But These Times Were Supposed to be a Changing. . . How Congress Should Regulate 527 Groups in Light of the Bipartisan Campaign Reform Act, the Vote for Change Tour, and the 2004 Presidential Election

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I. INTRODUCTION

Since the 1960s, musicians have capitalized on their musical celebrity to infuse their political ideals into the course of American politics.[1] Benefit concerts have often served as musicians' vehicle to popularize these political causes.[2] For example, Willie Nelson, John Mellencamp and Neil Young founded Farm Aid in 1985, and since then, have staged annual concerts featuring a prominent group of musicians to raise money for small farmers.[3] The popular Farm Aid concerts have raised and distributed over $17 million to family farms in forty-four different states.[4] More recently, scores of popular musicians, playing in ten cities throughout the world, reinvigorated the Live Aid concert series to popularize the plight of African nations as they battle debilitating poverty and AIDS epidemics.[5]

Aside from benefit concerts, musicians frequently record and release benefit albums to advance political causes. Perhaps the most recent and successful of these benefit albums was the "Tribute to Heroes" album, which raised over $150 million dollars for families affected by the attacks on the World Trade Center in 2001.[6] Similarly, a group of musicians concerned for the victims of the Kosovo War produced "No Boundaries."[7] Pearl Jam, a popular Seattle based band, donated the $10 million in proceeds from their hit single, "Last Kiss," to CARE, an organization that supported victims of the Kosovo War.[8]

Musicians seeking a more direct avenue to the political arena have also actively promoted candidates to effectuate

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1. Dan DeLuca, *Pop & Politics: A Combustible Combo in 2004*, MACON TELEGRAPH, Aug. 30, 2004, at 1.

2. *Id.*

3. *Farm Aid: About Farm Aid*, http://www.farmaid.org/site/PageServer?pagename=Aboutus_home (last visited September 30, 2004).

4. *Id.*

5. Jim DeRogatis, *LIVE 8 TAKES OFF; Ten Simultaneous Concerts Push for an End to Africa's Poverty: Naïve, Sure, But the World Sings for a Day*, CHICAGO SUN TIMES, July 4, 2005, at 30.

6. Anne Marie-O'Connor, *Tapping Into the Music Mainstream: Charities Embrace Rock Philanthropy*, FORT WAYNE JOURNAL GAZETTE, Sept. 28, 2003, at 8E.

7. *Id.*

8. Sarah Rodman, *Celebrity; 'Last Kiss' Is a Real Pearl for Kosovars*, BOSTON HERALD, June 15, 1999, at 18.

their political causes.[9] Musicians often perform at fundraisers for political candidates.[10] Classic rocker Jackson Brown and pop-star Michelle Branch serenaded a star-studded crowd at a Democratic fundraiser in July 2004, which raised Senator Kerry's campaign $4 million.[11] The support of popular musicians is not unique to Democratic campaigns; President George W. Bush enlisted popular country acts such as Travis Tritt and Lee Ann Womack to perform at the Republican National Convention.[12] Some musicians have gone a step further and actually hosted fundraisers for candidates.[13] Jon Bon Jovi, the lead singer of Bon Jovi, held a fundraiser at his New Jersey home in June 2004 that raised over $1 million for Senator Kerry's presidential campaign.[14]

In the 2004 Presidential Election, the 527 groups Moveon.org ("MoveOn") and America Coming Together ("ACT") devised a novel and ingenious vehicle, the "Vote for Change Tour," ("Tour") to campaign for Senator Kerry. A 527 group is an entity, independent of any political party, that is organized for the primary purpose of influencing federal elections.[15] The Tour poured $15 million dollars into ACT's coffers in the critical month prior to the election.[16] The Tour featured more than a dozen artists, most notably Bruce Springsteen, Pearl Jam, the Dave Matthews Band, the Dixie Chicks, Sheryl Crow, and R.E.M.[17] The musicians combined to play thirty-four shows that took place in October in nine critical states to the presidential electoral race.[18] The Tour

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9. *See, e.g.*, Maria L. La Ganga, *Kerry Event Sticks to Music, Message; Campaigning in Boston, He Reaches Out To Women and Minorities and Chides Bush for Rejecting an Invitation to the NAACP Convention*, LOS ANGELES TIMES, July 13, 2004, at A16. (John Kerry's campaign solicited the support of rockers from several generations to assist in his fundraising efforts, and this event is representative.)

10. Ben Sisario, *Directions: Receipts; The Sound of Money*, N.Y. TIMES, Oct. 24, 2004, at 24.

11. La Ganga, *supra* note 9.

12. Kathy Flannigan, *GOP Convention Gets a Nashville Twang*, MILWAUKEE JOURNAL SENTINEL, Aug. 29, 2004, at B7.

13. Mary Ann Akers, *Will the Real Rep.*, ROLL CALL, June 15, 2004.

14. *Id.*

15. *Recent Developments in Campaign Finance Regulation,* The Brookings Institution (Feb. 28, 2001), *available at* http://www.brookings.org/gs/cf/headlines/527_intro.htm (last visited Nov. 26, 2005).

16. Sisario, *supra* note 10.

17. *Id.*

18. Jim DeRogatis, *Rockers Play for Change; Some of Popular Music's Biggest Superstars Including Bruce Springsteen Have Signed on for a Series of Concerts*

exhibited two unique aspects that distinguished it from prior political advocacy from musicians. First, the musicians designated the ouster of President Bush as their sole political objective, and second, the Tour's revenue was directed to ACT, a 527 group, which employed the funds to register voters and produce sham issue ads.

The Tour's advocates hoped that the Tour would mobilize new and young voters and successfully overcome the razor thin margins that separated the candidates in 2000.[19] Meanwhile the Tour's detractors were quick to point out that although the Tour was billed as a voter contact program,[20] many of the concerts were held after voter registration deadlines had expired.[21] The Tour's detractors also emphasized that the likely Tour-goers were probably already loyal partisans.[22] Furthermore, they speculated that many Tour attendees would be disappointed to hear that their contributions go to 527 groups that were bankrolled by extremely wealthy businessmen and women.[23] Regardless of which argument one subscribes to, it is certain that the Tour exemplifies the dueling values of ardent advocacy and electoral integrity that inform the campaign finance debate.

To clarify the legal status of 527 groups, Congress should modify the present definition of "electioneering communications" in the Bipartisan Campaign Reform Act ("BCRA") to allow these groups to continue voter registration and get-out-the-vote efforts while restricting their ability to produce sham issue ads. To demonstrate the need for this proposal, this paper will: (1) present a brief history of campaign finance and the dire circumstances that often provoke reform; (2) trace the developments constituting the modern era of campaign finance reform, specifically analyzing the Federal Campaign Election Act of 1971 and the seminal case of *Buckley v. Valeo*; (3) chronicle the changes in the campaign finance field since BCRA and the landmark case

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Supporting the Defeat of President Bush, CHICAGO SUN TIMES, Aug. 5, 2004, at E1. The critical states were Pennsylvania, Ohio, Florida, North Carolina, Michigan, Iowa, Minnesota, Missouri and Wisconsin. *Id.*

19. Marty Logan, *Art-U.S.: Anti-Bush Musicians Hit the Road, But Will It Matter?*, INTER PRESS SERVICE, Aug. 18, 2004.

20. *Id.*

21. *Id.*

22. *Id.*

23. Logan, *supra* note 19.

McConnell v. FEC; (4) explain the emergence and status of 527 groups in the current campaign finance climate; (5) demonstrate the complicated interplay between BCRA, 527 groups and the Tour; and finally (6) propose a reform that advances the ideas expressed in BCRA without impinging on the constitutional rights of independent 527 groups.

II. OVERVIEW OF CAMPAIGN FINANCE REFORM

Campaign finance reform has been aimed at promoting democratic elections by preventing the influence of concentrated wealth and special interests at the expense of individual voters.[24] In 1896, Marcus Hanna, an Ohio mining tycoon and head of the Republican National Committee, uttered the ethos that drives campaign financing, "[t]here are two things that are important in politics. The first is money and I can't remember what the second one is."[25] Hanna importuned banks and corporations to contribute to William McKinley's presidential campaign in exchange for an open door policy toward big business.[26] Hanna raised over $6 million to finance McKinley's successful campaign.[27] William Jennings Bryant, McKinley's opponent in the 1896 election, raised $650,000 and lost the election.[28]

Sensing the public's outrage, President Theodore Roosevelt initiated the drive to eliminate the corrosive synergy of money and politics early in the 20th Century.[29] President Roosevelt exhorted Congress to not only ban corporate contributions, but to develop a system of public financing for federal elections.[30] Congress responded with the Tillman Act of 1907, which criminalized contributions to candidates for federal office from corporations and national banks.[31] In 1910, the Federal Corrupt Practices Act ("FCPA") required candidates for the House of Representatives to disclose campaign finance

24. United States v. UAW-CIO, 352 U.S. 567, 571 (1957).

25. JEFFREY H. BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA 29-30 (Crown Publishers) (2000).

26. *Id.* at 29.

