THE MUCH MALIGNED 527 AND INSTITUTIONAL CHOICE

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ABSTRACT

The continuing controversy over "527" organizations has led Congress to impose extensive disclosure requirements on these political organizations and to consider imposing extensive restrictions on their funding as well. The debate about what laws should govern these entities has, however, so far almost completely ignored the fact that such laws raise a complicated institutional choice question. This Article seeks to resolve that question by developing a new institutional choice framework to guide this and similar choices. The Article first explores the context for making this determination by describing the current laws governing 527s, including both federal election laws administered by the Federal Election Commission and federal tax laws administered by the Internal Revenue Service. The Article then proposes and applies an institutional choice framework to guide the decision of into which body of substantive law the current and proposed rules for 527s should be incorporated. The Article concludes that while regulation of political activity through both election law and tax law can work reasonably well, the different tasks for which these bodies of law and their implementing agencies are best suited require a different allocation of responsibilities than both current and proposed laws governing 527s provides. Finally, the Article identifies other areas that may benefit from application of this framework.

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INTRODUCTION

What is a 527? As one commentator succinctly put it, a 527 is a political advocacy group "named for a tax-code provision."[2] It would be easy to leave the explanation at that and move on to discuss whether 527s

[2] Stuart Taylor Jr., *Political Litter: With Many Words but Little Clarity, the Supreme Court Thrashes Around Over Electoral Fundraising and Redistricting*, LEGAL TIMES, July 3, 2006, at 44.

are truly the blight on democracy as alleged by some[3] or the bastions of free speech and free association as alleged by others.[4] But doing so skips over a series of intriguing and important questions. What does tax law have to do with political activity – isn't that what election law is for? And, given the existence of election law and the Federal Election Commission, how do we determine what role if any the tax law and the Internal Revenue Service should play with respect to political activity? Can these two bodies of law and their administering agencies both regulate political activity? Or will having them both do so undermine the goals of such regulation?

These questions are far from theoretical. After almost a century of election law and tax law operating separately in the political sphere, Congress breached that separation in 2000 by imposing an extensive disclosure regime on 527s that mimics the disclosure regime for election-law regulated political committees but is administered by the Internal Revenue Service.[5] When this disclosure regime revealed that in 2004 almost half-a-billion dollars flowed through 527s, including such infamous ones as Swift Boat Veterans and POWs for Truth and America Coming Together,[6] Congress began considering legislative proposals to extend to most 527s the election law restrictions on the sources and amounts of contributions that apply to political committees.[7] Yet during the passage of the 527 disclosure rules, and now the ongoing consideration of 527 contribution restrictions, there has been essentially no discussion regarding the fundamental differences between election law and tax law and how those differences should inform the debate over regulating the much maligned 527.

This Article explores this choice between election law and tax law by developing a new theoretical framework to judge whether pursuit of a particular policy goal is best done through one body of substantive law or another. Part I explains the context for making this determination by describing the current election law and tax law rules governing political activity. Part II develops a new institutional choice framework for making

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[3] *See, e.g.*, Glen Justice, *The 2004 Campaign: Campaign Financing: G.O.P. Group Says Its Ready to Wage Ad War*, N.Y. TIMES, Aug. 25, 2004, at A4 (quoting President Bush as saying "I don't think we ought to have 527's" and "they're bad for the system.").

[4] *See, e.g.*, Stephen Moore, *Issue Ads: Let 'Em Rip*, WASH. POST, Sept. 18, 2004, at A25 (the executive director of a 527, Club for Growth, defending political ads by outside groups, including 527s, as "fulfill[ing] an important role in our democratic system" by preventing candidates and political parties from monopolizing communications during the campaign season).

[5] *See infra* Part I.C. For the definition of a "political committee," see *infra* notes 26-27 and accompanying text.

[6] *See infra* note 96 and accompanying text.

[7] *See infra* notes 97-98 and accompanying text.

this decision, detailing the relevant characteristics of the legislative processes, administering agencies, and effectiveness of administration under two bodies of substantive law that may reveal crucial differences between the two. Part III applies this framework to the current and proposed intersection of election and tax laws, which targets 527s. Part IV suggests several ways that election law and tax law should – and should not – be changed to reflect the insights provided by this approach. My conclusion is that while regulation of political activity through both election law and tax law can work and work reasonably well, the different tasks for which these bodies of law and their implementing agencies are best suited require a different allocation of responsibilities than both current and proposed law provides. Finally, I identify other areas that may benefit from application of this new institutional choice framework.

A brief word on what this Article is not about. It is not an attempt to explore the significant constitutional issues raised by regulating 527s, a topic that has been addressed by others at length;[8] rather, I assume that at least some level of regulation is constitutionally permitted. This Article is also not an attempt to explore the wisdom of the general tax rule that expenditures for political activities are not deductible. That issue has not been raised in the current debates and, despite some recent scholarship suggesting that the tax treatment of such expenditures should be revisited,[9] it appears unlikely to be an issue in the foreseeable future. Finally, this Article focuses solely on federal laws, although it is important to note that

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[8] *See, e.g.*, Richard Briffault., *The 527 Problem . . . and the* Buckley *Problem*, 73 GEO. WASH. L. REV. 949 (2005); Elizabeth Kingsley & John Pomeranz, "*A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*," 31 WM. MITCHELL L. REV. 55, 103-18 (2004); Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1027-34 (2005); Adriana Riviere, Comment, *527s: The New Frontier for Election Law*, 60 U. MIAMI L. REV. 261 (2006).

[9] For example, several commentators have proposed reintroducing a federal tax credit for political contributions as one mechanism to increase citizen involvement in political campaigns and/or reduce the influence of special interests. Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 384-85 (1995); Thomas Cmar, *Special Series on Election Law: Toward a Small Donor Democracy: The Past and Future of Incentive Programs for Small Political Contributions*, 32 FORDHAM URB. L.J. 443 (2005); John M. de Figueredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591 (2005); Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 107-118 (2004); David Rosenberg, *Broadening the Base: The Case for a New Federal Tax Credit for Political Contributions* (2002). The previous credit existed from 1971 to 1986. *See* note 52 *infra*. Another commentator has proposed using the tax laws to limit political contributions by replacing campaign contribution ceilings with graduated campaign contribution taxes. David S. Gamage, Note, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283 (2004).

federal laws can have a significant effect on entities and individuals seeking to influence and participate in state and local elections and also may lead to the enactment of similar state laws.[10]

I. CURRENT & PROPOSED LAW

The current attempts to control 527s occur within a larger framework of rules governing political activity, which is embodied in both election law and tax law provisions. Until recently, these two bodies of law operated almost completely independently of each other and so it is useful to describe each in isolation before exploring how they now overlap and how pending proposals would increase that overlap. This separate operation arose from the fact that election law has historically sought to control the funding of a narrow range of election-related activities in order to prevent corruption and the appearance of corruption, resulting in a fundamental tension with the constitutionally protected freedoms of speech and association. Tax law, in contrast, has historically only sought to determine the proper tax treatment of funds used for broad range of election activities without imposing any absolute prohibitions, allowing it to avoid, for the most part, constitutional conflicts.

A. Election Law

Election law for purposes of this Article means non-tax laws relating to the disclosure of and restrictions on contributions and expenditures for political activity.[11] These laws are found in the Federal Election Campaign Act of 1971, as amended ("FECA").[12] Both the restriction and disclosure provisions arose because of Congress' concern with corruption and the appearance of corruption in elections.[13] Advocates of such rules also

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[10] Or legislative proposals may successfully become law at the state level while Congress is still considering them at the federal level. *See infra* note 97 (stating that West Virginia has already enacted a law imposing contribution limits on 527s).

[11] Other areas of election law include rules relating to eligibility to vote, eligibility to run for office, redistricting, ballot initiatives, and administration of elections. *See generally* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY (2d ed. 2002); DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW (3d ed. 2004). At least one commentator has questioned whether "election law" can be so easily defined, however, a point that is supported by the fact that tax law also regulates election-related activities as detailed in this Article. *See* John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37 (2004).

[12] FECA is codified primarily at 2 U.S.C. §§ 431-455 (2000 & Supp. III 2003).

[13] *See McConnell v. FEC*, 540 U.S. 93, 115-117 (2003) (detailing the corruption concerns that underlay Congress' enactment of federal election laws); *Buckley v. Valeo*, 424 U.S. 1, 27 (1976) (citing Congress' concern with "the impact of the appearance of

sought to reduce the influence of the wealthy over the electoral process,[14] although the Supreme Court has found this reason insufficient to justify the impact of these rules on freedom of speech and freedom of association.[15] In addition, Congress enacted the disclosure provisions to provide the electorate with information about candidates and their supporters and to gather information to detect violations of the restrictions.[16]

The constitutional protections for freedom of speech and freedom of association, and the related issue of encouraging participation by permitting anonymous involvement in the political process, are a counterweight to these goals, however.[17] Several members of the Supreme Court have also indicated that restrictions on political activity may have to be limited if there is sufficient evidence the restrictions reduce competitiveness in elections.[18] The need to strike a balance between these various concerns has led, among other results, to different rules for candidates, political parties, and other political committees[19] on one hand, and persons acting

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corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions").

[14] *See* ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 54-66 (1988) (detailing the development of arguments in support of and in opposition to contribution limits, including ones based on the allegedly improper undue influence of the wealthy).

[15] *E.g.*, *Buckley*, 424 U.S. at 48-49. Recently, however, several Supreme Court Justices have indicated a willingness to reconsider that conclusion. 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); *see also* Briffault, *supra* note 8, at 995-99 (arguing that political equality may provide a sufficient governmental interest to support additional restrictions on 527s).

[16] *Buckley*, 424 U.S. at 66-68.

[17] *See id.* at 14-15, 68. For example, the First Amendment's freedom of speech clause bars laws that prohibit the distribution of all anonymous documents that seek to influence voters in an election. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 353-56 (1995) (distinguishing *Buckley v. Valeo*). *But see Major v. Abell*, 361 F.3d 349 (7th Cir. 2004) (finding constitutional an Indiana statute that required political advertising expressly advocating the election or defeat of an identified candidate to include a disclaimer identifying the persons who paid for the advertising; distinguishing *McIntyre*).

[18] *Randall v. Sorrell*, 126 S. Ct. 2479, 2495 (2006) (Breyer, J. (plurality)); *see also Buckley v. Valeo*, 424 U.S. 1, 30-35 (1976) (in the context of a broad challenge to FECA's provisions, as amended in 1974, rejecting a challenge to FECA's contribution limits based on the argument that they discriminated between incumbents and challengers, in part because there was no evidence that this was in fact their effect). Ensuring competiveness in elections might also be a sufficient governmental interest to *support* the constitutionality of certain restrictions if there is sufficient evidence that the restrictions would promote such competiveness. *See, e.g.*, Richard Briffault, *The Return of Spending Limits: Campaign Finance After* Landell v. Sorrell, 32 FORDHAM URB. L.J. 399, 433-35 (2005) (arguing that there ensuring competitive elections may be sufficient grounds to support reasonable spending limits).

[19] For the definition of a political committee, see *infra* notes 26-27 and accompanying

independently of such entities, on the other hand.

1. Rules for Candidates, Political Parties, and Other Political Committees

Currently, election laws restrict the sources and the amounts of contributions to candidates,[20] political parties, and other political committees (defined below) and requires disclosure of contributions received and expenditures made. Congress also attempted to restrict the amount of expenditures by candidates and political parties, but in the landmark decision of *Buckley v. Valeo* in which the Supreme Court considered the constitutionality of FECA's major provisions, the Court found such limits to be unconstitutional.[21]

Restrictions. The restrictions on sources of contributions include long-standing prohibitions of corporate and union contributions to candidates.[22] Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"),[23] such entities could make contributions to political parties, but the 2002 law barred such "soft money" contributions to national political parties and ended the ability of state and local political party committees to use such contributions for most activities related to federal elections.[24] These prohibitions also extend to political committees other than candidate campaign committees and political party committees; such other political committees are commonly referred to as "political action committees" or "PACs."[25] The definition of a political committee, as interpreted by the Supreme Court in *Buckley*, is an organization that is either under the control of a candidate or has a "major purpose" to nominate or elect a candidate *and*

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text.

[20] For purposes of this Article, the term "candidates" includes candidate campaign committees.

[21] *Buckley*, 424 U.S. at 58-59; *see also Randall*, 126 S. Ct. at 2490-91 (Breyer, J., plurality) (joined by Roberts, C.J.) (reaffirming this position), 2501 (Kennedy, J., concurring) (same), 2501-02 (Thomas, J., concurring) (joined by Scalia, J.)) (same).

[22] 2 U.S.C. § 441b(a) (2000). Congress enacted the ban on corporate contributions in 1907 (Pub. L. No. 59-36, 34 Stat. 864 (1907)) and the ban on union contributions in 1943 (War Labor Disputes Act, ch. 144, § 9, 57 Stat. 163, 167 (1943)). Similar prohibitions also now exist for government contractors, 2 U.S.C. § 441c(a)(1) (2000), and foreign nationals who are not permanent residents, *id.* § 441e.

[23] Pub. L. 107-155, 116 Stat. 81 (2002) ("BCRA") (codified at scattered sections of 2 U.S.C.). With only a few minor exceptions not relevant here, the Supreme Court found BCRA's provisions to be constitutional. *McConnell v. FEC*, 540 U.S. 93 (2003).

[24] BCRA § 101, 116 Stat. at 82-86 (codified at 2 U.S.C. §§ 431, 441i (2000 & Sup.. III 2003)). Soft money is money that is not subject to FECA's limitations on the sources and amounts of contributions and so contrasts with hard money that is subject to those limitations and so is harder to raise. *See* ANTHONY CORRADO ET AL., THE NEW CAMPAIGN FINANCE SOURCEBOOK 29 (2005).

[25] *See* CORRADO , *supra* note 24, at 18 (describing the origin of the "PAC" label).

which either receives $1,000 in contributions or makes $1,000 in expenditures during a single calendar year.[26] This definition is less broad than it first appears because the Federal Election Commission (the "FEC"), in the wake of *Buckley*, interpreted "expenditures" in this context as being limited to expenditures for campaign contributions and express advocacy and applied this limited definition both to the major purpose test (*i.e.*, making that test whether the major purpose of the committee to make campaign contributions and/or engage in express advocacy) and the $1,000 threshold.[27]

The restrictions on contribution amounts means that even persons who are allowed to make contributions to candidates, political parties, and other political committees – *i.e.*, individuals who are U.S. citizens or permanent residents, political party committees, and PACs – can only contribute a limited amount to each candidate or organization. Many of the limits are subject to adjustment for inflation, but for individuals during the 2005-2006 election cycle the limit was $2,100 per candidate per election, higher annual amounts for contributions to political party committees and PACs, and $101,400 overall for all contributions during the election cycle.[28] Similar limits apply to contributions by political parties and PACs to candidates and each other, although there are no limits on transfers among political party committees and only national party committees have an aggregate limit and then only with respect to Senate candidates.[29]

The overall effect of these restrictions on sources and amounts is to make it harder for candidates, political parties, and other political committees involved in elections to raise large amounts – hence the term "hard money" for funds subject to these limits. Despite that term, political parties have shown a remarkable ability to raise such funds: in 2004 the national party committees raised over $1.2 billion in hard money as compared with the slightly less than $1.1 billion in *both* hard and soft

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[26] 2 U.S.C. § 431(4) (2000); *Buckley*, 424 U.S. at 79.

[27] *See* Briffault, *supra* note 8, at 957-58 (describing the FEC's adoption of this position). Both a careful reading of *Buckley,* see Polsky & Charles, *supra* note 8, at note 36 and accompanying text, and the *McConnell* decision, in which the Supreme Court upheld as constitutional restrictions on funding sources for certain communications that did not contain express advocacy, raise questions about the FEC's interpretation, but the FEC has maintained this interpretation. *See* Briffault, *supra* note 8, at 970-72 (describing FEC's ultimate rejection of a broader definition for political committee).

[28] *See* 2 U.S.C. § 441a(a)(1), (3) (2000 & Supp. III 2003) (providing the unadjusted by inflation limits for contributions by individuals); 70 FED. REG. 11658, 11659-60 (Mar. 9, 2005) (providing the inflation adjusted limits for the 2005-06 election cycle).

[29] *See* 2 U.S.C. § 441a(a)(1), (2), (4) (2000 & Supp. III 2003) (listing the unadjusted by inflation limits for contributions by entities other than individuals); 70 FED. REG. 11658, 11659-60 (Mar. 9, 2005) (listing the inflation adjusted limits for the 2005-06 election cycle, for those limits that are adjusted for inflation).

money they raised during 2000, the last presidential election year during which the parties could raise soft money.[30]

Disclosure. With respect to disclosure, current law requires candidates, political parties, and other political committees to provide detailed and frequent public filings identifying contributors who give more than $200 and recipients of expenditures who receive more than $200.[31] The Federal Election Committee makes these filings available to the public on the Internet through a searchable database.[32] Individual contributors are identified not only by name but also by address and employer, thereby making it relatively easy both to verify compliance with the above restrictions and for the public to identify the supporters of a particular candidate, party, or other political committee.[33]

2. Rules for Independent Actors

Individuals and groups acting independently of candidates and political party committees and that are not political committees under the FEC's narrow definition face a less extensive set of restrictions and disclosure requirements. First and most importantly, such persons are affected by election law only if they make "independent expenditures" or "electioneering communications."

In *Buckley*, the Supreme Court narrowly defined independent expenditures as expenditures for communications "that in express terms advocate the election or defeat of a clearly identified candidate."[34] In doing so, the Court listed what became known as the "magic words" that meet this "express advocacy" requirement.[35] While the FEC has consistently sought to include within the reach of the election laws any communication that "taken as a whole and with limited reference to external events . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a clearly identified candidate,"[36] not just

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[30] THE ELECTION AFTER REFORM 26 (Michael J. Malbin, ed. 2006).

[31] 2 U.S.C. § 434(a)(4), (b)(3)(A), (5)(A) (2000 & Supp. III 2003).

[32] The database is accessible at http://www.fec.gov/disclosure.shtml.

[33] *See, e.g.*, www.fundrace.org (allows searches for contributors by zip code, allowing visitors to identify their neighbors who have made reported contributions to federal candidates, political parties, or other political committees; operated by the charity Eyebeam R&D).

