” 540 U.S. 93, 193 (2003). See generally Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004) (examining *McConnell*’s impact on *Buckley* and as a part of a trend in new post-2000 campaign finance rulings of moving away from *Buckley*).

35. See *Buckley*, 424 U.S. at 45.

36. See Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL’Y REV. 235, 239–44 (2004). With respect to reform organizations seeking change based on problems with the *Buckley* decision, see generally Roy A. Shotland, *Act I: BCRA Wins in Congress. Act II: BCRA Wins Big at the Court. Act III: BCRA Loses to Reality*, 3 ELECTION L.J. 335 (2004). Complaints about the FEC’s enforcement of FECA were ubiquitous before BCRA’s passage. See, e.g., Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL’Y REV. 279 (1991); Amanda S. La Forge, *The Toothless Tiger—Structural, Political and Legal Barriers to Effective FEC Enforcement: An Overview and Recommendations*, 10 ADMIN. L.J. AM. U. 351 (1996).

37. The official terms in the FEC’s regulations are “federal” and “Non-federal” funds. See 11 C.F.R. § 300.2(g), (k) (2007).

38. See Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 670–71 (2004) (discussing rise in “issue advocacy” not regulated by FECA); Daniel H. Lowenstein, *BCRA and McConnell in*

reform eventually resulted in passage of the Bipartisan Campaign Reform Act of 2002 (BCRA).³⁹

BCRA drastically expanded the reach of federal campaign finance law related to raising and spending money by federal candidates and political parties. For the first time, the law reached out to regulate some activity by state and local parties, as well as activity by federal candidates in connection with state and local elections. Three main objectives of BCRA were to (1) eliminate soft money from federal elections, (2) restrict “electioneering communications,” (i.e. advertising from outside sources using soft money that referred to a federal candidate in the final days leading up to an election), and (3) limit the ability of state and local parties or candidates to become alternative outlets for soft money to fund certain “federal election activities” (FEA).⁴⁰ Many doubted the constitutionality of this expansion of the law, and a coalition of members of Congress and outside organizations challenged the law immediately under the expedited procedures provided in the law.⁴¹

In *McConnell v. FEC*⁴² the Supreme Court upheld the vast majority of the new provisions in BCRA, including the ban on raising or spending soft money by national political parties and federal candidates.⁴³ Justice Kennedy’s concurrence noted one consequence of BCRA and *McConnell* on future ballot measure campaigns, stating “Title I bars national party officials from soliciting or directing soft money to state parties for use on a state

Perspective, 3 ELECTION L.J. 277, 278–79 (2004) (same).

39. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

40. Another major revision in BCRA, increasing the individual contribution limits for the first time since 1974 and indexing those limits for inflation, is not discussed here as it is not relevant to ballot measure campaigns. See Richard L. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 131–32 (2004) (noting BCRA’s main features as removing soft money from various levels of political parties, restricting issue ads, and increasing individual contribution limits); Lowenstein, *supra* note 38, at 279 (same).

41. See *McConnell v. FEC*, 540 U.S. 93 (2003).

42. *Id.* This article only briefly discusses the *McConnell* case for the particular portions of BCRA that are implicated later in the discussion of federal campaign finance restrictions on ballot measure campaigns. For more thorough analysis of the *McConnell* decision, see, e.g., Hasen, *supra* note 34; Pildes, *supra* note 40; Overton, *supra* note 38; Lowenstein, *supra* note 38.

43. *McConnell*, 540 U.S. at 161 (upholding restriction on national parties); *id.* at 184 (upholding restrictions on federal candidates).

ballot initiative. This is true even if no federal office appears on the same ballot as the state initiative.”⁴⁴

Justice Kennedy is correct that BCRA’s restriction on national parties (and likewise on federal candidates or officeholders) to raise or spend soft money does not appear to depend upon a federal candidate appearing on the same ballot as a non-federal candidate or state ballot measure.⁴⁵ But the majority opinion correctly notes that this restriction does not bar all strategy planning between national party officials and state parties or candidates about ballot measures; rather, it only bars direct solicitation or spending of soft money by national parties.⁴⁶ As discussed below, the exact application of these fundraising restrictions to state ballot measures remains somewhat unsettled.

The *McConnell* Court also upheld the new “electioneering communications” funding restrictions and reporting requirements as facially constitutional.⁴⁷ The Court held that BCRA could regulate advertisements that do not constitute express advocacy for or against federal candidates because “[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters’ decisions and have that effect.”⁴⁸ The definition of “electioneering communications” was not unconstitutionally vague, according to the *McConnell* Court, and therefore did not require the statutory construction used in *Buckley* to limit independent expenditures to express advocacy.⁴⁹ Thus, these BCRA provisions could reach any broadcast communication, including advertisements supporting or opposing state ballot measures that mentioned a federal candidate within thirty to sixty days of a federal election to the appropriately targeted audience.

In addition, the Court upheld the new limitations on FEA conducted by state and local parties.⁵⁰ The Court held that Congress had the authority to regulate some aspects of state and

44. *Id.* at 289 (Kennedy, J., concurring).

45. *See* 2 U.S.C. § 441i(a)(1), (e)(1)(B) (2000).

46. *McConnell*, 540 U.S. at 160.

47. *Id.* at 201 (upholding electioneering communications disclosure provisions); *id.* at 209 (upholding electioneering communications funding restrictions).

48. *Id.* at 206.

49. *Id.* at 193–94. The definition of electioneering communication is discussed further in the next section.

50. *Id.* at 173.

local party activity, noting:

In constructing a coherent scheme of campaign finance regulation, Congress recognized that, given the close ties between federal candidates and state party committees, BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations.⁵¹

The Court held that “[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.”⁵² The Court rejected the plaintiffs’ argument that BCRA’s provisions were “a new brand of pervasive federal regulation of state-focused electioneering activities that cannot possibly corrupt or appear to corrupt federal officeholders and thus goes well beyond Congress’s concerns about the corruption of the federal electoral process.”⁵³ Instead, these restrictions on state and local party activity were upheld as narrowly tailored to further an important governmental interest.⁵⁴ The new era of federal campaign finance law reaching out to regulate parts of state and local elections had arrived.

III. BCRA’S EFFECTS ON STATE BALLOT MEASURE CAMPAIGNS

FECA, as amended by BCRA, does not mention state ballot initiatives or referenda, and the almost 400 pages of FEC regulations only mention ballot measures once, in an expired provision.⁵⁵ Before BCRA, a series of FEC advisory opinions exempted from campaign finance regulation most contributions or expenditures exclusively related to ballot measures (as opposed to state or federal candidate elections), based on both the statutory

51. *Id.* at 161.

52. *Id.* at 165–66.

53. *Id.* at 166. As noted in Hasen’s analysis of *McConnell*, the record of possible circumvention through *local* parties was sparse as compared to the evidence that the FECA restrictions would interfere with plenty of local activity. *See* Hasen, *supra* note 34, at 49. *See also* Lowenstein, *supra* note 38, at 280–82 (arguing BCRA improperly federalizes state and local activity in these provisions).

54. *McConnell*, 540 U.S. at 173.

55. *See* 11 C.F.R. § 100.24(a)(1)(iii)(A)(2) (2007). This provision expired on its sunset date of September 1, 2007. *Id.* § 100.24(a)(1)(iii)(B). However, as discussed below, the FEC has issued a proposed rule to make this provision permanent. *See* Federal Election Activity and Non-Federal Elections, 72 Fed. Reg. 31473 (proposed June 7, 2007).

language and *First National Bank of Boston v. Bellotti*.⁵⁶ But analysis of the FEC's post-BCRA advisory opinions and rulemaking reveals that all three areas of BCRA's expanded regulation (restricting federal candidates' involvement with soft money, restrictions on "electioneering communications," and restrictions on FEA by state and local parties) have a real impact on state ballot measure campaigns. First, the new restrictions on raising and spending nonfederal funds in 2 U.S.C. section 441i(e) affect the ability of federal candidates and officeholders to donate and raise money for ballot initiative committees, and the extent to which these candidates and officeholders can be involved in endorsing or opposing certain ballot measures in their states. Second, the "electioneering communications" provisions require disclosure of a ballot measure committee's donors to the FEC and can also restrict advertising for ballot initiatives by committees that are incorporated or that accept corporate donations. Finally, the FEA provisions can restrict how state and local political parties fund certain voter mobilization and public communications in connection with ballot measure campaigns. Although it is clear that these provisions all affect ballot measure campaigns, the precise contours of the law are somewhat unclear due to recent court decisions and imminent changes in the composition of the FEC. This section will further discuss the rules in each of these areas and explain how ballot initiative and referenda campaigns are implicated.

A. *Restrictions on Federal Candidates and Officeholders*

Recent social science analysis has discussed how modern candidates use ballot initiatives as proxy elections for issues and as a catalyst for voter turnout.⁵⁷ Ballot measures can be a useful

56. See, e.g., Op. Fed. Election Comm'n 1989-32 (July 2, 1990), available at <http://ao.nictusa.com/ao/no/890032.html> (noting foreign national contribution prohibition is only applicable to candidate elections); Op. Fed. Election Comm'n 1980-95 (Sept. 19, 1980), available at <http://ao.nictusa.com/ao/no/800095.html> (interpreting national bank contribution prohibition as applicable only to candidate elections and citing *Bellotti*). BCRA actually amended the foreign national prohibition in 2 U.S.C. § 441e(a)(1)(A) (2000), so that the prohibition now applies to any "federal, state or local election," removing the reference to "political office," which formed the basis for the FEC's interpretation in Advisory Opinion 1989-32. Pub. L. No. 107-155, tit. III, § 303, 116 Stat. 96, 109 (2002) (amending 2 U.S.C. § 441e (2000)).

