COMMENTS

WE DO NOT APPROVE THIS MESSAGE: USING CAMPAIGN ADVERTISING TO EXPOSE STEALTH POLITICAL COMMITTEES

I. THE FETID WATERS AROUND FEDERAL ELECTIONS

> Advertising!
>
> Now we're talking! Hectic campaign pace got you down? Your opponent seems to be right on too many issues? Buy some advertising time! It is the elixir to cure any ailing campaign. Whether a candidate is introducing himself, re-introducing himself, explaining himself, defending himself, reinventing himself, or simply destroying his opponent, TV is the medium of choice. And here's the best part . . . there are no rules. Political advertising cannot be held to the same high truth standards of, say, a beer commercial. Try it. Refer to your opponent as Hitleresque! You've got nothing to lose but any chance of ever going to heaven![1]

Television advertising is indeed the elixir of choice for flailing campaigns in this country. If used correctly, broadcast media can turn an election around. Throughout the late summer and fall of 2004, President George W. Bush trailed Senator John Kerry in the presidential race. One CNN/USA Today/Gallup poll showed a steady increase in Senator Kerry's poll numbers throughout September, reaching a high-water mark of forty-nine percent on October 9, while President Bush's poll numbers declined over the same period from fifty-four percent to forty-eight percent.[2] Then "Progress for America Voter Fund," a political nonprofit group (also called a "527 group" because it is organized under section 527 of the Internal Revenue Service tax code) dedicated to defeating Senator John Kerry, began running ads in several key "battleground" states.[3] All told, in the three weeks prior to the 2004 election, 527 groups that supported President Bush spent $30 million dollars on campaign advertising, triple the

1. JON STEWART ET AL., AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY INACTION 115-16 (Jon Stewart et al. eds., 2004).

2. CNN.com, America Votes 2004: The Poll Tracker, CNN/USA Today/Gallup Poll: Likely Voters, http://www.cnn.com/ELECTION/2004/special/polls/index.html (last visited Dec. 1, 2008).

3. Alex Knott et al., *GOP 527s Outspend Dems in Late Ad Blitz: Progress for America and Swift Boats Dominated Airwaves in Swing States*, CENTER PUB. INTEGRITY, Nov. 3, 2004, http://www.publicintegrity.org/527/report.aspx?aid=421.

amount spent by 527 groups that supported Senator John Kerry.[4] Thus, President Bush overcame his poll deficit and won reelection due in large part to the efforts of two relatively unknown political nonprofit entities that sprang from the ether and have since disappeared again.[5]

What are these 527 groups and where do their millions of dollars come from? These 527 groups had been in existence prior to the 2004 election, but recent changes in campaign finance law dramatically increased their importance.[6] Their role increased because, in 2002, Congress passed the Bipartisan Campaign Reform Act ("BCRA").[7] Prior to BCRA, campaign finance law prohibited wealthy individuals from donating to individual candidates.[8] In the wake of such restrictions, wealthy donors could still contribute their money to local or state party affiliates to aid the federal candidates they supported. BCRA outlawed such circumvention tactics,[9] and wealthy donors redirected their funds to ostensibly independent political nonprofit groups that were free from candidate or party control.[10] Armed with hundreds of millions of dollars, these ostensibly independent organizations engaged in the most expensive, effective, and easily administered type of campaign expenditure: television advertising.[11]

Under current campaign finance law, independent entities may not produce ads that expressly advocate the election of a federal candidate. If they did so, the money they expended would be considered a contribution to the candidate's campaign.[12] Thus, 527 groups must produce "issue ads" in order to avoid this outcome.[13] Unfortunately, these sham issue ads are often overt candidate campaign ads that carefully avoid using express advocacy terms such as "vote for" or "vote against" particular candidates but are unmistakable candidate campaign ads.[14] For example, one of the sponsors of BCRA, Senator John

4. *Id.*

5. Stephen R. Weissman & Ruth Hassan, *BCRA and the 527* Groups, *in* THE ELECTION AFTER REFORM: MONEY, POLITICS, AND THE BIPARTISAN CAMPAIGN REFORM ACT 79, 107 tbl.5.6 (Michael J. Malbin & Campaign Fin. Inst. eds., 2006).

6. *Id.* at 92 tbl.5.1.

7. Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C.).

8. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263 (codified as amended at 18 U.S.C. § 608 (2006)).

9. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 213, 116 Stat. at 94 (codified at 2 U.S.C. 441a(d))

10. Weissman & Hassan, *supra* note 5, at 92 tbl.5.1.

11. *See* CTR. FOR PUB. INTEGRITY, 527S IN 2004 SHATTER PREVIOUS RECORDS FOR POLITICAL FUNDRAISING (2004), http://www.publicintegrity.org/527/report.aspx?aid=435 [hereinafter CPI STUDY] (setting out most popular categories of spending in 2004 election cycle in table labeled "Fiscal Priorities").

12. *See* 2 U.S.C. § 431(8) (2006) (defining contribution to include "anything of value made by any person for the purpose of influencing any election for Federal office").

13. *See* Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 246 (2004) (noting Supreme Court's finding that issue ads fall outside "regulatory regime" of BCRA).

14. *See, e.g.*, *id.* at 246-48 (describing evolution of sham issue advertising).

McCain, was himself a "victim" of a sham issue ad. During the 2000 Republican primary, an organization called "Republicans for Clean Air" ran the following "issue ad" in the days leading up to the Ohio primary election:

> "Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush's clean air laws will reduce air pollution more than a quarter million tons a year. That's like taking [five] million cars off the road. Governor Bush, leading so each day dawns brighter."[15]

By avoiding terms that expressly urge voters to cast their votes for George Bush, the preceding ad was not a Bush campaign ad.[16] Months later, it surfaced that "Republicans for Clean Air" was actually only two billionaire Texas oilmen, brothers Charles and Sam Wyly, longtime friends and campaign contributors of then Texas Governor George W. Bush.[17]

In the wake of the BCRA's restrictions on large donations to political parties, large numbers of wealthy donors have outsourced the production of sham issue ads to ostensibly independent political nonprofit groups.[18] Such groups are not necessarily considered "political committees" for purposes of campaign finance law.[19] If they were, they would be subject to the same contribution limits as other political committees, such as the Republican and Democratic National Parties.[20] In order for federal regulators to treat such groups as "political committees," they must either register as a "political committee" with the Federal Election Commission ("FEC") or the FEC must make that determination by evaluating the group's activities,[21] a practice the FEC has historically avoided.[22]

This Comment proposes a per se rule that will classify any entity that produces campaign advertising as a "political committee" and subject the entity to campaign finance law. Part II.A will briefly survey the recent history of campaign finance law from the late 1970s until BCRA's passage in 2002. Part II.B will describe BCRA's new restrictions and wealthy donors' use of 527 groups to circumvent them. Part II.C will survey existing proposals for reform.

15. *Id.* at 247 (quoting CRAIG HOLMAN & LUKE MCLOUGHLIN, BUYING TIME 2000: TELEVISION ADVERTISING IN THE 2000 FEDERAL ELECTIONS 25 (2001)).

16. *Id.*

17. *Id.* at 247-48.

18. *See* CPI STUDY, *supra* note 11 (reporting top donors to 527s, and showing that greatest spending by 527s was broadcast advertising).

19. *See* 2 U.S.C. § 431(4) (2006) (defining "political committee").

20. *See* Holman, *supra* note 13, at 246-48 (describing gaps in campaign finance laws exploited by political nonprofit groups).

21. *See* Shays v. FEC, 424 F. Supp. 2d 100, 105-06 (D.D.C. 2006) (describing FEC's failure to codify Supreme Court definition of "political committee" and its adoption of case-by-case approach).

22. *See id.* at 115 (characterizing FEC's case-by-case approach to determining whether 527 group is "political committee" as "total failure," and expressing concern at FEC's "lack of explanation for its conclusion that adjudicating is preferable to rulemaking for regulating 527 groups").

Part III will propose new legislation that will close the "527 loophole" that wealthy contributors have exploited since BCRA's passage.

II. DEFENDING THE SYSTEM FROM CORRUPTION AND THE APPEARANCE OF CORRUPTION

A. Campaign Finance Law Under FECA: 1972–2002

A brief survey of campaign finance law over the last thirty years reveals a cat-and-mouse game between wealthy contributors and congressional reforms. In 1972, in an effort to stem corruption, Congress passed sweeping limits on how much money federal election campaigns could receive or spend.[23] The limits were challenged in Court, and, in 1976, the Supreme Court upheld Congress's limitations on the amount of money individual entities could contribute to candidates and national parties.[24]

In response, wealthy donors and national parties redistributed funds to state-level party committees and political nonprofit groups.[25] This transferred money became known as "soft money" because it was free from dollar limits and regulators' scrutiny.[26] In contrast, "hard money" was subject to federal campaign finance regulations.[27] State parties were permitted to use soft money for mixed-purpose activities, such as administrative costs and get-out-the-vote drives.[28] Political nonprofits often spent their soft money on "sham issue advocacy."[29]

Sham issue advertising is a practice of producing ads that ostensibly advocate on a particular issue but are obviously candidate campaign ads.[30] Because political nonprofit groups were free from campaign finance regulation, they allowed donors to contribute large sums of money to produce expensive television advertising, thus heavily subsidizing candidate campaigns.[31] Together, the soft-money loophole and sham issue advertising had successfully

23. *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431-441 (2006)) (implementing caps on money allowed for contributions and expenditures of campaigns); McConnell v. FEC, 540 U.S. 93, 116-19 (2003) (describing congressional attempts to address "'political potentialities of wealth' and their 'untoward consequences for the democratic process,'" including 1972 legislation (quoting United States v. Auto. Workers, 352 U.S. 567, 577-78 (1957))).