[34] *Buckley v. Valeo*, 424 U.S. 1, 44 (quoted language), 79-80 (applying the quoted language to the definition of an "expenditure" for purposes of individuals and groups other than candidates and political committees) (1976).

[35] *Id.* at 44, n.52 (words "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject'").

[36] 11 C.F.R. § 100.22(b).

communications containing the *Buckley* magic words, the courts have almost uniformly rejected this effort.[37]

In response to the ease with which a communication could be designed to avoid express advocacy classification while still clearly seeking to influence the election of a candidate,[38] Congress in 2002 created a new category of communications that are now subject to restrictions and disclosure: "electioneering communications."[39] Electioneering communications are broadcast, cable, or satellite communications which refer to a clearly identified candidate within a short period before a primary or general election (or nominating convention or caucus) and reach the relevant electorate.[40] Other activities that are done independently of candidates and political parties by individuals or groups other than political committees continue to be free from any restrictions or disclosure requirements under election law.[41]

Restrictions. Both independent expenditures and electioneering communications may not be paid for by corporations or labor unions.[42] There is, however, an exception for so-called "Massachusetts Citizens for Life" or "MCFL" corporations. These corporations are named after the

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[37] *See, e.g.*, *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 390-92 (4th Cir. 2001); *Maine Right to Life Comm., Inc. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *see also Chamber of Commerce of the United States of America v. Moore*, 288 F.3d 187, 193-96 (5th Cir. 2002) (citing cases striking down both this regulation and similar state provisions as unconstitutional). *But see FEC v. Furgatch*, 807 F.2d 857, 861-64 (9th Cir. 1987) (upholding the broader definition of express advocacy, which the FEC then incorporated into the cited regulation).

[38] *See Buckley*, 424 U.S. at 45 (recognizing the ease of creating such an advertisement). The following October 1996 advertisement about Bill Yellowtail, then a Democratic candidate for Congress in Montana, and paid for by Citizens for Reform, an independent organization not registered as a political committee, is illustrative of this concern:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's explanation? He only slapped her but her nose was not broken. He talks law and order but is himself a convicted criminal. And though he talks about protecting children, Yellowtail failed to make his own child support payments and then voted against child support enforcement. Call Bill Yellowtail and tell him we don't approve of his wrongful behavior.

Transcript, *Washington Week with Gwen Ifill & National Journal* (PBS television broadcast Nov. 7, 1997). Bill Yellowtail lost the election. *Ibid*.

[39] BCRA §§ 201-204 (codified at 2 U.S.C. §§ 434, 441a, 441b (2000 & Supp. III 2003).

[40] 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. III 2003).

[41] To be independent, expenditures must not be "coordinated" with candidates or political parties. *See* 2 U.S.C. § 441a(a)(7)(B) (2000) (treating expenditures that are coordinated with a candidate as contributions to the candidate's campaign and so subject to FECA's limits on such contributions).

[42] 2 U.S.C. § 441b(a), (b)(2), (c) (2000 & Supp. III 2003)).

Supreme Court case that created the exception, *FEC v. Massachusetts Citizens for Life*,[43] in which the Court held that the election law prohibition on corporate funding of independent express advocacy was unconstitutional as applied to organizations that had three characteristics: formed to promote political ideas and not to engage in business activities; having no shareholders or other persons with a claim to the organization's assets or earnings; and not established by a business corporation or labor union and not accepting contributions from such organizations.[44] The FEC subsequently issued regulations embodying its interpretation of this decision.[45] The Supreme Court has also extended this exception to electioneering communications.[46]

There are, however, no limits on the amount of contributions that may be received from eligible contributors – *i.e.*, individuals who are U.S. citizens and permanent residents and Massachusetts Citizens for Life entities[47] – to pay for independent expenditures or electioneering communications. Thus even with respect to the relatively narrow set of activities covered by election law, independent actors have a significant fundraising advantage. There are also no limits on expenditures, as the Supreme Court struck down such limits as unconstitutional at the same time that it struck down limits on expenditures by candidates and political parties.[48]

Disclosure. Current law also requires other persons who make either independent expenditures or electioneering communications to file detailed reports relating to those activities. For independent expenditures, these reports require the same level of detail with respect to contributions received and expenditures made as the reports for political committees and must be filed promptly after the spender reaches certain expenditure

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[43] 479 U.S. 238 (1986).

[44] *Id.* at 263-64.

[45] 60 FED. REG. 35292 (July 6, 1995) (among other provisions, adding 11 C.F.R. § 114.10 ("Nonprofit corporations exempt from the prohibition on independent expenditures")).

[46] *McConnell v. FEC*, 540 U.S. 93, 210-11 (2003). The 2002 electioneering communications provisions actually contain a *Massachusetts Citizens for Life*-type exception, codified at 2 U.S.C. § 441b(c)(2) (2000 & Supp. III 2003), but in an example of the convoluted history of those provisions that exception is completely eliminated by another provision, codified at 2 U.S.C. § 441b(c)(6) (2000 & Supp. III 2003).

[47] In theory PACs could also be contributors, but given that PACs can only raise hard money it would make little sense for a PAC to use its limited hard money to support an expenditure that was not subject to the hard money contribution limits. Contributions by candidates or political parties would raise coordination, and therefore lack of independence, concerns. *See* note 41 *supra* (describing the treatment of coordinated expenditures).

[48] *Buckley v. Valeo*, 424 U.S. 1, 51 (1976).

thresholds.[49] For electioneering communications, these reports require detailed information regarding expenditures of more than $200 but information regarding contributors is only required if a donor's aggregate contributions are $1,000 or more.[50] The person making electioneering communications must also file such reports promptly after he, she or it reaches a $10,000 expenditure threshold.[51]

Individuals and organizations other than political committees acting independently of candidates and political parties therefore have similar disclosure requirements and limits on *sources* of funds as candidates, political parties, and other political committees. Such individual actors are not, however, subject to any limits on the *amounts* given by permitted contributors, in contrast to candidates, political parties, and other political committees.

B. Tax Law

The heart of the tax law provisions addressing political activity is the long-standing rule that no tax deduction is allowed for expenditures for political activity, which is generally defined as activity that supports or opposes a candidate for elected public office.[52] To prevent avoidance of this rule, Congress has also prohibited charities that are eligible to receive tax deductible contributions from engaging in activities that support or oppose candidates[53] and required trade associations and similar entities to

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[49] 2 U.S.C. § 434(c), (g) (requiring reports from persons making independent expenditures of $10,000 or more ($1,000 or more if 20 days or less before an election) within 48 hours (24 hours if 20 days or less before an election) of the expenditures) (2000 & Supp. III 2003).

[50] *Id.* § 434(f)(2).

[51] *Id.* § 434(f)(1) (requiring reports within 24 hours of reaching the threshold).

[52] *See* 26 U.S.C. § 162(e) (2000). The Treasury Department issued the first version of this rule in 1915. SECRETARY OF THE TREASURY, TREASURY DECISIONS UNDER INTERNAL-REVENUE LAWS OF THE UNITED STATES, vol. 17, at 48, 57-58 (1915). The only exception to this rule was when Congress chose to provide a small credit and a small deduction for political contributions in order to encourage political participation in the 1970s and 1980s. *See* Revenue Act of 1971, Pub. L. 92-178, §§ 701-702, 85 Stat. 497, 560-62 (repealed in 1978 (deduction) and 1986 (credit)).

[53] *See* 26 U.S.C. §§ 170(c)(2)(D), 501(c)(3) (2000). Even before Congress codified the prohibition in 1954, political activities were thought to be inconsistent with charitable status. *See* 9 JACOB MERTENS, LAW OF FEDERAL INCOME TAXATION § 34.05, at 22 (rev. vol. 1983) (stating that the 1954 codification "merely expressly stated what had always been understood to be the law. Political campaigns did not fit within any of the specified purposes listed in the section."); *Slee v. Commissioner*, 42 F.2d 184, 185 (2d Cir. 1930) (in the context of upholding the denial of deductible contributions under the predecessor to Code section 501(c)(3) because of lobbying efforts, stating that "[s]o far, however, as [the recipient organization]'s political activities were general, it seems to us . . . that its

either pay tax on dues paid to them to the extent the dues are used for political activities or to notify the dues-payers and other contributors that the portion of their payments used for such activities are not deductible as a business expense.[54]

The reasons for this no deduction rule are unclear. Several respected commentators have suggested that the rule's origins lie in the same concerns about corruption and political equality that motivated election law.[55] The lack of any administrative or legislative history for this rule makes it impossible to confirm whether this was in fact the case, however.[56] A possible alternate explanation is that Congress simply viewed political activities as not being a trade or business and so as not being an appropriate subject for a business expense deduction or any other existing deduction.[57]

But regardless of the reasons for its adoption, the rule still left two issues unsettled. First, what should be the tax treatment of organizations primarily engaged in political activity? And second, what exactly

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purposes cannot be said to be 'exclusively' charitable, educational or scientific" as then (and now) required for a contribution to be deductible).

[54] *See* 26 U.S.C. §§ 162(e)(3), 6033(e) (2000) (also covering non-deductible lobbying expenditures).

[55] *See, e.g.,* 1 BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS, ¶ 20.3.7, at 20-58 (2d ed. 1981) (citing court cases upholding the rule which referenced the potentially negative role of money in politics); William D. Andrews, "*Personal Deductions in an Ideal Income Tax*," 86 HARV. L. REV. 309, 364 (1972) (without citation, stating that the reason for limiting the deductibility of political contributions is "[w]e fear oppression if wealthy people are able to dominate the political process"); Eric M. Zolt, *Deterrence Via Taxation: A Critical Analysis of Tax Penalty Provisions*, 37 UCLA L. REV. 343, 353-54 (1989) (including the denial of deductions for business political campaign expenditures and certain worthless debts owed by political parties in a list of tax provisions Congress haws enacted to increase the costs of undesirable activities); *see also Commissioner v. Heininger*, 320 U.S. 467, 473 (1943) (suggesting in *dicta* the denial of deductibility is rooted in sharply defined (but unstated) national policies); R.T. Boehm, *Taxes and Politics*, 22 TAX L. REV. 369, 412 (1967) (arguing that the initial ruling denying a deduction for political expenditures arose from a general attempt to control, *i.e.*, limit, the involvement of corporations in politics).

[56] Neither the pre-1962 administrative pronouncements nor the codification in 1962 provide any explanation for continuing the non-deductibility rule. *See, e.g.*, *supra* note 52; T.D. 2690, Art. 143 (1918), *reprinted in* INTERNAL REVENUE ACTS OF THE UNITED STATES, 1909-1950: LEGISLATIVE HISTORIES, LAWS, AND ADMINISTRATIVE DOCUMENTS (Bernard D. Reams, Jr., ed.), vol. 132, at 75 (1979); I.T. 3276, 1939-1 C.B. 108; H.R. REP. NO. 87-2518, 420-22 (1962) (describing the reasons for permitting the deduction for some lobbying expenses and then noting, without explanation, that there is no intent to permit the deduction of political campaign expenditures); S. REP. NO. 87-1881, 727-30 (1962) (same).

[57] *See* S. REP. NO. 93-1357, 26 (1974) (in the context of adding Code section 527, stating that political activity is not a trade or business); H.R. REP. NO. 93-1502, 104 (1974) (same). Tax deductions are generally only available if specifically provided by Congress. *Commissioner v. Tellier*, 383 U.S. 687, 693 (1966); *Biazar v. Commissioner*, T.C.M. (RIA) 2004-270, at 3.

constitutes political activity?

1. The Origin of 527s

Trying to address the first question, the Treasury Department initially wrestled with the extent to which organizations that otherwise qualified for tax-exempt but not charitable status – and so to which contributions are not deductible as charitable contributions – could engage in political activity. Examples of such organizations are "social welfare" organizations that are tax-exempt under section 501(c)(4) of the Internal Revenue Code (the "Code"), such as the Sierra Club and the National Rifle Association, labor organizations that are tax-exempt under Code section 501(c)(5), such as the AFL-CIO, and chambers of commerce and trade associations that are tax-exempt under Code section 501(c)(6), such as the U.S. Chamber of Commerce and the Alliance of Automobile Manufacturers. The Treasury Department ultimately concluded, after some flip-flopping, that such organizations would be tax-exempt as long as their primary activity furthered the social welfare, labor, or business purpose that justified their tax-exempt status but that political activity could not count toward this primary activity requirement.[58] In other words, political activity had be no more than a secondary activity of such entities if they wished to remain tax-exempt.[59] A corollary to this rule was therefore that organizations engaged primarily in political activity *were* taxable.[60]

This conclusion did not fully resolve the tax situation of organizations engaged primarily in political activity, however, because there still remained the question of whether contributions to such organizations – presumably the vast majority of their income – should be included in their taxable income. The Internal Revenue Service (the "IRS") initially took the

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[58] *See* I.R.S. Gen. Couns. Mem. 34,233 (Dec. 3, 1969) (reviewing the shifting positions of the IRS and the IRS Chief Counsel's office before ultimately reaching this conclusion); T.D. 6391, 1959-2 C.B. 139, 145 (with only the explanation that comments had been considered, reaching this conclusion with respect to Code section 501(c)(4) social welfare organizations). The IRS recently confirmed in an internal publication that this remains its position. John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS TECHNICAL INSTRUCTION PROGRAM FOR FY2003, at L-1, L-2 to L-3.

[59] Exactly how to determine what is an organization's "primary" activity remains unclear. *See, e.g.*, *ABA Members Comment on Exempt Organizations and Politics*, 45 EXEMPT ORG. TAX. REV. 136, 152-54 (2004) (describing the uncertain definition of "primary" in this context and proposing the creation of a bright-line safe harbor).

[60] *See* I.R.S. Gen. Couns. Mem. 33,495 (Apr. 27, 1967) ("[t]he [Internal Revenue] Service has maintained the position that a political party does not qualify for an exemption from tax under section 501(c)(4), or indeed that it is specifically exempted from taxation under any other section of the Code").

position that while such organizations were not exempt from tax, such contributions were excluded from their taxable income as "gifts."[61] But the government created some uncertainty on this point when it attempted to tax the Communist Party.[62] So to finally resolve this issue, Congress enacted the now infamous Code section 527.[63]

Section 527 resolved the tax exemption issue by providing tax exemption for organizations primarily engaged in political activity, but only with respect to contributions received by such organizations which are set aside for political activity.[64] Other contributions and income from other sources are still taxable.[65] Section 527 also subjects to tax – at the highest corporate tax rate – the net investment income of other types of otherwise tax-exempt organizations to the extent of the lesser of those organizations political activity expenditures or amount of net investment income.[66]

The effect of Code section 527 was therefore to clarify the tax status of organizations engaged primarily in political activity. At the same time, it ensured that neither those organizations nor other tax-exempt organizations permitted to engage in political activity as a non-primary activity – primarily social welfare organizations, labor organizations, and trade associations – could use their tax-exempt status to generate income that escaped taxation and was then used for political activity. By placing 527s and other tax-exempt organizations on the same tax footing, Congress hoped to encourage those other organizations to create 527s for their political activities "to the benefit both of the organization and the administration of the tax laws."[67] Combined with the rule that contributions to either section 527 organizations or other types of non-charitable tax-exempt organizations that engage in political activity are not tax deductible, this rule effectively requires all taxpayers to use after-tax dollars for political activity.[68]

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[61] I.T. 3276, 1939-1 (part 1) C.B. 108.

[62] *See Communist Party of U.S.A. v. Commissioner*, 373 F.2d 682, 684 & n.2 (D.C. Cir. 1967) (noting that despite the government's attempt to limit its assertion that the taxpayer had received taxable dues instead of non-taxable contributions to the Communist Party and so not applicable to political parties generally, the distinction between dues and contributions would now be of interest to all political parties).

[63] Pub. L. 93-625, § 10, 88 Stat. 2108, 2116-19 (1975) (codified as amended at 26 U.S.C. 527 (2000 & Supp. III 2003)).

[64] 26 U.S.C. § 527(a), (c)(1)(A), (3), (e)(1), (2) (2000).

[65] 26 U.S.C. § 527(b), (c)(1) (2000).

[66] 26 U.S.C. § 527(f) (2000).

[67] S. REP. NO. 93-1357, 30 (1974); *see also* H.R. REP. NO. 93-1502, 108 (1974) (same).

[68] *See supra* notes 52 & 54 and accompanying text. The Code section 527 legislation also taxed contributors on any built-in gain if they contributed appreciated property to a 527, thereby prevent such gain from avoiding taxation. Pub. L. 93-625, § 13, 88 Stat. 2108, 2120-21 (1975) (codified at 26 U.S.C. § 84 (2000)). There are some gaps in the

One major loose end still exists with respect to the tax treatment of contributions for political activities, however. Simultaneously with the enactment of section 527, Congress also clarified that donations to 527s would not be subject to gift tax (which arguably would have otherwise applied to contributions from individuals).[69] Congress left unclear, however, whether donations to other non-charitable tax-exempt organizations are subject to gift tax, whether the contributions are for political activities or not. The IRS' position is that the gift tax does apply to such contributions,[70] but there are reasons to believe that this position is both legally unsound[71] and not generally complied with or enforced in practice.[72]

2. The Tax Definition of Political Activity

While Code section 527 resolved the tax status of organizations engaged primarily in political activity, it did not completely resolve how broadly political activity should be defined for purposes of either section 527 or the other Code sections and regulations addressing political activity. That task was left primarily to the IRS.

The various tax provisions discussing political activity use varying language.[73] In practice, however, the IRS has repeatedly indicated that the

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coverage of this rule, although none appear to be major. These gaps include the fact that non-charitable tax-exempt organizations can earn income that is not subject to tax under 26 U.S.C. § 527(f) from trades or businesses that are substantially related to those organizations' primary purposes and then use those funds for political activity and the fact that veterans organizations are eligible to receive tax-deductible contributions under 26 U.S.C. § 170(a), (c)(3) but are not subject to any tax law restrictions on their political activities.

[69] Pub. L. 93-625, § 14, 88 Stat. 2108, 2121 (1975) (amending 26 U.S.C. § 2501(a) (2000)).