57. See, e.g., Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1098-1105 (2005) (discussing the use of ballot initiatives by candidates to

strategic tool for federal candidates, as well as for others who wish to influence federal candidate elections. Before BCRA there were few, if any, federal law restrictions on a federal candidate or officeholder's involvement with a ballot initiative campaign.⁵⁸

After BCRA, section 441i(e) restricts raising or spending nonfederal funds by federal candidates, including money raised or spent in state or local elections and money spent by nonprofit organizations.⁵⁹ First, section 441i(e)(1)(B) provides that federal candidates may only "solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office" if the money complies with the contribution amount limitations and source prohibitions in FECA. Second, section 441i(e)(4) allows federal candidates to make general solicitations for unlimited donations to nonprofit organizations organized under section 501(c) of the Internal Revenue Code,⁶⁰ but only if that organization does not have a principal purpose of conducting certain voter mobilization activities.⁶¹ If the nonprofit organization's principal purpose is to conduct such activities, the federal candidate is limited to making specific solicitations for donations from individuals in amounts not to exceed \$20,000 per year.⁶² These provisions extend beyond restricting the activities of federal candidates because they apply equally to federal officeholders who are not running for re-election, as well as to any "entity directly or indirectly established, financed, maintained or controlled" ("EFMC'd") by a federal candidate or officeholder.⁶³

influence partisan voter turnout and strengthen interest groups). The current analysis and data regarding the interaction between candidate and ballot measure campaigns shows how far this practice has evolved since the days of *Bellotti*. See, e.g., Richard Briffault, *Ballot Propositions and Campaign Finance Reform*, 1996 ANN. SURV. AM. L. 413 (1996) (discussing how separate ballot measure campaigns were from candidate campaigns so that there was no corruption rationale to support campaign finance regulation of ballot measure campaigns).

58. One possible issue that might have surfaced pre-BCRA would be whether a federal candidate could donate campaign funds to a ballot initiative committee. See 2 U.S.C. § 439a (Supp. 2004) (listing permitted uses for campaign funds and prohibiting use of campaign funds for personal use).

59. See *id.* § 441i(e)(1)(B) (restricting solicitations and spending in non-federal elections); *id.* § 441i(e)(4) (restricting solicitations for nonprofit organizations). See also 11 C.F.R. § 300.62 (2007) (non-federal elections); *id.* § 300.65 (nonprofit organizations).

60. I.R.C. § 501(c) (Supp. 2004).

61. Specifically, Type I and II FEA as described *infra* section C. See 2 U.S.C. § 441i(e)(4)(A) (2000).

62. See *id.* § 441i(e)(4)(B).

63. *Id.* § 441i(e)(1).

A series of FEC advisory opinions have addressed how section 441i(e) affects federal candidate involvement in ballot initiative campaigns. Advisory opinions do not have binding precedential effect at the FEC, and each one is expressly limited to the facts presented in the request.⁶⁴ But the Commissioners tend to defer to prior advisory opinions' interpretation of a statutory or regulatory provision in order to provide some consistency and predictability for those who are interpreting the law and applying it to their campaign activities. Since BCRA became effective, the FEC has issued four advisory opinions squarely addressing various applications of the new fundraising restrictions to ballot measure elections, but these opinions do not present consistent interpretations of the law. Because no clear FEC consensus rationale has emerged on these issues, these prior interpretations are subject to change as the Commissioners' terms expire and are replaced with new Presidential appointees who might not share the same views as prior Commissioners. The most recent advisory opinion regarding a ballot measure committee was issued in early 2006, and the changing composition of the FEC may affect the outcome of advisory opinion requests regarding ballot measure committees in the 2008 election.⁶⁵

1. *Federal Candidate-Controlled Ballot Measure Committees*

As discussed above, the restrictions in section 441i(e) apply specifically to any organization that is EFMC'd by a federal candidate or officeholder. Ballot measure committees are sometimes considered candidate-controlled, although they are usually tied to state or local candidates.⁶⁶ Two different advisory opinions discuss the issue of a ballot measure committee EFMC'd

64. 11 C.F.R. § 112.5(a) (2007).

65. At present, the FEC has one vacant Republican seat, two Republicans on recess appointments, one Democrat on "holdover" status awaiting nomination of a replacement, and two Democrats on recess appointments. See Kenneth Doyle, *Fate of FEC Nominees Still Unclear as Senate Committee Schedules Vote*, MONEY & POL. REP. (BNA), Sept. 25, 2007, at 1. These recess appointments are set to expire if the Senate does not confirm the nominations before the Senate ends its session in December 2007. *Id.*

66. See generally Hank Dempsey, *The "Overlooked Hermaphrodite" of Campaign Finance: Candidate-Controlled Ballot Measure Committees in California Politics*, 95 CAL. L. REV. 123 (2007) (arguing that present-day reality of candidate-controlled committees makes the *City of Berkeley* rationale for limiting campaign finance regulation of ballot measure campaigns obsolete); Garrett, *supra* note 57 (describing candidate-controlled ballot measure committees in California).

by a federal candidate.

The first advisory opinion to analyze BCRA's effects on federal candidate involvement with ballot measure committees was advisory opinion 2003-12 (Flake).⁶⁷ While a candidate for re-election, U.S. Representative Jeff Flake was working with a ballot measure committee called "Stop Taxpayer Money for Politicians Committee" ("STMP") to qualify a particular ballot measure for public vote in the November 2004 Arizona general election.⁶⁸ This advisory opinion makes a number of distinctions between types of ballot measure committees and different phases of a ballot measure campaign that affect how FECA applies. The FEC's general conclusion was that all activities of a ballot measure committee that is EFMC'd by a federal candidate are "in connection with any election other than an election for federal office" and, therefore, governed by the amount limitations and source prohibitions during the entire life of the ballot measure campaign.⁶⁹ The FEC then stated that STMP qualified as a committee "established" by Representative Flake because, *inter alia*, as one of the founding individuals for the ballot measure committee, he signed the papers with the state creating STMP, he served as STMP's first Chairman, and one of his campaign consultants was the aid that helped STMP with its state filings and opening its first bank account.⁷⁰

Once the ballot measure committee was found to be EFMC'd by a federal candidate, a number of restrictions attached. Most importantly, STMP was limited to raising a total of \$5000 per calendar year from any donor, and could not raise money from prohibited sources under FECA (such as corporations and labor organizations), even if state law allowed higher contribution amounts or contributions from these sources.⁷¹ Thus, although Representative Flake could serve as STMP's Chair and his

67. Op. Fed. Election Comm'n. 2003-12 (July 29, 2003), *available at* <http://ao.nictusa.com/ao/no/030012.html>.

68. *Id.* at 1-2.

69. *Id.* at 6. In order to determine if a ballot measure committee is EFMC'd by a federal candidate or officeholder, the FEC applies ten "affiliation factors" that look at the overall relationship between the individual and the committee. *Id.* at 7. 11 C.F.R. section 100.5(g)(4) (2007) lists the affiliation factors such as whether the individual has authority to direct or participate in the governance of the committee, or whether the individual had an active or significant role in the formation of the committee. *See also id.* § 110.3(a)(3).

70. Op. Fed. Election Comm'n 2003-12, at 7 (July 29, 2003), *available at* <http://ao.nictusa.com/ao/no/030012.html>.

71. *Id.* at 8.

campaign employees could be involved in directing STMP's activities, all fundraising by Representative Flake or STMP was limited to these restrictions.⁷² Basically, because Representative Flake established STMP, that *state* ballot measure committee was treated as a *federal* political committee and was required to comply with all amount limitations, source prohibitions, and reporting obligations in FECA.

In contrast to the limitations placed on STMP, the advisory opinion explained that ballot measure committees that are not EFMC'd by a federal candidate or officeholder are not restricted by section 441i(e)(1)(B) before the committee actually qualifies an initiative or referendum for the ballot.⁷³ The FEC noted that "merely encouraging voters to sign a petition" does not trigger these restrictions and a federal candidate or officeholder may freely encourage voters to sign petitions.⁷⁴ Commissioner Mason dissented from this advisory opinion, but agreed with the interpretation that the initial phase of qualifying a measure for the ballot did not trigger FECA, while the later phase of a campaign where voters are encouraged to vote for or against a ballot measure could be considered "in connection with an election."⁷⁵ But he disagreed with the interpretation that STMP, as a committee EFMC'd by a federal candidate, was still subject to FECA's restrictions even in the first qualifying phase.⁷⁶

In advisory opinion 2006-04 (Tancredo), the FEC again applied the EFMC'd analysis, this time focusing on a situation where a federal candidate "financed" a ballot measure committee.⁷⁷ In his advisory opinion request, U.S. Representative Thomas Tancredo presented different options for various donations to be made from his campaign committee to a state ballot measure committee (Defend Colorado Now or "DCN"). He also asked questions about permissible endorsements and other interactions with the committee.⁷⁸ The FEC concluded that Representative

72. *Id.* at 10–11. The advisory opinion also notes that any voter registration activity that STMP conducted might have to be reported as FEA expenses. *Id.* See section C below for further discussion of the FEA requirements.

73. *Id.* at 6; *see* 2 U.S.C. § 441i(e)(1)(B) (2007).

74. Op. Fed. Election Comm'n 2003-12, at 10 (July 29, 2003), *available at* <http://ao.nictusa.com/ao/no/030012.html>.

75. *Id.* at 2 (dissenting opinion).

76. *Id.* at 3.

77. Op. Fed. Election Comm'n 2006-04, at 1–2 (Mar. 31, 2006), *available at* <http://ao.nictusa.com/ao/no/060004.html>.

78. *Id.* at 1–2.

