

## BETWEEN POLITICAL SPEECH AND COLD, HARD CASH: EVALUATING THE FEC'S NEW REGULATIONS FOR 527 GROUPS

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### I. INTRODUCTION

A fifty-year-old man, graying at the temples, sits on his bed slowly tying his shoes. His wife comes in with his coffee, and the man takes it before leaving for work. He looks tired and depressed.

"You put in thirty years at the company," a deep voice intones. "You got good pay, healthcare. Then they send your job overseas. And," the voice continues, "under George Bush the company actually gets a tax break for doing it. Now, Bush says we're in a recovery..."

The man arrives at work, parking in front of a large sign that says "Burgers." When he steps out of his car, he puts on a big white paper hat. As he walks into work, the voice returns.

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“And after a year, you finally land another job. And you wonder, is this what you worked your whole life for?”

The scene cuts to a picture of George W. Bush. “We’re not being led,” the voice concludes. “We’re being misled.”<sup>1</sup>

This advertisement, heavily broadcast in the swing state of Ohio during July and August of 2004, was aired not by Senator John Kerry, George W. Bush’s opponent, but by a group called the MoveOn Voter Fund.<sup>2</sup> The MoveOn Voter Fund is one of many politically focused groups organized under section 527 of the Internal Revenue Code (“527 groups”)<sup>3</sup> that played a major role in the 2004 election.<sup>4</sup> 527 groups such as MoveOn Voter Fund, America Coming Together (“ACT”), and Swift Boat Veterans for Truth spent several hundred million dollars in the 2004 presidential race, grabbing lead headlines with their widely broadcast and often polarizing television advertisements.<sup>5</sup>

527 groups are “issue advocacy” organizations and are technically defined as tax-exempt nonprofit groups that do not engage in express advocacy of individual candidates but pursue other “electioneering activities” as their primary purpose.<sup>6</sup> They must be entirely independent from political candidates, committees, and parties because they can accept “soft money” contributions, and the 2002 Bipartisan Campaign Reform Act (“BCRA”) prohibited soft money contributions to any group that coordinates with candidates or parties.<sup>7</sup> Until outlawed by BCRA, “soft money” contributions to

<sup>1</sup> Introductory exemplar derived from Press Release, MoveOn Voter Fund, MoveOn Voter Fund Launches \$500,000 Ad Campaign in Ohio (June 22, 2004), available at <http://www.moveonvoterfund.org/flippingburgers/pressrelease.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> 26 U.S.C. § 527 (Supp. 2003).

<sup>4</sup> See, e.g., Howard Fineman & Michael Isikoff, *The Slime Campaign: How Both Sides Are Using the 527 Loophole to Throw Mud and Turn out the Vote*, NEWSWEEK, Sept. 20, 2004, at 18.

<sup>5</sup> The ads came from 527 groups that supported both presidential candidates. See Katharine Q. Seelye, *Both Sides’ Commercials Create Brew of Negativity, at a Boil*, N.Y. TIMES, Sept. 23, 2004, at A23. For example, television advertisements run by the pro-Bush Swift Boat Veterans for Truth in August of 2004 led eighteen percent of those surveyed in a Los Angeles Times poll to say they “believe that Kerry misrepresented his war record and does not deserve his war medals.” Ronald Brownstein, *Bush Edges Ahead of Kerry for the 1st Time*, L.A. TIMES, Aug. 26, 2004, at A1. On the other side of the spectrum, the pro-Kerry MoveOn was publicly criticized by the Anti-Defamation League for an advertisement appearing on its website comparing President Bush to Adolf Hitler. Press Release, Anti-Defamation League, ADL Says Hitler Ad Should Never Have Appeared on MoveOn (Jan. 5, 2004), available at <http://releases.usnewswire.com/GetRelease.asp?id=24749>.

<sup>6</sup> See 26 U.S.C. § 527(e)(1), (e)(2).

<sup>7</sup> See 2 U.S.C. § 441(a)(7) (Supp. 2003). An independent or “uncoordinated” expenditure is one made “without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.” *Id.* § 431(17)(B); see also *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (holding that the coordination prohibitions of the Federal Election Campaign Act (“FECA”) apply to issue advocacy organizations like 527 groups).

candidates and political parties were a staple of American campaign financing.<sup>8</sup> Unlike “hard money” contributions, which have a fixed contribution cap and must be reported to the Federal Election Commission (“FEC”),<sup>9</sup> soft money contributions are attractive to donors because they are unlimited and not subject to FEC disclosure, so they are difficult to track.<sup>10</sup>

When BCRA, also known as the McCain-Feingold bill, amended the Federal Election Campaign Act (“FECA”) of 1971 to outlaw unlimited “soft money” contributions to groups coordinating with candidates,<sup>11</sup> many organizations that expressly advocated for specific candidates (such as candidates’ election committees) found their fundraising abilities significantly curtailed.<sup>12</sup> No longer able to contribute large sums of money directly to parties or affiliated committees, wealthy donors began signing their “soft money” checks to independent “issue advocacy” 527 groups whose “issue” was the election or defeat of a particular candidate.<sup>13</sup> In an attempt to assign responsibility for documenting and publicizing contributions to 527s, Congress passed legislation in 2002 mandating that 527 groups disclose detailed contribution information to the IRS.<sup>14</sup> But the legislation mandated only IRS disclosure,<sup>15</sup> not FEC regulation or contribution limits, and in the 2004 campaign 527 groups raised and spent almost \$400 million in private money.<sup>16</sup>

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<sup>8</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 129–30 (2003) (quoting S. REP. NO. 105-167, at 4535 (1998) (“[T]he twin loopholes of soft money and bogus issue advertising have virtually destroyed our campaign finance laws . . .”).

<sup>9</sup> Currently, the fixed contribution cap on hard money donations is \$2000 from individuals and \$5000 from trade associations and nonprofit corporations. 2 U.S.C. § 441a(a)(1)(A), (C) (Supp. 2003).

<sup>10</sup> For an excellent explanation of the difference between soft and hard money, see Ruth Marcus, ‘Hard’ and ‘Soft’ Money: A Crucial, Sometimes Fine Line, WASH. POST, Sept. 5, 1997, at A16. Although not reported to the FEC, soft money contributions to 527 groups are statutorily disclosed to the IRS. See *infra* notes 14–15 and accompanying text.

<sup>11</sup> 2 U.S.C. §§ 431–455 (Supp. 2003).

<sup>12</sup> So many candidates’ committees filed lawsuits challenging BCRA after its passage that the eventual docket was “a veritable who’s who of American politics.” Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1181 (2002); see also Kenneth D. Katkin, *Campaign Finance Reform After Federal Election Commission v. McConnell*, 31 N. KY. L. REV. 235, 240 (2004) (stating that BCRA “is perhaps the strongest and most sweeping regulation of campaign finance ever enacted by Congress”).

<sup>13</sup> See Fineman & Isikoff, *supra* note 4. The great majority of 527 groups are legitimate issue advocacy organizations. See *infra* Part II.B.

<sup>14</sup> 26 U.S.C. § 527(j) (Supp. 2003); see Press Release, Sen. Joe Lieberman, Statement of Senator Joe Lieberman on Passage of Section 527 Fix Bill (Oct. 18, 2002), <http://hsgac.senate.gov/101802press4.htm> (stating that the law was “aimed at improving disclosure by Section 527 political organizations” to the IRS). Prior to the IRS disclosure requirements, donations to the groups were effectively anonymous because their independent and uncoordinated advocacy did not fall within FEC regulation. See David D. Storey, Note, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167, 178–84 (2002).

<sup>15</sup> 26 U.S.C. § 527(j)(2).

<sup>16</sup> See OpenSecrets.org, 527 Committee Activity: Top 50 Federally Focused Organizations, <http://www.opensecrets.org/527s> (last visited Dec. 1, 2005). The Center for Responsive Politics is a

While some of the \$400 million went to nonpartisan voter registration drives and neutral issue advocacy,<sup>17</sup> a great deal of the money went to partisan voting initiatives and television advertisements like the MoveOn Voter Fund ad above.<sup>18</sup> The MoveOn Voter Fund is a 527 group with a website declaring that it “primarily runs ads exposing President Bush’s failed policies in key ‘battleground’ states.”<sup>19</sup> The group is backed by wealthy financiers, including multibillionaire George Soros, who donated over \$2 million to the organization during the 2004 race.<sup>20</sup>

Other 527 groups are equally lucrative. Insurance magnate Peter Lewis, for example, donated almost \$3 million to ACT,<sup>21</sup> a group geared toward “lead[ing] the fight against George Bush’s radical right-wing agenda.”<sup>22</sup> On the other side of the political spectrum, influential Republican Jackson Stephens donated over half a million dollars to the economically conservative Club for Growth,<sup>23</sup> a group boasting that it won seventeen out of twenty-two targeted races and is the largest source of contributions to Republican candidates besides the Republican party.<sup>24</sup> Another major contributor was business mogul Jerry Perenchio, who donated over \$3 million to the Progress for America Voter Fund, a group dedicated to “educating the American people regarding the public policy positions of candidates . . . and mobilizing conservative voters,”<sup>25</sup> and with a link on its website in 2004 to a section called “Those Libs” that tracked groups opposed to President Bush’s reelection.<sup>26</sup>

The money donated by these and other powerful businessmen to 527 groups is money they might once have donated directly to party coffers or candidates’ committees. While the passage of BCRA closed off direct ave-

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nonpartisan, nonprofit research group. About the Center for Responsive Politics, <http://www.opensecrets.org/about> (last visited Jan. 21, 2006).

<sup>17</sup> See Michael Moss & Ford Fessenden, *Interest Groups Mounting Costly Push to Get out Vote*, N.Y. TIMES, Oct. 20, 2004, at A1.

<sup>18</sup> See OpenSecrets.org, 527 Committee Activity: Expenditure Breakdown—Federally Focused Organizations, <http://www.opensecrets.org/527s> (last visited Dec. 1, 2005).

<sup>19</sup> MoveOn Voter Fund, <http://www.moveonvoterfund.org> (last visited Dec. 1, 2005).

<sup>20</sup> OpenSecrets.org, MoveOn: Top Contributors, 2004 Cycle, <http://www.opensecrets.org/527s> (last visited Dec. 1, 2005).

<sup>21</sup> OpenSecrets.org, America Coming Together, 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=10> (last visited Dec. 1, 2005).

<sup>22</sup> America Coming Together, ACT 2.0 Building for the Future, <http://www.acthere.com/plan> (last visited Dec. 1, 2005).

<sup>23</sup> OpenSecrets.org, Club for Growth, 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=43> (last visited Dec. 1, 2005).

<sup>24</sup> The Club for Growth at a Glance, <http://www.clubforgrowth.org/record.php> (last visited Oct. 9, 2004).

<sup>25</sup> Progress for America Voter Fund, *Who Are We?*, PROGRESS FOR AMERICA, <http://pfavoterfund.com/docs/aboutus/> (last visited Dec. 1, 2005).

<sup>26</sup> Progress for America, Those Libs, <http://www.progressforamerica.com> (last visited Nov. 10, 2004).

nues for campaign cash, as the Supreme Court aptly noted in *McConnell v. FEC*—the 2003 decision upholding the constitutionality of BCRA—“[m]oney, like water, will always find an outlet.”<sup>27</sup> As the number of 527 groups exploded, and gained cash and prominence during the 2004 race, the groups began acting more boldly. Swift Boat Veterans for Truth ran television advertisements questioning Senator Kerry’s Vietnam War record that were so vicious even President Bush publicly called for the ads to stop.<sup>28</sup> The group publicly rebuffed him.<sup>29</sup>

The tremendous amount of money that flowed into 527 groups during the 2004 race, combined with the prominence and vitriol of many of the groups’ advertisements, fueled widespread and vocal criticism. Senator John McCain, co-sponsor of BCRA, called 527 groups “the first broad-scale attempt to undermine the BCRA.”<sup>30</sup> A *Los Angeles Times* editorial referred to 527s as “shadow groups.”<sup>31</sup> President Bush’s campaign went so far as to file a lawsuit demanding the FEC crack down on the advertising and election-related activities of 527 groups.<sup>32</sup>

In August of 2004, the FEC, in response to the deluge of criticism, passed two new rules to govern 527 groups.<sup>33</sup> The rules satisfied none of the groups’ critics.<sup>34</sup> As this Comment will demonstrate, however, these balanced, thoughtful FEC initiatives are likely to dramatically and positively alter the shape of federal elections in 2006 and beyond.

<sup>27</sup> *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

<sup>28</sup> Brian Knowlton, *Bush Calls for Halt to Anti-Kerry Ad*, INT’L HERALD-TRIBUNE, Aug. 24, 2004, at 1. If President Bush feared a backlash, his worries may have been misplaced: An *Economist* article declared that Senator Kerry’s drop in approval ratings prior to the Republican Convention in September of 2004 “had nothing to do with the convention and everything to do with the Swift Boat Veterans for Truth . . . .” *The Republican Convention: Grinding Out a Victory*, ECONOMIST, Sept. 4, 2004, at 27, 27.