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

25. *McConnell*, 540 U.S. at 122-23.

26. *Id.*

27. *Id.*

28. *Id.* at 123 n.7.

29. *Id.* at 128-29, 132 (noting that, because they were unregulated, soft-money donations were attractive means for "candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money").

30. *See* Holman, *supra* note 13, at 247-48 (describing difference between sham issue advertising and true candidate advertising).

31. *See McConnell*, 540 U.S. at 128-29 (explaining practice of candidates and parties soliciting donor contributions to so-called political nonprofit groups for issue ads).

circumvented Congress's effort to stem the tide of political corruption.[32]

1. The Basic Framework: The Compelling Interest of Fighting Corruption

Congress decided to regulate federal campaign contributions formally in 1971 with the passage of the Federal Election Campaign Act ("FECA") and the creation of the FEC.[33] FECA placed limits on the amounts of money that individuals, corporations, and other entities could contribute to federal election candidates and national parties.[34] The law was challenged in 1976 in *Buckley v. Valeo*.[35]

FECA imposed dollar limits on campaign contributions and expenditures. Generally speaking, FECA defines a contribution as a "gift" and expenditure as a "purchase."[36] The Court was careful to authorize regulations of campaign contributions only, not expenditures.[37] The majority distinguished between expenditures and contributions: Congress cannot limit campaign expenditures because doing so would exclude political discourse from the most effective means of mass communication advocacy.[38] Congress could, however, limit contributions because contributions are a general gesture of support and not an articulation of the underlying basis of support.[39] Thus, the Court struck down FECA's expenditure-limiting provisions as unconstitutional, because expenditures were deemed to carry special protections as free political speech.[40] Contributions to campaigns could be regulated, however, because contributions only become political speech when they are spent (or *expended*) by someone else.[41] Finally, contributions could be regulated only if they influenced federal elections.[42] State and local political activity fell outside FECA's regulatory reach.[43]

In upholding many of FECA's regulations, the *Buckley* Court reasoned that Congress had strong interests in preventing corruption and the appearance of corruption in federal politics.[44] Corruption, in this context, means quid pro quo

32. *Id.* at 129.

33. 2 U.S.C. § 437c (2006) (creating FEC to regulate federal campaign funding).

34. 2 U.S.C. § 441a(a)(1) (limiting individual contributions to federal candidates to $2000).

35. 424 U.S. 1, 35 (1976) (holding FECA limits on contributions constitutional).

36. 2 U.S.C. § 431(8)-(9).

37. *Buckley*, 424 U.S. at 20-21.

38. *See id.* at 20 (noting expenditure limits on candidates would impermissibly constrain candidates).

39. *Id.* at 21.

40. *Id.* at 19-20, 39.

41. *Id.* at 21.

42. 2 U.S.C. § 431(8)(A)(i) (2006) (defining "contribution" as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for *Federal* office" (emphasis added)).

43. McConnell v. FEC, 540 U.S. 93, 122 (2003) (finding that FECA's requirements and prohibitions do not affect donations made solely for purpose of influencing state or local elections).

44. *Buckley*, 424 U.S. at 28-29.

access and favors exchanged between elected officials and wealthy donors.[45] Even the appearance of such corruption undermines the credibility of the government.[46] In the face of these compelling government interests, the Court justified FECA's limitations on contributions and independent expenditures of express advocacy.[47]

Buckley and its progeny subject campaign contribution limits to less rigorous scrutiny than the strict scrutiny that is generally used to analyze freedom of speech regulations.[48] According to the Court in *McConnell v. FEC*,[49] "a contribution limit involving even 'significant interference' with associational rights is nevertheless valid if it satisfies the 'lesser demand' of being 'closely drawn' to match a 'sufficiently important interest.'"[50] The Court reasoned that the lower standard of review "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[51]

2. Soft Money and Issue Advertising

FECA's limits on contributions to federal candidates and national parties, also known as "hard money" or "federal money,"[52] led wealthy donors to redirect contributions to nonfederal entities such as state and local political parties.[53] Such funds became known as "soft money."[54] The FEC has developed permissive guidelines for state and local soft-money expenditures that benefit federal candidates.[55] Specifically, soft money can be used to subsidize "mixed use" expenditures that benefit both state and federal candidates.[56] For example, state parties can defray administrative costs for local campaign headquarters,[57] sponsor "get out the vote" activities in neighborhoods favoring certain state and federal candidates,[58] and, most importantly, can pay for "issue advocacy" advertising, even if such advertising mentioned federal candidates by name.[59]

45. *Id.* at 26-27.

46. *See id.* at 26 (stating that FECA's primary purpose is to "limit the actuality and appearance of corruption resulting from large individual financial contributions").

47. *Id.* at 28-29.

48. *McConnell*, 540 U.S. at 136 n.39.

49. 540 U.S. 93 (2003).

50. *McConnell*, 540 U.S. at 136 (citing FEC v. Beaumont, 539 U.S. 146, 162 (2003)).

51. *Id.* at 137.

52. *Id.* at 122-23 (defining "hard" and "soft" money) (internal quotation marks omitted).

53. *Id.* at 123.

54. *Id.* at 123.

55. *McConnell*, 540 U.S. at 123 n.7.

56. *Id.*

57. *See* 11 C.F.R. § 106.5(b)(2) (2007) (allowing forty to forty-five percent of mixed-purpose administrative costs to be paid with soft money).

58. *McConnell*, 540 U.S. at 123.

59. *Id.* at 123-24 & n.7 (citing FEC Advisory Op. 1995-25 (1995)).

In *Buckley*, the Court held that FECA only regulated funds for ads that used "express terms" to promote federal candidates to office.[60] Absent express terms such as "vote for" or "vote against" Candidate X, the advertisement was deemed an "issue advertisement" even if it named Candidate X, endorsed or criticized the candidate's positions, and urged citizen action.[61] Thus, beginning in the late 1990s, the nation's airwaves saw an explosion of "sham" issue advertisements that urged voters to call Candidate X and express their outrage over X's behavior, while avoiding explicitly urging them to vote against X.[62] The *Buckley* Court immunized such ads from FECA's regulations, thus effectively promoting their production.[63]

A 1998 Senate report described the troubling practice of wealthy donors gaining access to elected officials by donating large amounts of soft money for issue advertising.[64] Many ads were especially problematic because they were controlled by and coordinated with a federal candidate's campaign, thus allowing wealthy donors to circumvent the FECA restrictions on express advocacy.[65] According to one senator, "'the twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws, leaving us with little more than a pile of legal rubble.'"[66]

B. Congress Responds: The Bipartisan Campaign Reform Act of 2002

1. BCRA: Closing the Soft-Money Loopholes

Congress responded to the situation with the BCRA.[67] BCRA amended several key FECA provisions that regulated soft-money and campaign contributions. BCRA Title I seeks to close the soft-money loophole in federal politics by prohibiting national parties from soliciting, receiving, spending, or directing any soft money.[68] BCRA Title II regulates third parties' campaign activities, most notably the production of campaign advertising.[69] A year after its

60. Buckley v. Valeo, 424 U.S. 1, 44 (1976).

61. *See McConnell*, 540 U.S. at 126-27 (discussing "magic words" that turned issue ads into express advocacy under *Buckley* (internal quotation marks omitted)).

62. *Id.* at 127 n.20.

63. *See id.* at 127-28 (discussing how *Buckley* decision led corporations and unions to spend hundreds of millions of dollars on "issue ads" because such ads were not governed by FECA).

64. COMM. ON GOV'T AFFAIRS, INVESTIGATION OF ILLEGAL OR IMPROPER ACTIVITIES IN CONNECTION WITH 1996 FEDERAL ELECTION CAMPAIGNS, S. REP. NO. 105-167, vol. 4, at 4563-64 (1998) (citing Democrats' Minority Report, which criticized big contributors' greater access to candidates and observed that "[t]he biggest . . . loophole[] involv[es] so-called issue advocacy").

65. *McConnell*, 540 U.S. at 131.

66. *Id.* at 129-30 (quoting S. REP. NO. 105-167, vol. 3, at 4535 (providing additional views of Senator Collins)).