Tancredo may donate campaign funds to DCN, but that the amounts proposed would constitute “financing” because the amounts proposed constituted providing funds “in a significant amount” under the FEC’s affiliation factors.⁷⁹ The advisory opinion explains that Representative Tancredo’s first proposed alternative of donating the lesser of \$50,000 or 50% of DCN’s total donations would be a “significant amount” and would result in DCN being considered EFMC’d by the federal candidate under FEC regulations.⁸⁰ The second proposed alternative of donating the lesser of \$50,000 or 25% of DCN’s total donations required the FEC to look at the “context of the overall relationship” between Representative Tancredo and DCN to determine whether it would trigger EFMC’d status.⁸¹ Here, the FEC looked to facts similar to the Flake advisory opinion: Representative Tancredo would share polling data and strategy with DCN, he would use his own campaign funds to run advertisements supporting the initiative, he supported identical initiatives in the past, and he was closely identified with the issue.⁸² Based on the aforementioned facts, together with a determination that such a donation would be “substantial seed money” for DCN, the FEC determined that such a donation would result in Representative Tancredo “financing” DCN.⁸³

The Tancredo advisory opinion confirmed that federal candidates may use their own campaign funds to pay for advertisements endorsing a ballot initiative regarding an issue with which the candidate is associated.⁸⁴ The FEC also concluded that Representative Tancredo can accept polling data from DCN; however, this may result in an in-kind contribution subject to FECA’s amount limitations and source prohibitions.⁸⁵

79. *Id.* at 2–3. Chairman Toner and Commissioner von Spakovsky dissented and wrote separately to emphasize their view that an EFMC analysis should be a totality of the circumstances approach looking at all ten affiliation factors and disagreeing with the conclusion in this advisory opinion that DCN would be considered EFMC’d by Representative Tancredo. *See id.* (dissenting opinion).

80. *Id.* at 4.

81. *Id.* at 5.

82. *Id.*

83. *Id.* Tancredo’s third proposal was to pay signature-gathering vendors on behalf of DCN instead of donating money directly to the committee. The FEC noted that the legal effect was the same as if the money went directly to the committee, and therefore the analysis would not change. *Id.*

84. *Id.*

85. *Id.* at 6 (citing FEC’s polling data regulations at 11 C.F.R. § 106.4 (2007)).

The Tancredo advisory opinion should serve as a warning to ballot committees that want to take donations from federal candidates or officeholders (which is generally permissible). Accepting too much seed money from an individual governed by section 441i(e) could result in the ballot measure committee being considered as EFMC'd by that individual, especially if the ballot measure committee is also coordinating strategy or advertising with that individual. Once that threshold is crossed, the ballot measure committee could be subject to a host of FECA reporting requirements and funding restrictions.

Moving forward into the 2008 election, it is unclear whether the broad conclusion of the Flake advisory opinion (that any ballot measure committee EFMC'd by a federal candidate is subject to all restrictions of FECA throughout the campaign) would still be applied by the FEC. In a concurrence to advisory opinion 2005-10 (Berman-Doolittle), two Commissioners partially repudiated their votes on the Flake advisory opinion, stating “[w]hile we continue to believe that the result in 2003-12 was substantially correct, we believe that the reasoning was faulty.”⁸⁶ Instead of relying on section 441i(e)(1)(B) regarding non-federal elections, these Commissioners stated the better analysis was when a federal candidate EFMC's a ballot measure committee, *and* the issue is one with which the candidate is closely identified, *and* the committee spends soft money to influence voting for that ballot measure on the same day that the candidate is on the ballot, then the committee's actions are actually governed by section 441i(e)(1) as in connection with a *federal* election, *i.e.*, that federal candidate's own election.⁸⁷ This approach appears to be a narrower interpretation of the statutory restrictions in many ways. First, this analysis would not apply when a federal officeholder (generally subject to the restrictions of section 441i(e)) EFMC's a ballot measure committee when the officeholder is not running for re-election. Likewise, it would seem to allow a federal candidate who is not on the same ballot as the ballot measure, to EFMC a ballot measure committee without triggering FECA. Since these

86. Op. Fed. Election Comm'n 2005-10, at 2 (Aug. 22, 2005) (concurring opinion), *available at* <http://ao.nictusa.com/ao/no/050010.html>. However, Commissioner Weintraub did not write any separate concurrence to the Tancredo advisory opinion elaborating on this position. (Commissioner McDonald's term expired and he left the Commission at the end of 2005).

87. *Id.*

situations have not yet been presented to the FEC, a definitive answer would require a new advisory opinion request or perhaps a rulemaking on this subject that would provide regulations of general application. In the interim, ballot measure committees should be cautious when involving a federal candidate in establishing or financing the committee in order to avoid the restrictions imposed by federal political committee status.

2. *Ballot Measure Committees Independent of a Federal Candidate*

Two other advisory opinions have examined what is permissible under BCRA when a federal candidate or officeholder wants to become involved with a ballot measure committee that is independent (*i.e.*, not EFMC'd by the candidate or officeholder). In this circumstance, the BCRA restrictions still apply to the federal candidate, but do not necessarily attach to the activities of the ballot measure committee itself as described in the Flake advisory opinion. But the most recent advisory opinions indicate that the restrictions on the federal candidate or officeholder depend upon whether or not that candidate is participating in the same election as the ballot measure and whether the ballot measure committee is organized as a particular type of nonprofit corporation under the IRS tax code.

In advisory opinion 2004-29 (Akin), U.S. Representative Todd Akin asked a series of questions about donations, fundraising, and advertising for two ballot measure committees in his state of Missouri.⁸⁸ The FEC concluded that Representative Akin could donate campaign funds to the ballot measure committees and could also solicit hard money contributions to his campaign for the express purpose of passing those funds on to the ballot measure committees.⁸⁹ Consistent with other advisory opinions, the FEC also concluded that Representative Akin could appear in, and use his own campaign funds to pay for advertisements run both inside and outside his district that supported or opposed ballot measures.⁹⁰

The more complex question in the Akin advisory opinion was whether Akin could appear in advertisements that supported or opposed ballot measures if the ballot measure committee or

88. Op. Fed. Election Comm'n 2004-29 (Sept. 30, 2004), *available at* <http://ao.nictusa.com/ao/no/040029.html>.

89. *Id.* at 2-3.

90. *Id.* at 7-8.

another independent organization paid for those advertisements instead of his campaign. The FEC applied its post-BCRA regulations, stating that any “coordinated communication” between a candidate and an outside organization is an in-kind contribution to the candidate.⁹¹ In that case, such advertising would be considered coordinated because: (1) the advertisements would be paid for by the ballot measure committee; (2) Representative Akin would be “materially involved” in the creation of the advertisements because he would approve the content and personally appear in the advertisements; and (3) the advertisements would refer to a federal candidate within 120 days of the general election and be directed to voters in that district.⁹² Because the advertisements would be considered coordinated, the ballot measure committee could not pay for the advertisement if that cost would exceed the contribution limit to federal candidates or if the ballot measure committee was using money from prohibited sources, such as corporations or labor organizations.⁹³

To apply the Akin advisory opinion to the 2008 election cycle, independent ballot measure committees may accept donations of campaign funds from federal candidates or officeholders, even if those candidates appear on the same ballot as the initiative or referendum. Federal candidates and officeholders may also specifically raise money for their campaign accounts and tell donors that the money will be transferred to an independent ballot measure committee.⁹⁴ Finally, although ballot measure committees

91. *Id.* at 3–7 (citing and discussing the coordination test in 11 C.F.R. § 109.21 (2007)).

92. Op. Fed. Election Comm’n 2004-29, at 3–7. The timeframes for this last part of the coordination test in 11 C.F.R. § 109.21(c)(4) have since been revised by the FEC to vary based on the type of candidate referenced, but these changes are subject to ongoing litigation. See *Shays v. FEC*, No. 06-1247, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (memorandum opinion).

93. Op. Fed. Election Comm’n 2004-29, at 6–7. The FEC suggested that Representative Akin’s campaign reimburse the ballot measure committee for a portion of the costs of the ads to avoid any excessive or prohibited contributions. *Id.* at 7.

94. The analysis of permissible use of campaign funds in the Flake and Akin advisory opinions is somewhat outdated now since the rules on permissible use have changed to include “any other lawful purpose” in 2 U.S.C. § 439a(a) (2000 & Supp. 2005) and 11 C.F.R. § 113.2(e) (2007). See *Final Rules on Use of Campaign Funds for Donations to Non-Federal Candidates and Any Other Lawful Purpose Other than Personal Use*, 72 Fed. Reg. 56,245, (Oct. 3, 2007), available at <http://www.epa.gov/fedrgstr/EPAFR-CONTENTS/2007/October/Day03/contents.htm>. Thus, federal candidates need no longer show that the particular issue of the ballot measure is something that they are closely identified with in

may work with federal candidates and officeholders to prepare advertisements that feature endorsements or statements of opposition to particular ballot measures by the candidate, they must be aware of the coordinated communications rules. Within certain windows of time (ninety days before an election for a congressional candidate and 120 days before the primary election through the general election for a Presidential candidate),⁹⁵ advertisements targeted within that candidate's district could be considered an in-kind contribution to that candidate. If the ballot measure committee is incorporated (even as a nonprofit), any such contribution is prohibited under FECA and the ballot measure committee would be exposed to liability for making an illegal contribution.⁹⁶ If the ballot measure committee is not incorporated, then the amount limitations apply to any in-kind contribution to the candidate (which at just over \$2000 can be easily exceeded by paying the costs of an advertisement).⁹⁷ In 2006, the FEC specifically declined to create a "safe harbor" exception to the coordinated communication rules for advertisements where a federal candidate is endorsing or opposing a ballot measure.⁹⁸ Therefore, ballot measure campaigns need to be wary of these coordination rules and take appropriate steps to avoid a FECA violation when creating advertisements with a federal candidate.

The most recent advisory opinion, 2005-10 (Berman-Doolittle), also involved activities by federal candidates in support of an independent ballot measure committee, but presented a situation where the ballot measure was *not* on the ballot in the same election as the federal candidates.⁹⁹ This advisory opinion request from U.S. Representatives Howard Berman and John Doolittle asked what fundraising was permissible for these federal candidates in support of various ballot measures to be voted on in a special California statewide election in November 2005. Representatives Berman and Doolittle wanted to fundraise for independent ballot

order to allow donations of campaign funds.