[70] Rev. Rul. 82-216, 1982-2 C.B. 220 (stating that "gratuitous transfers to persons other than [527s] are subject to the gift tax absent any specific statute to the contrary, even though the transfers may be motivated by a desire to advance the donor's own social, political or charitable goals").

[71] *See* Barbara Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAXATION OF EXEMPTS 176 (Jan./Feb. 2004); Barbara Rhomberg, *The Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions*, 15 TAXATION OF EXEMPTS 62 (Sept./Oct. 2003).

[72] *ABA Members Comment*, *supra* note 59, at 142-43 (noting the apparent lack of knowledge about, and government enforcement of, the gift tax on contributions to section 501(c)(4) organizations).

[73] *See* 26 U.S.C. § 162(e)(1)(B) (2000) ("participation in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office"); 26 U.S.C. § 501(c)(3) (2000) ("participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any

same range of activities is implicated by these various references.[74] As stated in the most recent fact sheet issued by the IRS in this area, that set of activities is broadly defined as "any and all activities that favor or oppose one or more candidates for public office."[75] It is irrelevant whether the candidates are for federal office or not; the definition encompasses activity with respect local, state and even foreign candidates.[76] The fact sheet further states, consistent with prior IRS guidance,[77] that while some activities will clearly be political on their face others will require "evaluation of all the facts and circumstances" to determine if they are in fact political.[78]

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candidate for public office"); 26 U.S.C. § 527(e)(2) (2000) ("influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed"); 26 C.F.R. § 1.501(c)(4)-1 (2006) ("direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office").

[74] *See* INTERNAL REVENUE SERVICE, INTERNAL REVENUE MANUAL 7.25.4.7(2) (1999) ("[t]he rules determining what constitutes intervention in a political campaign for an IRC 501(c)(4) organizations are the same as those governing IRC 501(c)(3) organizations"); *ABA Members Comment*, *supra* note 59, at 144-45 (discussing IRS rulings indicating this convergence); Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, TAX NOTES, Jan. 17, 2000, at 391 (noting the IRS' reliance on guidance issued with respect to Code section 501(c)(3) to determine whether an organization qualified as a 527); Kingsley & Pomeranz, *supra* note 8, at 84-88 (discussing IRS rulings indicating this convergence). There is no similar authority with respect to Code section 162(e), but the similarity between its language and the language used in both Code section 501(c)(3) and the regulations under Code section 501(c)(4) strongly suggests the same definition applies. *See supra* note 73. The one major exception is that "exempt function" activities under Code section 527 include activities designed to support or oppose candidates for non-elected public offices and for offices with political organizations. *See* 26 U.S.C. § 527(e)(2) (2000); Kingsley & Pomerantz, *supra* note 8, at 88-91 (noting this dissimilarity). It is generally assumed that few if any 527s engage in such activities to any significant degree, however, particularly given that even charities (using tax deductible contributions) can, to a limited degree, engage in such activity. *See* I.R.S. Announcement 88-114, 37 I.R.B. 26 (1988) (seeking public comments on, *inter alia*, whether expenditures for such activities may be subject to tax under Code section 527 and stating that any such tax shall only be applied prospectively once the IRS decides the issue, which it has yet to do).

[75] IRS Fact Sheet 2006-17 (released February 2006).

[76] *See* Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii) (including candidates for national, state, or local office within the prohibition on charities engaging in political activity); James F. Bloom et al., *Foreign Activities of Domestic Charities and Foreign Charities*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY1992, at 14 (stating that the prohibition against charities engaging in political activity applies in foreign countries as well).

[77] *See, e.g.*, Rev. Rul. 2004-6 (relating to issue ads).

[78] IRS Fact Sheet 2006-17.

The result of this facts and circumstances approach is that it is difficult to find a general principle that can be applied to determine if a given activity is in fact "political" for tax purposes.[79] Such a determination instead must usually be based on the mix of precedential and non-precedential guidance issued by the Treasury Department over the past several decades that discusses the particular activity at issue, whether communications to the public about candidates, candidate questionnaires, voter guides, candidate appearances, or voter registration drives, to name a few.[80] For activities that on their face do not support, oppose, or perhaps even mention a candidate, this uncertainty has allowed organizations to influence the classification of such activities in part based on the information made available to the IRS. For example, providing the IRS with a blueprint of how an organization's planned activity, nonpolitical on its face, would affect elections was one means of having an organization classified as a section 527 organization before the enactment of the disclosure rules made that status less desirable.[81] The difficulty of applying this definition has, not surprisingly, led to a mixed record with respect to enforcing the tax rules for political activity, as detailed below.[82]

C. Combining Election Law and Tax Law

The differences between the election law and tax law provisions governing political activity led to a relatively sharp separation between the two bodies of law in practice. Candidates, political parties and PACs focused primarily on election law, as their only interaction with tax law was if they had to file a one-page IRS form if they had sufficient non-contribution income to become subject to tax under Code section 527.[83] Individuals and business entities that chose to be involved in politics also probably focused primarily on election law, as the tax law was simple: no deduction permitted for political activity expenditures.

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[79] *See EO Committee of ABA Tax Section Offers Commentary on Politicking*, 11 EXEMPT ORG. TAX. REV. 854, 856 (1995) (stating that the available rulings do not state "any unifying principle"); Kingsley & Pomeranz, *supra* note 8, at 64-71 (observing that the available rules "do not offer clear road signs, but rather mere examples").

[80] *See* Judith E. Kindell & John Francis Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY2002, at 335, 369-384 (summarizing the numerous IRS rulings applying the Code section 501(c)(3) definition of political activity to particular situations).

[81] *See* Kingsley & Pomeranz, *supra* note 8, at 87 (noting that private letter rulings on 527s involved organizations that carefully and intentionally presented their activities as designed to influence the election of candidates for public office).

[82] *See infra* Part III.C.1.

[83] IRS Form 1120-POL.

Tax-exempt entities, in contrast, tended to focus primarily on the tax law requirements. Charities avoided all "political activity," as defined broadly by the tax laws, and assumed, generally correctly, that they therefore were not engaging in any activities regulated by election law. Other types of tax-exempt organization, such as social welfare groups, labor organizations, and trade associations, while perhaps aware of the activities governed by election law, generally avoided those activities. For the ones that decided to engage in such activities, the most common route was to establish a separate PAC to make campaign contributions so as to comply with the prohibition on the use of corporate and union treasury funds for such purposes.[84] With the enactment of Code section 527, such separate entities were also attractive because they could clearly avoid any income tax by simply keeping their funds in non-interest bearing checking accounts. But the rise of the so-called "stealth PAC" 527s led Congress to breach this separation.[85]

Section 527 organizations were for many years not required to file any publicly available information returns with the IRS, unlike most tax-exempt organizations that are required to file an annual information return.[86] This lack of reporting was intentional, as Congress apparently assumed that section 527 organizations would be subject to the reporting requirements of federal or state election law.[87] This assumption eventually proved incorrect, however, as organizations realized and the IRS confirmed that the range of political activities which could qualify an organization as tax-exempt under Code section 527 was much broader than the range of activities governed by federal or state election laws.[88] This inconsistency led to the creation of

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[84] *See supra* note 25.

[85] Previous overlaps between election law and tax law have not raised the same issues as the current and proposed overlaps relating to 527s. The presidential candidate public financing system is housed in the tax laws, but all authority over that system other than cutting the actual checks is given to the FEC, not the IRS or the Treasury Department. *See* 2 U.S.C. § 437c(b)(1) (2000) (including the relevant sections of the Internal Revenue Code in the laws the FEC is responsible to administer). The FEC also requires organizations seeking to qualify for the *Massachusetts Citizens for Life* exception to be tax-exempt as social welfare organizations, but since organizations must also have the characteristics listed by the Supreme Court in that decision which tend to limit such organizations to social welfare organizations anyway, this requirement has not prove controversial. *See* 11 C.F.R. § 114.10(c)

[86] *See* 26 U.S.C. § 6033(a)(1) (2000). The major exception to this annual filing requirement is for churches and church-related entities. *See* 26 U.S.C. § 6033(a)(2)(A)(i)) (2000).

[87] *See* Hill, *supra* note 74, at 387, 390 & n.20 (suggesting that "there appears to have been at least an implicit assumption that section 527 organizations would be subject to the FECA" but also noting that "[l]ittle thought was given to the relation between section 527 and the new FECA").

[88] *See, e.g.*, I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996) (concluding that an

"stealth" 527s that were under no obligation to file publicly available reports under either election law or federal tax law.[89] While the exact scale of these stealth PACs' operations are not known, reports indicate it was substantial.[90]

To correct this oversight, Congress in 2000 passed amendments to Code section 527 that not only imposed an annual IRS information return requirement[91] but that also imposed a periodic reporting regime for contributors and expenditures mirroring the reporting regime for political committees under election law.[92] This reporting requirement includes an obligation to inform the IRS of the 527's existence within 24 hours of its creation and an obligation to file a series of reports identifying the names, addresses, employers and contribution amounts of all contributors who give $200 or more during the year and the names, addresses and expenditure amounts of all recipients of expenditures who receive $500 or more during the year.[93] Both the reporting schedule, with more frequent reports close to election dates, and the required information were based on the existing disclosure rules for PACs.[94] The IRS has created an Internet accessible

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organization qualified for tax-exempt status under Code section 527 even though it designed its election-related activities to specifically avoid falling within the reach of federal or state election laws); I.R.S. Priv. Ltr. Rul. 97-25-036 (Mar. 24, 1997) (same); I.R.S. Priv. Ltr. Rul. 98-08-037 (Nov. 21, 1997) (same); *see generally* Hill, *supra* note 74 (reviewing these rulings).

[89] *See, e.g.*, Hill, *supra* note 87 (describing the IRS rulings that permitted such 527s).

[90] *See, e.g.*, COMMON CAUSE, UNDER THE RADAR: THE ATTACK OF THE "STEALTH PACS" ON OUR NATION'S ELECTIONS 7-9 (2000), *available at* http://web.archive.org/web/20011129075319/www.commoncause.org/publications/utr/stealth.pdf (summarizing media reports regarding plans by 527s to spend in the aggregate tens of millions of dollars during 2000).

[91] *See* 26 U.S.C. § 6033(g) (2000 & Supp. III 2003).

[92] Pub. L. 106-230, 114 Stat. 477 (2000) (codified as amended at 26 U.S.C. §§ 527(i), (j) and other, scattered sections of 26 U.S.C.). As later amended, there are exceptions for 527s that already provide similar disclosures under federal or state election law. 26 U.S.C. § 527(j)(5) (2000 & Supp. III 2003).

[93] 26 U.S.C. § 527(i), (j) (2000 & Supp. III 2003).

[94] *Compare* 2 U.S.C. § 434(b)(3)(A) (requiring identification of each person, other than a political committee, who makes contributions aggregating more than $200 during a calendar year (or election cycle with respect to an authorized committee of a candidate for federal office)), (5)(A) (requiring identification of each person to whom expenditures aggregating in excess of $200 are made during a calendar year) (2000) *with* 26 U.SC. § 527(j)(3)(A) (requiring identification of each person to whom expenditures aggregating $500 or more are made during a calendar year), (B) (requiring identification of each person who makes contributions aggregating $200 or more during a calendar year) (2000 & Supp. III 2003); *compare* 2 U.S.C. § 434(a)(4) (the reporting schedule for political committees other than authorized committees of a candidate) (2000 & Supp. III 2003) *and* 26 U.S.C. § 572(j)(2) (the reporting schedule for 527s); *see also* H.R. REP. NO. 106-702, 17 (2000) (stating, with respect to the H.R. 4717 Code section 527 disclosure provisions, which were

database of these filings.[95]

The result of these new rules is that the IRS is now administering a disclosure regime that is very similar to the regime that the FEC administers with respect to candidate committees, political parties, and other political committees. The new rules therefore raise a significant institutional choice question: if the government can and will regulate the activities of 527s by imposing disclosure requirements, is election law or tax law the best vehicle through which to do so?

And this question has become even more important because of now pending proposals to increase the regulation of 527s. The changes wrought to election law by Congress in 2002 appear to have led to a significant flow of funds into 527s that are not subject to election law, approaching half-a-billion dollars in 2004, despite the new disclosure requirements.[96] This level of activity has led to calls also to impose funding restrictions on 527s by redefining "political committee" to include most 527s.[97] Such proposals

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almost identical to the ones ultimately enacted, that the reporting periods and deadlines were generally the same as those under FECA).

[95] *See* www.irs.gov/charities/political/article/0,,id=109644,00.html. Congress required such a database with respect to the names of 527s, 26 U.S.C. § 6104(a)(3) (2000), but the IRS also created a database with the complete notification forms and periodic reports.

[96] Center for Public Integrity, *527s in 2004 Shatter Previous Records for Political Fundraising* (Dec. 16, 2004), *available at* www.publicintegrity.org/527/report.aspx?aid=435. The extent to which this flow represented an increase from earlier presidential election years is not completely clear because of the lack of reporting by 527s before the enactment of the new disclosure rules in the middle of 2000, although there are reports indicating 527s planned to spend tens of millions of dollars in 2000. *See* COMMON CAUSE, *supra* note 90, at 7-9. Commentators have traced at least part of the increase to a shift in soft money contributions by labor unions from political parties to 527s, but it primarily appears to have come from individuals, particularly individuals making large contributions; corporations generally did not shift their soft money contributions from political parties to 527s but instead appeared to have simply stopped giving soft money. Briffault, *supra* note 8, at 963-64; Meredith A. Johnston, Note, *Stopping "Winks and Nods": Limits on Coordination as a Means of Regulating 527 Organizations*, 81 N.Y.U. L. REV. 1166, 1180-81 (2006).

[97] *See, e.g.*, 527 Reform Act of 2005, H.R. 513, 109th Cong., § 2 (2005); 527 Reform Act of 2005, S. 1053, 109th Cong., § 2 (2005). At least one state has already passed such a law. *See* 2005 W. VA. LAWS 4th Ex. Sess. ch. 9 (codified at W. VA. CODE ANN. § 3-8-12(g) (West 2006) (limiting contributions to a 527 from any one person to $2,000 per election cycle). The FEC also considered changing the regulatory definition of political committee to encompass many if not most 527s, but ultimately chose not to do so. 69 FED. REG. 68056, 68063-65 (Nov. 23, 2004); *see also* Press Release, Federal Election Commission, FEC Accepts Remand in Shays v. FEC and Bush-Cheney '04 v. FEC (May 31, 2006) (stating that the FEC has decided to provide a more thorough explanation of its earlier decision not to change the regulatory definition of political committee because court challenges to that decision had let to a court decision remanding that issue back to the FEC with the option of providing further explanation).

would in effect create a bi-furcated regulatory structure: the FEC would continue to be responsible for administering the political committee restrictions, but the IRS would continue to be responsible for administering Code section 527 and therefore making determinations regarding what organizations fall within that section.[98] Whether it is wise to do so requires considering the issue of institutional choice more generally.

II. HOW TO CHOOSE

A. Choice Scholarship Generally

Scholars discussing the choice of regulators for pursuing a particular policy goal usually focus on which branch or level of government is the most appropriate institution to develop and adopt the laws to further the policy, or whether a government institution is the most appropriate vehicle as compared to the market.[99] They therefore need to wrestle with issues such as federalism, the relative competencies of the courts versus the political branches, and the relative competencies of administrative agencies compared to the legislature.[100] They do not usually focus on choosing

[98] The legislation actually provides that it only applies to organizations that have given the notice to the IRS that they are in fact 527s, so it is unclear whether it would apply to an organization that is in fact described in Code section 527 but chooses not to provide that notice. *See infra* note 142 (noting the current uncertainty regarding whether 527 status is elective or mandatory). Presumably, however, the sponsors of the legislation do not expect organizations to be able to avoid the new definition simply by claiming, incorrectly, that they fall under another tax-exemption provision of the Code.

[99] *See, e.g.*, Joan MacLeod Heminway, *Rock, Paper, Scissors: Choosing the Right Vehicle for Federal Corporate Governance Initiatives*, 10 FORDHAM J. CORP. & FIN. L. 225 (2005) (comparing Congress, the Securities and Exchange Commission, and the courts); Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003) (comparing state and federal courts and legislatures to each other and to the market); William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST LAW REVIEW 509 (2000) (comparing institutions at federal, state and local levels of government to each other and the market).

[100] *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996). There is also literature regarding how interpretation of laws is affected by the branch of government with the authority to interpret them. *See, e.g.*, Ellen P. Aprill, *The Interpretive Voice*, 38 LOY. L.A. L. REV. 2081 (2005) (exploring court versus executive branch interpretation of the tax law); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003) (arguing in part that debates over legal interpretation can only be resolved by understanding the abilities and limitations of the institutions engaged in the

between two substantive bodies of law, both enacted by the same legislature but administered by different agencies.

The one significant exception is the "tax expenditures" literature written in response to the use by Congress and state legislatures of tax law to further non-tax policy goals. A tax expenditure is a tax law provision that departs from the "pure" version of tax law under which all taxpayers are taxed on their true, economic income.[101] For example, the exclusion from taxable income of employer-paid health insurance and other employee benefits is generally considered a tax expenditure because as an economic matter such benefits represent income to the employees.[102]

Scholars in this area focus on determining whether identified non-tax policy goals are best accomplished through the tax law administered by the IRS or through a different body of law administered by a different agency.[103] But almost all of this scholarship focuses on goals that involve government economic aid and so relies primarily on economic factors that

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interpretation).

[101] Stanley Surrey began this literature in 1967 when he introduced the concept of. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES 3-4 (Harv. Univ. Press 1973) (recounting his November 15, 1967 speech as Assistant Secretary of the Treasury for Tax Policy which developed the concept of "tax expenditures"); *see also* Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) (further developing this concept); STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (Harv. Univ. Press 1985) (exploring the uses of this concept).