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

68. Bipartisan Campaign Reform Act § 323(a); *McConnell*, 540 U.S. at 133.

69. Bipartisan Campaign Reform Act § 201; *McConnell*, 540 U.S. at 189. See *infra* Part II.B.3 for a discussion of BCRA Title II regulations of "coordinated expenditures" and "electioneering

passage, the Supreme Court substantially upheld BCRA in *McConnell v. FEC*.[70] Like the Court in *Buckley*, the *McConnell* Court held that the national interest in preventing corruption and appearance of corruption warranted "limited burdens" on First Amendment rights, and therefore BCRA's restrictions on campaign contributions, third-party coordinated expenditures, and campaign advertising were constitutionally valid.[71]

The *McConnell* Court considered Title I of BCRA's attempt to shut down the soft-money loophole.[72] Title I expanded FECA's contribution restrictions beyond candidates and national parties to the entities they control. Now, under BCRA, any funds contributed to an entity that is directly or indirectly established, financed, maintained, or controlled by a national committee is treated as a contribution to that national committee.[73] Further, any funds expended by any entities or individuals for "Federal election activity" will be subject to BCRA's limitations, prohibitions, and reporting requirements.[74] Thus, wealthy donors can no longer circumvent FECA's limits on contributions to national parties by redirecting their funds to state party offices.[75] Finally, party committees and their agents may not solicit donations for tax-exempt political advocacy groups, as they could under FECA.[76] It should be noted however, that BCRA contains an exception: party officials or agents may solicit funds for nonprofit groups organized under § 501(c) of the IRS code, provided the organization is not primarily organized for "get-out-the-vote activity" or "generic campaign activity" and the party official or agent does not explicitly specify how the funds should or will be spent.[77] Even in those situations, the official or agent can solicit only if individuals make the donations and the amounts solicited are limited to $20,000 per calendar year.[78]

Wealthy donors were left with few options. Under BCRA, they were forced to donate outside of the party apparatus and make large contributions to ostensibly independent entities that remained outside candidate and party

communications."

70. 540 U.S. 93 (2003).

71. 540 U.S. at 136.

72. *Id.* at 133 (describing BCRA Title I as "Congress' effort to plug the soft-money loophole").

73. BCRA asserts its authority over a "national committee" as follows:

> A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act.

2 U.S.C. § 441i(a)(1) (2006). BCRA extends the applicability of the above provision to include: "such national committee, any officer or agent acting on behalf of such a national committee, and any entity that is directly or indirectly established, financed, maintained, or controlled by such a national committee." *Id.* § 441i(a)(2).

74. *Id.* § 441i(b).

75. *See id.* (requiring application of regulations to funds expended or disbursed for federal election by state or local groups).

76. *See id.* § 441i(d) (prohibiting solicitation of funds for tax-exempt organizations).

77. 2 U.S.C. §§ 431(20)(A)(ii), 441i(e)(4)(A).

78. *Id.* § 441i(e)(4)(B).

control. Thus, in the wake of BCRA, individual donations to "independent" political nonprofit organizations ballooned by nearly 600% by 2004.[79] Political nonprofits have become an extremely important factor in federal electoral politics.

2. Rise of the Nonprofits

Political nonprofits live in a gap between BCRA and IRS regulations. Section 527 of the tax code grants tax-exempt status to nonprofit "political organizations" the specific purpose of which is to influence elections.[80] Yet, FECA regulations define a "political committee" as "any committee, club, association, or other group of persons" that receives contributions or makes expenditures totaling more than $1000 per calendar year.[81] The Supreme Court in *Buckley*, worried that such a definition could encompass purely issue-based groups, narrowed the term's scope to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[82] The *Buckley* test became known as the "'major purpose'" test.[83] The Court elaborated on the "major purpose" test a decade later in *FEC v. Massachusetts Citizens for Life, Inc.*[84] The Court stated that "should [a group's] independent spending become so extensive that the organization's *major purpose* may be regarded as campaign activity, the [group] would be classified as a political committee."[85] Such groups would consequently be subject to federal campaign finance law.[86]

In the thirty years since *Buckley*, the FEC has never codified the "major purpose" test. In 2004, the FEC considered incorporating the "major purpose"

79. *See* Weissman & Hassan, *supra* note 5, at 92 tbl.5.1 (contrasting 2000 campaign cycle donations of $37,068,053 with 2004 campaign cycle donations of $256,264,342).

80. A "527 group" is an entity organized under section 527 of the tax code, which reads in relevant part:

> (e) Other definitions.—For purposes of this section—
>
> (1) Political organization.—The term "political organization" means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.
>
> (2) Exempt function.—The term "exempt function" means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office 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. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under [I.R.C. § 162(a) (2006)].

26 U.S.C. § 527(e)(1)-(2) (2006).

81. 2 U.S.C. § 431(4).

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

83. FEC v. Akins, 524 U.S. 11, 26-29 (1998) (quoting *Buckley*, 424 U.S. at 79).

84. 479 U.S. 238 (1986).

85. *Mass. Citizens*, 479 U.S. at 262 (emphasis added).

86. *See* 26 U.S.C. § 527(e)(1) (defining 527 groups).

test.[87] Ultimately, the agency decided to continue application of the test on a case-by-case basis.[88] Congress did not explicitly include the test in BCRA,[89] but, in the wake of BCRA's explicit prohibition on soft-money contributions to political parties, wealthy donors have redirected hundreds of millions of dollars in soft-money donations to 527 groups, perhaps in light of the "major purpose" test's historical impotence.[90]

Empirical data proves that wealthy donors have shifted their massive contributions to 527 groups. Between the 2002 and 2004 elections, individual donations to 527 groups skyrocketed from approximately $37 million to approximately $256 million, an increase of nearly 600%.[91] Yet nearly all the increases came in large denominations.[92] Donations of $2 million dollars or more increased from zero in 2002 to twenty-four in 2004; donations between $1 million and $2 million increased from two in 2002 to twenty-eight in 2004; donations of $100,000 or more increased over 300%, from sixty-six in 2002 to 265 in 2004.[93] Meanwhile, relatively smaller donations between $5000 and $100,000 increased a mere thirty-eight percent from 1165 to 1617.[94]

Very large donations now account for a much larger percentage of the total number of donations. In 2002, individual donations to 527 groups of less than $100,000 accounted for roughly fifty percent of the total number of donations; by 2004, that number had shrunk to twelve percent.[95] In contrast, donations of $1 million or more accounted for six percent of the total number in 2002 and seventy percent in 2004.[96]

By the 2004 campaign cycle, 527 groups, armed with millions of dollars in soft-money donations, undertook a variety of activities that had previously been paid for by the political parties. Such groups organized get-out-the-vote drives, direct-mail advertising, political polling, and a host of other electioneering and administrative activities.[97] Nevertheless, both Democrat and Republican 527

87. *See* Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,743-45(III)(A) (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114) (proposing to incorporate version of "major purpose" test into FEC regulations for first time in notice of proposed rulemaking).

88. Shays v. FEC, 424 F. Supp. 2d 100, 112 (D.D.C. 2006). The *Shays* court described the FEC's case-by-case approach, which plaintiffs described as a de facto policy of nonregulation, as a "total failure." *Id.* at 115.

89. The definition of "political committee" remained unchanged after BCRA amended FECA: "[A]ny committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4)(A).

90. *See* Weissman & Hassan, *supra* note 5, at 92 tbl.5.1 (showing increase in donations to 527 groups in 2004 election cycle, particularly for donations over $100,000).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. Weissman & Hassan, *supra* note 5, at 92 tbl.5.1.

96. *Id.*

97. CPI STUDY, *supra* note 11.

groups spent the largest percentage of their total campaign expenditures on broadcast advertising, a far greater percentage than they spent for any other single activity.[98] Democrat-oriented 527 groups spent twenty-eight percent ($80,695,731) of their total expenditures on broadcast advertising, and Republican-oriented 527 groups spent sixty-five percent ($61,798,352) of their total expenditures on broadcast advertising.[99] It is clear that wealthy donors have used 527 groups to circumvent FECA contribution limits and have spent millions of dollars campaigning for their favorite federal candidates.[100]

3. Independent Activity: Scope, Limits, and Failures of Regulation

While BCRA Title I focuses on the conduct of national party officials and agents, Title II addresses ostensibly independent activities that directly benefit federal candidates, including the production of campaign advertising.[101] To that end, BCRA introduces a new concept— "electioneering communications"—to capture candidate campaign ads masquerading as issue advertisements.[102] Electioneering communications include "any broadcast, cable, or satellite communication" that (1) "refers to a clearly identified candidate for Federal office," (2) is made within sixty days of a general election or thirty days of a primary, and (3) "is targeted to the relevant electorate."[103] Entities that spend more than $10,000 per year in electioneering communications are now required to, among other things, disclose the names of donors who have contributed more than $1000.[104] Corporation and union general funds may not be used for electioneering communications.[105]

The Court in *McConnell* upheld the constitutional validity of these new disclosure and expenditure regulations.[106] The plaintiffs argued that *Buckley* had limited FECA's reach to communications of "express advocacy" and prohibited federal regulation of "issue advocacy."[107] The *McConnell* Court disagreed, saying that the "express advocacy" distinction did not reflect a First Amendment boundary between express advocacy and issue advocacy.[108] Noting that the "express advocacy" distinction in *Buckley* was merely statutory interpretation of a vague and potentially overbroad provision, the *McConnell* Court held that

98. *See id.* (listing top ten categories of spending by 527s in 2004 election cycle).