95. See 11 C.F.R. § 109.21(c)(4)(i)-(ii) (2007). There are also different rules regarding time periods for ads that mention a political party together with the candidate reference. *Id.* § 109.21(c)(4)(iv).

96. See 2 U.S.C. § 441b (2000); 11 C.F.R. § 114.2(b)(1) (prohibiting corporations from making contributions).

97. 11 C.F.R. § 110.1(b)(1).

98. Coordinated Communications, 71 Fed. Reg. 33,190, 33,202 (June 8, 2006) (to be codified at 11 C.F.R. pt. 109).

99. Op. Fed. Election Comm'n 2005-10 (Aug. 22, 2005), *available at* <http://ao.nictusa.com/ao/no/050010.html>.

measure committees, but would not raise money for any communications that would refer to either of them and that would be distributed in their districts.¹⁰⁰ The FEC's conclusion states the rules in section 441i(e)(1) regarding fundraising restrictions on federal candidates in federal and non-federal elections and then states that these restrictions "do not apply to the fundraising activities" described in the request without further explanation.¹⁰¹

Advisory opinion 2005-10 is an example of an advisory opinion where a majority of four Commissioners agreed on the result, but not the legal reasoning behind it. In advisory opinion 2005-10, there are three separate Commissioner statements: a dissent and two different concurrences with different legal analyses.¹⁰² Commissioner Thomas argued in a lengthy dissent that both the statutory language and past advisory opinions clearly indicate that a ballot measure election falls within section 441i(e)(1)(B)'s restrictions on fundraising in connection with "any election *other than* an election for federal office."¹⁰³ Thus, his interpretation supported the two-phase approach in the Flake advisory opinion, that once a ballot measure committee succeeds in qualifying the measure for the ballot, the subsequent phase of campaign activity leading up to the election should be considered governed by section 441i(e)(1)(B), and federal candidates and officeholders would only be allowed to raise amounts consistent with FECA's limitations and source prohibitions for those ballot measure committees.¹⁰⁴

Commissioners Weintraub and McDonald attempted to square the conclusions in this advisory opinion with the prior Flake advisory opinion by reinterpreting the reasoning behind Flake (as discussed above) and by generally characterizing ballot measure advocacy as "issue-driven" instead of "candidate-driven."¹⁰⁵ Thus, these Commissioners argue that the potential for corruption is lower and that a federal candidate's involvement in ballot measure campaigns is not *per se* restricted by BCRA.¹⁰⁶ Instead of a bright-line rule that ballot measure elections are always covered by section 441i(e)(1)(B) (as argued by Commissioner Thomas), or are never

100. *Id.* at 2.

101. *Id.*

102. *Id.*

103. *Id.* at 1-3 (dissenting opinion).

104. *Id.* at 3.

105. *Id.* at 1 (concurring opinion).

106. *Id.*

covered by section 441(e)(1)(B) (as argued by Commissioners Mason and Toner), these Commissioners attempted to create a compromised analysis that looks at the particular circumstances surrounding the ballot measure election to determine if restrictions are needed to prevent the risk of corruption.¹⁰⁷ Accordingly, if a federal candidate EFMC'd a ballot measure committee for an initiative on the same ballot on which he is running for re-election (*e.g.*, the Flake advisory opinion), then BCRA can appropriately restrict those activities. In contrast, where no federal candidate is on the same ballot as the initiative and the ballot measure committee is not EFMC'd by a federal candidate (*e.g.*, the Berman-Doolittle advisory opinion) there is no such risk, and BCRA restrictions do not apply.¹⁰⁸ These Commissioners also note that the exemption for certain solicitations for 501(c) nonprofit corporations would allow a federal candidate or officeholder to raise unlimited funds for a ballot measure committee organized under that section regardless of whether or not federal candidates are also on the ballot.¹⁰⁹

The disparate views of the Commissioners about how the BCRA restrictions applied in this case illustrate why there are no easy answers for federal candidates and ballot measure committees who want to work together on state ballot measure campaigns. Although there is no controlling rationale from the four Commissioners, federal candidates may cautiously rely on advisory opinion 2005-10 to support participation in activities that raise unlimited funds for an independent ballot measure committee for an initiative or referendum voted on during an election in which there are no federal candidates on the ballot.¹¹⁰ There is also some indication in advisory opinion 2005-10 that a ballot measure campaign may reduce the restrictions on federal candidate fundraising by incorporating as a 501(c) nonprofit organization.¹¹¹ But there are still limits on fundraising for 501(c) organizations

107. *See id.*

108. *Id.* at 3.

109. *Id.* (citing 2 U.S.C. § 441i(e)(4) (2002)).

110. Op. Fed. Election Comm'n 2005-10, at 10 (Aug. 22, 2005), available at <http://ao.nictusa.com/ao/no/050010.html> (concurring opinion) ("At the very least, Section 441i(e)'s fundraising restrictions do not apply to referenda and initiatives where, as here, no federal candidate appears on the ballot along with the referendum or initiative, and no ballot measure organization is established, financed, maintained or controlled by any federal candidate.").

111. *Id.* at 6 (dissenting opinion) (expressing uncertainty about the applicability of restrictions in 501(c) groups).

that conduct FEA (which may reach many common ballot measure campaign activities as described below). Moreover, incorporating as a 501(c) nonprofit would also increase the potential for advertisements that include federal candidate endorsements running afoul of the electioneering communications and coordinated communications regulations which are both subject to the corporate funding prohibition. So again, there are no clear options for ballot measure committees seeking to avoid BCRA restrictions on their activities other than perhaps rejecting any offer of fundraising or endorsements from federal candidates or officeholders (which would seem to be very helpful for achieving their ultimate goal).

Unfortunately, most of these questions were not answered in the FEC's response to a 2007 advisory opinion request seeking more definitive guidance on how Federal candidates can raise money for ballot measure committees.¹¹² In this request, current U.S. Representatives Kevin McCarthy and Devin Nunes of California specifically asked whether they may "freely raise funds" for independent ballot measure committees supporting a state ballot initiative regarding redistricting.¹¹³ In contrast to the Berman-Doolittle advisory opinion, this request states that the ballot initiative will be on the same ballot as both U.S. Representatives seeking re-election (either the 2008 primary or general election).¹¹⁴ The request also breaks this question into two parts, asking separately about raising money in the pre-qualification phase and the post-qualification phase of the campaign.¹¹⁵ This request also specifies that the ballot measure committee is a 501(c) nonprofit organization and cites the regulations governing federal candidate solicitations for such organizations.¹¹⁶ Finally, the request stipulates that any money raised by the candidates will not be used for public communications referring to either of them.¹¹⁷

Only two of the Commissioners who voted on advisory opinion 2005-10 considered this 2007 advisory opinion request (Commissioners Mason and Weintraub). Nonetheless, the result was similar to the Berman-Doolittle opinion: the FEC issued a brief

112. See Advisory Opinion 2007-28, available at <http://saos.nictusa.com/saos/searchao?SUBMIT=continue>.

113. *Id.* at 1.

114. *Id.* at 1-2.

115. *Id.* at 2.

116. *Id.*

117. *Id.*

answer with no controlling rationale. After citing the general rules restricting solicitations by Federal candidates and officeholders in section 441i(e), the advisory opinion states:

The Commission concludes that Representatives McCarthy and Nunes may solicit up to \$20,000 during any calendar year from individuals on behalf of PAIC or other similar ballot initiative committees not directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, either officeholder. The Commission is unable to agree on a single rationale. Further explanation is provided in the Commissioners' concurring opinions.¹¹⁸

At this time, all concurring opinions have not been released, but the one page concurring opinion by the two Republican Commissioners, Vice Chairman Mason and Commissioner von Spakovsky provides some insight.¹¹⁹ That concurrence explains that the \$20,000 from individuals limit on the amount of funds that the requesting Federal candidates can raise for the ballot committee was derived from the section 441i(e)(4)(B) exception to the fundraising restrictions for specific solicitations to nonprofit organizations organized under 501(c) of the tax code.¹²⁰ Mason and von Spakovsky, consistent with statements in prior advisory opinions, instead conclude that the restrictions of section 441i(e) do not apply at all and would vote to approve the unrestricted solicitation of funds by Federal candidates for ballot measure committees in these circumstances.¹²¹ When the Democratic concurring opinion is released, it will be interesting to see how Commissioner Weintraub applies her Berman-Doolittle approach to the situation where the federal candidates seeking to raise money for the ballot measure committee are themselves on the same ballot as the supported initiative. Evidently, the tax status of the ballot measure committee is a salient fact in this analysis if the answer depends upon whether or not that exception in section 441i(e)(4) is triggered. Without a consensus rationale approved by the FEC, this advisory opinion does not confirm the continued

118. *See id.* at 3.

119. *See* Op. Fed. Election Comm'n 2007-28 (Dec. 18, 2007) (concurring opinion), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=2212>.

120. *See id.*

121. *See id.*

viability of the Flake opinion's analysis of pre- and post-qualification phases of the ballot measure campaign. Based on the lack of consensus, ballot measure committees will have to continue to tread lightly when involving federal candidates in fundraising efforts. This is especially true for ballot measure committees that do not have 501(c) tax status, but are instead section 527 political organizations under the tax code.

3. *Ballot Measures as "Elections" Under FECA*

The fundraising restrictions in section 441i(e)(1) only apply if the federal candidate or officeholder is soliciting money in connection with "an election for Federal office" or "any election other than an election for Federal office."¹²² In many of these past advisory opinions, at least one Commissioner has expressed a dissenting view on the threshold question of whether or not ballot measures even constitute an "election" and trigger FECA.¹²³ These Commissioners have argued that the statute is expressly limited to elections for *public office* and therefore does not cover any solicitations by federal candidates or officeholders to support or oppose ballot measures.¹²⁴ This interpretation is based upon the statutory language¹²⁵ as well as comments filed with the FEC by members of Congress in response to the Berman-Doolittle advisory opinion. The members stated that their understanding when voting for BCRA was that these restrictions would not apply to ballot measures.¹²⁶ Part of the difficulty with this determination is

122. 2 U.S.C. § 441i(e)(1)(A)-(B) (2000).