27. *Id.* Hanna distributed the money to disseminate press releases, erect billboards and hire orators to deliver stump speeches extolling the values of William McKinley's campaign. *Id.*

28. BIRNBAUM, *supra* note 25.

29. United States v. UAW-CIO, 352 U.S. 567, 572 (1957).

30. BIRNBAUM, *supra* note 25, at 30.

31. *UAW-CIO*, 352 U.S. at 575.

information; a year later, the Senate followed suit.[32] In 1925 lax enforcement and persistent evidence of big business meddling in government policy, exemplified by the Teapot Dome Scandal, prompted President Coolidge to sign into law amendments to the FCPA.[33] The FCPA broadened the definition of contribution to include non-monetary donations and criminalized the acceptance of illegal corporate contributions.[34] However, the legislators responsible for crafting the legislation constructed loopholes to preserve the status quo.[35]

In the 1940s organized labor, with the onset of World War II and the correlating demands for increased production, commanded a new found political strength due to the catastrophic effect a strike would have posed.[36] Recognizing the opportunity for unions to influence federal elections, Congress passed the Smith-Connally Act, which banned union contributions during the war.[37] Following this Act, the Congress of Industrial Organizations created the first Political Action Committee ("PAC") to re-elect President Roosevelt.[38] Although President Roosevelt initially rejected

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32. BIRNBAUM, *supra* note 25, at 30.

33. ELIZABETH DREW, THE CORRUPTION OF AMERICAN POLITICS: WHAT WENT WRONG AND WHY 47 (Overlook Press) (2000). The Teapot Dome Scandal involved the no-bid contracts surrounding the lease of valuable naval oil reserves in California and Wyoming. Leslie E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal*, The Brookings Institution (1999), *available at* http://academic.brooklyn.cuny.edu/history/johnson/teapotdome.htm. When Albert B. Fall became Secretary of the Interior during the Harding Administration, he gained jurisdiction over the naval oil reserves. *Id.* In 1921, Fall leased two oil reserves in California to Edward Doheny, a former business associate, and received $100,000 allegedly as a loan. *Id.* Later in 1921, Fall leased the Wyoming Reserve to Harry Sinclair of Mammoth Oil Company. *Id.* Secretary Fall had negotiated the lease on his private ranch in New Mexico, and shortly thereafter, received valuable cattle, indirectly received $198,000 in bonds and another $36,000 loan from Sinclair. Bennett, *supra* note 33. The estimated profit that the Department of the Interior could have derived for the leasing rights was $100 million. *Id.* President Coolidge appointed special counsel to prosecute the civil and criminal cases stemming from the affair. *Id.* Several of the civil suits were successful civil and Secretary Fall was convicted of accepting a bribe and spent over nine months in prison. *Id.*

34. United States v. UAW-CIO, 352 U.S. 567, 577 (1957).

35. DREW, *supra* note 33, at 47.

36. *UAW-CIO*, 352 U.S. at 578.

37. *Id.*

38. *Campaign Finance: Important Dates – Federal Campaign Finance Legislation*, http://www.campaignfinancesite.org/history/financing1.html. (last visited Oct. 15, 2004). Political Action Committees are a mechanism used to contribute to political campaigns through voluntary donations from union members. *Id.*

the contributions flowing in from unions, he accepted over a half million dollars by the end of the election.[39]

In 1947, Congress passed the Labor Management Relations Act ("Taft-Hartley Act") over President Truman's veto.[40] The Taft-Hartley Act permanently banned union contributions to candidates for federal office, and significantly proscribed union contributions and expenditures.[41] Previously, unions had circumvented the ban on contributions through activities known as expenditures, i.e. paying the salaries of partisan organizers or buying radio time and advertising space directly instead of contributing to a campaign.[42]

As television and radio campaigning became embedded in American culture, a new era of campaign finance arrived and brought with it rapidly escalating costs.[43] Congress passed the Federal Election Campaign Act of 1971 ("FECA") to ameliorate the concerns surrounding this new age of campaign finance.[44] FECA restricted the amount of money spent on media advertising[45] and made disclosure requirements of campaign contributions and expenditures mandatory.[46]

FECA also established operational guidelines for Political

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39. JEFFREY H. BIRNBAUM, THE MONEY MEN: THE REAL STORY OF FUND-RAISING'S INFLUENCE ON POLITICAL POWER IN AMERICA 31 (Crown Publishers) (2000).

40. United States v. UAW-CIO, 352 U.S. 567, 584 (1957).

41. *Id.* at 582-83.

42. *Id.* at 581-82.

43. BIRNBAUM, *supra* note 25, at 31. Between 1956 and 1968, expenditures for advertising on television and radio increased from $10 million to $60 million dollars and overall campaign spending skyrocketed from $155 million to $300 million. *Id.*

44. Bryan R. Whittaker, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Finance After McConnell v. FEC*, 79 IND. L.J. 1063, 1068 (2004).

45. Federal Elections Campaign Act (FECA) of 1972, Pub. L. No. 92-225 § 104(a) (1972) *invalidated by* Buckley v. Valeo, 424 U.S. 1, 29, 51 (1976). No legally qualified candidate in an election (other than a primary or primary runoff election for a Federal elective office may (A) spend for the use of communications media on behalf of his candidacy in such election a total amount in excess of the greater of (i) 10 cents multiplied by the voting age population of the geographical area in which the election for such office is held, or (ii) $50,000. *Id.*

46. Federal Elections Campaign Act of 1972, Pub. L. No. 92-225 § 302(b) (1972):

> Every person who receives a contribution in excess of $10 for a political committee shall, on demand of the treasurer, and in any event within five days after receipt of such contribution, render to the treasurer a detailed account thereof, including the amount, the name and address (occupation and principal business, if any) of the person making such contribution, and the date on which received. *Id.*

Action Committees.[47] A PAC is a common name for a separate segregated fund, which is essentially a fund comprised of employee or member donations that is operated by the corporation or union aside from their general treasury funds for the purpose of influencing elections.[48] Under the FECA framework, corporations and unions were permitted to establish and administer PACs with their general treasury funds, but the fund itself had to be amassed through voluntary donations of employees or union members.[49] These voluntary contributions could then be expended to influence federal elections.[50] In 1976, the Federal Election Commission ("FEC") allowed corporations to solicit donations to PACs from employees and shareholders, but significantly reduced the amount a single PAC could contribute to elections.[51]

III. THE MODERN ERA OF CAMPAIGN FINANCE REFORM: THE FEDERAL ELECTION CAMPAIGN ACT OF 1974 AND *BUCKLEY V. VALEO*

President Nixon's 1972 re-election campaign and the ensuing Watergate scandal exposed the impotence of the campaign finance system and devastated public confidence in the political process.[52] The Watergate investigation revealed rampant campaign finance violations, the most grievous being the Milk Producers Association's contributions of $2 million to President Nixon's re-election committee in return for support on milk pricing controls.[53] The drastic meltdown of the public trust in the electoral process sparked congressional calls for reform to safeguard elections from undue interests.[54] In 1974, Congress enacted amendments to FECA in order to control the escalating costs of national campaigns.[55]

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47. *The Federal Election Campaign Laws: A Short History*, www.fec.gov/info/appfour.htm. (last visited on Oct. 15, 2004).

48. *Id.*

49. *Id.*

50. *Id.*

51. *The Federal Election Campaign Laws: A Short History*, *supra* note 47.

52. Audra L. Wassom, *The Campaign Finance Legislation: McCain-Feingold / Shays-Meehan – The Political Equality Rational and Beyond*, 55 SMU L. REV. 1781, 1783 (Fall 2002).

53. *Id.*

54. *Id.*

55. James C. Wald, *Money Talks, Politicians Listen: The Constitutional Grounds for Controlling Soft Money*, 12 S. CAL. INTERDISC. L.J. 319, 322 (Spring 2003).