99. *Id.*

100. *See* Press Release, Ctr. for the Study of Elections and Democracy, Brigham Young Univ., 527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return: Swift Boat Veterans 527 Played Historic Role (Dec. 16, 2004), *available at* http://projects.publicintegrity.org/docs/527/pdf2.pdf (describing substantial impact of "a few individuals willing to part with millions of dollars," particularly in waging "air wars" across broadcast media).

101. 2 U.S.C. § 434 (2006).

102. *Id.* § 434(f)(3)(A)(i).

103. *Id.*

104. *Id.* § 434(f)(1)-(2).

105. *Id.* § 441b(b).

106. McConnell v. FEC, 540 U.S. 93, 223 (2003).

107. *Id.* at 190.

108. *Id.* at 192-93.

Congress may regulate campaign communications of any sort if the regulations are clear and not overbroad.[109]

The Court further held that Congress has the power to regulate advertising that is "clearly intended to influence the election."[110] The *Buckley* Court's "express advocacy" test had become "functionally meaningless," because it failed to articulate a meaningful distinction between sham issue ads and true issue ads.[111] Congress may regulate electioneering communications because the *Buckley* Court's First Amendment analysis ratified congressional authority to combat real and apparent corruption.[112]

BCRA draws a distinction between electioneering communications that are coordinated with federal candidates and those that are independently produced. If the electioneering communication was produced independent of the candidate, then the entity that produced it is required to disclose its funding sources and may not accept contributions from union or corporate general treasury funds.[113] If the production of the electioneering communication was coordinated with a federal candidate's campaign, then the expenditure is treated as a contribution to the candidate's campaign.[114]

Congress directed the FEC to define "coordinated communications" between parties and independent producers.[115] According to Congress, the new regulations should not require formal agreement or collaboration between the parties and should address indirect connections such as the use of common vendors.[116]

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109. *Id.* at 191-94.

110. *Id.* at 193-94.

111. *McConnell*, 540 U.S. at 193. The Court described a "striking" example of one such sham issue ad, sponsored by "Citizens for Reform" and run during the 1996 Montana congressional race. It stated:

> Who is Bill Yellowtail? He preaches family values but took a swing at his wife. And Yellowtail's response? He only slapped her. But her nose was not broken. He talks law and order . . . but is himself a convicted felon. And though he talks about protecting children, Yellowtail failed to make his own child support payments—then voted against child support enforcement. Call Bill Yellowtail. Tell him to support family values.

Id. at 193-94 n.78 (internal quotation marks omitted). The Court stated, "[t]he notion that this advertisement was designed purely to discuss the issue of family values strains credulity." *Id.*

112. *Id.* at 193-94.

113. 2 U.S.C. § 441b(b).

114. *Id.* § 441a(a)(7)(C).

115. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (codified as amended at 2 U.S.C. § 441a(d)(4)(A) (2006)).

116. BCRA states, in relevant part:

> The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address—
>
> (1) payments for the republication of campaign materials;
>
> (2) payments for the use of a common vendor;
>
> (3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and
>
> (4) payments for communications made by a person after substantial discussion about the

In response, the FEC issued a set of regulations defining "coordinated communications." The new regulations require (1) that someone other than the candidate, party, or political committee pays for them;[117] (2) that the communication satisfies specific "[c]ontent standards";[118] and (3) that the creation of the communication satisfies specific "[c]onduct standards."[119]

A group of congressmen recently sued the FEC to change this definition and its accompanying standards.[120] The plaintiffs claimed the new regulations provide an unreasonably generous safe harbor for politicians and their supporters.[121] For example, the regulations allow candidates and wealthy supporters to produce communications in total concert, and even reach formal written agreements, if their activities occur more than 120 days before the election.[122] The D.C. Circuit struck down the regulations as fatally defective, finding that they "allowed a coordinated communication free-for-all for much of each election cycle."[123]

After thirty years of soft-money corruption and bogus issue advertising, Congress acted to eliminate the influence of large political donors. In response, large donors have turned to ostensibly independent political nonprofit organizations to circumvent BCRA's new restrictions. While BCRA did not directly regulate political nonprofit organizations, it did introduce limits on expenditures for electioneering communications.[124] Unfortunately, the FEC has been reluctant to apply the "major purpose" test to find political nonprofit organizations "political committees."[125] The FEC has also promulgated a definition of "coordinated communications" that allows wealthy donors to easily circumvent BCRA's intended limits on bogus issue advertising.[126] In the wake of these developments, campaign finance advocates have proposed a series of legislative reforms.

communication with a candidate or a political party.

Id.

117. 11 C.F.R. § 109.21(a)(1) (2007).

118. *See id.* § 109.21(c)(1)-(4) (stating that "electioneering communications" as defined in BCRA satisfies content standard).

119. *See id.* § 109.21(d)(1)-(4) (including such loose connections as discussions between candidate and person paying for communication as sufficient to satisfy conduct standard).

120. *See* Shays v. FEC, 414 F.3d 76, 79, 98 (D.C. Cir. 2005) (stating that BRCA's House sponsors brought lawsuit, claiming that FEC "has undone their hard work").

121. *Id.* at 98.

122. *Id.*

123. *Id.* at 100.

124. See *supra* notes 102-05 and accompanying text for a discussion of the BCRA's electioneering communications restrictions.

125. *See* Shays v. FEC, 424 F. Supp. 2d 100, 112 (D.D.C. 2006) (detailing agency's continued case-by-case analysis).

126. See *supra* notes 117-19 and accompanying text for the FEC's definition.

C. Proposed Reforms: Congress and the FEC

Several proposals have surfaced to close the 527 loophole and eliminate soft-money influence on federal elections.[127] Most of the proposals have focused on subjecting more political nonprofit groups to campaign finance law by broadening FECA's definition of "political committee" to include more entities organized under section 527 of the IRS code.[128] Both Congress and the FEC have considered revision of existing campaign finance law.[129]

In Congress, both the Senate and the House of Representatives have proposed amendments to FECA.[130] The bills categorically define all 527 groups as "political committees" but exempt groups if they meet certain narrow standards of conduct.[131] For example, an organization would be exempt if it advocated exclusively for elections in which no federal candidate appeared on the ballot.[132] An organization would be exempt if its activities related exclusively to state or local ballot initiatives.[133] A 527 group would lose its exempt status if it spent more than $1000 in voter registration drives or by producing "public communication[s] that promote[d], support[ed], attack[ed], or oppose[d] a clearly identified candidate for Federal office" during a one-year period leading up to the general election.[134] Consequently, a *non*exempt organization would be classified as a "political committee" and thus be subject to FECA's regime,[135] including the most onerous of FECA's regulations: political committees may not accept individual contributions larger than $2000.[136]

Independent of Congress's possible amendments to FECA, the FEC has considered incorporating *Buckley*'s "major purpose" test into federal regulations.[137] Under this approach, if the FEC found that an organization's

127. Many proposed revisions to the code are presented in the FEC's call for public comments as part of a 2004 rulemaking process. Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,736 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114).

128. 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, 1191 (2006); *see also* 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, 110-11 (2004) (describing lawmakers' attempts to broaden FECA's definition of "political committee" to reach more 527 groups).

129. *See* 527 Reform Act of 2005, H.R. 513, 109th Cong. (2005) (outlining House of Representatives' proposed amendments); 527 Reform Act of 2005, S. 271, 109th Cong. (2005) (outlining Senate's proposed amendments); Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,736 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114) (outlining FEC's proposed amendments).

130. H.R. 513; S. 271.

131. H.R. 513 § 2(b)(B); S. 271 § 2(b)(B).

132. H.R. 513 § 2(b)(B)(iii)(I); S. 271 § 2(b)(B)(iii)(I).

133. H.R. 513 § 2(b)(C)(ii); S. 271 § 2(b)(C)(ii).

134. H.R. 513 § 2(b)(D)-(b)(D)(ii); S. 271 § 2(b)(D)-(b)(D)(ii).

135. H.R. 513 § 2(a); S. 271 § 2(a).

136. 2 U.S.C. § 441a(1)(A) (2006).