123. See Op. Fed. Election Comm'n 2006-04 (Mar. 31, 2006) (dissenting opinion), available at <http://ao.nictusa.com/ao/no/060004.html>; Op. Fed. Election Comm'n 2005-10 (concurring opinion), available at <http://ao.nictusa.com/ao/no/050010.html>; Op. Fed. Election Comm'n 2003-12 (July 29, 2003) (dissenting opinion), available at <http://ao.nictusa.com/ao/no/030012.html>.

124. See Op. Fed. Election Comm'n 2005-10 (concurring opinion), available at <http://ao.nictusa.com/ao/no/050010.html> ("[B]allot initiatives and referenda are not elections for office as a matter of law under Section 441i(e) and, therefore, the statute's soft-money fundraising restrictions do not apply to ballot measure activities.").

125. See 2 U.S.C. § 431(1) (Supp. 2005) (defining "election" as "a general, special, primary, or runoff election," a political party caucus or convention to nominate a candidate, a primary election to select delegates to a national political party convention, or a Presidential preference primary election); 11 C.F.R. § 100.2(a) (2007) (defining "election" as "the process by which individuals . . . seek nomination for election, or election, to Federal office").

126. 11 C.F.R. § 100.2(a).

caused by the different statutory formulations in different provisions that create ambiguity about whether ballot measure elections are governed by some, or all, of the FECA provisions.¹²⁷ Although the view that ballot measures are simply not “elections” governed by FECA has yet to command a majority of four Commissioners, this is an interpretation that could be accepted in the near future with the changing composition of the FEC.¹²⁸ If that happens, then the distinctions discussed above between candidate EFMC’d committees and independent committees would no longer matter. Consequently, federal candidates and officeholders could freely raise and spend money without limitation in connection with state ballot measures. Thus, the law regarding federal candidates and officeholders’ involvement in state ballot measures is still a bit murky heading into the 2008 election year.¹²⁹

B. Electioneering Communications after FEC v. Wisconsin Right to Life

BCRA prohibits the use of any corporate or labor organization funds to pay for electioneering communications.¹³⁰ Broadcast television, cable, radio and satellite advertisements fall under this prohibition if the advertisement (1) refers to “a clearly identified candidate for Federal office,” (2) is aired within sixty days before a

127. These different formulations include section 441i(e)’s “election for Federal office” and “election other than an election for Federal office,” section 431(20)’s definition of certain types of Federal election activities as activities in connection with “an election in which a candidate for Federal office appears on the ballot,” section 441(b)’s prohibition on corporations, national banks, and labor organizations making contributions and expenditures in connection with “any election to any political office,” and section 441e’s prohibition on foreign nationals making a contribution in connection with “a Federal, State or local election.”

128. Although Commissioner Toner is no longer at the FEC, Commissioners Mason and von Spakovsky are current members who have expressed this view in the past. In addition, there could emerge more support for this position when the vacant Republican seat is filled or the current recess appointments expire and are replaced with two new Democratic nominees and one new Republican nominee.

129. Given the difference of opinion of various past and current Commissioners regarding the proper statutory interpretation of § 441i(e) with regard to ballot measure campaigns, and the potential confusion created by the different formulations of statutory provisions cited above, this is an issue ripe for legislative clarification. Any Congressional action to clarify the reach of FECA into ballot measure campaigns should strike the necessary balance and consider the constitutional implications of infringing on direct democracy. *See infra* Part IV.

130. 2 U.S.C. § 441b(a), (b) (2) (2000 & Supp. 2005); 11 C.F.R. § 114.2 (2007).

general election or thirty days before a primary election, and (3) is “targeted to the relevant electorate” of the referenced candidate (for House and Senate candidates).¹³¹ Individuals, associations, and other unincorporated entities are not prohibited from funding electioneering communications, but are subject to reporting and disclosing of their donations if they spend more than \$10,000 on such advertisements in a calendar year.¹³² The FEC has statutory authority to make exemptions to this rule, so long as the provision does not exempt advertisements that “promote, support, attack, or oppose” (“PASO”) a federal candidate.¹³³

These funding restrictions and reporting requirements can apply to radio and television advertisements supporting or opposing ballot measures which mention or feature a federal candidate.¹³⁴ Since most ballot measures are included in federal primary or general elections, the electioneering communications time period covers the last thirty to sixty days before the public votes on that ballot measure. Therefore, unincorporated ballot measure committees who wish to communicate to the public an endorsement of a ballot measure by a federal officeholder (who is also a candidate in that jurisdiction) in the days leading up to the election may be required to report donor information to the FEC if they spend past the \$10,000 threshold.¹³⁵ Unless the ballot measure committee sets up a segregated bank account that only pays for these advertisements, the report to the FEC must disclose the name of any donor who gave more than \$1000 to the ballot measure committee from the first day of the preceding calendar year.¹³⁶ This level of disclosure might far exceed what recordkeeping and reporting is required at the state level. Perhaps more importantly, if a ballot measure committee is incorporated, or takes corporate

131. 2 U.S.C. § 434f(3)(A)(i) (2000); *see also* 11 C.F.R. § 100.29 (2007). Communications that refer to a candidate for President or Vice President have specific requirements. *Id.* § 100.29(b)(3)(ii).

132. 2 U.S.C. § 434f(1)–(2); *see also* 11 C.F.R. § 104.20 (2007) (detailing which forms should be used).

133. 2 U.S.C. § 434f(3)(A)(ii), (3)(B)(iv).

134. *See* Op. Fed. Election Comm’n 2003-12, at 16–17 (July 29, 2003), *available at* <http://ao.nictusa.com/ao/no/030012.html> (applying electioneering communications funding restrictions and disclosure rules to ballot measure committee advertisements featuring a federal candidate).

135. *See* 11 C.F.R. § 104.20(b).

136. *Id.* at (c)(7). If a segregated account is used, then the committee need only disclose donors to that account in the last calendar year. *Id.* *See also id.* at (c)(8).

and labor union donations (if permissible under relevant state law), the statute prohibits the committee from using corporate or labor funds to pay for these advertisements.¹³⁷ These restrictions can be onerous for a ballot committee trying to get its message out to a statewide audience in the final weeks before the election.

Unfortunately, the FEC specifically declined to create an exemption for ballot initiative advertisements stating that such advertisements could be considered to PASO a federal candidate.¹³⁸ This decision echoed the same concerns presented in the advisory opinions about candidate involvement in ballot measure campaigns: “As ballot initiatives or referenda become increasingly linked with the public officials who support or oppose them, communications can use the initiatives or referenda as a proxy for the candidate, and in promoting or opposing the initiative or referendum, can promote or oppose the candidate.”¹³⁹

Although ballot measure committees did not get a specific regulatory exemption, many of these advertisements may now be free of the corporate funding restrictions (and possibly the reporting requirements) for the 2008 election cycle after the U.S. Supreme Court holding in *FEC v. Wisconsin Right to Life, Inc.* (“*WRTL*”).¹⁴⁰ In *WRTL*, a non-profit corporation challenged the electioneering communications funding prohibitions as unconstitutional as applied to specific “grassroots lobbying” advertisements that the group wanted to run mentioning a federal candidate within the electioneering communications timeframe.¹⁴¹ The *WRTL* Court, now including Justice Alito instead of Justice O’Connor (who served on the *McConnell* Court), agreed that the application of the corporate funding prohibition was unconstitutional.¹⁴² The principal opinion by Chief Justice Roberts

137. 2 U.S.C. § 441b(b)(2).

138. Final Rules on Electioneering Communications, 67 Fed. Reg. 65,190, 65,202 (Oct. 23, 2002) (to be codified at 11 C.F.R. pts. 100, 114).

139. *Id.*

140. 127 S. Ct. 2652 (2007). Others have endeavored to provide a full analysis of this recent decision and what it portends for campaign finance regulation in the era of the Roberts Court. See, e.g. Hasen, *Rethinking*, *supra* note 23; Hasen, *Buckley is Dead*, *supra* note 34. The case will be discussed here only briefly with regard to how it may open the door to advertisements for ballot measure committees that were previously restricted by the statute and FEC regulations.

141. See *WRTL*, 127 S. Ct. at 2660–61.

142. *Id.* at 2673. This holding came after an initial decision in the prior Supreme Court term that *McConnell* did not preclude as-applied challenges to the electioneering communications provisions. See *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006).

stated that it is only constitutional to subject an advertisement to the electioneering communications restrictions if the advertisement is the “functional equivalent” of “express advocacy.”¹⁴³ Furthermore, the opinion provided a test: “a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”¹⁴⁴ The Court held that the advertisements *WRTL* sought to run were lobbying advertisements seeking to shape public opinion about Senate filibusters of judicial nominations, and therefore may have been reasonably interpreted as something other than as an appeal to vote for or against the candidate named in the advertisement.¹⁴⁵

Ballot measure committees in the 2008 election cycle can now use *WRTL* to support running some advertisements featuring federal candidates within the electioneering communications timeframes without being subject to the corporate funding restrictions in the statute. This exemption would allow incorporated ballot measure committees to use their own general funds, and it would allow unincorporated committees to use corporate and labor union donations to fund these advertisements (if permissible under state law). After *WRTL*, an advertisement supporting or opposing a ballot measure may not be constitutionally restricted so long as there is any “reasonable interpretation” of the advertisement other than as an appeal to vote for or against the federal candidate endorsing or opposing the ballot measure. Surely, it is a “reasonable interpretation” that such an advertisement only seeks to influence support for, or opposition to, the proposed ballot measure, much like the *WRTL* advertisements sought to influence public opinion and the Senators’ position on judicial filibusters.