<sup>29</sup> Steve Centanni et al., *Swift Boat Vets Vow to Press on*, FOX NEWS.COM, Aug. 25, 2004, <http://www.foxnews.com/story/0,2933,129838,00.html>. In an interview following President Bush’s appeal, a leader of the Swift Boat Veterans group told Fox News that “[w]e’re not going to stop. We’d be doing this if John Kerry was a Republican.” *Id.* If President Bush rationally feared a backlash from the ads, then the group’s refusal to agree with the strategy of its favored candidate underscores the practical effect of BCRA’s prohibition of coordination between candidates and 527 groups.

<sup>30</sup> 150 CONG. REC. S577 (2004) (statement of Sen. McCain).

<sup>31</sup> Lisa Getter, *Legal Roles in Campaigns Put Spotlight on Shadow Groups*, L.A. TIMES, Aug. 26, 2004, at A20.

<sup>32</sup> Carol D. Leonnig, *Bush Sues to Stop ‘527’ Groups Backing Kerry*, WASH. POST, Sept. 2, 2004, at A6. The lawsuit may have been driven by the fact that Republicans were initially less successful than Democrats at organizing 527 groups. See Glen Justice, *Finance Battle Shifts to Election Panel*, N.Y. TIMES, Jan. 16, 2004, at A16. By the end of the 2004 race, however, Republicans had become far more successful in fundraising through 527 groups, and the lawsuit was dropped. Thomas B. Edsall, *After Late Start, Republican Groups Jump into the Lead: Since August, 527s Raised Six Times as Much as Democrats*, WASH. POST, Oct. 17, 2004, at A15.

<sup>33</sup> 11 C.F.R. §§ 100.57, 106.6 (2004).

<sup>34</sup> See Gregory L. Giroux, *F.E.C. Issues Rules Targeting Nonparty Groups*, N.Y. TIMES ONLINE, Aug. 20, 2004, <http://www.nytimes.com/cq/2004/08/20/news-1300508.html>.

The first of these remarkable rules requires that any 527 group soliciting money for the purpose of explicitly supporting or opposing a clearly identified federal candidate must register with the FEC as a “political committee.”<sup>35</sup> Political committees are subject to the same soft money regulations as political parties and candidates: they are prohibited from accepting all soft money, and are instead required to pay for all of their election-related expenses with hard money.<sup>36</sup> The second new rule mandates that groups broadcasting public communications (including television and internet advertising) that refer to any clearly identified candidate or party pay fifty percent of nonadministrative expenditures and one-hundred percent of the costs of those advertisements from hard money donations.<sup>37</sup>

The potential ramifications of these rules are complex. Had they been in effect during the 2004 election, many 527 groups that were set in motion with multimillion dollar donations from wealthy individuals never would have launched.<sup>38</sup> However, concerns about implementing new election guidelines in the middle of a race led the FEC to delay enacting the rules until 2005.<sup>39</sup> Thus the full effects of the new rules will not be felt until the 2006 congressional elections.

The rules are equally remarkable for what they do not do: they do not universally classify 527 groups as political committees, as a wide array of scholars<sup>40</sup> and politicians<sup>41</sup> had suggested. Many scholars have publicly supported a more comprehensive FEC rule that would classify any group having the “major purpose” of supporting or defeating a candidate as a political committee. According to the version of the rule popular with such academics, a “major purpose” would be shown when any group spent more than half of its funds on candidate-related advocacy.<sup>42</sup> At the same time, congressional legislators have proposed an even broader rule, in the form of a new law called the 527 Reform Act, which would remove the issue from

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<sup>35</sup> 11 C.F.R. § 106.6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* § 100.57(b)(1), (b)(2).

<sup>38</sup> See Thomas B. Edsall, *FEC Votes to Curb Nonparty Donations*, WASH. POST, Aug. 20, 2004, at A6 (discussing how several prominent 527 groups began with large donations from individuals).

<sup>39</sup> Amy Keller, *Members Vow Scrutiny After FEC Vote on 527s*, ROLL CALL, May 17, 2004, at 21. The vote on the rules was postponed from April until August, and they did not come into force until January 1, 2005. *Id.*

<sup>40</sup> See, e.g., Edward B. Foley, *Comments to FEC: April 5, 2004*, 31 N. KY. L. REV. 361 (2004) (arguing for the major purpose test’s adoption).

<sup>41</sup> See, e.g., Press Release, John McCain, FEC Must Do Its Job on 527s Tomorrow (Aug. 18, 2004), available at [http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content\\_id=1306](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1306) (calling on the FEC to approve a major purpose test).

<sup>42</sup> Notice of Proposed Rulemaking on Political Committee Status, 69 Fed. Reg. 11,736, 11,747 (Mar. 11, 2004) [hereinafter Notice].

the FEC's discretion entirely by explicitly classifying all 527 groups as political committees.<sup>43</sup>

These two widely advocated sets of rules raise hard questions about the balance between our desire to prevent wealthy individuals and corporations from holding unfair or even corruptive sway over elected leaders, and our desire to ensure that anyone who wishes to honestly tell others what he or she thinks—to advocate for an issue he or she finds compelling—is able to do so. Congress and the courts have articulated a clear justification for campaign finance legislation: to prevent the corruption and appearance of corruption that can result when candidates are forced to solicit vast sums of money from private individuals.<sup>44</sup> This Comment argues that despite all the criticism from scholars and politicians, the FEC's newly adopted rules are a balanced and reasonable mechanism to permit genuine issue advocacy while limiting the potential for political corruption.<sup>45</sup>

Part II of this Comment traces the genesis and development of FECA and BCRA, and shows how the Supreme Court has interpreted the legislation as geared toward removing corruptive influences from the political process. It also describes how section 527 groups arose and how they survive under the Court's corruption rationale. Part III analyzes the FEC's new rules, detailing how they will affect 527 groups and why they are superior to the widely touted alternatives. It explains why the scholarly alternative to the FEC's rules, the "major purpose" test, suffers from significant constitutional questions, and why Congress's effort threatens to push money into forms of advertising that mask donors' agendas even more than current advertising (such as agenda-driven political documentaries), or even cause money to be donated with outright illegality.

Part IV employs a law and economics analysis to consider the role mature 527 groups could play in the electoral process. It discusses an over-

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<sup>43</sup> 527 Reform Act of 2004, S. 2828, 108th Cong. (2004). As political committees, of course, 527 groups would be prohibited from accepting soft money. 2 U.S.C. § 441a(a)(1)(A) (Supp. 2003).

<sup>44</sup> See *infra* Part II.

<sup>45</sup> Invariably, this Comment will touch upon issues of unsettled constitutional and statutory interpretation. For instance, some scholars contend that BCRA is an unconstitutional infringement on First Amendment rights. See, e.g., James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers,"* 51 CATH. U. L. REV. 785, 824 (2002). Others have argued that the legislation serves only to entrench a plutocratic political class. See, e.g., Kathleen M. Sullivan & Pamela S. Karlan, *The Elysian Fields of the Law,* 57 STAN. L. REV. 695 (2004) (extrapolating John Hart Ely's likely response to modern campaign finance law). Yet others simply adopt an absolutist stance against the idea that government should ever regulate political speech. Cf. Brendan T. Holloway, Note, *McConnell v. Federal Election Commission: The Supreme Court Rewrites the Book on Campaign Finance Law. Will Political Speech Survive This Most Recent Onslaught?*, 13 COMMLAW CONSPECTUS 107 (2004). The purpose of this Comment, however, is not to remark on the constitutionality of BCRA or *McConnell*, but rather to demonstrate that despite widespread and vocal opposition, the FEC's new rules are a wise and permissible policy decision because they successfully balance the delicate interest of individual political speech with what the Supreme Court has recognized as Congress's prerogative to eliminate the appearance of corruption.

looked and unique benefit of 527 groups, specifically that the groups are an ideal vehicle to remedy certain previously identified failures in election markets. It also explains how the FEC's new rules will enhance those failure-correcting effects without increasing the likelihood of political corruption. Finally, Part V concludes that despite the widespread criticism, the FEC's new rules are sensible because they are the most likely to enhance genuine issue advocacy without unduly trampling free speech rights or increasing the likelihood of corruption.

## II. A BRIEF HISTORY OF CAMPAIGN FINANCE REGULATION

The history of private campaign financing is the history of American campaigns. Indeed, financing elections with private money was a part of American politics before the states even united.<sup>46</sup> In a 1757 race for a seat at Virginia's House of Burgess, a fresh-faced ex-lieutenant named George Washington "provided his friends with 'the customary means of winning votes,'" delivering a quart and a half of cider, wine, and beer to each of the 391 voters in his district.<sup>47</sup> During the vice-presidential contest in 1792,<sup>48</sup> supporters of New York Governor George Clinton subsidized a vehemently anti-Federalist Party paper known as the *National Gazette*.<sup>49</sup> The paper is credited with providing the governor with unexpected electoral successes in at least three states.<sup>50</sup>

Indeed, throughout the early 1800s the largest campaign costs were for partisan journals like the *Gazette*.<sup>51</sup> In 1832, Senator Daniel Webster found himself personally in debt to the Second Bank of the United States for costs associated with the publication of the Whig Party newspaper.<sup>52</sup> The Bank funded the paper to encourage opposition to President Jackson's plan to revoke the Bank's charter.<sup>53</sup> Indeed, by the time the charter's renewal was up for a vote, "Senator Webster was so heavily in debt to the Bank for loans extended to him that in effect it 'owned' him."<sup>54</sup> When the plan reached the Senate floor, Senator Webster argued passionately against it.<sup>55</sup>

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<sup>46</sup> GEORGE THAYER, WHO SHAKES THE MONEY TREE?: AMERICAN CAMPAIGN FINANCING FROM 1789 TO THE PRESENT 25 (1973).

<sup>47</sup> *Id.*

<sup>48</sup> There was only a vice-presidential contest in that year, as Washington won every vote for President in the Electoral College. President Elect, President Elect: 1792, <http://www.presidentelect.org/e1792.html> (last visited Dec. 1, 2005).

<sup>49</sup> THAYER, *supra* note 46, at 26.

<sup>50</sup> *Id.* The presumptive victor had been John Adams, who won the election at any rate. *Id.*

<sup>51</sup> *Id.* at 29.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* Daniel Webster, one of the most well-known antebellum Senators and a renowned rhetorician and orator, was an outspoken supporter for the renewal of the charter of the Second Bank. See William J. Kambas, *The Development of the U.S. Banking System: From Colonial Convenience to National Necessity*, 28 RUTGERS L. REC. 4 (2004). The Second Bank of the United States was long a contentious

By the late nineteenth century, the rise of corporations—and corporate pocketbooks—led to an explosive leap in the financing of elections.<sup>56</sup> It was often said at the time that Standard Oil “did everything to the Pennsylvania legislature except refine it.”<sup>57</sup> When the Pendleton Act closed off the arbitrary granting of civil service appointments in 1883,<sup>58</sup> politicians turned to corporate extortion to encourage contributions. The Republican chairman in Pennsylvania, Boies Penrose, was notorious for introducing bills to regulate corporations and then demanding party contributions to kill them in committee.<sup>59</sup> Penrose was so successful at squeezing money from businesses that he reportedly once raised \$250,000 in forty-eight hours<sup>60</sup>—which translates to almost \$4.5 million today.<sup>61</sup>

Such blatant extortion was not tolerated for long. The election of William McKinley in 1896,<sup>62</sup> in which McKinley spent in excess of \$7 million (almost eleven times the \$650,000 spent by his opponent, William Jennings Bryan),<sup>63</sup> helped bring about the passage of the Tillman Act in 1907.<sup>64</sup> The legislation prohibited direct contributions from corporations to political officeholders, but Congress provided no administrative enforcement mechanism.<sup>65</sup> As a result, the Tillman Act made a negligible difference in electoral corruption.<sup>66</sup> Similarly, the Publicity Act of 1910 required federal

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constitutional issue, however, and Senator Webster was a partisan Whig, so it may be unfair to tie his support for the Bank solely to his personal debts. *Id.*

<sup>55</sup> See Kambas, *supra* note 54.

<sup>56</sup> See THAYER, *supra* note 46, at 41.

<sup>57</sup> MARK GREEN, SELLING OUT: HOW BIG CORPORATE MONEY BUYS ELECTIONS, RAMS THROUGH LEGISLATION, AND BETRAYS OUR DEMOCRACY 3–4 (2002).

<sup>58</sup> Civil Service (Pendleton) Act, ch. 27, 22 Stat. 403 (1883) (codified as amended at 40 U.S.C. § 8165 (Supp. 2003)). The Pendleton Act was passed in response to the assassination of President Garfield by a campaign worker disgruntled that he did not receive a patronage job. As interpreted by the Civil Service Commission, it required written examinations for government employees and provided dismissal only for good cause. See Joseph Slater, *Homeland Security vs. Worker's Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U. PA. J. LAB. & EMP. L. 295, 307 (2004).

<sup>59</sup> THAYER, *supra* note 46, at 46.