137. *See* Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,745

major purpose was the nomination or election of a federal candidate, then the organization would be classified as a "political committee" and subject to FECA regulation.[138] The FEC considered four versions of the "major purpose" test.[139] First, the agency could rely on the organization's stated objective.[140] Second, an organization that spent more than fifty percent of its annual expenditures on federal election activities or electioneering communications would be considered a political committee.[141] Third, the FEC could enforce a disbursement threshold: organizations that spent more than the annual threshold amount would show a major purpose of electing federal candidates.[142] Finally, the agency considered its own codification of the approach taken by Congress's proposed 527 Reform Act of 2005,[143] in which it would declare all 527 groups political committees but carve out five narrow exceptions for organizations, the purpose of which was exclusively the promotion of nonfederal candidates.[144]

III. DRAINING THE TUB INSTEAD OF THROWING THE BABY OUT WITH THE BATHWATER

In order to close the twin loopholes of 527 groups and sham issue advertising, Congress should amend FECA's definition of "political committee" to include any entity that produces federal electioneering communications. Unlike existing proposals for reform, which are either too broad, in that they ensnare too many innocent local or issue-specific political nonprofit groups, or too narrow because they are easily circumvented by savvy political operatives, a test for the production of federal electioneering communications provides a clear

(proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114) (seeking comment on adoption of various "major purpose" tests).

138. *Id.* at 11,743-45.

139. *Id.* at 11,745-49.

140. *Id.* at 11,745-46.

141. *Id.* at 11,746-47.

142. Federal Election Commission, Political Committee Status, 69 Fed. Reg. at 11,747-48.

143. *See* 527 Reform Act of 2005, H.R. 513, 109th Cong. § 2(a)(D) (2005) (detailing Congress's proposed broadening to include 527 groups); 527 Reform Act of 2005, S. 271, 109th Cong. § 2(a)(D) (2005) (same).

144. The relevant portion of the FEC proposed regulations reads:

> Alternative 2-A provides that all 527 organizations would be considered to have the nomination or election of candidates as a major purpose, but carves out five exceptions: (1) Any 527 organization that is the campaign organization of an individual seeking nomination, election, appointment or selection to a non-Federal office; (2) any 527 organization that is organized solely for the purpose of promoting the nomination or election of a particular individual to a non-Federal office; (3) any 527 organization that engages in nomination and election activities only with respect to elections in which there is no candidate for Federal office on the ballot; (4) any 527 organization that operates in only one State and which is required by the law of that State to file financial disclosure reports with a State agency; and (5) any 527 organization that is organized solely for the purpose of influencing the selection, appointment, or nomination of individuals to non-elective office, or the election, selection, nomination or appointment of persons to leadership positions within a political party.

Federal Election Commission, Political Committee Status, 69 Fed. Reg. at 11,748.

line that local and issue-specific groups could respect and yet would be impossible for wealthy, covert donors to avoid. The practical consequence of the revised definition would be that producers of sham issue advertisements (the preferred method of circumventing federal campaign finance law) would no longer be able to avoid regulation. Finally, under Supreme Court precedent, the revised definition is constitutional because it is appropriately tailored to further a compelling government interest.

A. Inadequacies of Existing Proposals for Reform

1. Congress: The Futility of Grafting Tax Code Definitions onto Campaign Finance Law

Congress's proposed legislation would not survive constitutional scrutiny because it does not provide sufficient notice of potentially criminal conduct and because it is overbroad and will ensnare too many innocent local and issue-specific advocacy groups. The Supreme Court in *Buckley v. Valeo*[145] found the ambiguity in the terms "contribution" and "expenditure" to cause constitutional problems: "[d]ue process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal."[146] If enacted, the 527 Reform Act will impose criminal sanctions on 527 groups that fail to register as "political committees,"[147] but in many cases the IRS will reclassify 501(c) groups as 527 groups using a "facts and circumstances" test to determine whether the 501(c) group has engaged in enough political activity to reclassify it as a 527 group.[148] Thus, 501(c) organizations are faced with the difficult question of how much electioneering activity will trigger a reclassification and subsequent criminal sanctions. As two critics said, "no court could possibly find that the IRS definition of political . . . activities . . . would provide the necessary 'adequate notice' to survive a constitutional challenge for vagueness."[149]

Similarly, under the proposed legislation, the ease with which a 527 group could lose its exemption suffers from the same constitutional vagueness. Recall that the proposed 527 Reform Act exempts groups whose "activities *relate exclusively* to . . . elections where no candidate for Federal office appears on the

145. 424 U.S. 1 (1976).

146. *Buckley*, 424 U.S. at 77; *see also* Johnston, *supra* note 128, at 1191-94 (concluding that blanket classification of 527 organizations as political committees raises serious constitutional problems).

147. *See* 2 U.S.C. § 437(g) (2006) (describing enforcement provisions of statute).

148. *See* Kingsley & Pomeranz, *supra* note 128, at 64-65 (describing "facts and circumstances" test (internal quotation marks omitted)); *see also id.* at 65 n.39 (quoting Judge Posner, who said that "'facts and circumstances' . . . is no standard at all, and makes the tax status of charitable organizations and their donors a matter of the whim of the IRS" (quoting United Cancer Council v. Comm'r, 165 F.3d 1173, 1179 (7th Cir. 1999))).

149. *Id.* at 114.

ballot."[150] It is not clear exactly when a state or local issue advocacy group's activity would relate to a federal election. Conceivably, *any* political activity held during an election cycle could have some tenuous relation to the election. For example, an issue advocacy group dedicated to the reduction of urban drug use could spend $5000 on local antidrug programs and initiatives. A week later, a federal candidate announces that reduction of urban drug use is her central campaign theme. Would the group's prior antidrug activity now be related to the federal election? It is not clear. The "relate exclusively" language from the proposed 527 Reform Act is new verbiage; there is no known standard of review. In the face of such vague terminology, 527 groups could conceivably be subject to severe sanctions for engaging in any activity on any subject, anywhere and at anytime. Thus, in addition to terminal constitutional vagueness, the proposed 527 Reform Act suffers from being severely overbroad.[151]

Overbreadth became likely once Congress decided to import tax code definitions into election finance law, because, as Kinglsey and Pomeranz note, "[t]he IRS has long recognized that its standards for identifying political activity by tax-exempt organizations capture far more activity than is regulated under federal election law."[152] Even worse, the proposed 527 Reform Act does not literally require that the FEC strictly adhere to the IRS's existing classification methods. Rather, the Act permits reclassification of a group that is "*described* in section 527 of the Internal Revenue Code of 1986."[153] Thus, a political nonprofit could retain its non-527 classification for tax purposes but still be classified as a "political committee" if it meets the *description* of a 527 group.[154] The tax code description would be interpreted and applied by FEC officials, unencumbered by prior IRS rulings or federal precedent.

Even in the face of such broad restrictions on political speech, proponents of the proposed 527 Reform Act might argue that restrictions on local or issue advocacy are in fact constitutional, given the conclusion in *McConnell v. FEC*[155] that campaign contribution laws are subject to "less rigorous scrutiny" than general free-speech restrictions.[156] Nevertheless, the Court developed "less rigorous" (or "closely drawn") scrutiny in the face of legislation tailored to further the compelling government interest of combating corruption.[157] The *McConnell* Court repeated the *Buckley* Court's reasoning that contribution

150. 527 Reform Act of 2005, H.R. 513, 109th Cong. § 2(b)(B)(iii)(I) (2005) (emphasis added); 527 Reform Act of 2005, S. 271, 109th Cong. § 2(b)(B)(iii)-(b)(B)(iii)(I) (2005) (emphasis added).

151. *See* Kingsley & Pomeranz, *supra* note 128, at 114 (discussing constitutional overbreadth).

152. *Id.*

153. H.R. 513 § 2(b)(A)(i) (emphasis added).

154. See 26 U.S.C. § 527(e)(1)-(2) (2006) for a definition of organizations that qualify as 527 groups.

155. 540 U.S. 93 (2003).

156. *McConnell*, 540 U.S. at 136 n.39.

157. *Id.* at 136-37 (internal quotation marks omitted) (quoting FEC v. Beaumont, 539 U.S. 146, 162 (2003)). See *supra* Part II.A.1 for the discussion of the Supreme Court's validation of congressional authority to regulate campaign contributions in the face of the compelling government interests of combating corruption and the appearance of corruption.

limits are constitutional, in part, because they in no way infringe on the contributor's freedom to discuss an issue.[158]

In contrast, the 527 Reform Act sweeps independent, issue-specific advocacy groups into a regime of federal campaign finance law.[159] These independent groups, which have had no contact with federal candidates and the activities of which were never intended to influence federal elections, enjoy the First Amendment protection afforded all independent political expression.[160] The Court has said, "[f]reedom of speech plays a fundamental role in a democracy[] as . . . freedom of thought and speech 'is the matrix, the indispensable condition, of nearly every other form of freedom.'"[161]

The Supreme Court's high regard for independent political speech was on display in *FEC v. Massachusetts Citizens for Life, Inc*.[162] In striking down a FECA provision that limited expenditures by an independent issue group, the Court said, "[w]here at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[163]

2. The FEC: Bringing a Knife to a Gunfight

While Congress's proposals are likely to fail constitutional review, the FEC has approached the problem from a different angle: it has considered incorporating *Buckley*'s "major purpose" test into federal regulations.[164] Under the "major purpose" test, an entity is considered a "political committee" if its major purpose is the election of a federal candidate.[165] The FEC has proposed several ways of measuring an organization's "major purpose."[166] Unfortunately, each of the proposed approaches raises serious efficacy questions.