[102] *See* STAFF OF THE JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2006-2010 (JCS-2-06) (Apr. 25, 2006), at 3-4. Both the federal government and many state governments have institutionalized the concept of tax expenditures by regularly producing annual tax expenditure budgets. *See* 2 U.S.C. § 639(c)(3) (2000); 31 U.S.C. § 1105(a)(16) (2000) (requiring a list of tax expenditures to be included in the budget submitted by the President to Congress); OFFICE OF MANAGEMENT AND BUDGET, BUDGET OF THE UNITED STATES GOVERNMENT: ANALYTICAL PERSPECTIVES, FISCAL YEAR 2007, at 285-328 (2006) (tax expenditure estimates for fiscal years 2005 through 2011); STAFF OF THE JOINT COMM. ON TAXATION, *supra* (prepared for congressional committees); Herman P. Ayayo, *Tax Expenditures: Useful Economic Concept or Budgetary Dinosaur?*, 93 TAX NOTES 1152, 1153 (2001) (stating that 33 states prepare tax expenditure budgets on a regular basis).

[103] *See, e.g.*, Ann L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995) (discussing the earned income tax credit, an earnings subsidy to low-income workers provided through the tax system); Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics, and Taxes*, 49 UCLA L. REV. 685 (2002) (discussing tax-free employee benefits); Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit*, 38 VILL. L. REV. 872 (1993); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 997-1026 (2004) (discussing food stamps and the earned income tax credit).

do not apply to a regulatory program, such as regulating independent political activity.[104] It is therefore necessary to develop a new framework that relies on non-economic factors to choose between bodies of substantive law when a regulatory – as opposed to economic – result is the goal.

B. A Proposed Framework

Bodies of substantive law may differ in the legislative processes that create them, the administrative agencies that interpret and enforce them, and the actual or likely effectiveness of that administration. The differences in each of these areas can guide us in determining where it would be most appropriate to house a particular regulatory structure.[105]

1. Legislative Processes

The legislative process for particular sets of laws can vary with respect to the substantive *expertise* of the legislators or committees who are in a position to most influence the form of the new laws, the extent of *coordination* of those laws with other laws affecting the same activities or persons, the degree to which the process is *captured* by a limited group of constituencies, and the *visibility* of the process to the public at large. Since control over legislative drafting and approval tends to rest primarily with the relevant congressional committees, it is appropriate to focus primarily on the committee part of the process.[106]

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[104] *See, e.g.*, SURREY, *supra* note 101, at 134-36 (examining who is actually economically benefited from tax provisions and noting that tax deductions provide an upside-down subsidy by providing a greater financial benefit to higher income taxpayers than to lower income ones), 144 (noting the lack of periodic budget review for tax expenditures); SURREY & MCDANIEL, *supra* note 101, at 71-82 (further developing the upside-down subsidy issue), 102-03 (noting the lack of a cap on tax expenditure provisions) (1985); Cavanaugh, *supra* note 103 (arguing that taxes may be the optimal means to control externalities); Edward Yorio, *The President's Tax Proposals: A Major Step in the Right Direction*, 53 FORDHAM L. REV. 1255 (1985) (focusing on equity and efficiency concerns); Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 978 (1986) (same). This literature does occasionally mention non-economic factors, as detailed in *infra* Part II.B.

[105] It is assumed for purposes of this Article that the genesis of a regulatory structure is in a legislative body as opposed to an administrative agency or the courts, although both of the latter bodies play critical roles in the interpretation and enforcement of legislatively enacted rules.

[106] *See, e.g.*, Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards of Legislator Reputation*, 49 J.L. & ECON. 41, 43-45, (2005) (noting that the congressional committee system provides a mechanism for legislators to build credible reputations in specific policy areas, reputations that the authors finds are rewarded by repeat PAC contributions); Edward A. Zelinsky, *James*

Expertise. Congressional tax-writing committees collectively lack expertise in non-tax matters, although individual members will have expertise in various non-tax areas. The result of this lack of expertise is that such committees may be less able to design effective (tax) laws to further non-tax policy goals when compared with their counterparts on committees that focus on such goals.[107] For example, it would generally be expected that the House Committee on Agriculture would have more expertise with respect to farming issues than the House Ways and Means Committee.

Coordination. If responsibility for laws affecting the same activities or persons is split between the tax-writing committees and other congressional committees, this split may result in tax laws that counter instead of reinforce laws passed by those other committees. For example, Professor Thuronyi noted that the tax law encouraged dairy farmers to increase their production while at the same time agricultural subsidies encouraged them to decrease their production.[108] He therefore argued that if instead the same congressional committee reviewed all subsidies in a particular substantive area, more consistent and efficient subsidies would result.[109]

At the same time, if the laws affecting certain activities or persons relate to tax laws or policies then coordination with the tax laws through the tax-writing committees may be more desirable.[110] For example, pension plans are required to meet a complex set of requirements in order to be tax-exempt.[111] If Congress wants to enact other laws to encourage participation in private pension plans, a non-tax goal, a failure to coordinate those laws with the existing tax requirements could result in inconsistent requirements and incentives.

Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions, 102 YALE L.J. 1165, 1187 & n.5 (1993) (stating that the consensus among scholars studying Congress is that domination of the relevant committee leads to an outcome more favorable to the controlling party).

[107] Edward Yorio, *Equity, Efficiency, and the Tax Reform Act of 1986*, 55 FORDHAM L. REV. 395, 425 (1987); SURREY & MCDANIEL, *supra* note 101, at 106-07 (1985). *But see* E. Zelinsky, *supra* note 106 (criticizing the focus on the expertise of congressional committees as ignoring the agency problem created by limited constituencies capturing such committees).

[108] Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1161.

[109] *Ibid*. *But see* David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 994 (2004) (criticizing this example as applied to the agency level because the tax subsidies for farmers are part of a larger pro-business investment tax regime that the IRS may be the best agency to coordinate even though the Department Agriculture may be the best agency to regulate farmers specifically).

[110] *See* Thuronyi, *supra* note 108, at 1192-93 (noting that transferring jurisdiction over a tax provision that serves both tax and non-tax goals to a non-tax agency could complicate tax-policy decisions).

[111] *See* 26 U.S.C. §§ 401-420 (2000).

Capture. Congressional committees that focus on a particular policy area (*e.g.*, agriculture) may be prone to capture by the limited constituencies most affected by government policy in that area (*e.g.*, farmers).[112] Professor Zelinsky has therefore asserted that the legislative process is more likely to generate laws free from interest group capture and with greater legitimacy under pluralist criteria if that process subjects the laws to the scrutiny and influence of more and more diverse constituencies.[113] He therefore contrasted the tax-writing committees, which tend to attract the attention of a large number of constituencies and whose members tend to receive campaign contributions from a large number and variety of sources, with committees focused on other specific subject areas that tend to attract attention and campaign contributions only from a much smaller set of constituencies with vested interests in the subject matter of the committee.[114]

Visibility. The actions of congressional committees that focus on a particular policy area may be more visible to the public than tax-writing committees that approve tax provisions that touch on numerous non-tax areas.[115] To the extent such committees receive only the attention of limited constituencies, however, this may reduce their visibility and so their accountability for their decisions. If the latter effect dominates, tax-writing committees may be held more accountable because the provisions they enact are reviewed and publicized by more constituencies.[116]

The activities of tax-writing committees may also be less visible because of framing effects, *e.g.*, the ability of the tax-writing committees to characterize the laws they approve as "tax cuts" rather than "increased government spending" and so less subject to critical scrutiny. The tax expenditure concept is in large part an attempt to eliminate these framing effects, but there are reasons to believe that more than 30 years after the

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[112] *See generally* Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 LAW & SOC. INQUIRY 959 (1997) (book review) (describing the recent history of academic thought regarding capture by interest groups).

[113] Zelinsky, *supra* note 106.

[114] Zelinsky, *supra* note 106, at 1177-84. For an attempt to formally model this difference between tax-writing committees and other committees, see Dhammika Dharmapala, *Comparing Tax Expenditures and Direct Subsidies: The Role of Legislative Committee Structure*, 72 J. PUB. ECON. 421 (1998).

[115] *See* SURREY & MCDANIEL, *supra* note 101, at 104-05; Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 244-45 (1969). *But see* Weisbach & Nussim, *supra* note 109, at 969-70 (rejecting this visibility argument because of the increased public discussion of tax breaks and the potential for hidden subsidies in other, non-tax areas of law).

[116] *See* Zelinsky, *supra* note 106, at 1184 (noting that it appears the general media covers the tax-related institutions of government to a greater extent than more narrowly focused government institutions).

institutionalization of that concept this effect still exists.[117]

2. Administrative Agencies

Government agencies also differ from each other in ways similar to those found in the legislative process. Agencies have different areas of substantive *expertise*, usually have strong intra-agency *coordination* but difficulty coordinating with other agencies, may be *captured* by limited constituencies, and vary in their *accountability* to the public.

Expertise. Government agencies naturally develop expertise in their substantive areas of activity. Such expertise can lead to quicker and more accurate interpretation and enforcement of laws.[118] Lack of expertise may leave an agency incapable of effectively administering laws when compared to an agency with the appropriate expertise.[119]

Coordination. In general, a single government agency is better at coordinating activities within the agency (*i.e.*, has lower costs of coordination) than coordinating activities with other agencies.[120] This has led Professors Weisbach and Nussim to conclude in the context of government transfer programs that integration with the tax laws will be most successful when the coordination benefits between the tax system and the other program are high and the specialization benefits of a separate program are low.[121] In some cases Congress has created joint authority over

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[117] *See* Edward A. Zelinsky, *Do Tax Expenditures Create Framing Effects? Volunteer Firefighters, Property Tax Exemptions, and the Paradox of Tax Expenditure Analysis*, 24 VA. TAX. REV. 797 (2005) (arguing that for some or even many members of the public policies that are unacceptable when framed as direct government expenditures become desirable when framed as tax subsidies even though the policies are substantively and economically equivalent). *But see* Weisbach & Nussim, *supra* note 109, at 970-71 (rejecting this framing argument both because framing effects can be overcome by greater publicity for tax expenditures and because if it is valid, there is the members of the public who are subject to framing effects will also be likely to miss the often subtle effects of non-tax programs). For a more general consideration of common cognitive errors when considering tax-related issues, see Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL'Y & L. 106 (2006).

[118] *See* Weisbach & Nussim, *supra* note 109, at 985-86 (noting that specialization generally allows an individual or organization to perform the same activity more rapidly, more accurately, or better in some other dimension).

[119] *See* Yorio, *supra* note 107, at 425 (noting that the IRS generally has no expertise in areas outside of tax and so is less likely to effectively administer tax laws designed to further non-tax policy goals).

[120] *See* Weisbach & Nussim, *supra* note 109, at 985 (noting that separating a function into a separate division promotes coordination within that division but at the cost of increased coordination costs between that division and other activities of the same organization).

[121] Weisbach & Nussim, *supra* note 109, at 996; *see also* SURREY & MCDANIEL, *supra*

certain areas in an attempt to overcome the usually high costs of interagency coordination. These attempts to overcome the increased costs of coordination between agencies have had mixed results at best, however.[122]

Capture. The constituencies with particular interest in a certain substantive area may be able to capture an agency that specializes in that area. That capture may occur because those constituencies have strong influence with the congressional committees overseeing the agency, because those constituencies provide "revolving door" job opportunities to employees leaving that agency, or simply because those constituencies are the only ones willing to invest the time and resources to engage the agency when it is interpreting or enforcing the laws at issue. This capture may be enhanced or inhibited by the degree to which the agency and its employees are subject to political pressures from Congress or from political appointees within the Executive branch.

Accountability. An agency with sole responsibility for a particular substantive area may be subject to a greater degree of accountability with respect to activities in that area as compared to an agency that has responsibility for several areas. The degree to which the agency's activities area visible to the public, whether because of congressional or media

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note 101, at 106 (noting the confusion that can be created when both the Treasury Department and another executive agency have responsibility over the same area).

[122] *See, e.g.*, George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987) (noting the problems in the split-enforcement of the Occupational Safety and Health Act); Alan Larsen, *National Game Ranges: The National Wildlife Refuge System*, 6 ENVTL. L. 515, 525-29 (1975) (describing the conflicts created by dual management of game ranges, which are federal lands that are available for the grazing of domestic livestock); Joseph A. Lumsdaine, *Ocean Dumping Regulation: An Overview*, 5 ECOLOGY L.Q. 753, 792 (1976) (criticizing the results of joint administration of the Marine Protection, Research, and Sanctuaries Act); Sidney Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 57-63 (1989) (noting the problems in the split-enforcement of the Occupational Safety and Health Act and recommending elimination of the split); James R. Weiss & Martin L. Stern, *Serving Two Masters: The Dual Jurisdiction of the FCC and the Justice Department Over Telecommunications Transactions*, 6 COMMLAW CONSPECTUS 195 (1998) (noting problems with the split-enforcement of antitrust standards for telecommunications transactions). *But see* Richard H. Fallon, Jr., *Enforcing Aviation Safety Regulations: The Case for a Split-Enforcement Model of Agency Adjudication*, 4 ADMIN. L. REV. 389 (1991) (arguing for enforcement for federal aviation safety rules to be moved from the Federal Aviation Administration, a part of the Department of Transportation, to the independent National Transportation Safety Board); Paul R. Verkuil, *The Independence of Independent Agencies: The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 268-70 (1988) (citing advantages to split-administration of laws when one of the parties involved is an independent agency, including an increased perception of fairness).

attention, may also affect its accountability.

3. Effectiveness

Comparisons of the legislative process and the administering agency to determine which legal vehicle is best suited to pursue a particular non-tax goal are only part of the story. The story would not be complete without comparing how effective each substantive body of law, and therefore each implementing agency, is likely to be in implementing the law and so achieving the policy goal at issue. Relevant considerations include the *effectiveness of enforcement* by the applicable agency, the *compliance burden* on the regulated community, and the degree to which choice of legal vehicle creates opportunities for *administrative arbitrage*.

Enforcement Effectiveness. The effectiveness of enforcement may vary depending on what legal vehicle is chosen. If the agency charged with enforcing the laws already has established enforcement procedures and resources that are well tailored to the new regulatory scheme, then enforcement may be relatively effective. If the agency instead has enforcement procedures that are ill-adapted to the new laws, the effectiveness of enforcement may be low unless the agency can easily adopt new procedures. For example, using tax law allows enforcement through the existing tax collection infrastructure.[123] Whether that enhances enforcement will depend on whether the aspects of that infrastructure – *e.g.*, an experienced and national field staff, established legal support, the "intimidation" effect of the IRS, low audit coverage, a focus on tracking dollar amounts, significant time periods between activities and audit – fit well with the provision at issue. Agencies may also differ with respect to their available enforcement resources, and with respect to their litigation options if administrative enforcement proceedings fail.

Compliance Burden. The cost and therefore extent of compliance may vary depending on what legal vehicle is chosen. For example, if the laws governing a particular set of activities are spread among two or more substantive bodies of law, thereby requiring the regulated community to master – or hire experts in – both bodies of law, the cost of compliance may be significantly higher than if those laws were located in a single area. Similarly, if administration of those laws is split between two different agencies with different procedures, the cost of compliance may be higher.

Arbitrage Opportunities. If the laws governing the same set of activities or persons are split between two or more substantive areas of law and so two or more government agencies, opportunities for administrative arbitrage

[123] *See* Weisbach & Nussim, *supra* note 109, at 980 (making this point).

may arise. This result may arise from coordination failures at either the legislative or agency level. For example, the rise of the 527s reflects such a failure as Congress' apparent assumption that 527s would all be subject to federal or state election law disclosure requirements was incorrect because of the differing definitions of "political activity" for election law and tax law purposes, thereby permitting the creation of organizations that escaped the disclosure requirements of both bodies of law.[124]

III. MAKING THE CHOICE

As the first Part of this Article detailed, the overall goal of regulating political activity is to balance preventing corruption, preventing the appearance of corruption, and promoting political equality with protecting freedom of speech and association.[125] The tools that Congress uses to strike this balance are a mix of disclosure requirements and restrictions, although the exact parameters of these requirements and restrictions are hotly debated. This Part applies the framework developed above to this policy goal.

A. Legislative Processes

1. Election Law

The 2002 changes to election law were the result of a lengthy, convoluted, and high profile legislative process. While it is difficult to establish a firm start date for that process, it began no later than the introduction of the first major reform bill in 1998.[126] Detailed House Committee on Government Reform and Oversight and Senate Committee on Government Affairs investigations into the 1996 federal elections in large part motivated that legislation.[127] The next four years involved extensive legislative maneuvering and debates as the supporters of the legislation forced floor consideration of successive versions of the bill even

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[124] *See supra* notes 86-90 and accompanying text.

[125] *See supra* notes 13-17 and accompanying text.

[126] *See* Bipartisan Campaign Integrity Act of 1997, H.R. 2183, 105th Cong. (1998); *McConnell v. FEC*, 251 F. Supp.2d 176, 202 (D.D.C. 2003) (detailing the legislative origins of BCRA).

[127] *See* SENATE COMM. ON GOV'T AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. Rep. No. 105-167 (6 volumes) (1998); *Campaign Finance Investigation: Hearings Before the House Comm. on Gov't Reform and Oversight*, 105th Cong. 6 (1997), 1997 WL 621855 (statement of Dan Burton, Chairman).

when faced with unsupportive congressional committees.[128] The ultimate result of this bruising debate was significant but arguably limited changes to election law.[129] For example, the electioneering communications provisions initially covered a much broader range of communications but had to be pared back before they could be enacted.[130]

The legislative history of other election law provisions reveals a similar level of debate and attention. The initial ban on corporate campaign contributions and the initial federal disclosure rules were considered important enough to justify mentions President Theodore Roosevelt's State of the Union addresses,[131] numerous congressional hearings and complicated political maneuvering.[132] And the legislative debate for both

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[128] *See McConnell*, 251 F. Supp. 2d at 202-05 (summarizing this maneuvering, including the unfavorable report of the Committee on House Administration and the failure of the Senate Committee on Rules and Administration to act on the 1999 version of the bill); 2 CIS PL 107155, 107 CIS Legis. Hist. P.L. 155 (listing from 1998 forward hundreds of pages of House reports, over a thousand pages of hearing transcripts, and many days of congressional debates that lay behind the 2002 election law changes).

[129] *See* Thomas E. Mann, *Linking Knowledge and Action: Political Science and Campaign Finance Reform*, 1 PERSPECTIVE ON POLITICS 69, 79-80 (2003) (concluding that "the new law is a relatively modest, incremental undertaking"). *But see* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM xiv (2003) (concluding that BCRA is "far reaching legislation" that "federalizes much state and local activity" and "sharply curtails the rights of citizens to publicly criticize . . . officeholders and candidates").