The two provisions of the 1974 amendments relevant to this paper are the contribution and expenditure limits. Congress imposed contribution limits that limited the amount of money an individual could give per year to a single candidate to $1,000 and could give in total to $25,000.[56] The expenditure limits restricted the amount of money an individual could expend "relative to a clearly identified candidate during a calendar year" to no more than $1,000.[57]

A hoard of conservative and liberal politicians and political groups waited little more than two months before they filed suit challenging the FECA amendments. In 1976 the Supreme Court issued its landmark campaign finance opinion in *Buckley v. Valeo*, upholding contribution limits and striking down expenditure limits.[58] In its opinion, the Court immediately identified the First Amendment's virulent protection of free speech and freedom of association in the political arena.[59] Noting that these two protections were integral to a robust discussion of the candidates and the issues, the Court applied close scrutiny to the 1974 changes.[60] The proponents, therefore, had the burden of demonstrating that the contribution and expenditure limits served a sufficiently important government interest and were narrowly tailored to achieve that end.[61]

The Court first addressed the validity of the contribution limits. The proponents set forth three important government interests that the contribution limits served.[62] They argued that the contribution limits would (1) effectively circumscribe corruption or the appearance of corruption that had tainted past elections; (2) equalize the general population's ability to affect the outcome of elections while stripping wealthy contributors of their role as kingmakers; and (3) allow more candidates to compete in national elections by restricting the amount of money flooding into political campaigns.[63]

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56. 2 U.S.C. § 441(a) (1974). "No person shall make contributions (A) to any candidate and his authorized political committees with respect to any election for Federal office, which in the aggregate, exceed $1,000. No individual shall make contributions aggregating more than $25,000 in any calendar year." *Id.*

57. 2 U.S.C. § 608(e)(1) (repealed May 11, 1976).

58. Buckley v. Valeo, 424 U.S. 1, 29, 51 (1976).

59. *Id.* at 14.

60. *Id.*

61. *Id.* at 25.

62. *Buckley*, 424 U.S. at 25.

63. *Id.* at 25-26.

In upholding the contribution limits, the Court stated that the threat of corruption or the appearance of corruption constituted a sufficiently important government interest to justify the contribution limits.[64] The Court affirmed the proponents' argument that the appearance of corruption distorted the public confidence in elections, the most fundamental expression of a democracy. The Court posited that a contribution is an indirect form of political speech because it requires a campaign to act as an intermediary before it becomes political speech.[65] Thus, because contributions posed only a marginal restraint on the exchange of ideas,[66] Congress' decision to impose contribution limits was constitutional.

The Court next analyzed the parties' argument on the constitutionality of the expenditure limits. The proponents restated their arguments in support of the constitutionality but were not successful. Appellants' argument that the statutory expenditures limits were vague resonated with the Court.[67] The Court stated: "in order to preserve the provision against invalidation on vagueness grounds, [expenditure limits] must be construed to apply only to expenditures for communications that in *express terms advocate* the election or defeat of a clearly identified candidate for federal office."[68] Footnote 52 of the *Buckley* decision set forth the infamous "magic words." These magic words - "'vote for,' 'elect,' support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat' 'reject'" - comprised the exclusive list of terms that denoted express advocacy. [69]

After narrowly defining the permissible scope of expenditure limits, the Court addressed each of the proponents' arguments. The Court stated that the threat of corruption rationale that was sufficient to uphold contribution limits was insufficient to affirm expenditure limits.[70] The Court stated that the necessity of interpreting the statute narrowly to avoid vagueness concerns limited its effectiveness

64. *Id.* at 26.
65. *Id.* at 21.
66. *Buckley*, 424 U.S. at 21.
67. *Id.* at 40.
68. *Id.* at 44 (emphasis added).
69. *Id.* at 44 n.52.
70. *Buckley*, 424 U.S. at 45.

as a loophole closing measure.[71] In short, there was no important governmental interest in limiting express advocacy to $1,000 when unsavory groups could easily evade that limit through non-express or issue advocacy.[72] Moreover, the advocacy of independent groups did not generate the same threat of corruption.[73] In addressing the proponents' argument in support of expenditure limits, the Court concisely stated that the concept that a court may limit the speech of the few to strengthen the voice of the many directly contravenes the Court's First Amendment jurisprudence. Consequently, the stated rationale was not an important government interest, and the Court struck down expenditure limits.[74]

The *Buckley* decision's lasting influence on campaign finance centers on the Court's narrow circumscription of the activities Congress could regulate.[75] The Court's distinction between express and issue advocacy stifled the reforms Congress attempted in the 1974 amendments. The Court defined express advocacy as the employment of "express terms that advocate the election or defeat of a clearly identified candidate for federal office."[76] Issue advocacy, on the other hand, encompassed those activities that political committees conducted indirectly to benefit their campaigns.[77] This key difference between the express and issue advocacy set the stage for the creation of the soft money loophole.[78]

In order to comprehend the soft money loophole, a primer on campaign finance terminology is necessary. Hard money constitutes funds collected under FECA's statutory framework.[79] Hard money, therefore, is subject to amount and source limits, and political parties must disclose all

71. *Id.* at 45.
72. *Id.*
73. *Id.* at 46.
74. *Buckley*, 424 U.S. at 48-49.
75. ANTHONY CORRADO, CAMPAIGN FINANCE REFORM: BEYOND THE BASICS, 12 (The Century Foundation Press) (2000).
76. *Buckley*, 424 U.S. at 44.
77. James C. Wald, *Money Talks, Politicians Listen: The Constitutional Grounds for Controlling Soft Money*, 12 S. CAL. INTERDISC. L.J. 319, 319-20 (Spring 2003). Activities often carried out through issue advocacy are: paying the salaries of campaign organizers, buying advertising air time, and enlisting individuals to help with get out the vote drives. *Id.*
78. *Id.* at 320.
79. McConnell v. FEC, 540 U.S. 93, 122 (2003).

contributors and the amount they give.[80] Soft money is not subject to FECA's restrictions and is largely comprised of unlimited donations flowing in from wealthy individuals, corporations and unions.[81] Whereas candidates raise hard money, political parties raise hard and soft money.[82] Soft money may be used for the same activities as hard money, but it may not provide direct support to federal candidates.[83] The limits on directly supporting candidates are coextensive with the restrictions on express advocacy. It follows therefore that the only impediment to employing soft money was the restriction on the use of the "magic words" in campaign advertisements.[84] Hard and soft money could both be used for "grassroots organizing, get-out-the-vote drives, voter registration, candidate recruitment, issue development and advocacy."[85]

The *Buckley* decision's distinction between express and issue advocacy coupled with subsequent FEC guidance allowing national and state political committees to jointly finance mixed activities established the framework responsible for the soft money loophole.[86] To decipher the origins of the soft money loophole, it is important to note that while FECA regulated all federal elections, it did not encompass state regulation as well.[87] Therefore, state political committees were not prohibited from using soft money to influence federal elections.[88]

In 1978 the FEC issued guidance that permitted state and national parties to intermingle funds "on a reasonable basis" to pay for mixed activities.[89] Mixed activities were events that were arranged to influence state and federal elections."[90]

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80. *Id.*

81. L. Paige Whitaker, *Convinced by the Record: Showing an Appearance of Corruption: The Supreme Court Upholds the Groundbreaking McCain—Feingold Campaign Finance Law*, 51 AUG FED. LAW 26, 27 (August 2004). Source restrictions are limitations on what entities can contribute money. *Id.* For example, money solicited from unions and corporations may be made payable to soft money accounts only. *Id.*

82. Wald, *supra* note 55, at 320.

83. *Id.*

84. *See generally, id.*

85. Joel M.Gora, *"No Law...Abridging,"* 24 HARV. J.L. & PUB. POL'Y. 841, 861 (2001).

86. Wald, *supra* note 55, at 324.

87. *Id.*

88. *Id.*

89. Wald, *supra* note 55, at 324.

90. *Id.*

The 1990 release sought to clarify what constituted a reasonable basis by setting allocation rates.[91] The allocation rates permitted state political committees to use significantly more money to pay for these mixed activities than previously allowed.[92] Astute political operatives quickly recognized that shifting national committee funds to state committees permitted the parties to raise and expend monumental amounts of soft money, and the soft money loophole was born.[93] Thus, the *Buckley* decision's championing of political free speech and subsequent FEC actions severely damaged reform efforts to incorporate a wider spectrum of political voices.

IV. THE SITUATION TODAY: THE BIPARTISAN CAMPAIGN REFORM ACT AND *MCCONNELL V. FEC*

In the years following the creation of the soft money loophole, dubious campaign finance practices again posed challenges to the authenticity of the electoral process.[94] The *Buckley* decision's distinction between express and issue advocacy coupled with the FEC's guidance allowed eager political operatives to easily navigate the voids in campaign finance laws to generate enormous sums of soft money. The explosion of soft money really took hold in the 1990s with the increased license to use soft money for federal elections.[95] The percentage of soft money swelled from 5% and 11% in the 1984 and 1988 election years to 30% and 42% in the 1996 and 2000 elections.[96] To demonstrate the enormous amounts raised from relatively few donors, one need only consider that 800 donors generated $300 million out of a total $498 million raised in soft money in the 2000 elections.[97]

What was even more troubling, the campaigns used nearly 50% of the soft money to produce issue ads deriding opposing

91. McConnell v. FEC, 540 U.S. 93, 124 n.7 (2003).

92. *Id.* Whereas the allocation rates mandated that national parties pay for 60% of mixed activities with hard money, a state committee's allocation was contingent upon the ratio of state to federal candidates. *Id.* Because there are often more state candidates on a ticket, state committees could use significantly more soft money to finance mixed activities. *Id.*

93. *McConnell*, 540 U.S. at 124-25.