<sup>60</sup> *Id.* at 47.

<sup>61</sup> See Economic History Services, What Is Its Relative Value in U.S. Dollars?, <http://eh.net/hmit/> compare (last visited Jan. 24, 2004) (current value calculated according to the relative 2003 Consumer Price Index).

<sup>62</sup> The 1896 election was particularly interesting because it was the first election to feature a mass media advertising campaign led by a trained political operative. See GEORGE BENSON, POLITICAL CORRUPTION IN AMERICA 64–65, 85 (1978); THAYER, *supra* note 46, at 49.

<sup>63</sup> THAYER, *supra* note 46, at 50–51.

<sup>64</sup> Tillman Act, ch. 420, 34 Stat. 864 (1907) (codified as amended at 2 U.S.C. § 441(b) (Supp. 2003)).

<sup>65</sup> Congress did not create the FEC to oversee and administer the election laws until it passed FECA in 1971. FED. ELECTION COMM'N, TWENTY YEAR REPORT 7 (1995), available at <http://www.fec.gov/pdf/20year.pdf>.

<sup>66</sup> *Id.*

officeholders to report campaign contributions,<sup>67</sup> and the Federal Corrupt Practices Act of 1925 prohibited large donations from individuals.<sup>68</sup> But without an institutional framework to administer the laws they were widely ignored.<sup>69</sup>

Over the next sixty years, little change occurred in the regulation of donations to political campaigns beyond a sharp increase in the amounts donated.<sup>70</sup> New Deal-era government expansion and the economic boom following World War II cemented the bond between politicians and moneymen.<sup>71</sup> Corporations, unions, and wealthy individuals all gave millions of dollars to various candidates<sup>72</sup> in an effort to direct legislation and votes. The candidates in the 1956 election spent over \$155 million, and by 1968 that number had nearly doubled.<sup>73</sup>

*A. The First Real Attempt at Reform: FECA and Buckley v. Valeo*

By the next presidential election in 1972, the long-neglected campaign finance regime boiled over. Investigations into the Watergate affair revealed that President Nixon's staff allegedly funded his reelection with millions of dollars in secret contributions from, among others, industrialist Howard Hughes (via \$100,000 kept in a locked safe-deposit box) and financier Robert Vesco (via a briefcase containing \$200,000 cash).<sup>74</sup> Some of the money had even been laundered through a bank in Mexico City.<sup>75</sup>

Public outrage forced Congress to enact a more effective set of regulations for political fundraising in 1974, with an administrative agency to give them teeth. The legislation that developed, FECA, placed strict ceilings on direct contributions from individuals, political committees, and corporations to any clearly identified federal candidate.<sup>76</sup> Congress also created an administrative agency, the FEC, to enforce the law.<sup>77</sup>

<sup>67</sup> Campaign Expenses Publicity Act, ch. 392, §§ 4, 6, 36 Stat. 822, 823 (1910) (codified at 18 U.S.C. § 602 (2000)).

<sup>68</sup> Federal Corrupt Practices Act of 1925, ch. 368, 43 Stat. 1070, 1070–74, *repealed by* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–455 (Supp. 2003).

<sup>69</sup> FED. ELECTION COMM'N, *supra* note 65, at 8.

<sup>70</sup> Patrick Basham, *It's the Spending, Stupid!: Understanding Campaign Finance in the Big Government Era* 2 fig.1 (Cato Inst., Paper No. 64, 2001), available at <https://www.cato.org/pubs/briefs/bp64.pdf> (showing steadily rising federal campaign spending from 1954 to 2000); see THAYER, *supra* note 46, at 76–79 (discussing the rapid rise in electoral spending after the 1930s).

<sup>71</sup> See Basham, *supra* note 70, at 3–4.

<sup>72</sup> See, e.g., BENSON, *supra* note 62, at 138; THAYER, *supra* note 46, at 157–64.

<sup>73</sup> CONG. Q., INC., DOLLAR POLITICS 8–9 (3d ed. 1982).

<sup>74</sup> 2 BRUCE FREED & ROBERT A. DIAMOND, CONG. Q., INC., DOLLAR POLITICS 11, 18 (1974).

<sup>75</sup> ROBERT E. MUTCH, CAMPAIGNS, CONGRESS, AND COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 47 (1988).

<sup>76</sup> Federal Election Campaign Act (FECA) of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. § 441a (2000)).

<sup>77</sup> 2 U.S.C. §§ 437c–437d (2000).

Congress enacted FECA with three specific goals in mind. First, and most importantly, it wanted to limit corruption and the appearance of corruption that the existing ineffective campaign finance laws had engendered.<sup>78</sup> Second, Congress wanted to equalize the disproportionate influence of the wealthy in advocating for particular candidates.<sup>79</sup> Third, it hoped to reduce the total cost of American elections, which many legislators felt had gotten out of hand.<sup>80</sup>

Five years after the enactment of FECA, the Supreme Court reviewed the Act in *Buckley v. Valeo*, striking several portions for improperly regulating protected speech.<sup>81</sup> The Court determined that the only compelling governmental interest supporting the Act was preventing corruption or the appearance of corruption.<sup>82</sup> Equalizing the influence of the wealthy was found “wholly foreign to the first amendment,”<sup>83</sup> and the goal of limiting the total cost of elections was declared far outside the government’s authority.<sup>84</sup>

Building on the view that the only acceptable regulation of political speech was to prevent a corruptive influence (and the potential for a slippery slope to greater, impermissible regulations of political speech), the Court drew a sharp line between “contributions” and “expenditures.”<sup>85</sup> The Court held that contributions, as a form of “proxy speech,” should be ac-

<sup>78</sup> ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 9 (2000) (“[FECA’s] primary purpose was to end the corruption . . . that can accompany large, undisclosed contributions to candidates.”).

<sup>79</sup> *Id.* at 10. For a discussion of the manner in which the current campaign finance system discourages political participation, see generally Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73 (2004) (arguing for campaign finance reforms that would equalize political participation across the socioeconomic spectrum).

<sup>80</sup> CORRADO, *supra* note 78, at 10.

<sup>81</sup> *Buckley v. Valeo*, 424 U.S. 1, 143 (1976).

<sup>82</sup> *Id.* at 26. The governmental interest in preventing the *appearance* of corruption lies in the fact that corruption itself, as a clear quid pro quo, is difficult to prove. Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119, 135 (2004).

<sup>83</sup> *Buckley*, 424 U.S. at 48–49 (“[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure ‘the widest possible dissemination of information from diverse and antagonistic sources,’ and ‘to assure unfettered interchange of ideas’ for the bringing about of political and social changes desired by the people.” (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964))). For two recent pieces offering greater discussion of the role of equality in the political process, see Mark C. Alexander, *Money in Political Campaigns and Modern Vote Dilution*, 23 LAW & INEQUALITY 239 (2005), and Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKKER V. CARR TO BUSH V. GORE* (2003)).

<sup>84</sup> *Buckley*, 424 U.S. at 57 (“[T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending . . . . The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.”).

<sup>85</sup> *Id.* at 19–20. A campaign “contribution” is money a private individual or group donates to a political candidate, while a campaign “expenditure” is money spent by a candidate’s campaign. *Id.*

corded less First Amendment protection than expenditures, which are more akin to direct speech.<sup>86</sup> The effect of the decision is that a candidate spending money he or she has—either money that *has already been* contributed or from self-funding—is considered to engage in a type of political speech fundamentally protected by the Constitution. That money, therefore, may not be regulated. Money *being* contributed to a candidate, however, gives rise to a compelling government interest, preventing corruption, and thus may be regulated without infringing constitutional rights.<sup>87</sup>

The difficulty arises when groups other than candidates themselves run ads: are they personal, political expenditures, free from regulation as political speech, or candidate contributions? Adopting a bright-line distinction between the two, the *Buckley* Court ruled that any group with advertisements “expressly advocating” for a particular candidate was making a contribution to that candidate, and the group was governed by FECA.<sup>88</sup> It determined that “express advocacy” occurs when advertisements employ any of several specific “magic words,” including “vote for,” “elect,” and “defeat.”<sup>89</sup> The Court treated groups that did not use those magic words as engaging in “issue advocacy,” and their advertisements were not considered contributions.<sup>90</sup>

*Buckley* thus exempted issue advocacy groups from any FEC spending or disclosure requirements. As a result, parties, political action committees (“PACs”), and special interests,<sup>91</sup> often in coordination with a candidate or officeholder, solicited hundreds of millions of dollars from corporate and individual donors in unregulated soft money.<sup>92</sup> In one telling example, a Senate investigation revealed that at a fundraiser in 1996, President Clinton was handed a business card on the back of which was scribbled “I have an

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<sup>86</sup> *Id.* at 19–21. The Court reasoned that expenditures are similar to speech in that they both serve as forms of public communication, while donations from individuals to candidates rely on the candidate to do any actual public communicating. *Id.*

<sup>87</sup> CORRADO, *supra* note 78, at 11.

<sup>88</sup> *Buckley*, 424 U.S. at 42.

<sup>89</sup> *Id.* at 43–44. The magic words triggering express advocacy status were “‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [and] ‘reject.’” *Id.* at 44 n.52. Some scholars object to the use of the phrase “magic words test.” See James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289, 293 n.25 (2004) (“Using the phrase ‘magic words’ reveals the user to be a campaign finance ‘reform’ partisan and is akin to using the pejorative phrase ‘sham issue ads.’”).

<sup>90</sup> *Buckley*, 424 U.S. at 42–43.

<sup>91</sup> For an interesting look at the role of contributions from corporate special interests following FECA, see ANN B. MATASAR, CORPORATE PACS AND FEDERAL CAMPAIGN FINANCING LAWS: USE OR ABUSE OF POWER? 51–70 (1986).

<sup>92</sup> See DAVID B. MAGLEBY & CANDICE J. NELSON, THE MONEY CHASE: CONGRESSIONAL CAMPAIGN FINANCE REFORM 48–71 (1990).

associate . . . interested in donating \$5 million to your campaign.”<sup>93</sup> The card’s owner, Warren Medoff, had spent the previous seven years involved in an unsuccessful and dubious scheme to sell “pre-1940 gold-backed German loan documents” that were completely disavowed by the German government.<sup>94</sup> Nevertheless, chief-of-staff Harold Ickes immediately sought out Medoff and directed him to PACs affiliated with the campaign that could accept the money.<sup>95</sup> Because those PACs did not engage in express advocacy, Medoff’s contributions to President Clinton’s campaign went unreported until he testified about them before Congress in 1997.<sup>96</sup>

Following *Buckley*, parties and PACs began to spend soft money contributions either on issue advocacy advertisements that simply avoided the magic words, or on party administrative costs, which freed hard money contributions for campaign advertisements that did employ the magic words.<sup>97</sup> In practice, however, the two types of ads were barely distinguishable. Unregulated issue advocacy groups routinely ran advertisements that used none of the magic words but clearly supported or criticized specific candidates. One such advertisement, which was broadcast during the 2000 campaign by a group with the nondescript title of “Americans for Job Security,” criticized Vice President Gore’s proposed gasoline taxes while easily avoiding use of the magic words, concluding with the admonition “don’t be Gored at the gas pump.”<sup>98</sup> Soft money contributors and their stays in the Lincoln Bedroom provided routine fodder for late-night comedians,<sup>99</sup> but

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<sup>93</sup> Robert Paul Meier, Comment, *The Darker Side of Nonprofits: When Charities and Social Welfare Groups Become Political Slush Funds*, 147 U. PA. L. REV. 971, 972 (1999).

<sup>94</sup> *Id.* at 972 n.10.

<sup>95</sup> *Id.* at 972–73.

<sup>96</sup> At the time, one Senator stated that Medoff had offered “unheard-of contributions” to Clinton’s reelection campaign, and that “no one individual” had ever made such large donations before. *Investigation of Illegal or Improper Activities in Connection with the 1996 Federal Election Campaign—Part VII: Hearings Before the S. Comm. on Governmental Affairs*, 105th Cong. 251, 274 (1997) (statement of Sen. Don Nickles).

<sup>97</sup> Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 631 (2000).

<sup>98</sup> Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL’Y REV. 235, 241 (2004).