[130] *Compare* H.R. 2183, 105th Cong. § 201(b) (including within an expanded definition of express advocacy both any radio or television paid advertisement transmitted within 60 days of an election in the relevant state *and* any communication "expressing unmistakable and unambiguous support for or opposition to one or more clearly identified candidates when taken as a whole and with limited reference to external events, such as proximity to an election") *with* 2 U.S.C. § 434(f)(3)(A)(i) (2000 & Supp. III 2003) (limited electioneering communications to broadcast, cable, or satellite communications which refer to a clearly identified candidate within 30 days of a primary election (or nominating convention or caucus) and 60 days of a general election and reach the relevant electorate).

[131] *See* 40 CONG. REC. 96 (1905) (President Roosevelt supporting a proposed ban on corporate campaign contributions in his 1905 State of the Union address); 41 CONG. REC. 96 (1905) (same in his 1906 State of the Union address); 42 CONG. REC. 67, at 78 (1907) (President Roosevelt supporting the disclosure of campaign contributions and expenditures in his 1907 State of the Union address). Other campaign finance proposals have also made their way into State of the Union addresses speeches of later Presidents. *See, e.g.,* 112 CONG. REC. 141, at 143 (1966) (President Johnson proposing the revision and loosening of election law provisions); 139 Cong. Rec. H674 (1993) (President Clinton supporting campaign finance legislation); 143 Cong. Rec. H273, at H274 (1997) (same); 144 Cong. Rec. H30, at H34 (1998) (same).

[132] *See* MUTCH, *supra* note 14, at 6-16. One significant piece of election law legislation, the Federal Corrupt Practices Act of 1925, apparently had a very limited legislative history, but it represented essentially a recodification of existing campaign finance law that had been extensively debated and reviewed earlier, with the only major

the 1971 enactment of FECA and its 1974 amendment was also extensive.[133] Both FECA, as amended in 1974, and the 2002 election law changes also had to survive exhaustive litigation challenges.[134]

2. Tax Law

The tax law provisions relating to political activity have historically had much briefer and less exciting legislative histories. As noted previously, there is essentially no administrative or legislative history for the general rule that expenditures for political activities are not deductible, although both the House and Senate tax-writing committees ultimately considered and approved that provision.[135] The statutory prohibition on political activity for charities has a similar lack of legislative history, as then-Senator Lyndon Johnson introduced it as an amendment to an almost-final tax bill and so it completely avoided any committee consideration.[136] The tax-

change being that it no longer reached primary elections as required by the Supreme Court's decision in *United States v. Newberry*, 256 U.S. 232 (1921). *See* MUTCH, *supra* note 14, at 16-21.

[133] *See* 74 CIS PL 93443; 93 CIS Legis. Hist. P.L. 443 (listing the six House and Senate reports and five hearings that related to the 1974 to FECA); 72 CIS PL 92225, 92 CIS Legis. Hist. P.L. 225 (listing the ten House and Senate reports and six hearings that related to the 1971 enactment of FECA).

[134] *See* MUTCH, *supra* note 14, at 49-51 (detailing the breadth of the *Buckley* legal assault on FECA, as amended, and the credentials of those involved); *McConnell v. FEC*, 540 U.S. 93, 93 (2003) (listing the appellants in the case challenging the 2002 changes, who included Senators, members of Congress, major political parties, and various advocacy, labor and business associations); *McConnell v. FEC*, 251 F. Supp.2d 176, 183 (noting that the case involved eleven consolidated actions), 208 (noting that after some initial dismissals, the case still involved seventy-seven plaintiffs and seventeen defendants) (2003). Recognizing the importance and complexity of these cases, the Supreme Court in each instance extended the total time for oral argument from one to four hours. *See McConnell v. FEC*, 539 U.S. 911 (2003) (allocating four hours for oral argument); *Buckley v. Valeo*, 423 U.S. 820 (same) (1975); S. Ct. Rule 28, ¶ 3 (Supp. III 2003) (allowing one-half hour per side of oral argument absent a request for additional time, and stating that additional time is "rarely accorded"); S. Ct. Rule 44, ¶ 3 (1970) (allowing one-half hour per side of oral argument absent a request for additional time).

[135] *See supra* note 56.

[136] *See* Oliver A. Houck, "*On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations Under the Internal Revenue Code and Related Laws*," 69 BROOK. L. REV. 1, 23-29 (2003) (reviewing the incomplete historical record of the reasons for then Senator Lyndon B. Johnson's introduction of an amendment that added the prohibition on political campaign activities to Code section 501(c)(3) apparently in reaction to the opposition by section 501(c)(3) organizations during his 1954 primary campaign); Kindell & Reilly, *supra* note 80, at 335-36 (noting the lack of legislative history for the prohibition), 448-51 (discussing speculation regarding why Senator Johnson introduced the amendment but concluding it is impossible to be sure of his actual motivation).

writing committees and Congress as a whole did not apparently see the enactment of Code section 527 as a significant event either. Section 527's legislative history covers only a handful of pages and is intermixed with discussions of the tax provisions relating to upholstery and needles with which it was packaged.[137]

Even the 527 disclosure provisions have a relatively short legislative history. The first bill including them was introduced in April 2000, in part in reaction to the role of "stealth" 527s during the presidential primary election that year.[138] At first they appeared doomed to die in committee, but their supporters managed to force their consideration by threatening to sink the Defense Department's reauthorization bill by adding them to that legislation.[139] Within three months of their initial introduction, and after only a brief tax-writing committee report on a related bill and a single hearing by the House Subcommittee on Oversight, the provisions became law.[140]

Perhaps not coincidentally, litigation challenges to these rules have also been much less involved affairs. The courts have generally concluded that since these tax provisions only affect the cost of participating in political activities but do not prohibit such participation, they will be upheld in the face of constitutional challenges.[141] The 527 disclosure provisions survived

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[137] *See* H.R. 93-1502, at 103-13 (1974), S. Rep. 93-1357, at 25-36 (1974); H.R. Rep. 93-1642, at 22-23 (1974); William P. Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 THE TAX LAWYER 139, 140 (1975) (noting that Code section 527 was a noncontroversial addition to a "Christmas tree" tax bill).

[138] *See, e.g.*, Underground Campaign Disclosure Act, H.R. 4168, 106th Cong. (2000) (introduced Apr. 4, 2000).

[139] 146 CONG. REC. S4656-S4660 (daily ed. June 7, 2000) (Sen. McCain offering 527 disclosure provisions as an amendment to the National Defense Authorization Act for Fiscal Year 2001, S. 2549, 106th Cong. (2000)). The amendment would almost certainly have been fatal to the bill because the Constitution requires that revenue-generating provisions originate in the House. *See* U.S. Const. Art. I, section 6, first paragraph. The addition by the Senate of a tax provision to the reauthorization bill would have exposed that bill to being "blue-slipped" as a revenue bill that failed to meet this constitutional requirement. *See* 146 CONG. REC. S4785 (daily ed. June 7, 2000) (Sen. Sessions noting the risk this amendment created to the bill).

[140] *See* Pub. L. 106-230, 114 Stat. 477 (2000); H.R. Rep. 106-702 (2000); *Public Disclosure by Tax Exempt Organization: Hearings Before the House Subcomm. on Oversight*, 106th Cong. (2000), 2000 WL 852654 (statement of Amo Houghton, Chairman).

[141] *Branch Ministries v. Rossotti*, 211 F.3d 137, 143-44 (D.C. Cir. 2000) (relating to the Code section 501(c)(3) prohibition of political activity for charities); *see also Cammarano v. United States*, 358 U.S. 498, 512-13 (1959) (rejecting a constitutional challenge to the Treasury Department's denial of a deduction for lobbying expenditures on the grounds that, like everyone else, the taxpayers were "simply being required to pay for those activities entirely out of their own pockets"); *see generally* Donald B Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611,

challenge on essentially the same grounds, as the Court of Appeals for the Eleventh Circuit concluded that to avoid them an organization only had to forgo claiming tax-exempt status under Code section 527.[142] Some 527 organizations may also have intentionally chosen to not identify contributors who prefer to remain anonymous, viewing that choice as an election they make at the cost of the additional tax owed.[143]

3. Comparing the Processes

Considering these processes in light of the expertise, coordination, capture, and visibility factors identified earlier, reveals reasons to favor incorporating restrictions and disclosure requirements into election law as opposed to tax law. Expertise and capture probably do not favor either body of law over the other for a simple reason: both bodies of law are considered by incumbent politicians, regardless of which specific congressional committees are involved in the legislative processes. As experienced politicians, they are eminently familiar with the corruption and appearance of corruption concerns raised by political activity expenditures and with balancing those concerns against the freedom of speech and association concerns implicated when regulating such expenditures, as the Supreme Court repeatedly acknowledged in its decision upholding almost all of the 2002 changes to election law.[144] At the same time, such politicians, regardless of on which committee they serve, are all part of the

638-44 (2003) (discussing the subsidy/penalty rationale that protects tax provisions, including those related to political activity, from successful constitutional challenge on free speech or association grounds).

[142] *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361-62 (11th Cir. 2003). The IRS apparently believes that 527 status or at least the Code section 527 taxes are mandatory, not elective, . *See* I.R.S. Field Serv. Advisory 2000-37-040 (June 19, 2000) (stating "[s]ection 527 is not an elective provision"); *Edited Transcript of the January 30, 2004 ABA Tax Section EO Committee Meeting*, 44 EXEMPT ORG. TAX REV. 23, 29 (2004) (a senior IRS Chief Counsel official stating in the wake of the 11th Circuit decision that whether an organization chooses to file notice as a 527 is voluntary, but that being a political organization is not, and therefore a political organization is subject to the taxes provided by Code section 527 if it chooses not to file such notice or files such notice but fails to file the required disclosure reports).

[143] The government appears to permit such an election, as it conceded that this was an option for 527s when it defended the disclosure provisions against a constitutional challenge. Brief of the United States of America in Support of Its Motion to Dismiss at n. 4 & accompanying text, Nat'l Fed'n of Republican Assemblies v. United States, 148 F. Supp. 2d 1273 (S.D. Ala. 2001) (No. 00-759-Rv-C).

[144] *E.g.*, *McConnell v. FEC*, 540 U.S. 93, 137, 158. *But see McConnell*, 540 U.S. at 339 (Kennedy, J., concurring in judgment in part and dissenting in part) (arguing that in enacting, in his view, the vague and overbroad electioneering communications provisions, Congress has demonstrated a "fundamental misunderstanding of the First Amendment").

interest group that arguably presents the greatest danger of capturing the legislative process to pursue its own interests above the interest of others and of the public generally.[145]

Visibility and coordination present more complicated issues. With respect to the former, it has been argued that as a general matter tax laws are subject to greater visibility than laws in other substantive areas because the media and a larger number and range of interest groups pay attention to the activities of the tax-writing committees.[146] But in the specific context of political activity, the opposite appears to be the case. Tax law provisions relating to political activity receive scant attention while election law provisions are the subject of extensive debate and coverage.[147] The reason for the lack of attention to political activity-related tax provisions may rest on a simple fact: they do not involve much money.[148] As such they are of little interest to the interest groups and, probably, the media that normally cover the tax-writing committees. Election law provisions have been, in contrast, some of the highest profile pieces of legislation and so become subject to a high level of public scrutiny.

As for coordination, recall that tax law, until the enactment of the 527 disclosure provisions, focused on ensuring the use of after-tax dollars for political activity – *i.e.*, the cost of engaging in such activity.[149] Election law, in contrast, focused on the disclosure of and restrictions on such activity.[150] This division of responsibility suggests that new laws seeking to decrease or increase the cost of such activity would be better coordinated with the existing tax law provisions, while new laws seeking to disclosure or restrict such activity would be better coordinated with the existing election law provisions.[151] This conclusion is reinforced by the general bias

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[145] *See McConnell*, 540 U.S. at 262-63 (Scalia, J., concurring in part and dissenting in part) (criticizing BCRA for protecting incumbent politicians from criticism, although he stops short of asserting that the members of Congress were necessarily acting consciously in their own self-interest).

[146] *See supra* notes 115-116 and accompany text.

[147] *Compare supra* Part III.A.1 *with supra* Part III.A.2.

[148] The 527 disclosure provisions presumably had negligible revenue affect. Congress enacted the other tax provisions before JCT provided such revenue effect estimates, but given that the total amount spent during 2004 on political activities was somewhere in the single-digit billions, see *infra* note 161 and accompany text and *supra* note 96 and accompanying text, as compared to double-digit trillion of taxable income reported to the IRS in 2005 the latest year for which figures are available), see *infra* note 179 and accompanying text, it is unlikely those other provisions have significant revenue effects.

[149] *See supra* Part I.B.1.

[150] *See supra* Part I.A.

[151] This pre-existing division arguably biases the result when considering coordination – why could we not consider a wholesale re-allocation of responsibilities between election law and tax law? The answer is that the allocation of cost/subsidy rules to tax law is driven

of the tax laws against disclosure, in the interests of encouraging compliance with the tax laws.[152]

This division of responsibility may also explain the stark differences in the legislative processes for these two sets of political activity provisions. The potential harm from disclosure requirements and, even more so, from funding restrictions rises to a constitutional level and so attracts both greater legislative scrutiny and more robust litigation challenges. The potential harm from the tax provisions, at least until the introduction of the 527 disclosure rules, is limited to an increased cost of engaging in political activity. While potentially critical to candidates and others seeking to be involved in political activity, such an increased cost generally does not raise constitutional concerns, as the courts have repeatedly found.[153] It is unclear, however, that even if the tax law became involved in imposing disclosure requirements, as it has with 527s, or funding restrictions, as has been proposed by including most 527s in an expended definition of political committee based primarily on their tax classification, would immediately cause the relevant tax provisions to see a level of visibility equal to that faced by election law provisions. The history of the 527 disclosure rules indicates that at least initially this would not be the case.

The fact that visibility and coordination appear to favor incorporating restrictions and disclosure requirements into election law as opposed to tax law is not necessarily conclusive, however. Visibility could be improved, and coordination might be adequate if even a few members of the tax-writing committees had expertise in election law matters.[154] It also could be argued that the relative ease with which Congress passed the 527 disclosure provisions suggests that the tax law route presents less opportunities for capture, perhaps because the members of tax-writing committees are less consciously self-interested in this area than the members of the committees that consider election law provisions.[155] It is therefore necessary to also consider the relevant administrative agencies and the ultimate effectiveness of each body of law.

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in large part by the fundamental role of that body of law – to determine what is, and what is not, subject to tax.

[152] *See* James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns: The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 943-52 (1979) (describing the reasons underlying the confidentiality of tax information, including the current restrictions on disclosures within the government).

[153] *See supra* note 141.

[154] *See* Zelinsky, *supra* note 106, at 1185 (making this point).

[155] It could be argued as well, however, that there is a difference in expertise across members of Congress, particularly with respect to sensitivity to the constitutional issues of free speech and free association, and as the tax-writing committees generally do not have to consider such issues.

B. Administrative Agencies

1. The Federal Election Commission

The Federal Election Commission, an independent agency that reports directly to Congress, is responsible for administering and enforcing federal election law.[156] The Commission consists of six commissioners nominated by the President and confirmed by the Senate for six-year terms, no more than three of whom may be members of the same political party.[157] All Commission actions require four affirmative votes.[158] Historically the Commission has consisted of three Democratic and three Republican members chosen through negotiations between the relevant party's congressional leadership and the President.[159]

The Commission is currently supported by a staff of slightly less than 400 full time employees and a total budget of slightly more than $54 million, allocated over all functions including administration, audit (approximately 10 percent of staff), information technology, general counsel (approximately 35 percent of staff) and reports analysis (approximately 15 percent of staff).[160] During the last presidential election year approximately 10,000 candidate committees, political party committees, PACs, and other organizations (*e.g.*, organizations other than political committees that made independent expenditures and/or electioneering communications) filed reports with the FEC and reported slightly more than $8 billion in receipts and approximately $8.5 billion in expenditures.[161]

The FEC is responsible for providing guidance in the form of regulations, Advisory Opinions and public education material.[162]

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[156] *See* 2 U.S.C. § 437c(b)(1) (2000).

[157] *Id.* § 437c(a)(1).

[158] *Id.* § 437c(c).

[159] MUTCH, *supra* note 14, at 104-06 (detailing the power struggles between the President and Congress over several appointments); *see also* BROOKS JACKSON, BROKEN PROMISE: WHY THE FEDERAL ELECTION COMMISSION FAILED 10 (1990) (describing how the commissioners, at least through 1990 when the book was published, were "political cronies of party leaders" and employees of parties and PACs as opposed to prominent academics, distinguished former judges or national leaders from nonpartisan groups).

[160] FEDERAL ELECTION COMMISSION ANNUAL REPORT 2005, at 32-33 (available at www.fec.gov/pages/anreport.shtm).

[161] FEDERAL ELECTION COMMISSION ANNUAL REPORT 2004, at 79 (available at www.fec.gov/pages/anreport.shtm). The difference between expenditures and receipts is presumably the result of an organization receiving funds in one calendar year (*e.g.*, 2003) but not spending them until a later year (*e.g.*, 2004).

[162] *See* 2 U.S.C. §§ 437f (advisory opinions), 438(a)(2) (requiring publication of a

Regulations are subject to the requirements imposed by the Administrative Procedure Act, *i.e.*, generally issuance in proposed form, opportunity for public comment, then issuance in final form.[163] Advisory opinions only apply to the party requesting them and to persons in situations that are materially indistinguishable from that which is the subject of the advisory opinion.[164] Requests for advisory opinions are made public but the FEC is only required to allow 10 days for public comment before it issues a final advisory opinion.[165]

The FEC's enforcement efforts included having its Reports Analysis Division review all reports, auditing all of the presidential campaign committees and several dozen candidate campaign committees, and obtaining nearly $2.5 million in civil penalties and fines from 392 closed enforcement cases in 2005.[166] Information about enforcement matters is publicly available through in case files maintained in the FEC's Washington, DC office and increasingly online.[167] Conciliation agreements resolving enforcement actions are also public documents.[168]

Both the guidance and enforcement processes require approval from the commissioners, and they cannot delegate that approval authority.[169] For guidance the commissioners must approve both proposed and final regulations, as well as all Advisory Opinions.[170] For enforcement the commissioners are directly involved in essentially every step of the process, including deciding whether an investigation is warranted, whether there is probable cause to believe a violation has occurred after an investigation is complete, and whether a negotiated settlement should be accepted.[171]

Candidates who object to FEC-approved regulations generally have standing to challenge such regulations in court.[172] Any person who believes

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manual relating to preparing required reports), (8) (rules, regulations and forms).