94. Whitaker, *supra* note 81 at 27.

95. *McConnell*, 540 U.S. at 124.

96. *Id.*

97. *Id.*

candidates almost exclusively within sixty days of the election.[98] Sham issue ads are political attack ads that attempt to generate votes for a particular candidate often through attacking the candidate's opponent. Embittered partisans often produce these ads under the guise of a noble sounding name such as Citizens for a Better America in order to obscure the source of the advertisements.[99] The ads are run almost exclusively within the days preceding an election to maximize their effect.[100] When the parties' hard money had dried up, the parties went through back channels to solicit friendly interest groups to trumpet their cause.[101]

These troublesome developments, when paired with a 1998 Senate report documenting blatant and unchecked circumvention of campaign finance laws, moved Congress to formulate the BCRA.[102] Senator Collins stated in the Senate Report that, "the twin loopholes of soft money and bogus issue advertising have destroyed our campaign finance laws, leaving us with little more than rubble."[103] Senator Russell Feingold (D-WI), the co-sponsor of the BCRA, called the influence of soft money, "one of the most corrupting things I've ever seen in American politics."[104] The Senate Report chronicled the rampant disregard for campaign finance laws and how both major political parties traded campaign dollars for access to government.[105] The Senate Report found the widespread practice of large corporations giving generously to both parties especially disturbing because it demonstrated that corporations were only interested in currying access, rather than expressing an ideology.[106] Moreover, the Senate

98. Whitaker, *supra* note 81, at 29.

99. *Settled – and Not*, FORT WORTH STAR TELEGRAM, Dec. 18, 2003, at 12B.

100. *Reform's 'Killer Amendments'*, N.Y. TIMES, July 10, 2001, at A18.

101. Whitaker, *supra* note 81, at 29.

102. *Id.* The Senate Report found that party leaders routinely steered large contributors to certain soft money organizations when they had exhausted the federally regulated limits. *Id.*

103. S.REP. NO. 105-167, vol. 4, at 4611 (1998).

104. Interview by Uzo Osonye and Adam Lioz with Senator Russel Feingold, United States Senator from Wisconsin, 22 YALE L. & POL'Y REV. 339, 341 (Spring 2004).

105. McConnell v. FEC, 540 U.S. 93, 130 (2003). The Senate Report related the narrative of Roger Tamraz who openly asserted that his $300,000 donation to the Democratic National Committee was to gain support for an oil-line project. *Id.* On the Republican side, the Senate Report detailed how the Republican National Committee extended the enticing prospect of access to high officials in return for big time fundraisers. *Id.*

106. Whitaker, *supra* note 81.

Report found that corporations, unions and wealthy contributors easily circumvented the existing campaign laws and undermined a century's worth of reform efforts.[107]

After reviewing the report, congressional members identified three principle concerns: (1) the enormous influence of soft money, (2) the sham issued ads that soft money funded and (3) alleged improprieties in the 1996 elections.[108] To combat these inadequacies in the campaign finance laws and to improve the transparency of the electoral process, Congress passed the BCRA.[109] The BCRA sets forth expansive reforms, but the scope of this paper involves the amendments to FECA embodied in Title I and Title II. Title I eliminated the influence of soft money,[110] and Title II redefined "electioneering communications" to bar issue or sham ads within 60 days of the election.[111]

More specifically, to close the soft money loophole, Title I bars national committees from seeking or accepting contributions or making expenditures that do not comply with FECA's restrictions.[112] In order to curtail the mixed activities that allowed state committees so much leeway to influence national elections, Title I requires all state committee funding allocations to mixed activities to follow FECA's hard money restrictions.[113] Title II attacked the omnipresence of sham issue ads through redefining electioneering communications to require that any covered communication be paid for with hard money.[114] Title II also imposed strict disclosure

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107. *McConnell*, 540 U.S. at 146-47.

108. *Id.* at 122.

109. Maeghan Maloney & Michael Saxl, *The Bipartisan Campaign Reform Act: Unintended Consequences and the Maine Solution*, 41 HARV. J. ON LEGIS. 465, 466 (Summer 2004).

110. James C. Wald, *Money Talks, Politicians Listen: The Constitutional Grounds for Controlling Soft Money*, 12 S. CAL. INTERDISC. L.J. 319, 331 (Spring 2003).

111. Maloney & Saxl, *supra* note 109, at 468.

112. Audra L. Wassom, *The Campaign Finance Legislation: McCain-Feingold / Shays-Meehan – The Political Equality Rational and Beyond*, 55 SMU L. REV. 1781, 1790 (Fall 2002). Title I states that a "national party may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements." McConnell v. FEC, 124 S.Ct. 619, 654 (2003).

113. Wassom, *supra* note 52, at 1791.

114. *Id.*

> [B]roadcast, cable or satellite communication which (I)refers to a clearly identified candidate for Federal office; (II) is made within (aa) 60 days before a general, special or runoff election for the office sought by the candidate; or

requirements mandating that any person contributing more than $10,000 in a single calendar year toward electioneering communications file a report with the FEC identifying the relevant campaign and any co-contributors.[115]

Given the far-reaching reforms BCRA advanced in the political minefield that is campaign finance, litigation was a foregone conclusion. Senator Mitch McConnell, the lead opponent of the bill in the Senate, headed the suit which united a wide range of interests groups openly combative on other political issues against the FEC.[116] The plaintiffs espoused several legal theories arguing that BCRA violated: their First Amendment protections of freedom of speech and association, principles of federalism, Article I, § 4 of the Constitution, and the equal protection and due process clauses of the Constitution.[117] As such, plaintiffs contended that under the framework established in *Buckley* the Court should apply strict scrutiny and strike down Titles I and II of BCRA.[118]

Tellingly, the *McConnell* decision does not open with an introduction extolling the Court's virulent protection of the First Amendment as in *Buckley*, but rather with a scathing review of campaign finance practices in previous elections. Only then did the Court turn to the litigants' analysis of Titles I and II. To determine the applicable level of scrutiny, the Court stated that the proper inquiry was, "whether the mechanism adopted to implement the contribution limit, or to prevent circumvention of that limit, burdens speech in a way that a direct restriction on the contribution itself would

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(bb)30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and (III) in the case of a communication which refers to a candidate other than President or Vice President, is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i).

115. *McConnell*, 540 U.S. at 194.

116. Charles Lane, *High Court Takes on High Stakes Headache: Campaign Law Officers Difficult Issues*, THE WASHINGTON POST, Sept. 7, 2003, at A1. The twelve other plaintiffs included the National Right to Life Committee, the California Democratic Party, the American Civil Liberties Union, the American Federation of Labor and Congress of Industrial Organizations, and the Chamber of Commerce of the United States, challenged BCRA on similar grounds before the separate cases were consolidated. *Id.*

117. L. Paige Whitaker, *Convinced by the Record: Showing an Appearance of Corruption: The Supreme Court Upholds the Groundbreaking McCain - Feingold Campaign Finance Law*, 51 AUG FED. LAW 26, 31 (August 2004).