<sup>99</sup> For instance, David Letterman’s Top Ten list on March 6, 1997, the “Top Ten Ways Al Gore Tried to Raise Money for the Democratic Party,” included number two: “Equipped Lincoln Bedroom with coin-operated condom machine.” *Late Show with David Letterman* (CBS television broadcast Mar. 6, 1997), available at [http://www.cbs.com/latenight/lateshow/top\\_ten/archive](http://www.cbs.com/latenight/lateshow/top_ten/archive); see also Briffault, *supra* note 97, at 650 (discussing various perks offered by politicians to contributors, including one-on-one dinners with President Clinton and three-day golf outings with then-Speaker of the House Newt Gingrich and Senate Majority Leader Trent Lott); Jonathan S. Kresno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 126 (2003) (discussing political contributions offered in exchange for stays in the Lincoln Bedroom and plots at Arlington National Cemetery).

their unregulated and undisclosed donations, amounting to over \$500 million in the 2000 election, were no laughing matter.<sup>100</sup>

*B. Try, Try Again: BCRA and McConnell v. FEC*

Responding to the abuses of the 2000 election, Congress passed the most sweeping and controversial campaign finance legislation in twenty-five years.<sup>101</sup> When enacted in 2002, BCRA made two major changes to the campaign finance laws established by FECA. First, BCRA banned altogether the use of soft money contributions to political parties and groups directly affiliated with parties or candidates, instead requiring those groups to raise all of their funds through hard money contributions.<sup>102</sup> Additionally, BCRA disallowed any contributions from corporations or unions to parties and their candidates.<sup>103</sup>

Second, BCRA expanded *Buckley*'s definition of campaign contributions by requiring issue advocacy groups to be completely independent of candidates and parties.<sup>104</sup> This "noncoordination" requirement means that federal officeholders can no longer accept soft money donations from any group with which they or their party coordinate.<sup>105</sup> Moreover, BCRA prohibited issue advocacy groups from running advertisements—termed "electioneering communications"—that referred to any clearly identified federal candidate within sixty days of an election.<sup>106</sup> BCRA classified such groups as political committees, subjecting them to the total ban on soft money.<sup>107</sup>

The Supreme Court reviewed BCRA on an expedited basis in *McConnell v. FEC*.<sup>108</sup> In the second-longest decision in the Court's history,<sup>109</sup>

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<sup>100</sup> KATHLEEN H. JAMIESON ET AL., ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 1 (2000), available at [http://www.annenbergpublicpolicycenter.org/03\\_political\\_communication/issueads/2001\\_1999-2000issueadvocacy.pdf](http://www.annenbergpublicpolicycenter.org/03_political_communication/issueads/2001_1999-2000issueadvocacy.pdf).

<sup>101</sup> Bipartisan Campaign Reform (McCain-Feingold) Act of 2002, 2 U.S.C. §§ 431–455 (Supp. 2003). For a thorough discussion of the debate that surrounded the Act prior to its passage, see *News-hour with Jim Lehrer: Debating Reform* (PBS television broadcast July 11, 2001), available at [http://www.pbs.org/newshour/bb/congress/july-dec01/cfr\\_7-11.html](http://www.pbs.org/newshour/bb/congress/july-dec01/cfr_7-11.html).

<sup>102</sup> 2 U.S.C. § 441a(d)(4). Soft money donations are unlimited and anonymous, while hard money donations are strictly capped at \$2000 per person and reported to the FEC. See *supra* Part I.

<sup>103</sup> *Id.* § 441a(a)(5).

<sup>104</sup> *Id.* § 441a(a)(7)(B)(i).

<sup>105</sup> *Id.*; see *supra* note 7 and accompanying text.

<sup>106</sup> 2 U.S.C. § 434(f)(3).

<sup>107</sup> The *McConnell* Court also upheld most of BCRA's minor provisions, including a ban on electioneering communications thirty days before primaries, limitations on the use of state party fundraising in federal elections, and the "Stand By Your Ad" requirements behind the "I'm Senator Jones and I approved this message" phrase at the end of every political committee advertisement. *Id.* §§ 431–455; *McConnell v. FEC*, 540 U.S. 93, 159–173, 189–202 (2003).

<sup>108</sup> 540 U.S. at 133. Senator Mitch McConnell, long opposed to campaign finance regulation on free speech grounds, had led a filibuster to prevent BCRA from ever reaching a vote—and filed suit to block the statute immediately after it was signed into law. Cf. Alison Mitchell, *Vote is 60 to 40: Opponents of Measure Say They Will Push Battle into Courts*, N.Y. TIMES, Mar. 21, 2002, at A1.

*McConnell* upheld nearly every major provision of the Act.<sup>110</sup> Determining that the corruptive influence of money in the political process had reached unacceptable proportions, the Court deferred to Congress for the best solution.<sup>111</sup> More importantly, the Court upheld the statute's ban on soft money contributions to groups that coordinate with candidates.<sup>112</sup> The Court also expanded the magic words test of *Buckley* to include the much broader language of BCRA's electioneering communications ban, prohibiting groups that accept soft money from "expressly advocating" for federal candidates, regardless of the exact words they use.<sup>113</sup>

Following the passage of BCRA and the *McConnell* decision, election funding changed dramatically. The elimination of soft money from candidate and party coffers led to an intense drive for individual hard money contributions.<sup>114</sup> The brief presidential campaign of Vermont Governor Howard Dean pioneered the use of the Internet to target a wide number of individual hard money contributors to make up for the loss in soft money contributions, a strategy quickly and successfully mirrored by his competitors.<sup>115</sup> Through June of 2004, candidates raised a total of over \$1 billion in hard money contributions,<sup>116</sup> compared to the just over \$600 million in soft

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<sup>109</sup> Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 244 (2004). *McConnell* weighed in at 89,694 words, bested only by the 1857 *Dred Scott* decision, at 109,163 words. *Id.* at n.8. In terms of sheer pages, *McConnell*'s majority, concurring, and dissenting opinions are the longest in the Court's history, filling a combined 257 pages in the *United States Reports*. *Id.*

<sup>110</sup> *Id.* at 244. Several scholars argue that *McConnell*'s support for legislative deference is theoretically flawed. See Robert F. Bauer, *When "The Pols Make the Calls": McConnell's Theory of Judicial Deference in the Twilight of Buckley*, 153 U. PA. L. REV. 5 (2004) (questioning the scope of the Court's legislative deference because so much of Congress's intent was overruled in *Buckley*); John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37, 40 (2004) ("The Court today should not ask, as it does, whether some persons, even Members of Congress, conclusorily assert that the regulated conduct appears corrupt to them. . . . [I]t should instead inquire whether the conduct now prohibited inherently poses a real or substantive quid pro quo danger, so that its regulation will stem the appearance of quid pro quo corruption." (quoting *McConnell*, 540 U.S. at 298 (Kennedy, J., concurring in part and dissenting in part))).

<sup>111</sup> *McConnell* referenced the legislative record at least ten times before determining that corruption in political financing reached the epidemic proportion required to serve a compelling governmental interest. *McConnell*, 540 U.S. 93.

<sup>112</sup> *Id.* at 202-03.

<sup>113</sup> *Id.* at 191-94.

<sup>114</sup> See Rich Robinson, *Local Comment: Campaign Reform Far From Failure*, DETROIT FREE PRESS, Nov. 2, 2004, at 9A; Rebecca Walsh, *Soft Money Ban Hurting Some Utah Candidates*, SALT LAKE TRIB., Sept. 13, 2004, at A4 (discussing effects of BCRA's prohibition of soft money contributions).

<sup>115</sup> Alexandra Samuel, *The Web Election*, TORONTO STAR, Oct. 18, 2004, at D1. The campaign website for Senator Kerry raised over \$82 million in hard money contributions during the 2004 race, while President Bush's website raised over \$13 million. *Id.*

<sup>116</sup> Press Release, Ctr. for Responsive Politics, 527s Not Filling Soft Money Gap: Hard Money Giving Tops \$1 Billion (June 25, 2004), available at <http://www.opensecrets.org/pressreleases/2004/Post-BCRA.asp>.

and hard money contributions combined that funded the entire 2000 race.<sup>117</sup> Of that \$1 billion, individuals donated more than \$800 million,<sup>118</sup> a six-fold increase over 2000.<sup>119</sup>

Thus, although a greater amount of money entered the electoral stream in the 2004 cycle, the funding—in stark contrast with the prior regime—was overwhelmingly in the form of hard money. Because, by statute, no single hard money donation can be greater than \$2000, candidates, officials, and parties faced significantly fewer incentives to compromise themselves than they would have for larger donations.<sup>120</sup> BCRA's noncoordination provisions further meant that campaign managers had no opportunity to control or exploit the messages of issue advocacy groups, and wealthy interests funded by soft money lacked the opportunity to whisper agendas in candidates' ears.<sup>121</sup> As Senator Russ Feingold, co-sponsor of the BCRA said, "[It] was a victory . . . to accomplish the elimination of . . . one of the most corrupting things I've ever seen in American politics."<sup>122</sup>

### C. *Up and away: The Stratospheric Rise of 527 Groups*

Despite the general success of BCRA,<sup>123</sup> however, commentators, politicians, and journalists have all raised the specter that 527 groups, which are not regulated by the FEC, undermine BCRA's basic intent of removing soft money from the electoral equation.<sup>124</sup> The source of these complaints lies in congressional treatment of 527 groups under the Internal Revenue Code (the "Code"). The Code classifies "political organizations" under section 527 far more broadly than does FECA, as any "party, committee, fund, or

<sup>117</sup> Press Release, Ctr. for Responsive Politics, '04 Elections Expected to Cost Nearly \$4 Billion: Presidential Race to Top \$1.2 Billion (Oct. 21, 2004), available at <http://www.opensecrets.org/pressreleases/2004/04spending.asp>.

<sup>118</sup> Press Release, *supra* note 116. The rest of the \$1 billion came from PAC and party contributions, candidate self-funding, and loans. Press Release, *supra* note 117. It may be worth mentioning that although \$1 billion is certainly a lot of money, Americans spent \$3.12 billion on Halloween candy in 2004. *Halloween Treats for Retailers*, CNN MONEY, Oct. 16, 2004, [http://money.cnn.com/2004/09/28/news/economy/nrf\\_halloween](http://money.cnn.com/2004/09/28/news/economy/nrf_halloween).

<sup>119</sup> Individuals contributed \$140 million in 2000. FEC, Receipts of 1999–2000 Presidential Campaigns Through July 31, 2000, <http://www.fec.gov/finance/precm8.htm> (last visited Dec. 1, 2005).

<sup>120</sup> See Editorial, *Campaign Reform*, WASH. POST, Nov. 3, 2004, at A14.

<sup>121</sup> Indeed, if an otherwise unaffiliated group were even caught speaking to a candidate or party it could risk relegation to political committee status. See 2 U.S.C. § 431 (Supp. 2003).

<sup>122</sup> Interview, *Campaign Finance Reform*, 22 YALE L. & POL'Y REV. 339, 341 (2004) (interview with Senator Russell Feingold).

<sup>123</sup> John McCain, *Paying for Campaigns: McCain Eyes Next Target*, USA TODAY, Nov. 4, 2004, at 27A (stating that BCRA "has worked well to achieve its most important objective").

<sup>124</sup> See, e.g., *Hearing on Federal Election Commission and 527 Groups: Hearing Before the House Comm. on House Admin.*, 108th Cong. (2004) [hereinafter *Hearing*]; Press Release, Campaign Legal Ctr., Reform Groups: FEC Must Act on Complaints Against 527s (Aug. 31, 2004), available at <http://www.campaignlegalcenter.org/press-1285.html>; Mark Hosenball et al., *The Secret Money War*, NEWSWEEK, Sept. 20, 2004, at 22.

organization” that operates with the “primary purpose” of influencing the “selection, nomination, election or appointment” of any federal or state officer.<sup>125</sup> Thus 527 groups can maintain tax-exempt status while primarily engaging in political advocacy, as long as that advocacy does not cross the line from “issue” based to “express.”<sup>126</sup>

Congress’s original rationale for 527 groups was sound: Congress enacted section 527 of the Code in 1975 to exempt political organizations from paying income or gift taxes on donations.<sup>127</sup> Since taxes on gifts run higher even than the tax on income,<sup>128</sup> avoiding gift tax is essential to donors’ willingness to contribute to political causes.<sup>129</sup> Congress reasoned that donors would be less inclined to contribute outside the system if they did not lose as much to tax.<sup>130</sup>

Because Congress neither required disclosure for 527 groups nor prohibited their coordination with candidates and parties, they fell in the gap between FECA and the Code.<sup>131</sup> As a result, 527 groups remained an unregulated vehicle through which political actors could funnel large, anonymous contributions. In many circles, 527 groups became known as “Stealth PACs.”<sup>132</sup> In 1998, responding to an advisory request by the Sierra Club, the IRS determined that section 527 groups could permissibly engage in mass media advertising.<sup>133</sup> The ruling led to an explosion in the money do-

<sup>125</sup> 26 U.S.C. § 527(e)(1), (2) (Supp. 2003). Recall that a group is only classified as a political committee under FECA if it coordinates with a candidate or engages in prohibited electioneering. See *supra* note 106 and accompanying text.

<sup>126</sup> See Rev. Rul. 2004-6, 2004-1 C.B. 328.

<sup>127</sup> Richard Komyak, Note, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230, 242 (2001).

<sup>128</sup> Storey, *supra* note 14, at 176 n.93 (referring to the current rate schedule for gift taxes at 26 U.S.C. § 2001(c) (2000)).

<sup>129</sup> *Id.*

<sup>130</sup> See S. REP. NO. 93-1357, at 28 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7506 (stating that section 527 was geared “to the benefit both of the organization and the administration of the tax laws”). At the time section 527 was enacted, just following the Watergate scandal and the passage of FECA, the view was that candidates and political parties might need tax incentives to comply with the new law. See Holman, *supra* note 109, at 266; see also David S. Karp, Note, *Reexamining the Regulation of Issue Advocacy by Tax-Exempt Organizations Through the Internal Revenue Code*, 77 N.Y.U. L. REV. 1805, 1841 (2002).