[163] *See id.* § 437d(a)(8) (subjecting FEC developed regulations to the Administrative Procedure Act (chapter 5 of 5 U.S.C.)); 5 U.S.C. § 553 (2000 & Supp. III 2003) (establishing the general process for rulemaking, including publication of a notice of proposed rule making and an opportunity for interested persons to comment).

[164] 2 U.S.C. § 437f(c)(1) (2000).

[165] *Id.* § 437f(d).

[166] FEDERAL ELECTION COMMISSION ANNUAL REPORT 2005, at 5 (available at www.fec.gov/pages/anreport.shtml).

[167] *Id.* at 15; *see also* http://www.fec.gov/em/em.shtml (containing a searchable database of completed enforcement actions in pdf format, audit reports of Authorized, Unauthorized, and Publicly Financed Committees, Enforcement Profile for the prior fiscal year, and documents detailing enforcement processes).

[168] 2 U.S.C. § 437g(a)(4)(B)(ii) (2000).

[169] *Id.* § 437c(c).

[170] *Id.* § 437d(a)(7), (8).

[171] *Id.* § 437b(a)(2), (3), (4)(A)(i).

[172] *See Shays v. FEC*, 414 F.3d 76, 83-95 (D.C. Cir. 2005) (concluding that Members

a violation of the election laws has occurred has the right to file a complaint with the FEC.[173] A person who files a complaint with the FEC generally has standing to sue the FEC if it dismisses that complaint or fails to act upon within a certain amount of time.[174]

2. The Internal Revenue Service

The Department of the Treasury administers the federal tax laws, with guidance, collection and enforcement handled primarily by the Internal Revenue Service.[175] A single Commissioner, the only IRS employee appointed by the President, oversees the IRS.[176] The Commissioner is advised by the IRS Chief Counsel's Office, a separate division within the Treasury Department that also has only a single presidential appointee (the Chief Counsel).[177] The Chief Counsel reports to both the IRS Commissioner and the General Counsel of the Treasury Department.[178]

For the federal government's fiscal year ended September 30, 2005, the IRS collected over $2.2 trillion in taxes, including $1.4 trillion in income taxes based on 174 million returns.[179] During the same year it had approximately 94,000 employees and a budget of slightly over $10 billion, of which slightly less than half was dedicated to enforcement efforts.[180] No break out of expenditures or budgeted amounts relating to the narrow issue of political activity are available, but the IRS Tax-Exempt and Government Entities Division that oversees all tax-exempt organizations, including charities and 527s, dedicated 472 full-time equivalent staff to exempt organization compliance in the government's fiscal year 2005.[181] Tax-exempt organizations filed approximately 850,000 returns during calendar

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of the U.S. House of Representatives seeking reelection had standing to challenge FEC regulations implementing the 2002 changes to the election laws).

[173] 2 U.S.C. § 437g(a)(1) (2000).

[174] 2 U.S.C. § 437g(a)(8)(A) (2000); *FEC v. Akins*, 524 U.S. 11, 19-26 (1998) (applying this statutory provision in holding that filers of a complaint with the FEC had standing to bring a petition challenging the FEC's dismissal of that complaint).

[175] *See* 26 U.S.C. §§ 7801(a)(1) (describing the role of the Secretary of the Treasury), 7802(c)(1)(A) (describing the role of the IRS) (2000).

[176] *See id.* § 7803(a)(1)(A), (2).

[177] *See id.* § 7803(b).

[178] *Id.* § 7803(b)(2), (3).

[179] INTERNAL REVENUE SERVICE 2005 DATA BOOK 1-2 (available at www.irs.gov/pub/irs-soi/05databk.pdf).

[180] *Id.* at 51, 54 (employee figures include the Chief Counsel's office). The proposed fiscal year 2007 budget is approximately $10.5 billion. BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2007, at 236 (2006).

[181] NATIONAL TAXPAYER ADVOCATE, 2005 ANNUAL REPORT TO CONGRESS 295.

year 2004, not including initial and periodic reports filed by 527s.[182] The total number of tax-exempt organizations, including houses of worship and other church-related entities that have voluntarily chosen to file for IRS recognition of their tax-exempt status, is almost 750,000 and these organizations, not including houses of worship and church-related entities, have total annual receipts and expenditures of over $1 trillion.[183]

The Treasury Department provides guidance in numerous forms, including regulations, revenue rulings and procedures, private letter rulings and technical advice memoranda, and public education materials.[184] As with the FEC, regulations are subject to the requirements imposed by the Administrative Procedure Act.[185] Revenue rulings and procedures are generally issued only in final, not proposed, form.[186] Private letter rulings and technical advice memoranda are similar to FEC Advisory Opinions but legally may be relied upon only by the taxpayer requesting them,[187] although as a practical matter other taxpayers often do rely on them. Unlike Advisory Opinions, however, private letter rulings and technical advice memoranda, and background documents relating to them including the request for a ruling, are only made public after all identifying information for the taxpayer involved has been redacted.[188]

Given the vast number of filings received by the IRS, it is not surprising that its enforcement is somewhat spotty. With respect to tax-exempt organizations, the IRS audited less than 5,000 of the returns processed during calendar year 2004 or less than 0.6 percent.[189] All information about audits, and about taxpayers and their returns generally, is confidential and so may not be disclosed by the government to the public.[190] The major exception to this general rule is that applications for tax-exempt status and returns filed by tax-exempt organizations are generally available to the

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[182] INTERNAL REVENUE SERVICE 2005 DATA BOOK 32.

[183] Statistics of Income Division, Internal Revenue Service, *Charities and Other Tax-Exempt Organizations, 2002*, SOI BULLETIN, Fall 2005, at 263, 270.

[184] *See* 26 U.S.C. § 7805(a), (c) (2000).

[185] *See* MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 1.03 (revised 2d ed. 2002-2005).

[186] *See* INTERNAL REVENUE SERVICE, UNDERSTANDING IRS GUIDANCE – A BRIEF PRIMER (2006), http://www.irs.gov/irs/article/0,,id=101102,00.html (describing revenue rulings, revenue procedures, and other forms of IRS guidance).

[187] *See* 26 U.S.C. § 6110(k)(3) (2000).

[188] *See* 26 U.S.C. § 6110(a)-(c) (2000).

[189] INTERNAL REVENUE SERVICE 2005 DATA BOOK 32. This compares to an audit rate of approximately 0.93 percent for individual taxpayers and 1.24 percent for corporate taxpayers. *Id.* at 19.

[190] *See* 26 U.S.C. § 6103(a)-(b) (2000 & Supp. III 2003) (providing generally that tax returns and tax return information are confidential).

public, including filings by 527s.[191] The IRS also issues a public announcement when it revokes the tax-exempt status of an organization, as well as making all denials or revocations of tax-exempt status available in redacted form.[192]

The guidance process is handled by Treasury Department staff who report to the Assistant Secretary for Tax Policy, a presidential appointee, and by IRS and IRS Chief Counsel employees.[193] The enforcement process is handled by IRS employees, with legal advice provided by the IRS Chief Counsel's office.[194] While the IRS is regularly accused of using the audit process for political purposes,[195] recent investigations have not found any such misuse.[196] The IRS has a longstanding policy of shielding political appointees from involvement in almost all specific taxpayer matters.[197]

Only directly affected taxpayers have standing to challenge Treasury Department regulations or IRS enforcement actions, *i.e.*, only taxpayers who have had their tax bills increased (or claim of tax-exempt status denied) as a result of application of the regulation or enforcement action at issue. For example, a third party generally does not have standing to challenge the IRS' decision to grant tax-exempt status to a particular organization.[198] Similarly, while members of the public are free to file complaints with the IRS, they do not have standing to go to court to force IRS action on such complaints or even to know whether in fact there has been any IRS action.

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[191] *See* 26 U.S.C. § 6104 (2000 & Supp. III 2003).

[192] *See Tax Analysts v. IRS*, 350 F.3d 100 (2003) (holding that the IRS must disclose denials or revocations of tax exemptions in redacted form).

[193] *See* SALTMAN, *supra* note 185, at ¶ 1.01[2].

[194] *See* SALTMAN, *supra* note 185, at ¶ 1.02[4][a].

[195] *See, e.g.*, STAFF OF THE JOINT COMM. ON TAXATION, 106TH CONG., REPORT OF INVESTIGATION OF ALLEGATIONS RELATING TO INTERNAL REVENUE SERVICE HANDLING OF TAX-EXEMPT ORGANIZATION MATTERS 12-13 (Comm. Print 2000) (summarizing allegations that the IRS was engaging in political targeted examinations of tax-exempt organizations).

[196] *See, e.g.*, STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 195, at 6-11 (Comm. Print 2000) (finding in general no credible evidence of improper use of taxpayer information or conduct of audits, including for political purposes); INSPECTOR GENERAL FOR TAX ADMINISTRATION, REVIEW OF THE EXEMPT ORGANIZATIONS FUNCTION PROCESS FO REVIEWING ALLEGED POLITICAL CAMPAIGN INTERVENTION BY TAX EXEMPT ORGANIZATIONS 1-2 (2005), *available at* www.ustreas.gov/tigta/auditreports/2005reports/200510035fr.pdf (concluding that there were no indications of inappropriate actions, including political influence, in the IRS' process for reviewing alleged political campaign intervention by Code section 501(c)(3) organizations and initiating associated examinations of these organizations).

[197] STAFF OF THE JOINT COMM. ON TAXATION, *supra* note 195, at 96.

[198] *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 96 (1976).

3. Comparing the Agencies

The specialization of the FEC is both its strength and, at least as it is currently structured, its weakness. With administering election law as its sole function, the FEC necessarily has developed an expertise in the area of political activity. It also is highly accountable for its administration of that law, for it can neither point to another responsible party nor claim the press of other priorities when confronted with criticism about the interpretation or enforcement of election law. Its focus on enforcing the rules requiring the disclosure and, with respect to contributions, restriction of political activities also suggests that it is best suited to coordinate any future laws in those areas to ensure both complete coverage and no unnecessary duplication of reporting or contradictory rules. The results of the FEC enforcement process are also publicly available and may be challenged in court by the party who initially filed a complaint.[199]

The Treasury Department and the IRS in contrast have a mandate that encompasses a much larger area than just political activities.[200] Even the Exempt Organizations division, which has jurisdiction over 527s and other tax-exempt organizations engaged in political activities, has to pursue numerous objectives unrelated to political activity.[201] This limits the ability of the IRS to gain expertise with respect to political activities and also limits its accountability for regulating in this area since it can easily and legitimately plead the press of other priorities. The IRS' general focus on channeling funds into the right tax channel, as opposed to causing the disclosure of those flows of funds or imposing limitations on them, also suggests that its only coordination strength would be with respect to the taxation or lack thereof of political activity expenditures.

The FEC's specialization, which generates such a favorable comparison to the IRS with respect to expertise and accountability, also carries a substantial weakness, however: the apparent capture of the FEC by a significant portion of its regulated population, specifically incumbent politicians.[202] The FEC Commissioners, all of whom are political

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[199] *See supra* notes 167-168, 174.

[200] *See, e.g.*, OFFICE OF TAX POLICY AND INTERNAL REVENUE SERVICE, 2005-2006 PRIORITY GUIDANCE PLAN (2005), *available at* www.irs.gov/pub/irs-utl/2005-2006_guidance_priority_list.pdf (listing 254 guidance projects, of which only one related to political activity).

[201] *See, e.g.*, TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION, FY 2006 EXEMPT ORGANIZATIONS (EO) IMPLEMENTING GUIDELINES (2005), *available at* www.irs.gov/pub/irs-tege/fy_2006_implementing_guidelines.pdf (describing the Exempt Organizations division's priorities for the upcoming fiscal year; out of approximately 15 enforcement initiatives, only two involve political activity).

[202] *E.g.*, JACKSON, *supra* note 159, at 1-2.

appointees, not only have to approve all guidance but each significant stage of every enforcement action.[203] This structural constraint naturally leads to the suspicion that both the guidance and enforcement processes will be biased toward a lack of regulation by the interests of those who appointed the Commissioners.[204] This suspicion has been confirmed in part by the recent success of court challenges to a series of FEC-approved regulations interpreting the 2002 election law changes.[205]

The Treasury Department and the IRS in contrast have numerous structural and practical constraints preventing such capture. The size of the tax apparatus and the breadth of its mission makes it very difficult as practical matter for the few political appointees or even those who directly report to them to become personally involved in many guidance or enforcement projects.[206] With respect to enforcement, the IRS informal procedures generally exclude political appointees from decision making.[207] This insulation from political influences is only strengthened by the risk to the reputation of the IRS as a neutral and fair tax collector if any accusations of political bias were found to be true, as shown by the alacrity with which the Commissioner has sought investigations to counter accusations of such improper influence.[208]

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[203] *See supra* notes 169-171 and accompanying text.

[204] *See* Todd Lochner & Bruce E. Cain, *Equity and Efficacy in the Enforcement of Campaign Finance Laws*, 77 TEX. L. REV. 1891, 1895-96 (1999) (describing the widespread belief among FEC critics that it has been captured by political players and so was willfully complacent, although noting the difficulty of proving that this capture, as opposed to a lack of resources or inherent flaws in election law, is the source of the FEC's ineffectiveness); Trevor Potter & Glen Shor, *Lessons on Enforcement from* McConnell v. FEC, 3 ELECTION L.J. 325, 330-32 (2004) (citing the *McConnell v. FEC* decision as an express and implicit indictment of the FEC's performance in interpreting the election laws).

[205] *Shays v. FEC*, 337 F. Supp.2d 28, 130-31 (D.D.C. 2004) (remanding three-quarters of approximately 19 challenged regulations back to the FEC for reconsideration because of failure either to properly interpret the relevant statute or to comply with the Administrative Procedure Act), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005); *see also Shays v. FEC*, 424 F. Supp.2d 100 (D.D.C. 2006) (concluding that the FEC failed to present a reasoned explanation for its failure to promulgate a general rule regarding when a 527 must register as a political committee and remanding the matter to the FEC for further proceedings). A challenge to the regulations adopted by the FEC relating to certain soft money solicitation rules and the definitions of "coordinated communications" and "Federal election activity" is currently pending in the U.S. District Court for the District of Columbia. Complaint, *Shays v. FEC*, No. 06-CV-01247 (D.D.C. July 11, 2006), *available at* http://www.campaignlegalcenter.org/attachments/1610.pdf.

[206] *See supra* notes 176-177, 179-180 and accompanying text.

[207] *See supra* note 197.

[208] *See, e.g.*, INSPECTOR GENERAL FOR TAX ADMINISTRATION, *supra* note 196, at 1 (noting that received requests in November 2004 from both the IRS Commissioner and the head of the IRS Tax-Exempt/Government Entities Division to evaluate the process the IRS

These observations suggest that if the capture issue could be overcome or at least sufficiently addressed, the FEC's advantages with respect to expertise, accountability and coordination make election law the better vehicle for disclosure requirements and restrictions on political activity. The extent of this capture problem will be addressed in the next section, while the issue of whether it can be sufficiently addressed will be discussed in Part IV.

C. Effectiveness

1. Enforcement

A comparison of the actual enforcement of each body of laws in the hands of their implementing agencies reveals several striking contrasts suggested by the differences between them. By almost every measure the FEC has proportionately greater resources to dedicate to enforcement. Making the assumption that no more than a third of the FEC's staff, or approximately 130 employees, are dedicated to enforcement,[209] they only have to be concerned with approximately 10,000 organizations and cash flows of less than $10 billion annually.[210] The IRS, by comparison, has almost 500 employees dedicated to enforcement in its Exempt Organizations division, or about four times the number at the FEC, but their oversight encompasses both a number of organizations and a total annual cash flow that is almost a hundred times greater.[211]

This difference is reflected in the enforcement coverage by the two agencies. The FEC's staff actual reviews, at least in a cursory fashion, every form filed with the FEC and resolves several hundred enforcement actions a year.[212] The IRS makes no pretense that it reviews all of the 850,000 returns filed by tax-exempt organizations or even all of the periodic

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used to review allegations of potential political activities by tax-exempt organizations in 2004).

[209] *See supra* note 160 and accompanying text. The findings of a 1999 report on the FEC indicate this percentage is a reasonable assumption. PRICEWATERHOUSECOOPERS, LLP, TECHNOLOGY AND PERFORMANCE AUDIT AND MANAGEMENT REVIEW OF THE FEDERAL ELECTION COMMISSION (1999), at ES-5, *available at* http://www.gao.gov/special.pubs/fecrpt.pdf (finding that 31 percent of the FTC's staff time was dedicated to compliance).

[210] *See supra* note 161 and accompanying text. This is not to say that the FEC has more enforcement resources than it can use, simply that in comparison to the IRS its level of resources is substantially greater. *See, e.g.*, Scott E. Thomas & Jeffrey H. Bowman, *Obstacles to Effective Enforcement of the Federal Election Campaign Act*, 52 ADMIN. L. REV. 575, 579-83 (2000) (describing the FEC's need for greater resources).

[211] *See supra* notes 181, 183 and accompanying text.