The FEC acted quickly to implement the *WRTL* decision into

143. *WRTL*, 127 S. Ct. at 2659. *WRTL* actually included four views: (1) the principal opinion written by Roberts and joined in full by Alito and in part by Scalia, Kennedy, and Thomas; (2) a brief concurrence written by Alito; (3) a concurrence written by Scalia and joined by Kennedy and Thomas; and (4) a dissent written by Souter and joined by Stevens, Ginsburg, and Breyer. Scalia’s concurrence has three votes for overruling *McConnell* and invalidating the entire electioneering communications statutory provisions instead of crafting the “as-applied” exemption in Robert’s opinion. *Id.* at 2684.

144. *Id.* at 2667.

145. *Id.* at 2670.

its regulations governing electioneering communications before the 2008 electioneering communication windows started in early December 2007.¹⁴⁶ The regulations approved by the FEC exempt advertisements that meet the *WRTL* test from the prohibition on use of corporate and labor organization funds, but continue to apply the electioneering communications disclosure requirements.¹⁴⁷ The newly approved regulation restates the general test from Robert's opinion: that corporations and labor organizations are prohibited from making electioneering communications only if "the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate."¹⁴⁸ The regulation then includes a safe harbor provision, *i.e.*, a description of certain types of advertisements that will be automatically deemed to meet the exemption if all three prongs of the safe harbor provision are met.¹⁴⁹ Finally, the new regulation describes the FEC's analysis for advertisements that do not qualify for the safe harbor, but might nonetheless be exempt under the general rule.¹⁵⁰

Ballot measure committees can use this new *WRTL* exemption for advertisements supporting or opposing ballot measures and featuring federal candidates. To qualify for the safe harbor, the advertisement must either: (1) urge a candidate to take a particular position on a legislative, executive or judicial issue or urge the public to take a position and contact a candidate about the issue; or (2) propose a commercial transaction, such as the purchase of a product or service or attendance at a commercial event for a fee.¹⁵¹ Ballot measure advertisements with federal candidate endorsements would not likely meet this requirement because the advertisements would not be urging action by a candidate, but urging the public to vote for or against a ballot measure. But, not

146. At the time this article went to press, the FEC had approved regulatory text, but not yet issued its "Explanation and Justification" of the rules or published the regulations in the Federal Register. See Final Rules Approved at November 20, 2007 FEC Open Session, available at http://www.fec.gov/pdf/nprm/electioneering_comm/2007/provisions_approved_nov-20-2007.pdf.

147. *Id.* at 3 (modifying the electioneering funding prohibitions in forthcoming 11 C.F.R. section 114.2(b) and creating a new exemption in forthcoming 11 C.F.R. section 114.15).

148. *Id.* at 7-8 (setting forth requirements for the new safe harbor in forthcoming 11 C.F.R. section 114.15(b)).

149. *Id.* at 7.

150. *Id.* at 8-9.

151. *Id.* at 7-8.

qualifying for the safe harbor does not preclude such advertisements from qualifying for the general exemption under the FEC's new rule.

Ballot measure committee advertisements that focus on the measure to be voted on—instead of the candidacy of the federal candidate or officeholder appearing in the advertisement—should fall within the general *WRTL* exemption under the two-factor test described in section 114.15(c) of the FEC's new regulation. Under this regulation, the FEC considers whether an advertisement has “indicia of express advocacy” or “content that would support a determination that a communication has an interpretation other than as an appeal to vote for or against a clearly identified Federal candidate.”¹⁵² The new rule states that an advertisement will be deemed to have “indicia of express advocacy” if it mentions an election, candidacy, political party, opposing candidate, or voting by the general public, or it takes a position on a candidate's character, qualifications, or fitness for office.¹⁵³ Therefore, an advertisement endorsing a ballot measure that urges the public to vote for that measure could be deemed to have “indicia of express advocacy” under this first factor because it “mentions . . . voting by the general public.”¹⁵⁴ But the same ballot measure endorsement could contain one of the three types of content listed in the second factor by including “a call to action or other appeal that interpreted in conjunction with the rest of the communication urges an action other than voting for or against or contributing to a clearly identified Federal candidate or political party.”¹⁵⁵ Ballot measure committees should be able to meet this provision by tailoring the advertisement to focus on urging a vote on the ballot measure instead of commenting on the election of the candidate appearing in the advertisement. Balancing these two factors together, ballot measure committees should be able to claim that their advertisements featuring a federal candidate have a “reasonable interpretation other than as an appeal to vote” for or against that candidate.¹⁵⁶ The FEC should issue additional guidance and examples in a Federal Register document in the near future which ballot measure committees should consult when

152. *Id.* at 8.

153. *Id.*

154. *Id.*

155. *Id.* at 9.

156. *Id.* at 7.

creating such advertisements in order to take advantage of this exemption.

WRTL has arguably removed most of the restrictions that BCRA's electioneering communications provisions placed on ballot measure committee advertisements featuring a federal candidate. Therefore, ballot measure committees should not have to worry much about these provisions in the 2008 election cycle, especially if they spend under the \$10,000 reporting threshold. If a ballot measure committee spends over the reporting threshold, the new FEC regulations create a slightly different reporting requirement for incorporated entities than unincorporated groups. An incorporated ballot measure committee is only required to disclose the names of individual donors who gave the committee over \$1000 in the prior calendar year expressly *for the purpose of furthering* electioneering communications.¹⁵⁷ General donations to the ballot measure committee need not be itemized under the new rules, although the committee must still file the rest of the FEC's required report for electioneering communications within a day of the date of the first public distribution of the advertisement that triggers the reporting threshold.¹⁵⁸ The reporting requirements for unincorporated entities described above were not substantively changed, and a separate bank account may still be used to limit the donors subject to reporting.¹⁵⁹ Additional guidance regarding the scope of the reporting obligations for advertisements that qualify for this new *WRTL* exemption should be available when the FEC publishes its complete document in the Federal Register.

C. Restrictions on State and Local Parties Conducting Federal Election Activity

Generally speaking, state and local political parties may not use soft money to pay for any FEA, a term that encompasses a large amount of voter mobilization and communications traditionally handled at the state or local level.¹⁶⁰ FEA must be funded with federal funds or a specific allocation of federal funds and "Levin funds."¹⁶¹ This compromise in BCRA allows state and local parties to use some funds that are not fully compliant with FECA, but are

157. *Id.* at 1-2 (new provision 11 C.F.R. § 104.20(c)(9)).

158. *See* 11 C.F.R. § 104.20(b) (2007).

159. *See* Final Rules, *supra* note 138, at 1-2.

160. 2 U.S.C. § 441i(b)(1) (Supp. 2005); 11 C.F.R. § 300.33 (2007).

161. 2 U.S.C. § 441i(b).

raised and spent pursuant to different restrictions. Levin funds must be raised within the limits of state campaign finance law and in amounts no greater than \$10,000 per calendar year per person.¹⁶² These funds may only be raised by the committee that spends the funds (*i.e.*, no transfers between different party committees or organizations and no fundraising by national parties or federal candidates is allowed).¹⁶³ State and local party committees who conduct FEA may also be required to submit detailed reports about Levin funds spent and raised.¹⁶⁴

Unlike electioneering communications, the funding restrictions on FEA do not depend upon a reference to a federal candidate.¹⁶⁵ Therefore, some activity conducted by state and local political parties to support or oppose ballot measures can be subjected to the FEA funding rules even if no federal candidates are involved or mentioned.¹⁶⁶ BCRA created a structure where there are four types of FEA: voter registration activity (Type I); voter identification, get-out-the-vote activity, and generic campaign activity (Type II); public communications that PASO a clearly identified federal office (Type III); and services provided by an employee of a state or local party who spends more than 25% of their time on activities in connection with a federal election (Type IV).¹⁶⁷ Different funding rules apply to each type of FEA: Types I and II FEA may be funded with an allocated combination of federal and Levin funds, whereas Types III and IV FEA must be funded completely with federal funds.¹⁶⁸ The allocation ratios take into account the composition of the ballot in any particular election year to vary the percentage of federal funds required. For example, in a Presidential election year with a Senate candidate on

162. 2 U.S.C. § 441i(b)(2)(B)(iii); 11 C.F.R. § 300.31.

163. 2 U.S.C. §§ 441i(b)(2)(B)(iv), (b)(2)(C); 11 C.F.R. §§ 300.31(a), (e).

164. 11 C.F.R. § 300.36(b)(2) (requiring party committees that are also political committees must report FEA receipts and disbursements for both federal and Levin funds if they aggregate more than \$5000 in a calendar year).

165. See 2 U.S.C. § 441i(b)(2)(B)(i); 11 C.F.R. § 300.32(c)(1) (noting that FEA referring to a clearly identified federal candidate may not be funded with Levin funds and must be paid for solely with federal funds).

166. Although the FEA rules targeted at State and local party activity, the scope of the activity considered “FEA” also affects the ability of federal candidates and officeholders to fundraise for 501(c) nonprofit corporations as discussed above with regard to the Flake advisory opinion and pending advisory opinion request 2007-28.

167. 2 U.S.C. § 431(20)(A)(i)–(iv) (Supp. 2005); 11 C.F.R. § 100.24(b)(1)–(4) (2007).

168. 2 U.S.C. § 441i(b)(2)(A); 11 C.F.R. § 300.32(b).

the ballot in that state, a minimum of 36% federal funds must be used, whereas in a year where neither a Presidential or Senate candidate appears on the ballot in that state only 15% federal funds is required.¹⁶⁹ These funding restrictions and reporting requirements have already started to deter state and local parties from funding activity that would be considered FEA.¹⁷⁰

State and local parties who conduct voter registration drives in connection with a ballot measure campaign may trigger the FEA funding and reporting restrictions.¹⁷¹ Type I FEA covers “voter registration activity” within 120 calendar days before a federal primary or general election.¹⁷² The statute does not define the term, but FEC regulations state that Type I FEA covers “contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote.”¹⁷³ The regulation includes examples such as distributing registration forms and assisting individuals in completing and filing the forms.¹⁷⁴ Thus, the typical canvasser who goes door-to-door, or stands outside a supermarket with voter registration forms and information supporting or opposing a ballot measure, could qualify as Type I FEA so long as the activity occurs in the 120 days leading up to the election.