<sup>131</sup> See Storey, *supra* note 14, at 167.

<sup>132</sup> *Id.* The term is something of a misnomer, however, because PACs engage in the express advocacy of particular candidates while 527 groups are unaffiliated issue advocacy organizations. See *id.* 527 groups are thus fundamentally different from PACs, and many 527 groups have sister PACs to conduct express advocacy with hard money donations. See, e.g., *Support the MoveOn Voter Fund*, MOVEON VOTER FUND, <https://www.moveonvoterfund.org> (last visited Dec. 1, 2005) (distinguishing between MoveOn Voter Fund, a 527 group which “primarily runs ads exposing President Bush’s failed policies in key ‘battleground’ states,” and MoveOn PAC, which “helps members elect candidates who reflect our values”). The majority of MoveOn’s most negative political advertisements are funded by its PAC, which only accepts hard money donations. See Linda Feldmann, *Political Ads: Cash Still King*, CHRISTIAN SCI. MONITOR, Aug. 25, 2004, at 1.

<sup>133</sup> I.R.S. Priv. Ltr. Rul. 1999-25-051 (June 25, 1999).

nated to, and the visibility of, section 527 groups,<sup>134</sup> groups that spent over \$100 million in the 2000 election cycle,<sup>135</sup> but escaped FEC regulation through advertising that simply avoided using *Buckley's* "magic words."<sup>136</sup>

The 2000 record doubled in 2002, a non-presidential election year, with over \$250 million in unregulated and unreported contributions spent by 527 groups.<sup>137</sup> Many of the groups' titles, such as the "Democratic Governors' Association" or the "Michael Steele for Maryland Committee," were indicative of their "independence" from parties and candidates.<sup>138</sup> Other 527 groups, formed by candidates' friends and allies, adopted more circumspect names. In one notorious example, a previously unknown 527 group calling itself "Republicans for Clean Air" broadcast an advertisement in seven states on the night before their 2000 Republican primaries that accused John McCain of voting against solar energy.<sup>139</sup> Easily avoiding the magic words, the ad concluded, "George Bush: Leading so each day dawns brighter."<sup>140</sup> It was only revealed some months later that the "Republicans for Clean Air" were two Texas billionaires and longtime friends of Governor Bush who had played an important role throughout his campaign.<sup>141</sup> Once the funding for "Republicans for Clean Air" leaked, other groups released information showing that those billionaires also contributed millions of dollars in antienvironmental lobbying.<sup>142</sup>

Such ads clearly revealed the need for Congress to require more thorough disclosure of contributions to 527 groups.<sup>143</sup> In 2002, Congress passed the "Brady-Lieberman" 527 Disclosure Act, which required 527 groups to file extensive monthly and quarterly financial reports with the IRS that would be made publicly accessible via the Internet.<sup>144</sup> Even with the Brady-Lieberman disclosure requirements in place, however, BCRA's restrictions on soft money donations left 527 groups as the most accessible avenues for donating large amounts of money to specific political causes. BCRA may

<sup>134</sup> Kornylak, *supra* note 127, at 245.

<sup>135</sup> 2000 Cycle Federal 527 Organizations, POLITICAL MONEY LINE, <http://www.politicalmoneyline.com> (last visited Dec. 1, 2005).

<sup>136</sup> See Anthony Corrado, *Financing the 2000 Presidential General Election*, in FINANCING THE 2000 ELECTION 79, 82 (David B. Magleby ed., 2001).

<sup>137</sup> 2002 Cycle Federal 527 Organizations, *supra* note 135.

<sup>138</sup> *Id.*

<sup>139</sup> Richard Pérez-Peña, *Air of Mystery Clouds Shot at McCain*, N.Y. TIMES, Mar. 3, 2000, at A15.

<sup>140</sup> *Id.*

<sup>141</sup> Holman, *supra* note 109, at 247-48.

<sup>142</sup> Press Release, Sierra Club, Sierra Club Demands Withdrawal of False Bush Ad: Funder of 'Republicans For Clean Air' Has Donated Thousands to Opponents of Clean Air (Mar. 3, 2000), available at <http://www.commondreams.org/news/2000/0303-03.htm>.

<sup>143</sup> See 148 CONG. REC. S10, 799 (2002) (statement of Sen. Lieberman), available at <http://hsgac.senate.gov/101802press4.htm> ("With the potential for . . . all this new money coming in, it is critical that we have a healthy 527 disclosure regime in place.").

<sup>144</sup> 26 U.S.C. § 527(j)-(k) (Supp. 2003). The reports are available at <http://forms.irs.gov/politicalOrgsSearch>.

have prohibited express advocacy in the electioneering communications of independent groups, but 527 groups claimed to be engaging in issue advocacy and were thus exempted from BCRA.<sup>145</sup> In total, the groups raised and spent over \$450 million on advertising related to the 2004 presidential election campaign,<sup>146</sup> producing ads eerily similar to those that most voters considered banned by BCRA.<sup>147</sup> Pressure was brought to bear, and the FEC responded in late 2004 by issuing its new rules to govern 527 groups.<sup>148</sup>

### III. ANALYZING THE FEC'S NEW REGULATIONS FOR 527 GROUPS: BALANCED, THOUGHTFUL, AND BETTER THAN THE ALTERNATIVES

The FEC's new rules address the main criticism of the role 527 groups played in the 2004 election, namely that 527 groups were used as an "end run" around the soft money prohibitions of BCRA in their advertisement of specific candidates instead of actual issues.<sup>149</sup> In adopting its new rules, the FEC faced a dilemma over how to prevent soft money from going to support candidates and parties without unduly limiting its legitimate use.<sup>150</sup> By definition, the primary purpose of a 527 group is to influence a federal election.<sup>151</sup> And the independent issue advocacy the groups claim to engage in is a form of speech fundamentally protected by the First Amendment.<sup>152</sup>

Before the new rules, 527 groups occupied an unusual place in election law.<sup>153</sup> They could maintain their tax-exempt and issue advocacy status as long as they did not foray into BCRA's domain by coordinating with affili-

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<sup>145</sup> See *Buckley v. Valeo*, 424 U.S. 1, 42 (1976) (ruling that issue advocacy is a form of protected speech under the First Amendment and cannot be regulated by the FEC).

<sup>146</sup> *2004 Cycle Federal 527 Organizations*, *supra* note 135.

<sup>147</sup> See Howard Fineman & Michael Isikoff, *Slime Time*, NEWSWEEK, Sept. 20, 2004, at 18.

<sup>148</sup> FEC Rules for Political Committee Status, 11 C.F.R. §§ 100.57, 106.6 (2004).

<sup>149</sup> See, e.g., Paula Dwyer et al., *Issue Ads: Free Speech or End Run?*, BUS. WK., Feb. 28, 2000, at 154; Thomas B. Edsall, *'Soft Money' Ban Evasion Alleged*, WASH. POST, Nov. 22, 2002, at A10. But see Edward B. Foley & Donald Tobin, *Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (2004).

<sup>150</sup> *Buckley* held that independent "issue advocacy" groups could not be deemed "political committees" or regulated by the FEC. *Buckley*, 424 U.S. at 22. The FEC has administrative authority, however, to define the terms "independent" and "issue advocacy" in line with election law and relevant jurisprudence. See Administrative Procedure Act, 5 U.S.C. §§ 553, 557 (Supp. 2003); *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."); see also *United States v. Mead*, 533 U.S. 218, 229 (2001) (holding that when agencies employ formal rulemaking, they interpret statutes with "the force of law"). For a full treatment of the propriety of the FEC's rulemaking for its 527 regulations, see Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating Section 527 Organizations*, 73 GEO. WASH. L. REV. 1000 (2005).

<sup>151</sup> 26 U.S.C. § 527(e)(1)-(2) (2000).

<sup>152</sup> See *Buckley*, 424 U.S. at 22.

<sup>153</sup> See Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341 (2004).

ated political actors<sup>154</sup> or conducting prohibited electioneering communications.<sup>155</sup> The groups were subject to strict reporting requirements by the IRS but could accept unlimited donations from any source.<sup>156</sup> Unmistakably political, they were nevertheless ignored by FECA and BCRA.<sup>157</sup>

The regulations eventually adopted by the FEC were co-authored by Republican Chairman Bradley Smith and Democratic Vice Chairwoman Ellen Weintraub<sup>158</sup> and will significantly alter the way 527 groups operate in future elections.<sup>159</sup> The first rule requires any 527 group whose fundraising literature refers to a clearly identified federal candidate to register with the FEC as a political committee.<sup>160</sup> Additionally, 527 groups are required to fund any advertisements that refer to specific political parties or candidates entirely with hard money.<sup>161</sup> The rule also requires that a 527 group raising money for state as well as federal elections still raise at least half of its funds with hard money.<sup>162</sup>

The second rule adopted by the FEC requires all 527 groups, whether their fundraising refers to a clearly identified federal candidate or not, to raise at least fifty percent of their expenditures with hard money.<sup>163</sup> This ensures that 527 groups advocate for issues important to a sizable group of people as opposed to the concentrated interests of one or two large donors.

The practical effect of these two regulations is that although 527 groups may still raise and spend money to support issues of broad appeal, the groups may have far more difficulty raising and spending soft money to support specific candidates. To further that end, the new rules require that in order to accept soft money contributions, which are always recorded and

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<sup>154</sup> 2 U.S.C. § 441a(a)(7) (Supp. 2003). The lack of coordination between political actors and issue advocacy groups was highlighted in an interview in the days leading up to the 2004 election with George Soros, a man who, all told, donated over \$23 million to 527 groups favoring Senator Kerry in the 2004 election season. OpenSecrets.org, George Soros Contributions to 527 Committees, 2004 Election Cycle, <http://www.opensecrets.org/527s/527indivsdetail.asp?ID=11001147458&Cycle=2004> (last visited Nov. 15, 2004). When asked what advice he would give Senator Kerry to assure victory, Soros responded that he had never once met or spoken with Senator Kerry, and would not offer him advice if he did. *George Soros on Bush Administration Policies in Iraq* (C-SPAN television broadcast Oct. 28, 2004).

<sup>155</sup> 2 U.S.C. § 438(f) (2000).

<sup>156</sup> 26 U.S.C. § 527(j) (2000).

<sup>157</sup> 2 U.S.C. §§ 431–455 (Supp. 2003).

<sup>158</sup> Campaign finance reform is unlike much other government regulation in that it breaks all the usual molds of partisanship; in fact, every one of the proposals to regulate 527 groups has bipartisan co-sponsors. See *Hearing, supra* note 124, at 3 (statement of Rep. Ney) (“It’s a strange day indeed when you have Democrats defending unfettered spending as a legitimate political right, and the Republicans want to prohibit it by a regulatory agency . . .”).

<sup>159</sup> See FEC Rules for Political Committee Status, 11 C.F.R. §§ 100.57, 106.6 (2004).

<sup>160</sup> *Id.* § 100.57(b)(1).

<sup>161</sup> *Id.* § 106.6(f)(1).

<sup>162</sup> *Id.* § 100.57(b)(2).

<sup>163</sup> *Id.* § 106.6(c).

made publicly available by the IRS,<sup>164</sup> 527 groups may not tell prospective donors which candidates they support.<sup>165</sup> With respect to soft money specifically, 527 groups may not expressly advocate for any particular candidate, or coordinate their actions with anyone affiliated with a campaign.<sup>166</sup> They may not mention specific candidates or parties in advertisements within sixty days of an election,<sup>167</sup> and whatever soft money they accept must be met with an equal amount of hard money.<sup>168</sup> In short, the FEC's new rules will force 527 groups in the next election cycle to genuinely advocate for specific issues or face significant curtailment of their fundraising abilities.

To many critics, however, the new FEC rules do not go far enough because 527 groups can still accept some soft money contributions.<sup>169</sup> Academics and politicians have widely touted two competing proposals to replace them. Academic critics have advocated expanding the FEC's definition of "political committee" to include any group whose "major purpose" is to influence a federal election.<sup>170</sup> Politicians, led by John McCain, have proposed legislation that would modify the Code to require that every 527 group register with the FEC as a political committee, subject to all fundraising restrictions.<sup>171</sup> Although the proposals may seem similar in effect, they have vastly different implications—and as demonstrated below, both suffer flaws that make them inferior to the FEC's newly adopted rules.

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<sup>164</sup> 26 U.S.C. § 527(j)–(k) (Supp. 2003).

<sup>165</sup> 11 C.F.R. § 100.57(a).