118. *McConnell*, 540 U.S. at 138.

not."[119] The Court then stated that Title I placed only a marginal restraint on the First Amendment protections, and therefore strict scrutiny was inappropriate.[120] Justices O'Connor and Stevens stated that less rigorous scrutiny was appropriate because BCRA neither limited the overall amount of money that could be raised nor impaired the political message expressed through these contributions.[121]

The Court then examined the governmental objectives that Title I sought to effectuate. The Court latched on to the appearance of corruption rationale in affirming Title I's constitutionality. The Court broadly conceived corruption to include circumvention of the law and adopted the view that corruption amounted to undue influence, not just quid pro quo bribes.[122] The Court noted that the record was replete with examples of donors and politicians using the national parties as intermediaries to trade access for contributions.[123] The Court chronicled the dodgy transactions whereby donors contributed soft money to federal candidates, who controlled the purse strings to those soft money accounts in exchange for access to that candidate.[124]

The plaintiffs challenged Title II's definition of electioneering communications on the grounds that *Buckley* had promulgated a constitutionally binding distinction between express and issue advocacy that Congress could not override.[125] The Court responded that the plaintiffs had mistaken the holding in *Buckley* to be a constitutional decision, when the Court had actually set forth the distinction as a statutory construction to avoid striking down the statute being overbroad.[126] Moreover, the Court stated that a distinction between express and issue advocacy was not constitutionally required.[127] To support this proposition, the Court echoed the trial court's findings that the, "'magic words'

119. *Id.* at 138-39.
120. *Id.* at 139.
121. *Id.* at 140
122. *McConnell*, 540 U.S. at 150.
123. *Id.* at 151. The Court was especially troubled that several national party committees expressly provided for varying levels of access to candidates according to the amount of soft money a donor contributed. *Id.* The more money a contributor promised, the greater his or her access to the candidate would be. *Id.*
124. *Id.* at 156.
125. *Id.* at 190.
126. *McConnell*, 540 U.S. at 190.
127. *Id.* at 193.

distinction is functionally meaningless.'"[128] The Court thus upheld the BCRA's definition of electioneering communications because the statute sufficiently specified impermissible activities that could be objectively determined, thereby obviating any vagueness concerns.[129]

V. THE EMERGENCE OF 527 GROUPS AND THEIR INFLUENCE IN POLITICAL CAMPAIGNS TODAY

Everyone following the 2004 presidential election noted the ubiquitous presence of 527 groups. This section identifies the innocuous origins of these groups, and then chronicles their meteoric surge to the forefront of the campaign finance debate. 527 groups, so named for the Internal Revenue Code section that authorizes them, are political organizations created and operated for the purpose of accepting contributions and / or making expenditures to influence, directly or indirectly, a campaign for elected office.[130] Section 527 simply exempted contributions to political organizations from the federal income and gift taxes.[131] By conferring tax-exempt status on 527 groups, Congress sought to clarify the confusion regarding the taxation of political organizations and to "encourage political activities which are the heart of the democratic process."[132] The resulting legislation permitted willing parties to establish political organizations informally without the rigors of mandatory disclosure requirements.[133]

Although §527 has existed since 1974, its latent advantages surged to prominence during the 1998 congressional races and the 2000 presidential primaries. During these campaigns, these groups acquired the epithet "stealth PACs."[134] These "stealth PACs," often consisted of little more than a registered agent and a post office box number.[135] Their political potency rested in their ability to solicit soft money and produce sham ads underneath a

128. *Id.* at 193.
129. *Id.* at 194
130. 26 U.S.C. § 527.
131. *Id.*
132. S. Rep. 93-1357 at 7502 (1974).
133. *Id* at 7503 (1974).
134. *Recent Developments in Campaign Finance Regulation,* The Brookings Institution (Feb. 28, 2001), *available at* http://www.brookings.org/gs/cf/headlines/527_intro.htm (last visited Nov. 26, 2005).
135. *Id.*

blanket of anonymity due to the absence of disclosure requirements.[136] On the strength of that combination of attractive qualities, 527 groups proved irrepressible and mushroomed throughout the campaign finance community.

The 2000 Republican Presidential Primary campaign brought their existence to the forefront of the campaign finance reform debate. In that primary, a 527 group, registered as the Republicans for Fresh Air, broadcast a $2.5 million onslaught of sham issue ads attacking Senator McCain's environmental record.[137] Only after Senator McCain's record had been impugned was the financial source of the attack ads revealed to be Sam Wyly, a billionaire supporter of then Governor Bush.[138] Senator McCain returned to Congress determined to prescribe disclosure requirements for 527 groups and enlisted the aid of Senator Russell Feingold (D-WI).[139] Senator Feingold stated that the bill was intended to "shine a spotlight on organizations seeking to affect elections with secret contributors."[140] President Clinton signed it into law in July 2000,[141] marking the most significant change in campaign finance reform in the previous twenty years.[142]

BCRA, however, did not expressly include 527 groups in its enhanced regulations, and therefore, the restrictions on 527 groups' ability to make expenditures and produce issue ads are subject only to *Buckley's* strictures.[143] As such, both conservative and liberal groups participated in the §527 fundraising extravaganza in the 2004 election.[144] On the strength of these unregulated contributions, conservative groups, such as the Swift Boat Veterans for Truth, and liberal

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136. *Id.*

137. *McCain Pushes Measure to Curb Tax-Exempt Secret Political Cash*, CHICAGO TRIBUNE, June 8, 2000, at 14.

138. *No Longer a Secret*, BUFFALO NEWS, July 1, 2000, at C2.

139. *McCain Pushes Measure to Curb Tax-Exempt Secret Political Cash*, *supra* note 138.

140. Josh Goldstein, *IRS measure Will Remove Cloak from Most Secret Donor Groups*, THE MILWAUKEE JOURNAL SENTINEL, August 27, 2000, at 285A.

141. *Recent Developments in Campaign Finance Regulation,* The Brookings Institution (Feb. 28, 2001), *available at* http://www.brookings.org/gs/cf/headlines/527_intro.htm (last visited Nov. 26, 2005).

142. Goldstein, *supra* note 140.

143. Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 Tax Notes 387, 395 (2000).

144. Bill Lambrecht, *Campaign Finance Fight Will Resume*, ST. LOUIS POST-DISPATCH, Nov. 7, 2004, at A01.

groups, such as the Media Fund, aired caustic attack ads denouncing their opponent's candidate.[145] Whereas the parties are held accountable for their attack ads and were subject to a backlash if they went too far, 527 groups are independent and unrestrained by any fear of political repercussions.[146]

The $1.02 billion spent in the 2004 presidential campaign made it the most expensive in history.[147] President Bush and Senator Kerry combined to raise more than $675 million in federal hard money, shattering the 2000 record of $528 million.[148] Democratic 527 groups weighed in with about $230 million and Republican groups, although entering the fray later, managed to kick in $96 million in soft money contributions.[149] Soft money heavily influenced the 2004 election despite Congress' passage of the BCRA and its ban on soft money contributions.[150]

VI. THE INTERPLAY OF THE BCRA, 527 GROUPS AND THE VOTE FOR CHANGE TOUR

The Vote for Change Tour ("Tour") served as a microcosm of the numerous methods that campaign fundraisers employed in the past election to allow a torrent of soft money to flow into 527 groups. The first part of this section chronicles the elaborate procedures MoveOn PAC and ACT employed to transform the Tour into a channel of soft money to defeat conservative candidates. The second part of this

145. *Id.* The Swift Boat group persistently attacked Senator Kerry's war record and the anti-war protests the Senator participated in following his return, despite the President's campaign openly honoring Senator Kerry's Vietnam service. *Id.* The Media Fund aired advertisements alleging that President Bush secretly granted Osama bin Laden's relatives permission to leave the country immediately after the events on September 11, 2001. *Id.*

146. Lambrecht, *supra* note 144.

147. Joanna Chung, *Battle Over Funding Continues after History's Costliest Presidential Race*, FINANCIAL TIMES, Nov. 20, 2004, at 9. *See also Open Secrets: 2004 Presidential Election*, http://www.opensecrets.org/presidential/index.asp. (visited Nov. 26, 2005) (The combination of hard money and soft money contributed to presidential candidates combined to make the 2004 presidential election the most expensive in history).

148. *Open Secrets: 2004 Presidential Index*, http://www.opensecrets.org/presidential/index.asp. (last visited on Nov. 26, 2005).

149. Charles Lewis & Aron Pilhofer, *Ready, Set, Attack - The Role of Stealth Committees in the 2004 Campaign*, THE NEWARK STAR LEDGER, Dec. 19, 2004, at 1.

150. Lambrecht, *supra* note 144.

section places the Tour in its larger context to illustrate the tension between the operations of 527 groups and the *McConnell* decision's affirmance of BCRA's reforms. This second section demonstrates that the preponderance of 527 groups poses an identical threat of apparent corruption that formed the basis of the *McConnell* decision.

MoveOn PAC, the PAC for the 527 group MoveOn.org, produced the Tour.[151] When people purchased tickets to the Tour, they were asked to contribute to MoveOn PAC and told the proceeds of their ticket sales would go to MoveOn PAC.[152] Because MoveOn.org utilized their PAC, MoveOn.org contributors were limited to the FEC imposed restrictions on PACs, which limit the amount individuals, corporations and labor unions can contribute.[153] However, MoveOn PAC then contributed the net proceeds of the Tour to ACT,[154] a 527 group, which is not subject to federal caps on contributions or expenditures.[155] In effect, the transfer from MoveOn.org to ACT converted hard money into soft money and allowed ACT to allocate the resources at will.

To illustrate the importance of the transfer, MoveOn.org could not have contributed more than $5,000 to any candidate for federal office under the FEC caps. Consequently, the gross proceeds of $15 million[156] would have had to be distributed amongst scores of candidates. However, the transfer to ACT allowed much wider latitude to allocate the lion's share of the proceeds to supporting a single campaign. The Tour's structuring is indicative of the measures that 527 groups employ to raise soft money and circumvent campaign finance laws at the same time.