State or local party efforts to identify voters sympathetic to the party’s position on particular ballot measures could also constitute Type II FEA (get-out-the-vote, voter identification or generic party activity). Similar to the voter registration definition, get-out-the-vote activities include contacting voters “by telephone, in person, or by other individualized means, to assist them in engaging in the

169. 11 C.F.R. § 300.33(b).

170. See, e.g., Letter from Mark Brewer, President, Ass’n of State Democratic Chairs, to FEC, available at http://www.fec.gov/pdf/nprm/fea_definition/comm_03.pdf (last visited Dec. 27, 2007) (commenting on proposed FEA rulemaking); Letter from Scott R. Falmlen, President, Ass’n of State Democratic Executive Directors, to FEC (Sept. 28, 2005), available at http://www.fec.gov/pdf/nprm/fea_definition/comm_09.pdf (commenting to FEC regarding proposed FEA rulemaking); Letter from Darryl Tattrie, CommonCentsConsulting, to FEC (Sept. 29, 2005), available at http://www.fec.gov/pdf/nprm/fea_definition/comm_10.pdf (commenting to FEC regarding proposed FEA rulemaking).

171. See Op. Fed. Election Comm’n 2003-12, at 15 (July 29, 2003), available at <http://ao.nictusa.com/ao/no/030012.html> (applying FEA provisions to various communications by ballot measure committee).

172. 2 U.S.C. § 431(20)(A)(i); 11 C.F.R. 100.24(b)(1).

173. 11 C.F.R. § 100.24(a)(2).

174. *Id.*

act of voting.”¹⁷⁵ Specific examples in the regulation include providing voters with the date of the election, times and locations of polling places, or offering to transport people from the polls.¹⁷⁶ Thus, phone call reminders from the state party to voters telling them the date and times of the election and urging them to vote “yes” or “no” on a particular ballot measure could be considered a get-out-the-vote activity.¹⁷⁷ FEA voter identification includes acquiring voter lists and adding information about the likelihood of voting in an upcoming election that a state or local party might gather to indicate support for or opposition to a ballot measure in an upcoming election.¹⁷⁸ Finally, generic campaign activity includes public communications that promote or oppose a political party without mentioning any federal or non-federal candidates.¹⁷⁹ Therefore, a mass mailing supporting a political party and promoting the party’s position on an upcoming ballot measure could meet this definition.

Type II FEA is not subject to the 120-day rule discussed above with regard to voter registration activity, but instead is determined by a particular period of time in each state based on the earliest filing deadline for access to a primary election in that state.¹⁸⁰ The Type II FEA time period runs from that filing deadline through to the general election, and therefore can encompass a large portion of any election year.¹⁸¹ Any activity conducted during that time period that otherwise meets the definition of get-out-the-vote, voter identification, or generic campaign activity will be considered Type II FEA even if the activity is targeted at a ballot measure campaign

175. *Id.* at (a)(3).

176. *Id.* at (i)–(ii).

177. The scope of this provision was discussed in Advisory Opinion 2006-19, where the FEC decided that certain direct mail and pre-recorded telephone calls to registered Democrats before a joint state and federal election did not constitute get-out-the-vote activities because (1) the communications only promoted non-federal candidates; (2) the communications were four or more days before the election; (3) these “form letter” communications were not targeted to subsets of Democratic voters; and (4) the communications only contained the date of the election without the individual voter’s polling locations or times.

178. 11 C.F.R. § 100.24(a)(4).

179. *Id.* § 100.25.

180. *Id.* § 100.24(a)(1). The statutory limitation on Type II FEA was that this activity must be “in connection with an election in which a candidate for Federal office appears on the ballot.” 2 U.S.C. § 431(20)(A)(ii) (Supp. 2005). FEC regulations implemented this statutory provision as a timeframe requirement.

181. *Id.* § 100.24(a)(1)(i).

and does not mention federal races.¹⁸² Because this is a fairly large window, most voter mobilization activity leading up to a ballot measure election would most likely be covered in this timeframe and could be subject to the FEA funding restrictions and reporting requirements.

During the most recent FEA rulemaking, some state parties expressed concern that activity in connection with wholly local elections, *e.g.*, mayoral elections or ballot measure elections, were improperly classified as FEA under this approach just because that local election fell within the larger Type II FEA time period.¹⁸³ In response, the FEC created a regulatory exemption for voter identification and get-out-the-vote activities conducted in connection with a local election held on a different day than any federal election if the activity referred exclusively to non-federal candidates, ballot measures, or the date and polling times and locations for the local election.¹⁸⁴ This exemption would cover some state and local party activity regarding ballot measures, but only when that election is held separate and apart from the federal election.¹⁸⁵ Moreover, this exemption was created with a sunset date of September 1, 2007.¹⁸⁶ Although the FEC has issued a notice of proposed rulemaking to make the exemption permanent (and possibly expand the exemption), the current exemption on the books has expired and a new rule has not yet been publicly released.¹⁸⁷

Unfortunately, there are no definitive answers as to what ballot measure voter mobilization efforts by state and local parties might be covered under the FEA regulations. Adding to the uncertainty

182. *Id.* § 100.24(b)(2); Interim Final Rule on the Definition of Federal Election Activity, 71 Fed. Reg. 14357, 14359 (March 22, 2006) (stating that the FEA restrictions apply to "efforts related to non-Federal elections that simply happen to fall within the Type II FEA time periods.").

183. *See, e.g.*, Letter from Lance H. Olson, General Counsel, Cal. Democratic Party, to FEC (June 3, 2005), *available at* http://www.fec.gov/pdf/nprm/fea_definition/comm_06.pdf (commenting to FEC regarding rulemaking).

184. 11 C.F.R. § 100.24(a)(1)(iii)(A) (2007).

185. *Id.*

186. *Id.* § 100.24(a)(1)(iii)(B).

187. *See* Notice of Proposed Rulemaking on FEA and Non-Federal Elections, 72 Fed. Reg. 31,473 (proposed June 7, 2007) (to be codified at 11 C.F.R. pt. 100) (noting that even the proposed revised exemption would only apply to ballot measures which were voted on in wholly separate elections from any federal primary or general election, and it is unclear how many states would hold such separate elections in 2008 apart from the Presidential primary, congressional primaries, and November general election).

is a recent U.S. District Court opinion striking down the FEC's regulatory definitions of "voter registration activity" and get-out-the-vote activities as too narrow and not covering *enough* state and local activity.¹⁸⁸ Pending appeal or a new FEC rulemaking, however, the current definitions remain on the books and in force for the 2008 elections.¹⁸⁹ This uncertainty may be enough to keep state and local parties away from any voter mobilization efforts in support of, or opposition to, a ballot measure that could be considered FEA. But given the increased political party involvement with ballot measures, it is more likely that local parties might unknowingly stumble into federal reporting and funding obligations while advocating their positions on a local ballot measure.¹⁹⁰

IV. STRIKING THE NECESSARY BALANCE

The recent requests for advisory opinions on the application of BCRA to state ballot measure-related activities foreshadow the conflicts that are likely to arise as federal regulation expands to cover more activities with a potential impact on state elections, rather than just activities expressly directed at the federal races at issue in a particular election cycle. Other election reform proposals that have been considered in recent years have brought with them the same risks of conflict. For example, a reform measure recently proposed to regulate the activities of "unregistered" section 527 organizations would have required all state ballot measure committees to register as federal political committees and follow federal source and amount restrictions if

188. See *Shays v. FEC*, No. 06-1247, 2007 WL 2616689 at *83-86 (D.D.C. Sept. 12, 2007) (memorandum opinion) (holding the FEC's definitions of "voter registration activity" and "get-out-the-vote" activities unduly compromises the Act in violation of *Chevron* step two and failed the APA's reasoned decision making requirement).

189. *Id.* at 93-94 (refusing to enjoin the operation of the regulations pending appeal or further rulemaking).

190. The FEA rules also apply to an "association or similar group of candidates for state or local office or of individuals holding state or local office." See 2 U.S.C. § 441i(b)(1) (2000), *invalidated by* *McConnell v. FEC*, 251 F. Supp. 2d 176 (2003); 11 C.F.R. § 300.32(a)(1) (2007). Because these groups are not allowed to raise or spend Levin funds, any FEA voter mobilization activity done by this type of group supporting or opposing a ballot measure would be required to be paid for with all federal funds. 11 C.F.R. § 300.32(a)(1). The FEC attempted to exempt these groups from the definitions of "get-out-the-vote" and "voter identification," but removed those exemptions after a U.S. District Court struck these regulations down as contrary to Congressional intent in BCRA. See *Shays v. FEC*, 337 F. Supp. 2d 28, 104, 107 n.83 (D.D.C. 2004).

they conducted get-out-the-vote or voter registration campaigns in conjunction with a ballot measure election held simultaneously with an election for federal office.¹⁹¹

These federal regulatory efforts stem from legitimate concerns that the federal system of limiting contributions cannot work if there are avenues through which unregulated money can have substantial influence on elections. The 2004 presidential election provided an excellent example of the effect that initiative measures on hot-button issues like gay marriage can have on driving turnout of voters likely to support the candidates of a particular political party.¹⁹² To the extent that political operatives arrange for the presence of “sham” initiatives on the ballot in order to skew the results of candidate elections, federal regulation of such initiatives seems to be justified on the same basis as regulation of federal election activity. Increasing strategic involvement of candidates directly in ballot measure activities likewise justifies consideration of the candidate corruption concerns that were once thought to be absent from the regulation of ballot measure issues. The most notable example of this phenomenon is California Governor Arnold Schwarzenegger’s unabashed fundraising and advocacy for ballot measures to strengthen both his political base for re-election and his bargaining position vis-à-vis the California Legislature.¹⁹³

Each of these bases for regulation turns on certain assumptions about the intent of the political actors engaged in these activities. We recognize as problems each of the putative problems addressed above because of our implicit assumption that the placement of “wedge issue” ballot measures in a presidential year or the involvement of an elected official with ballot measure campaigns is undertaken for the nefarious purpose of evading otherwise-applicable campaign finance restrictions. But it is equally possible that ballot measures on controversial social issues appear on the ballot at the same time that candidates are discussing those issues in their campaigns, simply because those issues are something that voters actually care about. Therefore, they attract

191. H.R. 513, 108th Cong. § 2 (2006) (referring to organizations described in section 527 of the Internal Revenue Code of 1986); Municipal Debt Refinancing Act, S. 271, 108th Cong. (2003).