<sup>166</sup> Indeed, restrictions on 527 groups coordinating with political parties could have a devastating impact on the effectiveness of parties' voter mobilization drives. See *George Bush Wins: Back to Basics*, *ECONOMIST*, Nov. 6, 2004, at 25, 26. In the 2004 race, for instance, Republicans paid for voter mobilization in the swing state of Ohio with hard money, permitting party activists to target specific voters with precinct lists on election day. *Id.* at 26. Democrats, on the other hand, relied on 527 groups such as ACT that had soft money funding and were therefore prohibited from collaborating with the party or using its precinct lists. *Id.* As the day wore on and last-minute voter drives swung into high gear, the Republicans were advantaged by their superior coordination, and turned out Ohio voters more effectively. *Id.* The final tally in Ohio placed President Bush almost 120,000 votes ahead of Senator Kerry, despite polls before the election showing near-equal popular support. Sandy Theis & Stephen Koff, *Blackwell Certifies Ohio Election Results; Recounts, Probe of Voting Still Sought*, *PLAIN DEALER* (Cleveland), Dec. 7, 2004, at B1.

<sup>167</sup> 26 U.S.C. § 434(f)(3).

<sup>168</sup> 11 C.F.R. § 106.6(c). To 527 groups, unsurprisingly, the rules go too far. Shortly after the rules came into effect, one 527 group, Emily's List, filed a motion for a preliminary injunction to block their enforcement. The motion was denied. *Washington in Brief*, *WASH. POST*, Mar. 1, 2005, at A3 ("A federal judge has . . . denied a request by Emily's List for a preliminary injunction against Federal Election Commission regulations that took effect Jan. 1. The judge wrote that Emily's List failed to show it would be irreparably harmed if the rules remained in effect.").

<sup>169</sup> See, e.g., Holman, *supra* note 109, at 271.

<sup>170</sup> See, e.g., Foley, *supra* note 153, at 351; *supra* note 42 and accompanying text.

<sup>171</sup> 527 Reform Act of 2004, S. 2828, 108th Cong. (2d Sess. 2004).

A. *Expanding the Definition of a Political Committee: The “Major Purpose” Test and First Amendment Protections*

The first alternative regulatory proposal to the FEC’s rules is the “major purpose” test. Widely supported by academics,<sup>172</sup> the test was authored by Democratic commissioner Scott Thomas and his Republican counterpart, Michael Toner.<sup>173</sup> The major purpose test simply classifies any group that acts with the “major purpose” of influencing a federal election—whether organized under section 527 or not—as a political committee.<sup>174</sup> The proposal would find a “major purpose” when a group spends the majority of its resources (more than half of its funds) on advertisements that “promote, support, attack, or oppose” any federal candidate.<sup>175</sup> It would employ considerations of coordination or express advocacy only for groups spending less than a majority of their resources on federal elections.<sup>176</sup> The “major purpose” test differs significantly from the FEC’s adopted rules, which classify organizations as having the major purpose of influencing an election only if they violate the coordination, electioneering, or express advocacy measures of BCRA.

Advocates of the major purpose test find support in the wording of the Supreme Court’s decisions in *Buckley*<sup>177</sup> and *McConnell*.<sup>178</sup> Both, at various points, define a political committee as an organization with the major purpose of electing or defeating federal candidates, but the decisions take different approaches to determining when a major purpose exists. *Buckley* found a major purpose by virtue of the magic words,<sup>179</sup> and *McConnell* expanded it to include all defined electioneering communications.<sup>180</sup> In addi-

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<sup>172</sup> See, e.g., Foley, *supra* note 153; Fred Wertheimer, Editorial, *Why the FEC Is Wrong on Soft Money Groups*, BOSTON GLOBE, Nov. 1, 2004, at A15; Press Release, Ctr. for Responsive Politics, Noble’s Testimony on 527 Groups (Mar. 10, 2004), available at <http://www.opensecrets.org/pressreleases/2004/Noble527Testimony.asp> (quoting Senate testimony of Larry Noble, executive director of the Center for Responsive Politics, who advocated for the “major purpose” test’s adoption).

<sup>173</sup> Notice, *supra* note 42. When the FEC published its original Notice of Proposed Rulemaking (which included the “major purpose” test), it received nearly 200,000 comments, by far the most ever received by the Commission. 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, 112 (2004). An overwhelming majority of the professional, nonacademic witnesses at the FEC’s Hearings opposed the major purpose test proposal. *Hearing*, *supra* note 124, at 139 (statement of Ellen L. Weintraub).

<sup>174</sup> See Foley, *supra* note 40, at 368.

<sup>175</sup> Notice, *supra* note 42, at 11,759.

<sup>176</sup> See Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA MONEY & POL. REP., Jan. 7, 2004, at 4, available at <http://ecommercecenter.bna.com/moneyandpolitics/jan2004.htm>.

<sup>177</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 252 (1986).

<sup>178</sup> *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003).

<sup>179</sup> See *Buckley*, 424 U.S. at 44 n.52.

<sup>180</sup> *McConnell*, 540 U.S. at 204.

tion, the *McConnell* Court stated that the electioneering standard was only the minimum required under BCRA.<sup>181</sup> Accordingly, supporters of the major purpose test argue that *McConnell* permits the FEC to cast a far wider net.<sup>182</sup> Proponents further point to the congruence of the term “major purpose” with the text of section 527,<sup>183</sup> which incorporates groups whose “primary purpose” is influencing federal elections.<sup>184</sup>

The major purpose test employs an operational, rather than organizational, trigger to classify 527 groups. In categorizing any group spending more than half of its funds on a federal election as a “political committee,” without differentiating whether the spending is going to support particular candidates or just particular issues, the “major purpose” test reaches a far wider array of organizations than just 527 groups.<sup>185</sup> Thus while the test achieves the goal of eliminating soft money from the political process, it does so at the cost of potentially suppressing hundreds of other groups—including church charities, environmental groups, and public interest organizations—that are engaged in legitimate issue advocacy.<sup>186</sup>

Several types of independent issue advocacy groups could be unduly regulated by the FEC under the “major purpose” test. The first are tax-exempt groups organized under provisions of the Code other than section 527, including those incorporated under sections 501(c)(3) (educational, religious, and personal organizations),<sup>187</sup> 501(c)(4) (social welfare charities),<sup>188</sup> and 501(c)(6) (corporations).<sup>189</sup> Currently, 501(c)(3) and 501(c)(6) groups are permitted to attempt to influence elections as long as doing so

<sup>181</sup> Foley & Tobin, *supra* note 176.

<sup>182</sup> See Complaint at 20, *Democracy 21 v. Am. Coming Together* (Complaint Before the Fed. Election Comm’n Jan. 15, 2004), available at <http://www.fecwatch.org/law/enforce/pdfs/527complaint.pdf>. The FEC has not acted on Democracy 21’s complaint. See Letter from Donald J. Simon, Counsel to Democracy 21, to Lawrence H. Norton, General Counsel, Fed. Election Comm’n 2–3 (Aug. 31, 2004), available at <http://www.opensecrets.org/pressreleases/2004/FECcomplaints.pdf>.

<sup>183</sup> Foley & Tobin, *supra* note 176.

<sup>184</sup> 26 U.S.C. § 527(e)(1) (Supp. 2003).

<sup>185</sup> See Foley, *supra* note 153, at 354; see also *Comments on Proposed Rulemaking on Political Committee Status*, FEC, Apr. 5, 2004, at 8 n.4, [http://www.fec.gov/pdf/nprm/political\\_comm\\_status/public\\_citizen\\_holman.pdf](http://www.fec.gov/pdf/nprm/political_comm_status/public_citizen_holman.pdf) (discussing an FEC proposed rule, Political Committee Status, 69 Fed. Reg. 11,736 (Mar. 11, 2004) and stating that the criteria for 501(c) groups that would fall under the major purpose test is “a gray area”).

<sup>186</sup> In response to the original Notice of Proposed Rulemaking, 415 separate “civil rights, environmental, civil liberties, women’s rights, public health, social welfare, religious, consumer, senior, and social service organizations” filed a joint brief with the FEC objecting to the “devastating impact” the “major purpose” test would have on issue advocacy. Alliance for Justice, *Comments and Request to Testify Concerning Notice of Proposed Rulemaking on Political Committee Status*, FEC.GOV, Apr. 5, 2004, at 1, [http://www.fec.gov/pdf/nprm/political\\_comm\\_status/aron\\_hendrsn\\_mchbrg\\_moore\\_pope.pdf](http://www.fec.gov/pdf/nprm/political_comm_status/aron_hendrsn_mchbrg_moore_pope.pdf) (discussing Political Committee Status, 69 Fed. Reg. 11,736 (Mar. 11, 2004) (codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114)).

<sup>187</sup> 26 U.S.C. § 501(c)(3) (2000).

<sup>188</sup> *Id.* § 501(c)(4).

<sup>189</sup> *Id.* § 501(c)(6).

does not make up a “substantial” amount of their spending.<sup>190</sup> 501(c)(4) groups can have influencing an election as their primary purpose, as long as electioneering itself does not make up a substantial part of their activities.<sup>191</sup>

Thus, under the “major purpose” test, 501(c)(4) social charities (such as the National Organization for Women and the National Rifle Association)<sup>192</sup> that engage in too many election-related activities in furtherance of their organizational goals could fall under FEC regulation.<sup>193</sup> If such groups feel that a particular election has serious ramifications for the social constituencies they represent, they would be largely incapacitated if their spending happened to pass the magic fifty-percent limit, even if their activities are substantially oriented to issue advocacy, not electioneering. For instance, a peace-oriented 501(c)(4) with receipts of less than \$100,000 would be relegated to political committee status under the “major purpose” test, with the corresponding prohibition on any soft money donations, by taking out a single full-page advertisement in the *New York Times* specifically criticizing President Bush over the war in Iraq.<sup>194</sup>

As another example, the threat of a lengthy IRS investigation into whether a 2004 speech criticizing President Bush by Julian Bond, chairman of the NAACP, violated election laws led the organization to voluntarily reclassify itself from a 501(c)(3) nonprofit to a political committee.<sup>195</sup> At the NAACP’s 2004 annual convention in Philadelphia, Bond declared that the Republican Party “appeal[s] to the dark underside of American culture” and “relie[s] on the politics of racial division,” and also attacked the Bush administration’s policies on Iraq.<sup>196</sup> The NAACP was soon given notice by

<sup>190</sup> See Foley & Tobin, *supra* note 176.

<sup>191</sup> See *id.*

<sup>192</sup> See Nonprofit Res. Ctr., *All About Nonprofits*, NONPROFITMAINE.ORG, [http://www.nonprofitmaine.org/all\\_about\\_nonprofits.asp](http://www.nonprofitmaine.org/all_about_nonprofits.asp) (last visited Dec. 1, 2005).

<sup>193</sup> Other groups fearing classification as a political committee under the “major purpose” test include the Planned Parenthood Federation of America, the American Civil Liberties Union, the Bronx AIDS Services Foundation, and many other widely known social organizations. See Alliance for Justice, *supra* note 186, at 1, 3–14.

<sup>194</sup> Current rates for a full-page ad in the *New York Times* are \$55,188, more than 50% of the hypothetical peace group’s budget. See N.Y. TIMES, 2005 ADVERTISING AND REGIONAL RATE GUIDE (2004), available at <http://www.nytadvertising.com>. Ellen Weintraub, FEC Vice Chairwoman, described a full-page advertisement in the *Washington Post*, by a 501(c)(3) called the Family Amendment Research Council, as one that would improperly count as an electioneering communication under the “major purpose” test. The article read, in part, “Dear Mr. President: We Are Deeply Grateful: We deeply appreciate your long-standing and deep-seated commitment to the preservation of the family. We especially thank you for the decision you have announced to support and work for the passage of the Federal Marriage Amendment . . . .” *Hearing, supra* note 124, at 46 (testimony of Ellen L. Weintraub). As Vice Chairwoman Weintraub aptly summed up, “Does [the ad] promote or support a clearly identified federal candidate? I think it does. Is it the kind of communication that the Federal Election Commission should be regulating? I think not.” *Id.*

<sup>195</sup> Mike Allen, *NAACP Faces IRS Investigation*, WASH. POST, Oct. 29, 2004, at A8.

<sup>196</sup> Vernon Clark & Jennifer Moroz, *NAACP’s Bond Criticizes Republicans*, PHILA. INQUIRER, July 12, 2004, at A08.

the IRS indicating that if its investigation concluded that Bond had engaged in prohibited advocacy for or against a clearly identified federal candidate, and the group did not reclassify itself voluntarily, each of its sixty-four directors could face personal excise sanctions.<sup>197</sup> In stark contrast to the partisan missions of many 527 groups, the NAACP describes its institutional goal as “ensur[ing] the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.”<sup>198</sup> The NAACP’s political committee status will likely limit its fundraising abilities, and if the “major purpose” test were in place, even lesser instances of partisan advocacy could relegate broadly issue-oriented groups to FEC regulation.<sup>199</sup> For instance, nonprofit groups that issue legislative report cards on congressional members’ voting histories to their constituents (like the NAACP) could fall under the “major purpose” test’s political committee definition because informational report cards can be construed to “promote, support, attack, or oppose” identified federal candidates.<sup>200</sup>

Other tax-exempt groups fearing regulation under the major purpose test are nonprofit 501(c)(3) religious organizations.<sup>201</sup> Churches, synagogues, and mosques cannot endorse candidates, or they risk losing their 501(c)(3) status.<sup>202</sup> But a pastor can praise a candidate in his sermons, let her speak in front of the congregation, and organize buses to polling locations on voting day. If religious groups spend more than half of their budgets supporting these activities, they could risk political committee status under the “major purpose” test. Not only would that stifle donations—and raise questions about whether there needs to be disclosure about who puts money in the collection plate—it would also add a costly administrative layer to an already cash-strapped system.<sup>203</sup> Moreover, legitimate 501(c)(3),

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<sup>197</sup> See Press Release, IRS, Tax-Exempt Organizations and Political Activities (FS-2004-14) (Oct. 2004), available at <http://www.irs.gov>; Press Release, NAACP, NAACP Questions Timing of IRS Examination of Tax Exempt Status (Oct. 29, 2004), available at <http://www.naacp.org/news/2004/2004-10-29.html>.