Rigid scrutiny of the Tour's operations and the management teams of 527 groups crystallize the conflict between these 527 groups and *McConnell*. ACT, the recipient of the transfer, is a 527 group with the avowed purpose of defeating George W. Bush and electing Democrats to federal,

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151. David Fricke, *Taking It To the Streets*, ROLLING STONE MAGAZINE, Sept. 2, 2004, at 37.

152. Moveon.org, http://www.moveon.org. (last visited Sept. 25, 2004).

153. *The Federal Election Campaign Laws: A Short History*, www.fec.gov/info/appfour.htm. (last visited on Oct. 15, 2004).

154. Fricke, *supra* note 151.

155. *Federal Election Campaign Laws: A Short History*, *supra* note 47.

156. Ben Sisario, *Directions: Receipts; The Sound of Money*, N.Y. TIMES, Oct. 24, 2004, at 24.

state and local office.[157] Ellen R. Malcolm, a veteran political activist and fundraiser for Democratic causes,[158] serves as ACT's president and Steve Rosenthal, a former member of the Clinton administration, serves as the group's chief executive officer.[159] ACT, while claiming to be primarily a grass roots organization,[160] received millions of dollars in contributions from billionaire financiers.[161] George Soros, the most prodigious contributor to 527 groups and a stark opponent of George W. Bush,[162] contributed $7.5 million to ACT alone.[163] Moreover, ACT used the Tour's proceeds in collaboration with the Media Fund to produce issue ads and to fund a massive get-out-the-vote drive in the closing days of the elections.[164]

MoveOn.org and ACT's close ties to political campaigns is representative of the entire atmosphere surrounding 527 groups. Leaders of the 527 groups and the political parties often leave a campaign to join a 527 group or vice versa. Jim Jordan directed Senator Kerry's campaign until November 2003.[165] After departing from the campaign, Jordan established Thunder Road Group, a communications firm, and quickly signed lucrative contracts to advise ACT and the Media Fund.[166] Harold Ickes, a former White House adviser

157. *America Coming Together: Building for the Future*, http://actforvictory.org/act.php/home/gotv/ (last visited Nov. 8, 2004).

158. Ms. Malcolm is the founder of EMILY's list, which is a group dedicated to electing pro-choice and female Democratic candidates for office. *America Coming Together, Who We Are*, http://www.actforvictory.org/act.php/home/content/about (last visited Nov. 9, 2004).

159. *Id.*

160. *Id.*

161. Marty Logan, *Art-U.S.: Anti-Bush Musicians Hit the Road, But Will It Matter?*, INTER PRESS SERVICE, Aug. 18, 2004.

162. *See* Lisa Getter, *The Race for the White House; With 527s, New Power Players Take Position*, LOS ANGELES TIMES, Nov. 1, 2004, at A16. Through the creation of these independent organizations, at least 45 individual donors have contributed $1 million or more in this election. *Id.* George Soros said, "I think I managed to galvanize the opposition to President Bush and I'm really proud of what I've done." *Id.*

163. *Open Secrets: Top Individual Donors*, http://www.opensecrets.org/527s/527indivsdetail.asp?ID=11001147458&Cycle=2004. (last visited Nov. 9, 2004). Ironically, Soros has contributed over $18 million through his Open Society Institute to initiatives aimed at tightening campaign finance laws. Susan Jones, *Examine Backers of Vote for Change Tour, Watchdog Group Says*, http://www.cnsnews.com. (last visited Nov. 9, 2004).

164. *Interest Groups, Many Voices*, http://www2.gwu.edu/~action/2004/interestg.html (last visited Nov. 9, 2004).

165. *Id.*

166. *Id.*

to President Clinton, who himself advised the Kerry campaign, created the Media Fund to produce commercials lauding Senator Kerry's achievements and disparaging President Bush's record.[167] The Media Fund's chief media consultant, Bill Knapp, vacated his position at the Media Fund to accept a similar position with the Kerry campaign.[168]

These checkered relationships are not unique to liberal 527 groups. In October 2004, Ken Mehlmen, President Bush's campaign manager, spurred donors to contribute to Progress for America, a Republican 527 group.[169] Additionally, Benjamin Ginsberg, counsel to President Bush's re-election campaign, was forced to resign due to the role he played in assisting the Swift Boat Veterans for Truth, an anti-Kerry 527 group.[170] Ginsberg provided legal services to the group despite White House denials that it was involved in the attack ads on Mr. Kerry's Vietnam credentials.[171] Democrats were careful not to revile Mr. Ginsberg too boldly for fear their own muddled interactions would be scrutinized.[172]

The Tour is also representative of an ongoing phenomenon in campaign finance that forces campaigns to look to outside groups capable of generating enormous sums of soft money. In order to stay competitive in modern day media campaigns, political parties are forced to either consent to the 527 group activities or lose the clout these entities yield in their favor. This phenomenon is evidenced in the Republican Party's

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167. Jim Drinkard, *'Outside' Political Groups Full of Party Insiders; Coordination is Illegal, But Hard To Prove*, U.S.A. TODAY, June 28, 2004, at A7.

168. *Id.*

169. *Id.* The director of Progress for America was Susan Hirschmann, a former aide to House Majority Leader, Tom DeLay. *Id.* Progress for America was the primary conservative 527 group, and it expended over $35 million during the 2004 campaign. *Open Secrets: 527 Committee Activity*, http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004 (last visited Jan. 21, 2005). MBNA executives and the owner of the San Diego Chargers National Football Team each kicked in $5 million dollars to the group. Jeanne Cummings, *Those 527 Fund-Raisers Prove Resilient: Republicans, Slow Off the Blocks, Now May Decide Not to Act to Get Rid of Them*, WALL ST. J., Dec. 6, 2004, at A4. Meanwhile, DeLay has faced a dogged investigation of his political action committee, Texans for a Republican Majority. Sylvia Moreno, *Companies to Aid Texas Probe: Sears, DCS to Talk About DeLay Associates' Fundraising*, THE WASHINGTON POST, Jan. 13, 2005, at A3.

170. Patrick Healey, *Bush Lawyer Quits Over Tie to Anti-Kerry Veterans*, BOSTON GLOBE, Aug. 26, 2004, at A1.

171. *Id.*

172. *Id.* The President's re-election campaign zeroed in on Robert Bauer, who served as legal counsel to ACT and was simultaneously working for the Democratic National Committee. *Id.*

about face on the legitimacy of 527 groups.[173] Ed Gillespie and Marc Racicot, central figures in the President's re-election efforts, initially decried the Democrats' use of 527 groups.[174] However, Racicot and Gillespie subsequently designated Progress for America and the Leadership Forum as preferential vehicles for 527 contributions.[175] This political conundrum resembles the actual or apparent corruption rationale that the *McConnell* court found persuasive in upholding BCRA.[176]

The Tour is a microcosm of the practices that 527 groups employ to continue to evade congressional efforts to reduce the prevalence of soft money and issue ads during federal campaigns. Congress passed BCRA to staunch the flow of unregulated money into campaigns and to diffuse the influence of sham issue ads.[177] Meanwhile, the Tour infused $15 million into the campaign in late October.[178] Although a small percentage of the roughly $335 million 527 groups were responsible for raising, the Tour's $15 million placed one party at a disadvantage that could be made up only through seeking similar geysers of soft money.[179] Furthermore, the personnel responsible for deploying that $15 million, through their ties to campaigns or administrations in which they had formerly worked, could effectively target a candidate's needs and serve as that candidate's proxy.

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173. Jeanne Cummings, *Those 527 Fund-Raisers Prove Resilient: Republicans, Slow Off the Blocks, Now May Decide Not to Act to Get Rid of Them*, WALL ST. J., Dec. 6, 2004, at A4.

174. Jim Drinkard, *'Outside' Political Groups Full of Party Insiders; Coordination is Illegal, But Hard To Prove*, U.S.A. TODAY, June 28, 2004, at A7.

175. *Id.*

176. *See* McConnell v. FEC, 540 U.S. 93, 94-95 (2003).

177. H.R. REP. NO. 101-131(I), at 36 (2003).

178. Ben Sisario, *Directions: Receipts; The Sound of Money*, N.Y. TIMES, Oct. 24, 2004, at 24.

179. Liberal 527 groups outspent conservative groups heavily in the early going of the campaign season. John Frank, *GOP 527s Finish Campaign Strong / Final Weeks' Outspending of Pro-Democrat Groups Was Reverse*, HOUSTON CHRONICLE, Nov. 6, 2004, at 5. However, in the last three weeks of the campaign, the Progress for America Voter Fund, a conservative group, spent $16.7 million, outspending all liberal groups combined. *Id.* During this time, the Swift Boat Veterans for Truth spent $6.7 million attacking Senator Kerry's record. *Id.*

VII. WHY THE MCCAIN / FEINGOLD BILL IS NOT THE ANSWER TO THE 527 GROUP DEBATE AND HOW IT CAN BE IMPROVED

Having demonstrated in the last section that these groups do pose a tangible threat to the sanctity of elections, the question then becomes: How should Congress regulate these groups?