[212] *See supra* note 166 and accompanying text.

or annual filings by 527s, and its audit coverage reaches less than one percent of the returns filed.[213]

The FEC and the IRS also have substantially different reaction speeds. While critics of the FEC complain that it can take a year or two for the FEC to resolve a complaint of election law violations[214] – a reasonable complaint, given that this is an eternity in the fast-paced world of politics – the IRS pace of enforcement is much slower. Since the IRS is used to auditing returns filed months after the end of the year in which the activity reported occurred and, if it determines tax is owed, can always impose interest to compensate for any delays, it is used to conducting audits that do not even *start* until one or more years after the activity at issue occurred.[215] And audits can drag on for years, particularly when they are political sensitive. For example, while the audit of the NAACP for alleged political activity inconsistent with its status as a charity began remarkably promptly – in October 2004 when the activity at issue occurred in July 2004 – the audit is still pending more than two years after the alleged activity and shows no signs of being resolved in the near future.[216]

But do these differences also translate into more effective enforcement? Here the picture is mixed. Looking first at disclosure, it is generally agreed that the FEC currently manages to obtain and disseminate in a timely and readily accessible manner the information required to be disclosed by election law.[217] Ironically, the alleged focus of the FEC on trivial and technical violations of the law,[218] if true, probably means that disclosure

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[213] *See supra* note 189 and accompanying text.

[214] Thomas & Bowman, *supra* note 210, at 589 (describing how the enforcement process can cause even a fairly routine matter to take a year for the FEC to resolve); *see also* Lochner & Cain, *supra* note 204, at 1915-16 (finding that the FEC resolved 70 percent of randomly selected complaints filed in 1991 and 1993 within two years, although noting that this figure is misleading both because it is the more complex disputes that undoubtedly take longer and because even two years is a long-time in politics).

[215] In evaluating the earned income tax program, Professor Alstott noted a similar responsiveness issue in that the tax system's annual accounting interval makes it impossible for that system to respond quickly to a taxpayer's changing financial circumstances. Alstott, *supra* note 103, at 579-84.

[216] *See* Fred Stokeld, *Documents Show Republican Lawmakers Contacted IRS about NAACP*, 2006 TAX NOTES TODAY 97-3 (2006).

[217] PRICEWATERHOUSECOOPERS, *supra* note 209, at ES-3 to ES-5, 3-5 to 3-6; FRANK J. SORAUF, MONEY IN AMERICAN ELECTIONS 250-51 (1988); Testimony of Senator Russell Feingold Before the Committee on Rules and Administration, United States Senate (July 14, 2004), 2004 WL 1590056; *see also* Testimony of Trevor Potter Before the Committee on Rules and Administration, United States Senate (July 14, 2004) (acknowledging that "[t]he FEC has always been known for its high-quality disclosure office," but also asserting that the FEC's failure to penalize political committees for failing to register and file reports undermines disclosure), 2004 WL 1590048.

[218] *See* MUTCH, *supra* note 14, at 94 (summarizing such allegations); Lochner & Cain,

failures receive a disproportionate level of attention. The IRS record on disclosure pales in comparison. The rapidly constructed IRS website for filings by 527s is difficult to use and search, according to third parties.[219] And 527s fail to make many required filings and, when they do file, often make incomplete filings according the Treasury Inspector General for Tax Administration.[220]

While the IRS has announced increased enforcement measures to combat these problems,[221] its success with other publicly available filings raises concerns about the effectiveness of those measures. The annual information returns filed by most tax-exempt organizations are also public documents.[222] Besides the returns for 527s, only the returns for charities are only readily available on the Internet, however, and then only because a private party secured funding and created an Internet site for posting these returns.[223] There is no indication that the returns for other types of tax-exempt organizations (other than 527s) will be readily accessible in the near future absent such private party intervention. Finally, the accuracy of these

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supra note 204, at 1897 (concluding, based on an analysis of randomly selected enforcement actions in 1991 and 1993, that the FEC spends "the bulk of its resources pursuing relatively technical or trivial violations"). The FEC has recently sought to address this concern by implement an abbreviate enforcement process for late or non-filed disclosure reports. FEDERAL ELECTION COMMISSION ANNUAL REPORT 2005, at 11-13 (available at www.fec.gov/pages/anreport.shtm) (describing the program).

[219] *See* PUBLIC CITIZEN, OFF TO THE RACES: FIRST QUARTER REPORTS SHOW THAT 50 TOP "527" ORGANIZATIONS COLLECTED ALMOST $11 MILLION IN SOFT MONEY; DISCLOSURE PROBLEMS CONTINUE 4-6 (2002), *available at* http://www.citizen.org/documents/1stQ2002_527Report.pdf (noting problems with the website); UNITED STATES GENERAL ACCOUNTING OFFICE, POLITICAL ORGANIZATIONS: DATA DISCLOSURE AND IRS'S OVERSIGHT OF ORGANIZATIONS SHOULD BE IMPROVED 8-14 (2002) (detailing concerns about difficulties with using the IRS website and flaws with planned IRS efforts to address these concerns). There do not appear to have been any reports since 2002, so the degree to which the IRS has addressed these initial problems is unknown.

[220] TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION, ADDITIONAL ACTIONS ARE NEEDED TO ENSURE SECTION 527 POLITICAL ORGANIZATIONS PUBLICLY DISCLOSE THEIR ACTIVITIES TIMELY AND COMPLETELY 5-6 (2005), *available at* www.treasury.gov/tigta/auditreports/2005reports/200510125fr.pdf (based on a statistically valid sample of the 527 filings and without independently verifying any of the submitted information, concluding that 7 percent of 527s failed to file a timely initial report, 13 percent failed to file one or more required periodic reports, and of those that did file the required period reports 22 percent did not include all of the required information).

[221] I.R.S. News Release IR 2004-110 (Aug. 19, 2004), *available at* http://www.irs.gov/newsroom/article/0,,id=128521,00.html; *see also* Notice 2002-34, 2002-1 C.B. 990 (to promote disclosure by 527s, announcing a voluntary compliance program permitting 527s to file all required forms by July 15, 2002 without penalty).

[222] *See supra* note 191 and accompanying text.

[223] *See* www.guidestar.org (operated by the charity Philanthropic Research, Inc.).

returns has been a long-standing criticism, particularly with respect to information regarding political activity.[224] This criticism is unlikely to be addressed in the near future given the less than one percent audit rate for such returns.[225]

The enforcement of funding and other restrictions presents a somewhat different picture. Supporters and critics differ over whether the FEC engages in effective enforcement of such restrictions.[226] The main barrier cited by critics being the enforcement structure that requires a majority of the politically appointed commissioners to approve each significant step for every enforcement action.[227] Critics have alleged that these flaws have allowed purported PACs to escape their filing obligations, permitted political parties and candidates (as opposed to corporations and individual contributors) to escape the imposition of fines and led to a reduction in new enforcement cases.[228] Statistics on the degree of enforcement or lack thereof are difficult to obtain and interpret; anecdotal evidence indicates

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[224] *See, e.g.*, THE CAMPAIGN FINANCE INSTITUTE, NONPROFIT INTEREST GROUPS' ELECTION ACTIVITIES AND FEDERAL CAMPAIGN FINANCE POLICY 12-13 (2006) (noting that of the non-527 tax-exempt organizations studied, some were failing to report some or all of their political activity in part because of inadequate IRS oversight); Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 381-82 (2004) (noting the apparent paucity of IRS enforcement actions and minimal penalties for tax-exempt organization reporting failures).

[225] *See supra* note 189 and accompanying text.

[226] For the best articulation of the view that the FEC enforcement is, if anything, too aggressive, see Bradley A. Smith & Stephen M. Hoersting, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145 (2002).

[227] *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, 286 (citing "party-line deadlocks" as one barrier to the FEC investigating violations of the law) (1991); John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L. J. 115, 119 (2004) (citing the majority vote requirement as making the FEC "structured to fail"). The FEC also lacks a chief executive position, instead having a rotating "Chairman," whose primary duties are to preside over meetings and testify before Congress, and two staff members, the general counsel and a staff director, who both report directly to commissioners and neither of whom report to the other. *See* 2 U.S.C. §§ 437c (2000); MUTCH, *supra* note 14, at 103.

[228] *See, e.g.*, JACKSON, *supra* note 159, at 1 (asserting that the commissioners often overrule FEC staff recommendations to investigate suspected infractions); PRICEWATERHOUSECOOPERS, *supra* note 209, at 3-6 to 3-7 (citing the consensus of eight interviewed legal practitioners that the enforcement process took a long time to resolve alleged violations and noting that most of them believed that the then current FEC enforcement did not create a strong deterrent effect); SORAUF, *supra* note 217, at 254-57 (noting general agreement, at least in 1988, that the FEC's enforcement efforts were both slow and timid, and attributing these flaws primarily to congressional efforts to keep its enforcement efforts limited); Testimony of Trevor Potter Before the Committee on Rules and Administration, United States Senate (July 14, 2004), 2004 WL 1590048 (F.D.C.H.).

some recent increase in enforcement but how this compares to the actual amount of violations is unclear.[229]

The IRS, in contrast, has relatively detailed statistics about its level of general enforcement of the rules governing tax-exempt organizations as reflected in audit rates. The problem is that audit rates for tax-exempt organizations (and generally) are very low,[230] either indicating a relatively compliant regulated community or a relative lack of enforcement. The most documented area relating to political activity is with respect to the prohibition on charities engaging in political activity, but even there the number of audits were few and most resulted in only an advisory even when the IRS found a violation[231] – again indicating either a generally law-abiding community or a lack of effective enforcement.

There are reasons to suspect that the latter is the larger part of the explanation.[232] The IRS has particular difficulty in enforcing the tax laws

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[229] *E.g.*, Kenneth P. Doyle, *Former MZM Employee Pleads Guilty to Making Illegal Campaign Donations*, 1 BNA WHITE COLLAR CRIME REP. 14 (Aug. 4, 2005), at d15; Press Release, Federal Election Commission, Federal Home Loan Mortgage Corporation ("Freddie Mac") Pays Largest Fine in FEC History (Apr. 18, 2006), http://www.fec.gov/press/press2006/20060418mur.html (reporting that Freddie Mac had agreed to pay a $3.8 million civil penalty to settle allegations it had violated various election laws).

[230] *See supra* note 189.

[231] During the 2004 election year, the IRS initiated either examinations or, in the case of churches and other houses of worship, inquiries of 132 organizations. *See* EXEMPT ORGANIZATIONS, FINAL REPORT: PROJECT 302: POLITICAL ACTIVITIES COMPLIANCE INITIATIVE 5 (2005) ("FINAL REPORT"), http://www.irs.gov/pub/irs-tege/final_paci_report.pdf. This compares to the approximately 250,000 charities that filed annual information returns in the year for 2002 (the latest year for which filing data is available from the IRS); the IRS also estimates there are 500,000 additional charities that are active but are not required to file such returns either because they are houses of worship and church-related organizations or because they have a relatively low level of financial activity. Statistics of Income Division, *supra* note 183, at 1 & n. 1. Of the 82 closed cases, no political activity was found in 18 cases and 56 led to findings of minor or isolated incidences of political activity. Of the remaining eight cases, five led to the filing of corrected or delinquent returns and three to proposed revocation. FINAL REPORT, at 18-19; EXEMPT ORGANIZATIONS, 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI): SUMMARY OF RESULTS 1 (2006), http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf. The organizations involved have appealed four of the closed cases within the IRS, which likely include all three proposed revocations. *See* FINAL REPORT, at 18.

[232] At least one watchdog organization has asserted that the IRS is exaggerating the extent to which charities violate the Code section 501(c)(3) prohibition on political activity, but that organization bases its criticism primarily on the fact that in less than 40 percent of recent investigations of alleged violations has the IRS determined that an actual violation occurred. OMB WATCH, THE IRS POLITICAL ACTIVITIES ENFORCEMENT PROGRAM FOR CHARITIES AND RELIGIOUS ORGANIZATIONS 1, 8-9 (2006), *available at* http://www.ombwatch.org/pdfs/paci_full.pdf. But anecdotal information indicates that at least minor violations may be relatively widespread even if not investigated by the IRS.

when there is a lack of third-party reporting of a taxpayer's activities.[233] With respect to tax-exempt organizations, the IRS rarely challenges the tax-exempt status of a charity because of political activity, and then usually only in the most egregious cases.[234] More questionable cases tend to become bogged down in the enforcement process, with the IRS often sitting on them for years – whether in the hope of wearing down the organization involved or out of shear inertia it is unclear. And the most political sensitive cases tend to be the ones that are the most delayed. For example, the IRS did not rule on the Christian Coalition's application for tax-exempt status under Code section 501(c)(4) for nine years, then litigated the denial of that status for another five years, and recently agreed to grant that status subject to certain conditions.[235] The FEC case against the Christian Coalition, by comparison, was resolved in seven years from the date of the first complaint until a court decision, although in the end a court found only relatively minor violations of election law.[236]

2. Compliance Burden

Individuals and organizations that engage in political activities are already used to being, at least potentially, subject to both election law and tax law and so placing new rules in either body of law should at first glance not result in significant compliance burden differences. But that first glance is deceptive because it ignores the fact that until enactment of the 527 disclosure rules compliance with the tax law for 527s was very simple – a

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See, e.g., John Fritze, *Political Gifts by Churches Break IRS Rules: At Least 115 in Maryland Have Donated Money to Candidates Since 2000*, BALTIMORE SUN, Feb. 26, 2006, at 1A (based on a review of candidate finance reports, concluding that over six years 115 churches in Maryland had made contributions to candidates).

[233] *See* UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, TAX GAP: MAKING SIGNIFICANT PROGRESS IN IMPROVING TAX COMPLIANCE RESTS ON ENHANCING CURRENT IRS TECHNIQUES AND ADOPTING NEW LEGISLATIVE ACTIONS 1-2. 6-7 (2006) (estimating that the IRS will collect $290 billion less that the total amount of taxes owed, even after enforcement efforts are completed, primarily because of underreporting of income; this amount represents approximately 13.7% of all taxes owed).

[234] *See supra* note 231.

[235] *See* Complaint, *Christian Coalition Int'l v. United States*, No. 2:01-cv-377 (Feb. 25, 2000), *reprinted in* 2000 TAX NOTES TODAY 41-49; Gregory L. Colvin, *IRS Gives Christian Coalition a Green Light for New Voter Guides*, 2005 TAX NOTES TODAY 207-29 (2005) (analyzing the successful revised application by the Christian Coalition International for recognition of exemption); Fred Stokeld, *IRS Grants Exempt Status to Christian Coalition International*, 2005 TAX NOTES TODAY 207-6 (2005) (reporting that the IRS granted tax-exempt status to the Christian Coalition International based on its "revised operations").

[236] *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999). Neither side appealed the decision.

single one-page filing requirement, and then only if the 527 had non-contribution income in excess of $100.[237] All of the complex issues for 527s involved the election law and dealing with the FEC. The creation of overlap between election law and tax law through the 527 disclosure rules increased the administrative burdens of 527s by sharply increasing their responsibilities under the tax law and so their potential interactions with the IRS as well as the FEC. It is difficult to measure the extra cost associated with having to deal on a more regular basis with two agencies as opposed to a single one, but it certainly comes with some costs.

This shift to dual authority over may also increase compliance burdens by forcing 527s to deal much more extensively with an agency – the IRS – with which they have not had an opportunity to develop informal norms and informal procedures for interaction. This lack of such informal mechanisms may also decrease the effectiveness of enforcement, as the IRS seeks to learn how to deal more extensively with a new set of organizations.[238]

3. Regulatory Arbitrage Opportunities

Regulatory arbitrage generally exists when an entity can choose under which of two or more regulatory structures it will operate, thereby giving the entity the opportunity to choose the structure with the lowest regulatory burdens.[239] But it can also exist when different types of entities can engage in the same activity but be subject to different regulatory structures.[240] In that situation, the decision is whether the cost, if any, of operating through a particular type of entity justifies the lower regulatory burden achieved.

An example of such regulatory arbitrage can be seen in the concerns that gave rise to the 527 disclosure rules. Congress had apparently assumed that 527s did not need to be subject to any tax law disclosure rules because they were already covered by federal and state election law disclosure rules.[241]

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[237] *See supra* note 83.

[238] *See* Lochner & Cain, *supra* note 204, at 1900-01 (describing how an effective enforcement strategy requires the fostering of long-term relationships with regulatees who are repeat players in order to establish such informal mechanisms).

[239] This concept tends to be used primarily in the context of regulating business transactions. *See, e.g.*, Rob Frieden, *Regulatory Arbitrage Strategies and Tactics in Telecommunications*, 5 N.C. J. L. & TECH. 227 (2004); Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L L. 563 (1998); Frank Partnoy, *Financial Derivaties and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211 (1997).

[240] *See, e.g.*, William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of "Going Private,"* 55 EMORY L.J. 141 (2006) (discussing the increasing regulatory burdens on public companies that therefore encourage businesses to shift to a private company form despite the costs of doing so).

[241] *See supra* note 87.

Political operatives eventually discovered, however, that this assumption was not true: if they were willing to curtail their actions in certain ways in order to avoid activities clearly subject to election law (*i.e.*, campaign contributions and express advocacy) they could create 527s that were not subject to election law disclosure requirements.[242] The activities of these so-called "stealth PACs" were in many ways identical to the activities of PACs and indeed of political party committees and candidates, but by paying the cost of avoiding certain activities they could avoid both election disclosure rules and restrictions.

Do the current and proposed rules relating to 527s create similar opportunities for regulatory arbitrage? They do in one very significant way. By targeting an organization type, instead of an activity type, the existing disclosure rules and the proposed rules for imposing restrictions on 527s only reach 527s. The exact same activities as that conducted by 527s – political activity as broadly defined for tax purposes – can be conducted by other types of organizations, creating an arbitrage opportunity.[243] This choice comes at a significant cost, however, for other types of tax-exempt organizations: a non-527 must engage in, and obtain sufficient funding for, non-political activity at a scale sufficient to make it the organization's primary purpose.[244] There is also the risk of the gift tax applying to large donors, although both the annual exemption (currently $12,000)[245] and the uncertainty of both the gift tax's application and enforcement[246] reduce this risk to some degree. The continued high level of funding for 527s[247] indicates that these costs are generally too high to pay in order to avoid the disclosure rules.[248] This conclusion is necessarily tentative, however, since

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[242] *See supra* note 81.

[243] *See supra* notes 59, 74 and accompanying text. Tax law therefore provides a taxpayer with the ability to choose between a varieties of organizational structures through which to engage in political activity, with Congress not having a strong preference between the choices since all of them lead to the same tax result: use of after-tax dollars to pay for political activity.

[244] *See supra* note 59 and accompanying text.