The first possible way an organization could be classified as a "political committee" would be if it publicly pronounced itself to be a political

158. *McConnell*, 540 U.S. at 134-35 (citing Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

159. *See* 26 U.S.C. § 527(e)(1)-(2) (defining 527 groups as any "party, committee, association, fund, or other organization . . . organized and operated primarily for the purpose of . . . accepting contributions or making expenditures").

160. *See McConnell*, 540 U.S. at 136 & n.39 (stating that campaign contribution laws, such as those under proposed 527 Reform Act, are subject to "less rigorous" freedom of speech scrutiny).

161. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 264 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)).

162. 479 U.S. 238 (1986).

163. *Mass. Citizens*, 479 U.S. at 265.

164. *See* Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,743-45 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106, 114) (proposing to incorporate "major purpose" test into FEC regulations for first time in notice of proposed rulemaking).

165. See *supra* notes 82-90 and accompanying text for a discussion of the *Buckley* Court's "major purpose" test.

166. Federal Election Commission, Political Committee Status, 69 Fed. Reg. at 11,745.

committee.[167] Unfortunately, a 527 organization has little incentive to voluntarily declare itself a political committee and subject itself to FECA's severe contribution limits, because when the FEC has subsequently sued groups for failing to make such a declaration, the penalty is relatively small and arrives long after the election is over. For example, the FEC recently settled a suit against Swift Boat Veterans for Truth,[168] a 527 group that supported George W. Bush during the 2004 election campaign with a series of highly successful negative campaign ads targeted at his opponent, Senator John Kerry.[169] The FEC sued the Swift Boat Veterans and other 527 groups for FECA violations, including claims that the Swift Boat Veterans failed to register with the FEC as a "political committee."[170] The case was settled in December 2006, and the Swift Boat Veterans and POWs for Truth paid a combined $299,500.[171] That may sound like a significant figure, but the Swift Boat Veterans for Truth received over $17 million in contributions and spent over $22 million in federal campaign activities.[172]

The FEC has also considered using an organization's expenditures to measure its major purpose, either as a percentage of total organization expenses or by spending more than a fixed threshold amount.[173] Nevertheless, commentators have noted that under such a regime, the organization could avoid classification as a "political committee" by simply tailoring its structure or expenses to avoid expending a majority of its resources on federal election activities.[174] Under the threshold method, any group that spent over a fixed dollar amount on the election of a federal candidate would be found to be a "political committee."[175] Groups could respond to that method by breaking their organization into smaller organizations. Each would spend up to, but not more than, the threshold amount, whatever it was.[176] Under the percentage method,

167. *Id.* at 11,745.

168. Press Release, FEC, FEC Collects $630,000 in Civil Penalties from Three 527 Organizations (Dec. 13, 2006), *available at* http://www.fec.gov/press/press2006/20061213murs.html [hereinafter FEC, Press Release] (noting that Swiftboat Veterans and POWs for Truth paid $299,500 to settle charges for failing to register with FEC as political committee).

169. *See* Johnston, *supra* note 128, at 1184 (discussing Democrats' failure to respond to successful Swift Boat Veterans for Truth anti-Kerry attack ads during 2004 presidential campaign).

170. FEC, Press Release, *supra* note 168.

171. *Id.* A copy of the settlement agreement is available at http://eqs.nictusa.com/eqsdocs/000058ED.pdf.

172. Weissman & Hassan, *supra* note 5, at 104 tbl.5.4, 107 tbl. 5.6.

173. Federal Election Commission, Political Committee Status, 69 Fed. Reg. 11,736, 11,746-47(III)(B)(2)-(3) (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pt. 100.5(a)(2)(ii)-(iii)).

174. *See* Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BUREAU NAT'L AFF., http://www.bna.com/moneyandpolitics/loophole.htm (last visited Nov. 28, 2008) (concluding that 527 groups wishing to avoid political committee classification will structure their expenditures to avoid fifty-one percent expenditures on federal election activities); *see also* Johnston, *supra* note 128, at 1193-94 (discussing FEC "expenditure method" of measuring organization's major purpose (internal quotation marks omitted)).

175. Federal Election Commission, Political Committee Status, 69 Fed. Reg. at 11,747.

176. *See* Foley & Tobin, *supra* note 174 (discussing other strategies nonprofit groups might use to circumvent threshold amount method of discerning major purpose).

any group that spent a majority of its expenses on the election of a federal candidate would be found to be a "political committee."[177] Under that approach, groups could reorient their activities to engage in mixed federal and state activities to remain just under fifty percent federal activity.[178] Ultimately, perhaps in the face of such futility, the FEC declined to adopt any new "major purpose" test and instead chose to continue with its case-by-case determination of an organization's status as a political committee.[179] Unfortunately, the case-by-case determination method has been described as a "total failure."[180]

Cunning political players have been able to navigate the "major purpose" and "express advocacy" waters and defy Congress's intent to limit their influence.[181] BCRA was Congress's attempt to close the soft-money loophole that FECA and the *Buckley* Court left open.[182] In response, wealthy political players have funneled their money to outside organizations that engage in the same campaign expenditures previously paid for by political committees, the largest and most corrosive of these being bogus issue advertisements.[183] In order to effectively implement BCRA's prohibition on soft money, regulators must control political operatives engaged in federal campaigning, while respecting the First Amendment rights of local and issue-specific advocates.[184]

B. A New Proposal: Focus on Electioneering Communications

Congress should amend FECA so that the entities that sponsor electioneering communications are per se "political committees" for purposes of campaign finance law. FECA regulations define "political committees" as "any committee, club, association, or other group of persons" that receives contributions or makes expenditures exceeding $1000 per calendar year.[185] Congress should change this definition to: "any committee, club, association, or other group of persons that receives contributions or makes expenditures aggregating in excess of $1000 during a calendar year *or sponsors the production of electioneering communications as defined in 2 U.S.C. § 434(f)(3)(A)(i)*." Electioneering communications include any broadcast, cable, or satellite communication that (1) refers to a clearly identified candidate for federal office, (2) airs within sixty days of a general election or thirty days of a primary, and (3) is targeted to the relevant electorate.[186] Under the new definition, any entity that

177. Federal Election Commission, Political Committee Status, 69 Fed. Reg. at 11,746.

178. Foley & Tobin, *supra* note 174.

179. Johnston, *supra* note 128, at 1175.

180. Shays v. FEC, 424 F. Supp. 2d 100, 115 (D.D.C. 2006).

181. See *supra* Part II.B for a discussion of "major purpose" and "express advocacy" tests, as well as "soft money" and "sham issue advertising."

182. See *supra* Part II.B.1 for a discussion of BCRA's attempt to close the soft-money loophole.

183. See *supra* Part II.B.2 for a discussion of the rise of 527 groups and their expenditures on campaign advertising.

184. See *supra* Part II.C for a discussion of the scope and limits of proposed reforms.

185. 2 U.S.C. § 431(4)(A) (2006).

186. *Id.* § 434(f)(3)(A)(i).

produced such a communication would be considered a "political committee" and subject to FECA campaign finance law. This proposal would have the practical effect of eliminating sham issue ads, is superior to existing proposals, and would survive constitutional scrutiny.

1. Practical Consequences: The Elimination of Sham Issue Advertising

By expanding the definition of "political committee" to include entities that produce electioneering communications, Congress would put an end to sham issue advertising. For example, under the status quo, if Wealthy Donor wanted to fund expensive campaign ads for his candidate of choice, he could create a political nonprofit organization to produce the broadcast advertising using his large contribution.[187] The organization would be subject to disclosure and reporting regulations but otherwise would remain untouched.[188] The 527 group would not be subject to campaign finance laws as long as the FEC did not determine its major purpose was the election of Wealthy Donor's candidate. In the event that the FEC did determine that the group's major purpose was the election of the candidate, the penalties would be relatively small compared to the millions spent on the advertising. Finally, the penalties would arrive long after the ads had run and the election had been decided.[189]

Under the new definition, Wealthy Donor's sham issue group, as a political committee, would be subject to FECA regulations, the most significant of which would be the group's inability to accept donations over $2000 from any individual.[190] In the face of such a restriction, political nonprofits would have a simple choice: abstain from producing electioneering communications or enter the election fray and be subject to the same regulations as any other political committee.

Political nonprofits that wished to avoid classification as a federal "political committee" would simply adhere to their stated purpose of local or issue advocacy. All 527 organizations are formed with the express purpose of promoting an individual to federal, state, or local public office.[191] Under the proposed revised definition, a 527 group that produced electioneering communications that did not mention a federal candidate would avoid the "political committee" classification and its subsequent regulations. By enacting a bright-line rule that captured organizations intentionally influencing federal elections, Congress would erect a clear boundary that local or issue-centered

187. See *supra* Section II.B.2 for a discussion of how wealthy donors have used 527 groups to circumvent campaign finance laws.