A. Campaign Finance Reformers' Legal Challenge to Compel the FEC to Reign in 527 Groups Will Likely Prove Futile Because Congress Identified the Increased Role that 527 Groups Would Play and Failed to Act

Representatives Shays and Meehan's lawsuit against the FEC seeking to compel it to employ its regulatory authority to reign in these 527 groups provides one possibility.[180] Obviously, the representatives' lawsuit against the FEC assumes that the FEC will not act independently on the issue of 527 groups. Indeed, the sponsors and the FEC have engaged in a vitriolic public dispute.[181] In the most blatant example of disdain, Senator McCain stated: "We've fought too long and too hard to sit back and allow this worthless agency [to] undermine the law."[182] Representative Shays accused the FEC of "look[ing] the other way while 527s have played by their own rules [by] evading the campaign finance laws [and] flooding the airwaves with attack ads."[183] Senator Feingold added, "[s]ometimes it seems a little bit like our mission in life is to clean up the mess that the FEC has made."[184] FEC Chairman Bradley A. Smith responded by labeling Senator McCain's comments as "unbecoming of a Senator," and stated upon the introduction of S2828 that he was "pleased that [McCain] and his colleagues have decided to use the proper route to change the law—with legislation rather than

180. Press Release, Senator John McCain, McCain, Feingold to Support '527 Group' Lawsuit, (Sept. 14, 2004), *available at* http://www.campaignlegalcenter.org/press-1299.html (last visited Oct. 13, 2004).

181. *See* Kathleen Hennessy, *McCain, Feingold Aim to Shoot Huge Campaign Loophole*, L.A. TIMES, Sept. 23, 2004, at A22.

182. Press Release, Sen. John McCain, McCain Statement on the Introduction of the 527 Reform Act, (Sept. 22, 2004).

183. Hennessy, *supra* note 181.

184. Helen Dewar, *Bill Would Curb 527 Spending; No Action Expected Before Elections*, THE WASHINGTON POST, Sept. 23, 2004 at A27.

regulatory fiat."[185]

The Shays-Meehan lawsuit, however, seems unlikely to resolve the issue. During BCRA Senate floor debate, Senator Joseph Lieberman stated that BCRA likely would cause large political contributors, having been foreclosed from distributing soft money to the political parties, to channel their campaign funds to independent 527 groups.[186] The Senator's comments intimate that Congress saw this as a likely possibility but did not address this issue. Thus, the lawsuit is no more likely to achieve the desired result any more than leaving the resolution to the FEC would.

B. The McCain / Feingold Amendment to BCRA Redefining "Political Committee" to Include 527 Groups Assaults the First Amendment Freedoms Guaranteed Under the Buckley / McConnell Framework

The main hope for campaign finance reform dealing with 527 groups is the proposed McCain / Feingold amendment to BCRA, S2828.[187] The McCain / Feingold bill would redefine "political committee" to include any organization that raises or expends more than $1,000 per year, and has as its major purpose influencing federal elections for office.[188] 527 groups

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185. Hennessy, *supra* note 181.

186. 148 Cong. Rec. S10779 (daily ed.Oct. 17, 2002) (statement of Sen. Lieberman), *see also* Heather L. Sidwell, *Taming the Wild West: The FEC's Proposed Regulations to Bridle '527' Political Groups,* 56 ADMIN. L. REV. 939, 944 (Summer 2004).

187. Dewar, *supra* note 184. Senator McCain, recognizing the widespread criticism of 527 spending in the past election, has gushed that he is confident that Congress will pass the bill. *Id.* However, in the wake of the election, there are two formidable barriers to the legislation's passage: his colleagues in the Republican Party and President Bush's second term agenda. Jeanne Cummings, *Those 527 Fund-Raisers Prove Resilient: Republicans, Slow Off the Blocks, Now May Decide Not to Act to Get Rid of Them*, WALL ST. J., December 6, 2004, at A4. Early in the election, the Republicans disdained the use of 527 groups, due in large part to the Democrats' prowess. *Id.* At the close of the campaign, however, conservative 527 groups unleashed a $30 million barrage of television and radio advertisements that dwarfed similar Democratic efforts. *Id.* The primary obstacle staring down the reform measure is the perception among some Republicans that 527 groups could now be a major asset. *Id.* T. Boone Pickens, a wealthy Texan and large contributor to conservative 527 groups, has already stated that if 527 groups are allowed to continue, he will be active in contributing. Cummings, *supra* note 173. Secondly, President Bush has set an ambitious agenda for his second term including prosecuting the Iraq war, the war on terrorism, reforming Social Security, and overhauling the tax code. *Id.* The widespread coverage of those issues has deposited election reform firmly on the back burner. *Id.*

188. Bipartisan Campaign Finance Reform Act, § 2828, 108th Congress (2004).

fall outside of BCRA's definition of political committee because they do not select or nominate candidates for office.[189] As such, 527 groups are regulated under a more permissive scheme that clenches to *Buckley*'s distinction between express and issue advocacy.[190] Thus, 527 groups are permitted to exist on the outskirts of campaign finance and openly raise soft money to produce sham issue ads.[191] The new definition would place 527 groups squarely within BCRA's strictures, thereby limiting their ability to raise soft money and produce sham issue ads.[192] The proposed McCain / Feingold legislation would also limit contributions to 527 groups to $25,000 in any calendar year.[193]

The proposed legislation will surely engender a vociferous debate and generate a lawsuit if it is passed due to the astounding amount of money conservative and liberal groups raised through 527 groups.[194] Anticipating a court challenge, the legislation's authors were careful to construct the legislation using the *Buckley* Court's "major purpose" test. *Buckley* established that campaign finance regulations apply when the organization's major purpose is to affect a campaign for federal office.[195] ACT's bold mission statement to defeat George W. Bush and elect progressive candidates undoubtedly would bring them within the amendment's parameters.[196] The constitutional question that remains is whether the bill "permissibl[y] limits the contributions that non-party groups

189. Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 Tax Notes 387, 395 (2000).

190. Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of the BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 246 (Spring 2004).

191. *Id.*

192. Dewar, *supra* note 184.

193. Cummings, *supra* note 173.

194. Bill Lambrecht, *Campaign Finance Fight Will Resume*, ST. LOUIS POST-DISPATCH, Nov. 7, 2004, at A01.

195. Holman & Claybrook, *supra* note 190. What percentage of an organization's activity needs to be political is a somewhat nefarious question. A blanket ban on contributions to independent groups, however, would likely run afoul of First Amendment protections ensuring freedom of speech and association. Edward B. Foley, *The 'Major Purpose' Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341 (2004). Thus, one suggested manner to accomplish campaign finance reform and accommodate First Amendment guarantees has been to apply a 50% threshold to the amount a group can spend on influencing federal elections. *Id.*

196. *Americans Coming Together: Building for the Future*, http://www.actforvictory.org/act.php/home/content/about. (last visited Nov. 9, 2004).

receive from individual donors to a specified amount when any electioneering activities are undertaken by the group are conducted independently from the activities of political parties and their candidates."[197]

The McCain / Feingold amendment, however, does not permissibly limit the activities of 527 groups. The bill glosses over the independent status of 527 groups and assumes that the courts will hold that the same threat of apparent corruption present in *McConnell* will apply to 527 groups. As the Court in *McConnell* stated, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny will vary up or down with the novelty or the plausibility of the justification raised."[198] The *McConnell* Court found less rigorous scrutiny was appropriate because of the sense of obligation that inured in large soft money contributions to accounts that candidates effectively controlled.[199]

In the case of 527 groups, the justification for regulating these groups is that the enormous quantity of soft money they collect poses a threat of corruption that undercuts the integrity of elections. The body of evidence for regulating 527 groups consists of the frequent management transfusions that are tantamount to coordination and the parties' propensity to resort to 527 groups for soft money to circumvent BCRA. While these phenomena certainly warrant regulation, they do not pose the same threat that *McConnell* dealt with. The *McConnell* Court specifically identified, "the manner in which parties have *sold* access to federal candidates and officeholders that has given rise to the appearance of undue influence" as its justification for regulating these groups.[200] The Court then cited the prolix Senate Report detailing the numerous breaches of campaign finance law before deciding that less rigorous scrutiny was appropriate and upheld the reforms.[201]

The decisive factor separating the regulation of political parties and 527 groups is that federal candidates are not controlling the purse strings to these 527 groups. 527 groups do not pose the same threat of corruption or sense of

197. Foley, *supra* note 195, at 341.

198. McConnell v. FEC, 540 U.S. 93, 144 (2003), (quoting Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 391 (2000)).