<sup>198</sup> NAACP.org, Mission Statement, [http://www.naacp.org/about/about\\_mission.html](http://www.naacp.org/about/about_mission.html) (last visited Dec. 1, 2005).

<sup>199</sup> The issue at stake was well phrased in congressional testimony by the 501(c)(3) nonprofit advocacy group Housing Works, which is devoted to “inform[ing] the public on issues relating to HIV/AIDS, health care, housing, [and] welfare benefits,” when it wrote, “[s]imply put, campaign finance reform laws should not be used to silence AIDS activists.” *Hearing, supra* note 124, at 100 (prepared statement of Charles King, Keith Cylar & Michael Kink).

<sup>200</sup> See Alliance for Justice, *supra* note 186, at 8. FECA expressly permits membership organizations to communicate with their constituents for any purpose without those expenditures counting toward political committee status, something the “major purpose” test’s proposed rules do not take into consideration. See 2 U.S.C. § 441b(b)(2)(A) (Supp. 2003).

<sup>201</sup> See *Don’t Blush, Just Flush*, *ECONOMIST*, Oct. 16, 2004, at 26.

<sup>202</sup> 26 U.S.C. § 501(h)(1) (Supp. 2003).

<sup>203</sup> That layer would be on top of the already heightened transaction costs that would exist due to dual regulation of 527 groups by the FEC and IRS. See Cong. of Chiropractic State Ass’ns, *Section 527 Relief Bill Passes House and Senate*, COCSA.ORG, Oct 18, 2002, <http://www.cocsa.org/pubs/>

as well as (c)(4) and (c)(6) organizations, could be subject to intrusive and costly FEC investigations whenever an ideological opponent deemed it useful to register a complaint.<sup>204</sup>

Even private groups not seeking tax-exempt status could be regulated by the “major purpose” test. The test regulates *any* group having the major purpose of influencing federal elections.<sup>205</sup> Such dramatic limitations on political speech raise substantial First Amendment concerns. A few commentators have suggested that radio and television programs with particularly partisan messages, such as the liberal *West Wing* or shows on the conservative Fox News Channel, may have many aspects in common with political communications and should be considered contributions.<sup>206</sup> Others have observed that the crush of political books published during campaigns, such as the 2004 bestsellers *Unfit for Command*, which criticized the leadership style of Senator Kerry, and *Worse than Watergate*, which excoriated the Bush Administration on the Iraq war, often clearly serve to support or oppose federal candidates.<sup>207</sup> BCRA prohibits corporations from making political contributions,<sup>208</sup> and under the broad language of the major purpose test, politically oriented shows and books could risk serious creative curtailment, chilling their vital participation in the democratic dialogue.<sup>209</sup>

Although Congress has wide-ranging power to modify tax exemptions in line with policy goals, prohibiting private political discourse is another

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news/87\_271\_1191.cfm (describing attempts to alleviate the expense of dual IRS and state reporting requirements on local associations).

<sup>204</sup> Alliance for Justice, *supra* note 186, at 24 n.17 (“This standard is particularly troubling because it will allow an organization’s political opponents, merely by filing a complaint with the Commission, to instigate a debilitating investigation into all of the organization’s inner workings.”).

<sup>205</sup> Notice, *supra* note 42, at 11,743.

<sup>206</sup> See Dave Kopel, *West Wing Finance: Does McCain-Feingold Apply to Television Dramas?*, NAT’L REV., Apr. 10, 2001, <http://www.nationalreview.com/kopel/kopelprint041001.html>.

<sup>207</sup> The language of BCRA explicitly exempts newspaper editorials and “periodical publications” from FEC regulation, but says nothing about other forms of mass media. 2 U.S.C. § 431(9)(a)(1) (Supp. 2003); see Emily Kirstine Wacker, Note, *Bulletproof Speech: Are Political Books Beyond Litigation’s Reach?*, 12 VILL. SPORTS & ENT. L.J. 125 (2005) (discussing the threat to political books under the campaign finance laws). FEC Commissioner Bradley Smith has suggested that television, books, and even internet Weblogs could be regulated as political contributions if the agency adopted a broad “political committee” standard like the “major purpose” test. See Bradley A. Smith, Remarks at The Ohio State University, Moritz College of Law 7 (Sept. 15, 2004), available at <http://moritzlaw.osu.edu/electionlaw/events/events-0915-02.html> [hereinafter Remarks].

<sup>208</sup> 2 U.S.C. § 441(b)(2) (2000); see Citizens United, Fed. Election Comm’n Advisory Op. No. 2004-30 (Sept. 10, 2004), available at <http://ao.nictusa.com/ao/no/040030.html>.

<sup>209</sup> The *McConnell* Court recognized the possibility that broad interpretations of the campaign finance laws could lead to improper regulation of private speech, stating, “Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a benefit on the candidate.” *McConnell v. FEC*, 540 U.S. 93, 156 (2003) (emphasis omitted). However, that has not halted attempts to have the FEC declare CBS News a political committee due to its airing of documents relating to President Bush’s National Guard service that were later shown to be forgeries, or CNN for its 2004 employment of Paul Begala and James Carville, two on-air commentators who also held paid positions in the Kerry campaign. Remarks, *supra* note 207, at 11.

matter.<sup>210</sup> In a long string of cases, the Supreme Court has repeatedly held that the government's only interest sufficient to regulate political speech is the prevention of corruption or the appearance of corruption.<sup>211</sup> The potential for corruption—as exemplified by Daniel Webster, Boies Penrose, and Richard Nixon—is and always was the single most pervasive problem with money in American politics. The *McConnell* Court's repeated references to congressional reports about the corrupting influence of soft money,<sup>212</sup> and the Court's eventual deference to Congress for how best to combat corruption, reveals the importance of the corruption rationale in campaign finance regulation.<sup>213</sup> To that end, the Court applied a standard of “close,” not “strict,” scrutiny for legislative tailoring of campaign finance regulations.<sup>214</sup> That standard, however, still requires that restrictions on political speech be geared toward limiting corruptive influences if they are to avoid impinging on First Amendment protections.<sup>215</sup>

The “major purpose” test shifts focus away from the corruption rationale in its regulation of *any* group promoting, supporting, attacking, or opposing a federal candidate, and threatens to overinclusively regulate many groups that pose no corruptive or potentially corruptive threat. The FEC's adopted rules ensure that an individual who contributes to an issue advocacy group that does not coordinate with political candidates can expect far less “quid” for his “quo”—indeed, serious coordination questions might arise if the candidate or his staff ever personally interacted with a 527 group.<sup>216</sup> The law simply affords no opportunity for donors to tell the can-

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<sup>210</sup> See Karp, *supra* note 130, at 1823–24 (citing *Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding that tax exemption constitutes a form of government subsidy to which Congress may add or subtract at will as long as it acts rationally)).

<sup>211</sup> Brian R. Whittaker, *A Legislative Strategy Conditioned on Corruption: Regulating Campaign Financing After McConnell v. FEC*, 79 IND. L.J. 1063 (2004); see, e.g., *McConnell*, 540 U.S. 93; *Nixon v. Shrink Mo. Political Action Comm.*, 528 U.S. 377, 393 (2000) (accepting Missouri's interest in preventing “the appearance of corruption” by mandating state contribution limits); *FEC v. Nat'l Conservation Political Action Comm.*, 470 U.S. 480, 497 (1985) (“The hallmark of corruption is the financial quid pro quo: dollars for political favors.”); see also *Campaign Finance Reform*, *supra* note 122, at 341 (“I think the corruption rationale has worked well. I think it does a good job.” (statement of Senator Russell Feingold)).

<sup>212</sup> See *McConnell*, 540 U.S. at 129.

<sup>213</sup> *Id.* at 154; see also Holman, *supra* note 109, at 263.

<sup>214</sup> *McConnell*, 540 U.S. at 141.

<sup>215</sup> *Id.* at 136–37. Whittaker suggests that *McConnell* requires Congress to establish a record showing how any restrictions on speech are related to preventing corruption. Whittaker, *supra* note 211, at 1091.

<sup>216</sup> For example, in a letter during the 2004 campaign to the Republican Party's chairman and staff, the Republican National Committee's (“RNC”) General Counsel reminded the party's employees that “[i]n general, RNC officials should have no discussions with representatives of Section 527 organizations . . . [or] leave to join any Section 527 organization this election cycle. [RNC officials] should be meticulously careful to avoid even the appearance of an attempt to direct funds to, or solicit funds on behalf of, any specific organization.” Letter from Mike Duncan et. al., Gen. Counsel, Republican Nat'l

didate what they want in return for their contributions.<sup>217</sup> The “major purpose” test, on the other hand, goes beyond the legitimate aim of preventing corruption by subjecting unaffiliated groups to political committee status without them ever appearing, let alone being, corrupt.

Furthermore, restricting the fundraising abilities of groups that are not coordinated and do not engage in express advocacy or prohibited electioneering cannot be called “closely drawn”—*McConnell*’s test for close scrutiny—to limiting corruption or the appearance of corruption.<sup>218</sup> Simply constraining the total amount of soft money in politics, without even a potential threat of corruption, is not on its own a sufficient governmental interest to overcome the constitutional right to speak one’s political beliefs.<sup>219</sup> Such strict regulation of groups that may merely desire to participate in the political process, disseminating their particular viewpoints in the stream of ideas without exerting any undue influence over elected officials, offends the notion that the free and unencumbered interchange of political dialogue is essential for democracy to flourish.

By comparison, the FEC’s newly adopted regulations prevent 527 groups from declaring support for a particular candidate or party to potential donors. That, combined with the coordination and electioneering provisions, ensures that contributions to 527 groups are based on the issues they advocate and not made in exchange for potential political favors. The “major purpose” test, on the other hand, is overly broad in its prohibition of soft money donations, and thus in spite of the howls, the FEC wisely rejected it.

#### B. *Shrinking the Tax Code’s Exemption: The 527 Reform Act and the Creation of Perverse Incentives*

Proposed by a bipartisan slate of election reformers including Senators John McCain and Russell Feingold, the 527 Reform Act<sup>220</sup> would amend FECA to specifically declare that all groups organized under section 527 of

Comm., to Ed Gillespie et. al., Chairman, Republican Nat’l Comm. (May 17, 2004), available at <http://www.gop.com/Counsel/FEC527.html>.

<sup>217</sup> See Bopp & Coleson, *supra* note 89, at 331 (“Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses.” (citing *McConnell*, 540 U.S. at 188)).

<sup>218</sup> *McConnell*, 540 U.S. at 185 n.72 (“Congress must show concrete evidence that a particular type of financial transaction is corrupting or gives rise to the appearance of corruption and that the chosen means of regulation are closely drawn to address that real or apparent corruption.”).

<sup>219</sup> As the Court in *McConnell* wrote:

We repeatedly have struck down limitations on expenditures “made totally independently of the candidate and his campaign,” on the ground that such limitations “impose far greater restraints on the freedom of speech and association” than do limits on contributions and coordinated expenditures, while “failing to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process.”

*Id.* at 221 (citations omitted).

<sup>220</sup> 527 Reform Act of 2004, S. 2828, 108th Cong. (2d Sess. 2004), available at <http://www.govtrack.us/data/us/bills.text/108/s2828.pdf>.

the Code are political committees.<sup>221</sup> The Act would thus limit itself to groups seeking tax-exempt status under section 527, leaving other organizations unaffected.<sup>222</sup> A group seeking to spend soft money on uncoordinated activities that do not run afoul of BCRA would be free to do so as long as the group paid income and gift taxes.<sup>223</sup> In the drive to remove all soft money from the political process, however, the 527 Reform Act both unfairly encumbers those 527 groups engaged in legitimate issue advocacy and also forgets the anticorruption rationale under which Congress created 527 organizations in the first place.

Despite the lightning storm of criticism that 527 groups received in the 2004 election, a significant number of the groups do engage in genuine issue advocacy.<sup>224</sup> One such 527 group is the Sierra Club, which advocates for particular candidates based on their environmental policies.<sup>225</sup> The Sierra Club claims its primary mission is “[e]duc[at]ing and enlist[ing] humanity to protect and restore the quality of the natural and human environment,”<sup>226</sup> regardless of “who sits in Congress or the White House.”<sup>227</sup> In April of 2004, the Sierra Club ran advertisements that criticized President Bush’s loosening of environmental enforcement and ended with calls for his administration to enforce the Clean Air Act.<sup>228</sup> Although the advertisements criticized a clearly identified federal candidate, they were unmistakably focused on a particular political issue rather than the candidate himself.