188. See 2 U.S.C. § 434(f) for a description of FECA reporting requirements.

189. See *supra* notes 168-72 and accompanying text for an example of the small penalties assessed compared with the millions spent.

190. *See* 2 U.S.C. § 441a(a) (limiting dollar amounts of contributions to political committees as follows: "(1) . . . no person shall make contributions—(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $ 2,000").

191. 26 U.S.C. § 527(e)(2).

groups could respect.[192] Such groups would avoid the per se political committee classification by abstaining from clearly identified conduct.

Critics could argue that using the production of electioneering communications to trigger a "political committee" classification would be too narrow a solution because it would fail to capture groups that carefully avoided producing broadcast media and instead engaged in traditional campaign activities such as door-to-door campaigning or fundraising dinners. Nevertheless, there are two arguments against this proposition. First, sham issue groups have historically been loath to spend money on "ground war" activities and instead have focused on broadcast media.[193] Perhaps this is because television ads are so effective, or perhaps it could be because television ad production requires little direct coordination with political candidates or parties (such coordinated expenditures would be treated as contributions to the candidate's campaign).[194] Under the existing regime, nonprofit groups have independently produced ads that parrot party talking points or simply attack their candidate's adversary on issues on which the adversary appears weak.[195] Under the revised proposal, the FEC would no longer focus on the level of coordination between candidates and nonprofit groups (an expensive investigation of a hurdle such groups can easily clear) but instead would simply use the fact that the ad is a piece of federal electioneering communication to declare the producer a "political committee," thereby exposing more bogus "issue advocates" for what they are: candidate advocates.

Second, even if a political nonprofit group abstained from producing federal electioneering communications, it could still find itself with a political committee classification if the FEC found its major purpose to be the election of a federal candidate.[196] Imagine if instead of spending millions of dollars on anti-Kerry advertising, the Swift Boat Veterans had marched an army of campaign workers door to door in battleground states. The FEC could still have declared the group a "political committee" by applying the "major purpose" test from *Buckley*. In fact, the revised definition proposed in this Comment does not supplant the

192. The *McConnell* Court noted the clarity of the definition of "electioneering communications":

> Finally we observe that new FECA § 304(f)(3)'s definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term['s] . . . . components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.

McConnell v. FEC, 540 U.S. 93, 194 (2003) (citation omitted).

193. *See* Ctr. for the Study of Elections and Democracy, Brigham Young Univ., *supra* note 100 (noting that 527s are unlikely to be able to financially support "ground war" activities like get-out-the-vote campaigns in future); *see also* CPI STUDY, *supra* note 11 (finding that major party 527 groups spent more money on broadcast advertising than any other type of campaign expenditure).

194. 2 U.S.C. § 441a(a)(7)(C).

195. *See* Johnston, *supra* note 128, at 1184 (discussing how candidate Bush simultaneously chastised independent 527 groups while benefiting from their success in disparaging his opponents).

196. See *supra* notes 82-90 and accompanying text for a discussion of the *Buckley* Court's "major purpose" test.

"major purpose" test; it is merely an alternative and much easier means of identifying a political committee.

2. Comparing a Focus on Electioneering Communications to Existing Proposals for Reform

Revising the definition of "political committee" to include entities that produce electioneering communications raises none of the same constitutional vagueness or overbreadth concerns as the 527 Reform Act. Rather, this proposal is clear and narrowly tailored. The proposal is also superior to the FEC's proposed FECA revisions that would incorporate the "major purpose" test into federal regulations. Wealthy donors cannot circumvent a test that focuses on "electioneering communications" the way they can avoid classification under a "major purpose" analysis.

Congress has considered and thus far declined to amend the BCRA definition of "political committee" to include all 527 groups.[197] One principal problem with defining federal election law using tax code definitions is vagueness and overbreadth.[198] The tax code definition is vague because the IRS will use a "facts and circumstances" test to determine whether a 501(c) group should be reclassified as a 527 group.[199] Also, the proposed 527 Reform Act would exempt groups the activities of which "relate exclusively" to state and local issue advocacy.[200] As previously discussed, this terminology is unconstitutionally vague. In contrast, this proposal would add the production of "electioneering communications" to the definition of "political committee." The term "electioneering communications" is already in FECA, and the Supreme Court has found that the term erects a bright-line rule and raises no vagueness concerns. The Court in *McConnell* noted:

> Finally we observe that . . . [the] definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term['s] . . . . components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.[201]

In addition to being appropriately clear, revising the definition of "political committee" to include entities that produce electioneering communications is not overbroad because it would only ensnare entities that intended to influence federal elections. Production of effective broadcast media is under the complete control of the sponsor, requiring careful scripting and attention to minute

197. *See* 527 Reform Act of 2005, H.R. 513, 109th Cong. § 2(b)(B)(iii)(I) (2005) (exempting certain 527 groups, for example, if no candidate for federal office appears on ballot). See *supra* Part III.A.1 for a discussion of the proposed 527 Reform Act.

198. *See* Johnston, *supra* note 128, at 1190-94 (discussing House and Senate proposals, and concluding that they are overbroad and unconstitutional).

199. *See* Kingsley & Pomeranz, *supra* note 128, at 64-65 (describing "facts and circumstances" test).

200. H.R. 513 § 2(b)(B)(iii)(1).

201. McConnell v. FEC, 540 U.S. 93, 194 (2003) (citation omitted).

production details. Broadcast media costs thousands of dollars per second to produce and broadcast.[202] Such a substantial expense provides a clear indication of a particular organization's intention to promote federal candidates and would not regulate organizations that mistakenly or inadvertently promoted a federal candidate in the process of their otherwise purely issue or local election activities.

Under the proposed 527 Reform Act, local or purely issue advocacy groups could inadvertently trigger their status as a political committee if a federal candidate appeared on a ballot for an election they were campaigning for, or if a federal candidate attended a rally for their issue or even if attendees or audience members began campaigning at the rally without their consent. Under this Comment's proposal, a local or issue group could be involuntarily classified as a political committee only if it produced electioneering communications, or if the FEC found its major purpose was the election of a federal candidate. These possibilities are sufficiently narrow to survive "closely drawn" scrutiny, unlike blanket regulation of local or issue-centered political nonprofit groups.

Revising the definition of "political committee" to include entities that produce electioneering communications will also ensnare the savvy political operatives that could easily circumvent the FEC's proposed regulations. The FEC considered and declined codification of the "major purpose" test into existing regulations.[203] While the agency did not disclose reasons for continuing its case-by-case approach, one serious problem with codification of the "major purpose" test is that wealthy donors could easily circumvent the barrier by structuring their organizations or their activities to avoid either threshold spending amounts or proportional measures that would trigger the "political committee" classification.[204] Production of electioneering communications is a clear, objectively identifiable boundary and offers no such opportunities for circumvention.[205] The test is simple and its conclusions inescapable: organizations that sponsor electioneering communications are political committees. There is no inquiry into the organization as a whole and whether the production of the communication was part of a major purpose to promote a federal candidate.

Advocates of existing proposals will note that, unlike the proposed 527 Reform Act and the FEC's proposed codification of the "major purpose" test, a focus on electioneering communications will fail to capture many wealthy donors who engage in nonbroadcast means of influencing federal elections. Critics could point out that, for example, during the 2004 election cycle, Democratic 527 groups spent over $27 million dollars on salaries, polling, direct mail,

202. *See* CPI STUDY, *supra* note 11 (presenting "Fiscal Priorities" table, which demonstrates that broadcast advertising represented top category of spending for 527s in 2004 election cycle).

203. See *supra* Part III.A.2 for a summary of the FEC's attempt to incorporate the "major purpose" test into the regulatory scheme.

204. Johnston, *supra* note 128, at 1194.

205. The Supreme Court noted in *McConnell* that "[s]ince our decision in *Buckley*, we have consistently applied less rigorous scrutiny to contribution restrictions aimed at the prevention of corruption and the appearance of corruption." 540 U.S. at 138 n.40.

professional services, and miscellaneous administrative costs.[206] Such donors could simply transfer more of their expenses from broadcast media expenditures to targeted get-out-the-vote campaigns, nonbroadcast media communications, or other activities that FECA defines as "federal election activities."[207] Nevertheless, as previously stated, historical data clearly indicate that wealthy donors overwhelmingly choose broadcast media as their preferred means of influencing elections,[208] and the FEC may continue to use an organization's other expenditures on election activity as evidence to support a finding that its major purpose was the election of a federal candidate.[209] Thus, the organization would still fail to circumvent campaign finance law. Finally, many state and local political organizations engage in mixed-setting, state-federal election activity. Congress's and the FEC's proposals, which attempt to use such conduct to classify an organization as a federal political committee, capture too many innocent local organizations to satisfy constitutional due process requirements.[210]

Ultimately, any effective reform must focus on capturing organizations that purport to be issue-specific but are in fact merely vehicles for candidate-centered entities to circumvent existing election finance regulation. Existing proposals fail either because they are overbroad and thus subject innocent actors to criminal consequences or are easily circumvented by sophisticated political operatives.[211] By focusing on the production of broadcast media, regulators will have an easy means of identifying political players who intend to influence federal elections and yet avoid ensnaring purely local or issue-specific entities.