199. *Id.*

200. *Id.* at 153-54.

201. *Id.* at 154.

obligation that political parties did. BCRA succeeded in extracting many corporations and unions from the past election's soft money bonanza. Major corporations and labor unions, the former campaign finance giants, capitalized on BCRA's proscription of soft money contributions to political parties to downsize their political spending and did not channel that money into 527 groups.[202] Instead, corporations and unions concentrated on educating their employees and members about issues affecting their interests, and pressed the importance of registering to vote and getting to the polls.[203] This withdrawal from the soft money race emphasizes that 527 contributors are not trading on access to federal candidates.

When one applies this new campaign finance atmosphere to the McCain / Feingold amendment, the sliding scale that the Court utilizes to determine what level of scrutiny is applicable, and the Court would likely apply strict scrutiny. Because the amendment seeks to place drastic limits on these independent groups' ability to accept contributions, Congress would need an overwhelming body of evidence to convince the Court of its plausibility. The record for regulating 527 groups, while certainly indicative of a threat of corruption, does not rise to the required sense of obligation. Thus, the Court would likely apply strict scrutiny and should strike down the McCain / Feingold bill.

C. *Congress Should Subject 527 Groups to a Modified Definition of "Electioneering Communications" That Would Reduce Their Ability to Generate Sham Issue Ads*

To determine how Congress should regulate 527 groups, it would be helpful to review BCRA's impact in the past election. BCRA's contribution limits forced the political parties to cater to previously inactive contributors. The evidence of this phenomenon can be seen in the record amount of hard money raised, as well as the influx of first time contributors via the Internet.[204] Conversely, BCRA did little to eliminate sham

202. Jeane Cummings, *Closing the Spigot: In New Law's Wake, Companies Slash Their Political Donations; Instead, They Urge Employees to Vote, Donate and Lobby; No Funding for the 527s*, THE WALL ST. J. Sept. 3, 2004, at A1.

203. *Id.*

204. *Open Secrets, Presidential Election Contributors*, http://www.opensecrets.org/presidential/index.asp. *See also* Glen Justice, *The 2004*

issue ads; the ads were as constant in battleground states as in previous elections.[205] Additionally, 527 groups were able to raise even more money to produce sham issue ads based upon the strength of their previous issue ads.[206] The amount of soft money driving the 2004 campaigns was staggering, decreasing only slightly since the last presidential election.[207]

With these successes and failures in mind, legislation that subjected 527 groups to a modified definition of electioneering communications would serve the goals of preventing the appearance of corruption and of fostering the nascent political activism of previously isolated individuals. The modification would allow 527 groups to bar the production of sham issue advertisements, but would permit voter registration drives and get-out-the-vote activities. Thus, if these 527 groups were raising money merely to produce sham issue advertisements to impugn a candidate close to a federal election, they would be barred from doing so. Additionally, if groups were truly committed to issues, they could produce the advertisements and raise these issues in the public forum prior to the blackout periods that BCRA imposes.

First and foremost, this limitation would not pose the same constitutional hurdle that the McCain / Feingold bill does. The modified definition would be based upon the constitutionally approved activities that can be funded with so-called Levin money.[208] Levin money can pay for voter registration, get-out-the-vote efforts and general campaign activities.[209] Significantly, Levin money cannot fund broadcast communications that specifically identify a

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Election: Fund-Raising; Kerry Kept Money Coming with Internet as His A.T.M., NEW YORK TIMES, Nov. 6, 2004, at A12 (chronicling the story of Sam Warren, an Alabama voter who had not previously given to a political campaign, but gave nearly $2,000 to the Kerry campaign due in large part to the ease with which he pointed and clicked).

205. Bill Lambrecht, *Campaign Finance Fight Will Resume*, ST. LOUIS POST-DISPATCH, Nov. 7, 2004, at A1.

206. *Id.*

207. 527 groups primarily concentrating on the presidential election raised approximately $246 million. *Silent Partners, The Center for Public Integrity*, http://www.publicintegrity.org/527/report.aspx?aid=435&sid=300 (last visited Nov. 26, 2005).

208. Levin money receives its name from the amendment proposed by Senator Carl Levin (D-MI) that allows state and local political committees to pay up to $10,000 for certain mixed activities. McConnell v. FEC, 540 U.S. 93, 163 (2003).

209. *Id.* *See* 2 U.S.C. § 441i(b)(2) These permissible uses should be distinguished from the prohibited use of producing sham issue ads.

candidate for federal office.[210] In upholding this distinction, the *McConnell* Court stated that, "any public communication that promotes or attacks a clearly identified federal candidate *directly affects* the election."[211] The Court concluded that the proscribed activities were a reasonable response to the threat of actual or apparent corruption that these activities posed.[212]

Secondly, the modified electioneering communications definition has public policy advantages. Although its perception as a voter registration drive was at odds with its use as a fundraising vehicle, the Tour sought to mobilize young voters. The 2004 election highlighted the importance of young voter registration programs and turnout efforts.[213] In the battleground states of Pennsylvania, Wisconsin and Ohio, all states that the Tour visited, young voters were crucial to Senator Kerry's victory in those states.[214] In ten of these battleground states, young voter turnout was 64%, a rate that far surpassed the young voter turnout across the country.[215] Continued efforts to bolster this nascent political activism can only contribute to the effective functioning of future elections.

Moreover, if these 527 groups were prohibited from producing sham issue ads, the viability of these vehicles as soft money engines would be imperiled. A ban on sham issue ads would force large contributors to decide whether their support of an issue is so ardent that they should continue their advocacy. Additionally, contributors might decide that the bar on sham issue advertising dashes their desires and that they should seek another avenue for their advocacy. Either scenario improves the current system and may result

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210. *McConnell*, 540 U.S. at 163. *See* 2 U.S.C. §§ 441(i)(b)(2)(i-ii).

211. *Id.* at 170 (emphasis added).

212. *Id.*

213. *See* Beth Kassab, *What Happened to All Those Young New Voters?*, ORLANDO SENTINEL, Nov. 4, 2004, at A10. The young voter turnout has been the subject of a dizzying amount of interpretation and conjecture. Some groups touted that this past election saw the greatest number of young voters since 1972. Jose Antonio Vargas, *Vote or Die? Well, They Did Vote; Youth Ballots Up 4.6 Million From 2000, in Kerry's Favor*, THE WASHINGTON POST, Nov. 9, 2004, at C1. Others were quick to point out that as a percentage of the electorate, there was no increase despite high expectations and a media onslaught. Vicki Haddock, *Pre-election Expectations Fail to Materialize at Polls*, THE SAN FRANCISCO CHRONICLE, Nov. 7, 2004, at E1.

214. Vargas, *supra* note 213.

215. Katherine M. Skiba, *Get-out-vote-blitz Boosted Youthful Turnout by 4.7 million voters; Nearly 52% of those Ages 18 to 29 Voted, up from 42% in 2000*, THE MILWAUKEE JOURNAL SENTINEL, Nov. 7, 2004, at 17.

in the desired goal of reducing the amount of soft money influencing campaigns. Additionally, contributors seeking to popularize their issues could do so as long as they did not identify a federal candidate or do so within 120 days of the election.

VIII. CONCLUSION

There is a prominent theory in campaign finance that "money is like water. It will find its own level, and if you are somehow able to put tighter restriction on 527s then some other vehicle will emerge to do exactly the same thing."[216] This phenomenon was evidenced lucidly in the past election. When BCRA closed the soft money loophole, campaign finance veterans rapidly adapted, and 527 groups were soon awash in soft money. These independent 527 groups, frequently operated by former campaign officials, blanketed swing states with sham issue ads attacking a candidate. As a result, 527 groups' ability to raise soft money to produce issue advocacy eviscerated the reforms set forth in BCRA.

To curb the widespread circumvention of BCRA and avoid the application of the money is water theory, a modified contribution of electioneering communications would allow contributors to donate as much as they choose. Instead of foreclosing an avenue to participate in advocacy, the modified definition would place limited restrictions on the form their advocacy could take. Such a definition has constitutional support as found in the *McConnell* Court's discussion of the Levin amendment. Additionally, the amendment promotes the public policy of reaching out to new and young voters and the promotion of integrity in elections. The amendment would do all of this without crossing the line of actual or apparent corruption stoked when contributions foster a sense of obligation. As such, Congress should eschew its support of the McCain / Feingold Amendment and propose the modified definition of electioneering communications to regulate 527 groups.

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216. Chung, *supra* note 147.