192. See Garrett, *supra* note 57, at 1101–02. See generally STEPHEN P. NICHOLSON, VOTING THE AGENDA: CANDIDATES, ELECTIONS, AND BALLOT PROPOSITIONS (2005) (analyzing the interrelationships between candidates and ballot measure elections).

193. See Garrett, *supra* note 57, at 1105–07.

both direct policy proposals and candidate attention. For example, an elected official may be involved in ballot measure elections precisely because she has been unable to advance a particular proposal through ordinary legislation, and she is taking that issue to the voters out of a sense of public stewardship and desire to advance her policy agenda. Sorting out legitimate ballot measure activity from illegitimate activities requires the kind of intent-based analysis that the Supreme Court has eschewed in the campaign finance context. Accordingly, writing a narrowly tailored regulation that applies to only illegitimate activities, without including an intent element, would be impossible.

Thus, any federal regulation of state ballot measure activities based on the theory that they provide convenient cover for those who would avoid restrictions on contributions would likely need to sweep broadly and cover all initiatives. Assuming that such regulation could clear the First Amendment hurdle recognized in the *First National Bank of Boston v. Bellotti* and *Citizens Against Rent Control v. City of Berkeley* cases, it would still need to justify the substantial federal intrusion into state governance that such a regulation would constitute. No federal court decision has ever held that direct democracy at the state level violates any federal constitutional provision.¹⁹⁴ It is difficult to see how such a conclusion could be reached in light of the Framers' own insistence on popular ratification of the Constitution, not to mention Congress' express endorsement of, at least, the legislative referendum at the state level.¹⁹⁵ In a federal system, at least some deference is due to the legitimate choices of state governments about the conduct of state government itself. Absent constitutional violations, and given our founding commitment to consent of the governed as a fundamental basis for the legitimacy of government, it is hard to frame an argument that direct democracy is per se illegitimate.¹⁹⁶ Any federal regulation of state ballot measure

194. In *Pacific States Telephone & Telegraph Co. v. Oregon*, the Supreme Court refused to accept jurisdiction of a Guarantee Clause challenge to state initiative lawmaking based on the political question doctrine. 223 U.S. 118, 151 (1912).

195. See U.S. CONST. art. VII; WATERS, *supra* note 10, at 3; THE FEDERALIST NO. 49, *supra* note 122, at 339; BUDGE, *supra* note 122; DUVIVIER, *supra* note 10, at 229–30; see also Robert G. Natanson, *Initiative & Referendum & the Republican Form of Government*, in THE BATTLE OVER CITIZEN LAWMAKING 17 (M. Dane Waters ed., 2001). But see Engberg, *supra* note 17, at 578 (contending that Congress could regulate or even eliminate ballot initiatives under its Guarantee Clause authority).

196. Cf. DUVIVIER, *supra* note 100, at 248–52 (arguing that ballot measures addressing areas in which legislation generally fails and initiatives are particularly

activity would therefore have to acknowledge the legitimacy of the underlying system and comply with the ordinary constitutional requirement that it not sweep more broadly than necessary in remedying whatever ills formed the justification for federal action.¹⁹⁷

Any federal regulation of state ballot measures should also be conducted with a well-supported, nuanced understanding of how ballot measure politics actually operate.¹⁹⁸ Reformers in this area tend to paint the evils of direct democracy with a broad brush, citing the influx of large-dollar corporate and union contributions as a proxy for the existence of actual corruption and voter confusion. Real data about the operation of the initiative paints a more complex picture. For example, while more money in a race may actually result in greater odds of victory (and thereby raise equality concerns), in the initiative context, it does not have a direct effect on success. Solid empirical evidence demonstrates that spending on ballot measure campaigns has more effect when that spending is on the side opposed to the measure, perhaps because those efforts benefit from the voters' predisposition to vote "no" on ballot measures.¹⁹⁹ The spectral image of big money interests forcing legislation through the initiative process therefore does not seem to hold true, at least not as a universal matter. Nor do all initiatives operate to the disadvantage of minority groups, as exemplified by successful pro-rights initiatives and the defeat of anti-rights initiatives even in states where the political composition of the electorate would portend a different result.²⁰⁰ Moreover, at least some of the concerns about the majoritarian nature of

useful, such as political reform, matters of health and safety traditionally reserved to states, and areas appropriate for social experimentation are due particular deference).

197. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 539–40 (1998) (discussing constitutional limitations).

198. See generally Briffault, *Ballot Propositions*, *supra* note 57, at 432–38 (detailing the logistical problems of campaign finance regulation in the ballot measure context); Elisabeth R. Gerber, *The Logic of Reform: Assessing Initiative Reform Strategies*, in *DANGEROUS DEMOCRACY: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 143 (Larry J. Sabato, Howard R. Ernst, & Bruce A. Larson, eds., 2001) (analyzing various reform proposals in light of empirical evidence about ballot measure politics).

199. Briffault, *Ballot Propositions*, *supra* note 57, at 427; Elisabeth Garrett & Elisabeth R. Gerber, *Money in the Initiative & Referendum Process: Evidence of Its Effects & Prospects for Reform*, in *THE BATTLE OVER CITIZEN LAWMAKING* 73, 79 (M. Dane Waters ed., 2001).

200. DuVivier, *supra* note 100, at 242.

governance by initiative can be resolved by the power of judicial review, which extends even to initiatives, rather than by increasing regulation of direct democracy.

In addition, any regulation that affects direct democracy should consider the benefits of direct democracy, so that it might avoid unintended consequences that would reduce or eliminate those benefits. Direct democracy has been shown to increase voter turnout and engagement, which in turn operates to the benefit of candidate elections and the overall perception of government's legitimacy.²⁰¹ Direct democracy has also provided a historically effective bypass for the kinds of political reform that elected representatives are unlikely to accomplish, including campaign finance reform itself, and as a forum for social experimentation at the state level.²⁰² Aligning ballot measure elections so that they use the same structure of contribution limits as candidate elections increases the likelihood of capture by the same political actors who spend money and exert influence in candidate elections, rather than providing an alternative avenue for otherwise unrepresented interests to accomplish what they cannot accomplish through the normal legislative process. Even those who fear that ballot measure campaigns have been captured by big-money interests surely do not wish to lose the possibility of enacting reforms that those currently in power will not impose on themselves. Instead, a "hybrid democracy" system, in which both representative and direct democracy play a vibrant role, can result in better outcomes and more respect for the will of the people.²⁰³

Perhaps most importantly, direct democracy is a concrete recognition of the foundational principle that democratic government requires the consent of the governed, and that the governed therefore have the right to choose the way in which they will be governed—including the choice to reserve legislative authority for themselves. Citizens' use of that reserved legislative power need not always be perfect to be worthy of respect. In the words of political theorist Michael Walzer, the citizenry's claim on

201. *Id.* at 236; see also David B. Magleby, *Ballot Initiatives & Intergovernmental Relations in the United States*, 28 *PUBLIUS* 147, 148–151 (1998) (contending that availability of the initiative results in more responsive elected officials).

202. See Garrett, *supra* note 57, at 1112; DuVivier, *supra* note 10, at 238.

203. See Garrett, *supra* note 57 (describing "hybrid democracy"); see also THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 246–51 (1989) (advocating a "mixed model" of democracy).

the authority to rule does not rest on “their knowledge of the truth.”²⁰⁴ Rather, the people “may not know the right thing to do, but they claim a right to do what they think is right [I]t is a feature of democratic government that the people have a right to act wrongly.”²⁰⁵ Individual reformers, and even elected representative bodies, should think twice before imposing regulations on this retained authority simply because they disagree with some of the ways in which it is used.

V. CONCLUSION AND FURTHER RECOMMENDATIONS

From the history of campaign finance regulation in the United States to date, one thing seems true: because people who live and work here have an interest in the outcome of governmental decisions, they have an interest in influencing elections, and they are willing to spend money to do it. Those who are particularly committed to influencing elections and governmental outcomes will be creative in their attempts to gain advantage inside (and sometimes outside) the boundaries imposed by whatever regulatory system is in place. This is the constant struggle of campaign finance reform efforts.

Now that federal campaign finance regulation has reached its current breadth, attempts to snuff out evasive contribution restrictions inevitably conflict with the lesser and different restrictions on related areas of political activity, including direct democracy. Both the application of current law and any further attempts at reform will proceed best by a careful consideration of the interests at stake in both federal regulation and citizen participation in direct democracy. This approach—provided that it relies on actual information about how ballot measure campaigns affect elections—will preserve the societal benefits of direct democracy, respect the balance of powers in our federal system, and avoid overbroad and unconstitutional restrictions on the core political speech through which the governed express consent and provide direction to their governments.

204. Michael Walzer, *Philosophy & Democracy*, 9 POL. THEORY 379, 383 (1981).

205. *Id.* at 385.