3. Focus on Electioneering Communications Will Survive Constitutional Challenges

A proposal to redefine "political committee" to include entities that produce electioneering communications will survive the "closely drawn" scrutiny that the Court has applied to campaign finance regulation.[212] First, this proposal is a contribution limitation, not an expenditure limitation. The Supreme Court has historically employed a looser standard to contribution limits than to expenditure limits.[213] Second, even if the Court were to characterize the proposal as an expenditure regulation, the proposal is authorized by the Court's decision

206. *See* CPI STUDY, *supra* note 11 (breaking down 527 expenditures by type).

207. 2 U.S.C. § 431(20)(a) (2006).

208. See CPI STUDY, *supra* note 11, for a detailed analysis of how wealthy donors chose broadcast media over all other forms of campaign activity in the 2004 election cycle.

209. See *supra* notes 82-90 and accompanying text for a detailed description of the "major purpose" test.

210. See *supra* notes 146 and 151 and accompanying text for a discussion of the constitutional requirements related to classifying an organization.

211. See *supra* Part III.A for a discussion of proposed reforms.

212. *See* McConnell v. FEC, 540 U.S. 93, 137 (2003) (approving "less rigorous standard of review," as in *Buckley*'s "closely drawn" scrutiny, to contribution limits (internal quotation marks omitted)).

213. *Id.* at 134 (noting that *Buckley* and its progeny subject "restrictions on campaign expenditures to closer scrutiny than campaign contributions").

in *McConnell*.[214] Finally, this proposal is an anticircumvention measure, and the Court has stated that it will employ less rigorous scrutiny to Congress's attempts to prevent circumvention in campaign finance law, an area where it enjoys particular expertise.[215]

Critics might argue that faced with the prospect of being classified as a "political committee" and thus subject to FECA contribution and disclosure limits, entities will curtail their advocacy expenditures. Thus, the proposal would amount to regulation of campaign expenditures and would thus be unconstitutional under *Buckley*.[216] Recall that *Buckley* invalidated restrictions on campaign expenditures but authorized restrictions on campaign contributions because "expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions."[217] In fact, this approach would not regulate expenditures; it would merely use the fact of the expenditure to trigger a classification that would carry contribution regulations. Contribution restrictions are permissible because, according to the *Buckley* Court, even under a rigorous standard of review, weighty interests are served by restricting financial contributions to political candidates and justify the limited effect on First Amendment freedoms.[218] In 2003, the *McConnell* Court expressly validated contribution regulations.[219] Nonprofit organizations faced with a political committee classification would continue to be free to expend their funds in any way they saw fit for their candidate of choice.

Even if future courts perceived this proposal as a restriction on expenditures instead of contributions, Supreme Court precedent authorizes the proposal's limits on independent expenditures. Critics would argue that Congress does not have the power to regulate independent expenditures unless they are coordinated with parties or candidates.[220] The Court in *Buckley* struck down a $1000 limit on independent expenditures on communications for clearly identified candidates because such restrictions "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication."[221] More recently, the Court invalidated a FECA provision that barred a pro-life nonprofit corporation from using general treasury funds to distribute pro-life direct mailings that mentioned individual federal candidates.[222] Finally, current

214. *Id.* at 152 n.48 (refusing to limit Congress's regulatory power to contributions to candidates).

215. *Id.* at 137-38.

216. *See* Buckley v. Valeo, 424 U.S. 1, 44 (1976) (holding that limits on campaign expenditures impermissibly burden constitutional right of free expression).

217. *Id.* at 23.

218. *Id.* at 29.

219. *McConnell*, 540 U.S. at 134-36.

220. If electioneering communications are found to be "coordinated with" a party or candidate, then those expenditures would be considered contributions to the candidate or party. 2 U.S.C. § 441(a)(7)(C) (2006).

221. *Buckley*, 424 U.S. at 19-20 (footnote omitted).

222. FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 241 (1986).

campaign finance law draws a line between communications that are coordinated with a candidate or party and those that are not: coordinated communications are treated as campaign contributions, noncoordinated communications are not.[223] Thus, the argument goes, Congress can only regulate expenditures that are coordinated with a party or candidate. That reading is erroneous, because the question of whether a communication is coordinated is only asked in the context of whether to treat the expenditure as a contribution to the candidate's campaign, not in the context of whether the First Amendment prohibits regulation of independent expenditures.

According to the majority in *McConnell*, independent expenditures may indeed be regulated. The Court found that the First Amendment does not prevent Congress from regulating independent, noncoordinated expenditures in an effort to combat corruption or the appearance of corruption.[224] The Court found corruption in this context to be larger than the quid pro quo exchange of favors or the appearance of corruption between donors and individual candidates.[225] Specifically, the Court said that FECA limits on campaign contributions to multicandidate political parties cannot be justified simply because such contributions are merely pass-through structures to ultimately fund individual candidate's campaigns.[226] Rather, subsequent cases established that the First Amendment does not prohibit Congress from regulating "express advocacy and numerous other noncoordinated expenditures."[227]

Justice Kennedy disagreed, arguing that Congress could only limit contributions that "prevent[ed] . . . the actual or apparent *quid pro quo* corruption 'inherent in' contributions made directly to, contributions made at the express behest of, and expenditures made in coordination with, a federal officeholder or candidate."[228] The majority rejected that limit, finding that "[t]his crabbed view of corruption, and particularly of the appearance of corruption, ignores precedent, common sense, and the realities of political fundraising."[229]

The Court could also find that a proposal to classify entities that produce electioneering communications as "political committees" amounts to an anticircumvention measure and is thus entitled to heightened deference from the judiciary.[230] According to the Court in *McConnell*, application of a "less rigorous standard of review" to contribution limits "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[231] The Court continued: "It also provides Congress with

223. See *supra* notes 113-26 and accompanying text for a discussion of "coordinated communication" in the context of treating such expenditures as a contribution to a candidate's campaign.

224. *McConnell*, 540 U.S. at 152 n.48.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 152 (majority opinion discussing Justice Kennedy's opinion).

229. *McConnell*, 540 U.S. at 152.

230. *See id.* at 137 (giving Congress "sufficient room" to respond to circumvention concerns).

231. *Id.*

sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[232]

There is no doubt that, over the last several elections, wealthy donors have used political nonprofit groups to circumvent campaign finance laws aimed at preventing corruption and the appearance of corruption. Their principal means of doing so has been to continue to fund expensive broadcast media advertising that expressly advocates for particular candidates, not issues.[233] Furthermore, according to the *McConnell* Court, "because the First Amendment does not require Congress to ignore the fact that 'candidates, donors, and parties test the limits of the current law,' these interests have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits."[234]

Thus, the state's compelling interest in limiting corruption should authorize a targeted refinement of "political committee" to include those entities that produce electioneering communications. In doing so, Congress could ensnare the large donors that, in its long-standing view, corrupt the political system either through quid pro quo favors and access or undermine the system's credibility by creating the appearance of corruption. Rather than circumvent the system by producing sham issue ads themselves, such wealthy donors would be treated as any other political organization, subject to the same public oversight and responsible for the same public welfare.

IV. INACTION IS ACTION

At the heart of this problem is a simple idea: a wealthy individual should not be able to buy an election outcome. Even if a wealthy donor did not receive a favor in return, just the appearance of such corruption is corrosive to the public trust that is essential to any successful democracy. If wealthy donors are allowed to control the outcomes of elections, rational politicians will naturally, sensibly protect their interests for fear of being targets in the next election. In the absence of meaningful reform, the politician who makes the fewest billionaire enemies will win.

Congress, perhaps contrary to its own interests, has acted to eliminate corruption from the federal political process. FECA was enacted to force shady political operatives and backroom operatives into the light of public scrutiny, to subject them to rule of law. Unfortunately, Congress's efforts have simply motivated the wealthy power brokers to redistribute their contributions in new patterns while effecting the same manipulations of the electoral process.

Beginning in 1974, they could no longer influence elections by donating to individual federal candidates, so they shifted their contributions to state political

232. *Id.*

233. *See id.* at 146 (discussing process by which large donors contribute to candidates via soft-money loopholes to create "debt" in officeholder).

234. *McConnell*, 540 U.S. at 144 (citation omitted) (quoting FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 457 (2001)).

committees, knowing the funds would go to support the federal candidate of their choice. In 2002, they could no longer circumvent the individual candidate contribution limits in this way, and so they exponentially increased their own production of federal election advertising, masquerading as issue advertising. Only by focusing on the advertisements themselves can regulations ensnare the savvy do-it-yourself billionaire campaign managers. To find their influence, one need look no further than the 2004 presidential race. Such a focus is a dire imperative, easy to implement, and constitutionally permissible. Entities that produce electioneering communications must be classified as political committees and made subject to campaign finance law.

Joseph Argentina*

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