[245] 26 U.S.C. § 2503(b) (2000 & Supp. III 2003).

[246] *See supra* note 71-72 and accompanying text.

[247] *See supra* note 97 and accompanying text.

[248] *But see* THE CAMPAIGN FINANCE INSTITUTE, *supra* note 224, at17-21 (detailing how certain well-funded and prominent organizations have chosen not to use 527s but to instead direct their political activity that is not subject to election law through other types of tax-exempt organizations). The ability of at least well-advised and well-funded entities to change their tax classification is not new. *See, e.g.*, Karen Gullo (of the Associated Press), *IRS Rules Will Let Donors to "Civic" Groups Stay Secret*, DENVER POST, Oct. 24, 1997, at A32 (reporting that two groups that spent $3 million in 1996 to support or oppose candidates shifted from 501(c)(4) to 527 status in the face of congressional and public scrutiny).

it is unclear to what extent political activity has shifted to non-charitable tax-exempt organizations other than 527s and whether that shift will increase over time.[249]

The benefits from shifting activities from a 527 to another type of non-charitable tax-exempt organization would be significantly increased, however, if the pending proposals to require all 527s to submit to the PAC restrictions on contributions became law. What may currently be a trickle[250] of funds moving from 527s to these other tax-exempt organization could well become a torrent – if for no other reason than the donors who want to contribute large amounts of funds to support political activity will have no where else to go.[251] The vague definition of political activity for tax purposes also reduces the cost of such a shift. While some activities may be unquestionably political activity,[252] others could perhaps be recharacterized as completely nonpartisan. For example, it may be possible for many current 527 activities, such as voter registration drives that are nonpartisan on their face but are political because they are geographically targeted to areas with close races, to be recharacterized as completely nonpartisan by carefully selecting criteria other than the competitiveness of a particular race as the basis for geographic targeting.

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[249] *See* THE CAMPAIGN FINANCE INSTITUTE, *supra* note 224, at 3, 32-33 (2006) (describing how many organizations engaged in political activity create a constellation of entities to pursue such activity, often including 527s and non-charitable tax-exempt organizations, and noting the potential such entities to shift political activities from the former to the latter if faced with additional regulation of 527s); PUBLIC CITIZEN, THE NEW STEALTH PACS: TRACKING 501(C) NON-PROFIT GROUPS ACTIVE IN ELECTIONS (2004) (concluding that non-charitable tax-exempt organizations other than 527s spend at least tens of millions of dollars on political activity each federal election year).

[250] And even the current movement may be more than a trickle. *See* PUBLIC CITIZEN, *supra* note 249 (documenting the tens of millions spent by non-charitable tax-exempt organizations on political activity in each federal election year). The lower level of confirmed and estimated 527 funding in 2006 may also indicate that funds have moved elsewhere, although the fact that these figures are preliminary and 2006 is a non-presidential federal election year make it difficult to be sure that this is the case. *See* Press Release, Campaign Finance Institute, 527 Group Fundraising Grew More Slowly in First Quarter of 2006 than 2004 (May 19, 2006), http://www.cfinst.org/pr/051906.html.

[251] *See* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (describing the hydraulic nature of political money, in that it has to go somewhere and it is part of a broader ecosystem). One response to this concern is that perhaps the re-direction will be in a favored direction, but given the essentially equal independence of both 527s (other than political committees) and other types of tax-exempt organizations it seems unlikely that the likely shift here would be particularly favored. *See* Daniel R. Ortiz, Commentary, *Water, Water Everywhere*, 77 TEX. L. REV. 1739, 1743-44 (1999) (noting this point in the context of a shift from groups controlled by candidates to those that are not, but remaining neutral as to which set of organizations it would be better to direct the funds).

[252] *See, e.g.*, *supra* note 38 (Bill Yellowtail ad).

There is also no tax rule that prevents a taxable organization from engaging in political activity.[253] There is greater uncertainty and therefore greater potential cost for such an organization than even non-527 tax-exempt organizations, as taxable organization would be exposed not only to the gift tax issue but also to whether contributions are taxable income. But there may be one significant advantage to using a taxable entity: it is not clear that an otherwise taxable organization that engages in political activity as its primary activity would be or could be forced under Code section 527.[254] In rejecting a challenge to the new disclosure rules, the Court of Appeals for the Eleventh Circuit stated that an organization could avoid the disclosure rules simply by choosing not claim tax-exempt status under section 527.[255] This leads to a perverse and ironic result: the use of tax categories in order to eliminate "stealth" 527s could lead to the creation of a new category of "stealth" taxable entities. Regulation of such entities through the tax law would be complicated by both the established secrecy of information provided to the IRS by such organizations[256] and the lack of a tax-exempt hook to overcome constitutional concerns.[257]

4. Conclusion

The difference in enforcement results and the potential for regulatory

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[253] For example, Triad Management Services and Triad Management Services, Inc. were both taxable entities that the courts ultimately determined should have been registered as political committees and also violated a host of other election laws. Final Judgment and Order Granting Declaratory and Injunctive Relief, *FEC v. Malenick*, No. 02-CV-01237 (D.D.C. July 26, 2005). Despite the fact that the FEC's legal battles with these entities and their founder, Carolyn Malenick, lasted nine years, there is no indication that at any point did the IRS assert that these entities should have been classified as 527s. *See, e.g.*, John Bresnahan, *After Long Fight, Triad Files FEC Report*, ROLL CALL, Nov. 1, 2005 (detailing the outcome of that battle without any mention of IRS involvement). Whether the IRS will be more likely to make such assertions given the new 527 disclosure rules is unclear.

[254] Such an entity might be required to register as a PAC, thereby losing any advantage its taxable status might gain, but it is far from clear how effective the FEC would be in enforcing such a requirement. *See* Bresnahan, *supra* note 253 (summarizing the nine year legal battle that it took to force Triad Management Services to register and file disclosure reports as a political committee, but noting that the reports failed to disclosure the identities of donors and that the only penalty ultimately imposed was a $50,000 civil fine). The FEC recently sued the Club for Growth Inc. for failure to register as a political committee, but that suit is still pending. *See* Complaint, *FEC v. Club for Growth, Inc.*, No. 05-CV-01851 (Sept. 19, 2005), *available at* http://www.fec.gov/law/litigation/club_for_growth_complaint.pdf.

[255] *Mobile Republican Assembly v. United States*, 353 F.3d 1357, 1361-62 (11th Cir. 2003).

[256] *See supra* note 190.

[257] *See supra* note 141.

arbitrage suggest two conclusions. First, it appears that the FEC is better suited to administer a disclosure regime and that the use of a tax category – Code section 527 – to trigger the application of that regime generates limited regulatory arbitrage opportunities because the cost of disclosure is relatively small compared to the cost of shifting political activities into another type of entity. Second, both the FEC and IRS are not very effective at enforcement of non-disclosure provisions (restrictions on contributions for the FEC, placement in the correct tax category based on political activity for the IRS) but for different reasons – the FEC is subject to an administrative structure that inhibits such enforcement while the IRS lacks sufficient resources to engage in such enforcement, particularly given the tax law's vague definition of political activity. This suggests that a restrictions regime that requires both effective FEC enforcement and effective IRS enforcement to succeed has two significant hurdles to overcome. Its ability to succeed is also complicated by the arbitrage opportunity presented by the fact that tax law permits political activity to be conducted by numerous types of entities, not just 527s, creating opportunities to shift activities to a lower-regulated entity, although there are costs to doing so.

IV. SPECIFIC PROPOSALS

These observations and conclusions suggest certain specific proposals both with respect to current law and recent proposals to change current law. These proposals including shifting responsibility for the 527 disclosure rules to the FEC, not imposing existing political committee contribution restrictions based on the 527 tax classification, and changing the structure of the FEC to reduce its capture and therefore, hopefully, enhance its effectiveness.

A. Shift Responsibility for 527 Disclosure to the FEC

The FEC's three decades of expertise in obtaining accurate disclosure reports for political committee and promptly making those reports easily accessible to the public, its greater visibility and therefore accountability for regulating political activity generally, and its ability to coordinate the political committee and 527 disclosure regimes argue strongly for shifting responsibility for the 527 disclosure regime to the FEC. The FEC's greater enforcement resources, developed in part specifically to address such disclosures, and relatively effective enforcement of the existing political committee disclosure regime also support this shift. The places where the FEC is weakest – the extent of its capture by incumbent politicians and

subsequent ineffective enforcement, particularly with respect to restrictions – are of lesser concern when it comes to disclosure. At the same, it appears that the relatively low cost of disclosure for most political actors is insufficient to justify the cost of attempting to move out of the 527 category, at least based on the still extensive activities of 527s in 2004, even given the opportunities for such shifts created by both the vague tax law definition for political activity and the relatively ineffective IRS enforcement of tax classifications based on political activity.[258]

One criticism of this proposal is that it does not go far enough to fix the problems with the 527 disclosure rules. Those problems include the thresholds for disclosure of contribution and expenditure information being unnecessarily low given that such detailed information is not needed to help enforce restrictions on contributions as those do not (yet, at least) apply to 527s that are not political committees. They are also arguably unnecessarily low because they apply even to 527s that may engage in federal-election related activity only as a small part of their activities or may only engage in activities that are nonpartisan on their face although the intent is to influence the election of one or more candidates.

The first criticism has some merit and in a perfect world the threshold might be significantly higher, as, for example, is the case for contributions for electioneering communications, that have a $1,000 threshold instead of the $200 threshold applicable to 527s. The additional administrative burden from the lower thresholds does not appear to be significant, however.[259] The second point ignores the fact that the public has a relatively strong interest in knowing who is supporting or opposing particular candidates, whether federal, state or local and whether obviously or more subtly.[260]

B. Do Not Impose Contribution Restrictions on 527s

The recent proposals to impose political committee contribution restrictions on 527s (by redefining "political committee" so that it encompasses most 527s) present more significant problems, however. Proponents of this change are right to seek it through legislation – as

[258] The differences in the legislative process between election law and tax law tends to support this conclusion, although they are less important here because the disclosure regime is already in place. The shifting of the disclosure responsibility to the FEC would place it within the more visible election law regime, and under the oversight of members of Congress who may be more expert than the members of the tax-writing committees in balancing the free speech and free association concerns raised by such disclosure and coordinating all of the provisions requiring disclosure and restriction of political activity. *See supra* Part III.A.3.

[259] *See supra* notes 247-248 and accompanying text.

[260] *See supra* note 16.

opposed to regulatory change, although they are pursuing that route as well – to ensure that this sharp limitation on contributions is done only after highly visible consideration of the trade-offs involved.[261] But they are wrong in assuming that this combination of FEC-enforced instructions imposed on entities subject to an IRS-enforced classification can be effective.

The FEC has the expertise, accountability, and ability to coordinate with the existing restrictions on all political committees to implement such restrictions, although here the capture problem and resulting lack of effective enforcement are at their highest level and so would have to be addressed (see the next proposal). The problem is that the restrictions would apply based on a tax classification even though the IRS has limited accountability for ensuring that entities engaged in political activity are in fact are placed in the right tax category, no demonstrated ability to coordinate with the FEC on matters relating to political activities, and enforcement efforts that are hampered by both a vague definition of political activity and limited resources for such enforcement. This problem is aggravated by the fact that exactly the same kind of activity can be conducted in other types of tax entities, specifically other types of non-charitable tax-exempt organizations and taxable entities. Although there is a significant but hard to quantify cost of using a different type of entity – at least in part intentionally so, as Congress wanted to encourage tax-exempt organizations to concentrate their political activities in 527s to lower compliance and enforcement burdens[262] – there are strong reasons to believe the cost would be worth paying for many of the donors who would find themselves with no where else to give their funds to support political activity of their choosing.[263] One ironic effect of such a shift would be the best-funded groups, which presumably would often be the groups with the largest donors, would be most able to bear the costs of the shift and so would gain an advantage over their lesser funded competitors.[264]

One response to this proposal would be to urge instead that the FEC and the IRS work together the oversee 527s, perhaps with the FEC even lending

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[261] Seeking such a change through regulations as opposed to legislation also raises administrative law concerns. Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 42 (2005); Polsky & Charles, *supra* note 8, at 1016-27.

[262] *See supra* note 67 and accompanying text.

[263] *See supra* note 96 (describing the main sources of funds for 527s)

[264] *See, e.g.*, Posting of Brad Smith to http://www.campaignfreedom.org/blog/ (July 24, 2006) (criticizing a recent Campaign Finance Institute report regarding the use of multiple entities with varying tax classifications to pursue a common political agenda, see *supra* note 224, because it focused on the largest such organizations and therefore the ones most able to bear the cost of any additional regulation).

some of its more abundant enforcement resources to support policing the 527 line (again, assuming the capture problem and its effects can be resolved). The problem with such joint administration, however, is that generally it does not work.[265] There are no compelling reasons to believe there would be greater success here. Joint administration might even undermine the strengths that each agency brings to the table. The otherwise politically insulated decisions by the IRS would become subject to politically influenced FEC input; the FEC's accountability would be reduced because it could blame the IRS, with its much larger range of responsibilities and priorities, for any delays in producing guidance or engaging in enforcement.

C. Restructure the FEC to Reduce Capture

Even if Congress makes no further changes in law with respect to 527s, there is still the problem of the FEC's apparent capture by incumbent politicians and resulting ineffective enforcement, particularly for contribution restrictions. Here, however, the IRS can provide some help not as a co-enforcer but as a model. To protect the misuse of the tax laws for political purposes Congress and the IRS have taken several steps, including limiting the number of political appointees in the IRS to one person (or two, counting the Chief Counsel), granting final decision authority to that single appointee (the Chief Counsel serves in an advisory capacity), and intentionally shielding that one appointee from involvement in particular enforcement actions.[266]

Existing proposals to change the FEC's structure to combat capture incorporate a number of these elements plus several others.[267] Common proposals include creating a strong Chair with authority to make some of the decisions now assigned to the full commission,[268] reducing the

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[265] *See supra* note 122 and accompanying text.

[266] *See supra* notes 176-177, 196-197. When it comes to guidance the Assistant Secretary for Tax Policy, a political appointee, is also involved, although much of the work is done by professionals in the Assistant Secretary's office.

[267] *See* Federal Election Administration Act of 2006, H.R. 5676, 109th Cong. (2006) ("FEA Act"); BRUCE ACKERMAN & IAN AYRES, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 10, 128-39 (2002).

[268] FEA Act, *supra* note 267, § 101 (*inter alia*, amending FECA § 361 to grant the Chair of the new Federal Election Administration new powers); JACKSON, *supra* note 159, at 63-64; John McCain, *Reclaiming Our Democracy: The Way Forward*, 3 ELECTION L.J. 115, 119-20 (2004); *see also* PROJECT FEC, NO BARK, NO BITE, NO POINT: THE CASE FOR CLOSING THE FEDERAL ELECTION COMMISSION AND ESTABLISHING A NEW SYSTEM FOR ENFORCING THE NATION'S CAMPAIGN FINANCE LAWS 2 (2002) (proposing the creation of new election-law agency with a single administrator); Verkuil, *supra* note 122, at 275-78 (arguing that independent agencies would, in general, improve their effectiveness by

threshold vote required for at least the initial determination that the FEC should begin an investigation from four to three votes,[269] and changing to an odd number of commissioners to prevent deadlocks (although it is unclear how partisan balance could be maintained with such a change).[270] It is true that some commentators have argued any such changes will at best produce marginal changes and at worst actually create less effective enforcement, and so a better solution is to remove the restrictions in their entirety while emphasizing disclosure.[271] But assuming, as this Article does, some level of restrictions as well as disclosure requirements, even changes that will result in potentially marginal improvements should be considered.[272]

CONCLUSION

Election law and tax law are different; the FEC and the IRS are different. These facts are obvious but they have to date played little if any role in discussions regarding 527s and the imposition on these tax-created entities of what have historically been election-law rules. This Article has attempted to explore those differences and through doing so provide a reasoned basis for choosing which body of law and which agency is best suited for considering and pursuing regulation of political activity. The result of this approach has led to some proposals regarding the direction that future change in this area should take.

This approach has also required the development of a new framework for making this choice when considering a regulatory, as opposed to economic, policy goal. The insights of this framework therefore not only have ramifications for the important but relatively narrow question of how to choose the best substantive body of law to use for regulating political activity but also ramifications for any attempt to use the tax law, as opposed to another substantive body of law, to regulate a set of activities. One area where this framework may have immediate application is the increasing use of the tax law to not only determine the tax status of nonprofit organizations and of contributions to them, but to require such organizations to disclosure their finances and activities and to place pressure on such organizations to

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having a single administrator but who, in deference to congressional concerns, could be removed for cause by Congress).

[269] Thomas & Bowman, *supra* note 210, at 592-93.

[270] FEA Act, *supra* note 267, § 101 (*inter alia*, amending FECA § 352 to create a new Federal Election Administration with three members); JACKSON, *supra* note 159, at 64-65; McCain, *supra* note 268, at 119; Potter & Shor, *supra* note 204, at 334.

[271] Lochner & Cain, *supra* note 204, at 1935-36.

[272] It is beyond the scope of this Article to shift through the various FEC reform/replacement proposals and develop the optimal list of changes.

adopt certain good governance processes and procedures.[273] Another possible application is the proposed use of the tax law to increase the financial transparency of public corporations by requiring them to disclosure their federal tax returns.[274] Other applications may also exist, including making choices that do not involve tax law. Such applications are beyond the scope of this modest Article, but hopefully this Article has advanced the ability to analyze and make such choices.

[273] *See, e.g.*, PANEL ON THE NONPROFIT SECTOR, STRENGTHENING TRANSPARENCY GOVERNANCE ACCOUNTABILITY OF CHARITABLE ORGANIZATIONS (2005) (making various proposals along these lines); STAFF OF S. COMM. ON FINANCE, 108TH CONG., TAX EXEMPT GOVERNANCE PROPOSALS (Staff Discussion Draft 2004) (same).

[274] *See, e.g.*, *A Tune-Up on Corporate Tax Issues: What's Going On Under the Hood,* 109th Cong. (2006), (statement of Charles Grassley, Chairman, including that one witness would propose requiring making public Schedule M-3, detailing differences between figures recorded for accounting purposes and those reported for tax purposes, for at least some corporations).