If reclassified as a “political committee,” the Sierra Club would be prohibited from soliciting any soft money contributions. All donations from individuals would be forced to come from hard money, capped at \$2000 per

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<sup>221</sup> *Id.* § 2(b).

<sup>222</sup> See Press Release, Campaign Legal Center, Key Lawmakers Introduce Bill to Close “527” Soft Money Loophole (Feb. 2, 2005), available at <http://www.campaignlegalcenter.org/press-1430.html>.

<sup>223</sup> See *id.*

<sup>224</sup> Thomas Mann and Norman Ornstein, two social scientists who helped develop the congressional record relied upon in *McConnell*, write that

[m]ost of the reports about shadow political party organizations reeling in large soft money donations from corporations, unions and wealthy individuals . . . are based more on hype than fact. . . . There is no evidence that previous corporate soft-money donors to parties are shifting these contributions to outside groups. With the link to elected officials broken, the pressure to give has greatly diminished.

Thomas E. Mann & Norman Ornstein, Editorial, *So Far, So Good on Campaign Finance Reform*, WASH. POST, Mar. 1, 2004, at A19.

<sup>225</sup> See OpenSecrets.org, Sierra Club: 2004 Election Cycle, <http://www.opensecrets.org/527s/527cmtes2.asp?ein=&cycle=2004&format=&tname=Sierra+Club> (last visited Dec. 1, 2005).

<sup>226</sup> Inside the Sierra Club, <http://www.sierraclub.org/inside> (last visited Nov. 5, 2004).

<sup>227</sup> Sierra Club, In Focus: 100 Reasons to Get Involved: Reason #100, We Have the Power, <http://www.sierraclub.org> (last visited Nov. 7, 2004).

<sup>228</sup> OpenSecrets.org, 527s: Sierra Club, 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=47> (last visited Dec. 2, 2005).

year. Yet as the Sierra Club's advertisements and proclamations make clear, the group has the primary aim of environmental protection, regardless of candidate. Indeed, having the primary purpose of influencing federal elections, as all 527 groups do, does not necessitate the primary purpose of endorsing any specific candidate at all. Support or opposition to a federal candidate may be, and often is, wholly ancillary to legitimate issue advocacy. The 527 Reform Act, however, would force issue-focused groups such as the Sierra Club to choose between ending soft money donations and losing their tax-exemptions altogether.

That Hobson's Choice underscores a second problem with the 527 Reform Act—its failure to appreciate Congress's reasons for enacting section 527 in the first place. As with most campaign finance law, Congress primarily developed section 527 to prevent corruption.<sup>229</sup> 527 groups were originally set up in 1975 as an incentive for political parties, recently subjected to reporting requirements under FECA, to accept donations within the system and not in envelopes under tables.<sup>230</sup> Economists have long noticed that the heavier a tax, the more taxed groups strive to avoid it, and Congress acted reasonably by lowering taxes to encourage compliance with an undesirable law.<sup>231</sup>

Congress also traditionally viewed political speech by noncandidates as an arena exempt from taxation.<sup>232</sup> Although that tradition was later modified slightly by BCRA's prohibition on soft money donations to parties, Congress's first reaction to nonparty political groups registering as 527s was to require IRS disclosure, not campaign finance regulation.<sup>233</sup> In effect, Congress expressed support for regulation of 527 groups within the revenue framework as opposed to campaign finance.<sup>234</sup> Congress thus consistently viewed section 527 as a way to incentivize groups to report donations, while allowing the public to make rational determinations about the groups' legitimacy based on a free flow of information.<sup>235</sup>

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<sup>229</sup> See Kresno & Sorauf, *supra* note 99, at 126–35.

<sup>230</sup> See Holman, *supra* note 109, at 266; *supra* note 130 and accompanying text.

<sup>231</sup> See, e.g., Joseph E. Stiglitz, *The General Theory of Tax Avoidance* 31–33 (Nat'l Bureau of Econ. Research, Working Paper No. 1868, 1986), available at <http://www.nber.org/papers/w1868.pdf>.

<sup>232</sup> Kornylak, *supra* note 127, at 242.

<sup>233</sup> See 26 U.S.C. § 527(j) (Supp. 2003).

<sup>234</sup> FEC Vice Chairwoman Ellen Weintraub, in testimony before Congress, acknowledged that she felt Congress's enactment of the 527 Disclosure Act was a clear statement that 527 groups were outside political committee regulation. She testified:

Congress made a choice. It could have subjected 527 organizations to the FEC's regulatory regime in 2000, or 2002[,] . . . but it did not. . . . I cannot ignore the view of 128 House members and 19 Senators that . . . "[t]here has been absolutely no case made to Congress, or record established by the [FEC], to support any notion that tax-exempt organizations or other independent groups threaten the legitimacy of our government when criticizing its policies."

*Hearing, supra* note 124, at 41–42 (testimony of Ellen Weintraub) (citation omitted).

<sup>235</sup> According to Representative Christopher Shays, one of the initial sponsors of the House version of BCRA and an outspoken campaign finance critic, Congress was aware that 527 groups would not be

The 527 Reform Act, however, undermines that purpose and creates perverse incentives for potential donors and groups to avoid regulation altogether. By making 527 status less attractive for groups that are not coordinated with political candidates, the legislation threatens to push issue advocacy groups to simply forgo tax exemptions altogether, removing the very mechanism that triggers contributor disclosure.<sup>236</sup> The Act would achieve a significant reduction in most 527 groups' total budgets, but the most questionable donors would likely choose anonymous contributions if not motivated to do otherwise.<sup>237</sup> Without tax inducements to keep them honest, those donors would have a strong incentive to leave the 527 system entirely—diminishing the corruption-reducing effect the legislation was designed to achieve.<sup>238</sup>

As a further result of the 527 Reform Act, only the wealthiest groups would be able to continue functioning, exacerbating the disproportionate impact of wealthy individuals on the political process.<sup>239</sup> Those groups would be able to afford the cost of leaving the tax-exemption regime because their contributors could bear losing their tax deductions. Less wealthy 527 groups, however, would be forced to have their contribution limits slashed, leading them into a cycle of steadily decreasing influence.<sup>240</sup>

Even if the loss of tax-exempt status due to the 527 Reform Act proved untenable for many 527 groups, soft money is unlikely to disappear. In all probability, the money would simply go “upstream,” further and further

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regulated when it passed BCRA. See *Hearing, supra* note 124, at 101–02 (statement of Bradley A. Smith, quoting Christopher Shays).

<sup>236</sup> Such a move could herald the return of “stealth PACs,” so painstakingly eliminated by Congress, by removing the incentives for disclosure requirement compliance. See Storey, *supra* note 14, at 178–84. Congress could not simply require all groups involved in the political process to disclose their funding because, while independent issue advocacy groups accept disclosure in exchange for tax-exempt status, *Buckley* prohibited Congress from regulating such groups outright. *Buckley v. Valeo*, 424 U.S. 1, 43–44 (1976).

<sup>237</sup> For a discussion of the role of anonymity in political issue advocacy, see Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611 (2003).

<sup>238</sup> See Allison Joy Rosendahl, *527 Regulation and the Trickle-Down Effect*, 8 N.Y.U. J. LEGIS. & POL'Y 179, 189 (2004) (“[T]he 527 Act may even push [soft] money in directions that fall under the radar, perhaps towards greater state and 501(c) activity.”).

<sup>239</sup> See Martin H. Redish, *Free Speech and the Flawed Postulates of Campaign Finance Reform*, 3 U. PA. J. CONST. L. 783, 808–11 (2001).

<sup>240</sup> The notion that American elections are disproportionately influenced by the wealthy is not new. See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 84 (1993) (“Many people think that the present system of campaign financing distorts the system of free expression, by allowing people with wealth to drown out people without it.”); Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1163 (1994) (“The purpose of campaign finance reform should be to fashion a system in which electoral and governmental decision-making is based on the participation, deliberation, and interests of all citizens rather than on the awesome wealth of the few.”).

away from candidates.<sup>241</sup> “Upstreaming” occurs when a candidate’s supporters are forced to spend money to aid him or her only indirectly, such as by funding partisan political documentaries or independent advertisements, as opposed to direct donations.<sup>242</sup> Instead of the candidate spending the money, the money is spent on the candidate’s behalf, without his or her involvement.<sup>243</sup> While upstreaming can be a good way to reduce corruption or the appearance of corruption—a person who contributes money upstream has little access to a candidate, and thus little opportunity to influence his or her agenda—if money goes too far upstream its details can become difficult to see from the shoreline.<sup>244</sup> As one commentator correctly perceived,

[when] speakers have to be more and more distant from the candidates, in order to escape campaign finance regulation, the candidates become less and less accountable for that speech. In other words, the effect of closing the 527 “loophole” could be to spur the creation of even less responsible speakers next time around.<sup>245</sup>

One plausible result of upstreaming from the 527 Reform Act, for example, would be an even greater explosion in funding for political documentary filmmaking.<sup>246</sup> With the financial success of Michael Moore’s *Fahrenheit 9/11*, and its politically charged message, political documentaries with the intent to influence federal elections are on the rise.<sup>247</sup> Film studios released at least four political documentaries in September and October of 2004 alone, with such partisan titles as *Going Upriver: The Long War of John Kerry* and *George W. Bush: Faith in the White House*.<sup>248</sup> While po-

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<sup>241</sup> See Michael Dorf, *Why 527 Groups Can’t Be Silenced*, CNN.COM, Aug. 31, 2004, <http://www.cnn.com/2004/LAW/08/31/dorf.527s/index.html>.

<sup>242</sup> *Id.*

<sup>243</sup> BCRA’s own noncoordination measures are an example of upstreaming, albeit to a small degree. By forcing contributed money to unaffiliated 527 groups, candidates can no longer control how the money is spent, but neither can donors promise contributions to them in exchange for favors. See *supra* notes 28–29 and accompanying text.

<sup>244</sup> See Dorf, *supra* note 241.

<sup>245</sup> *Id.*

<sup>246</sup> The FEC has already been confronted with advisory questions on documentary filmmaking. See Bill of Rights Ed. Found., Inc., Op. Fed. Election Comm’n No. 2004-15 (June 25, 2004), available at <http://ao.nictusa.com/ao/no/040015.html>; Citizens United, Inc., Op. Fed. Election Comm’n No. 2004-30 (Sept. 10, 2004), available at <http://ao.nictusa.com/ao/no/040030.html>.

<sup>247</sup> See *Political Documentaries: Fact and Fiction* (Nat’l Pub. Radio broadcast June 24, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=1973994>.

<sup>248</sup> See, e.g., Amazon.com, *George W. Bush: Faith in the White House*, [http://www.amazon.com/gp/product/B0002VEPD0/qid=1139174354/sr=1-1/ref=sr\\_1\\_1/103-3984478-8648621?s=dvd&v=glance&n=130](http://www.amazon.com/gp/product/B0002VEPD0/qid=1139174354/sr=1-1/ref=sr_1_1/103-3984478-8648621?s=dvd&v=glance&n=130) (last visited Feb. 5, 2006); Amazon.com, *Going Upriver—The Long War of John Kerry*, [http://www.amazon.com/gp/product/B000646MMA/qid=1139174176/sr=11-1/ref=sr\\_11\\_1/103-3984478-8648621?n=130](http://www.amazon.com/gp/product/B000646MMA/qid=1139174176/sr=11-1/ref=sr_11_1/103-3984478-8648621?n=130) (last visited Feb. 5, 2006); Amazon.com, *Bush Family Fortunes—The Best Democracy Money Can Buy*, [http://www.amazon.com/gp/product/B0002T7YWQ/qid=1139174620/ref=br\\_1f\\_d\\_14/103-3984478-8648621?n=518964&s=dvd&v=glance](http://www.amazon.com/gp/product/B0002T7YWQ/qid=1139174620/ref=br_1f_d_14/103-3984478-8648621?n=518964&s=dvd&v=glance) (last visited Feb. 5, 2006); Amazon.com, *Bush’s Brain*, [http://www.amazon.com/gp/product/B0002V7SMA/qid=1139174759/ref=br\\_1f\\_d\\_17/10103-3984478-8648621?n=518964&s=dvd&v=glance](http://www.amazon.com/gp/product/B0002V7SMA/qid=1139174759/ref=br_1f_d_17/10103-3984478-8648621?n=518964&s=dvd&v=glance) (last visited Feb. 5, 2006).

litical documentaries can reach the zenith of issue advocacy, they can also be a misleading or partisan attempt to confuse and frighten voters, and their financial backers can be difficult to determine.<sup>249</sup>

Other individuals seeking to influence an election could shift their focus to manipulating the flow of political information by investing in, and controlling, media outlets.<sup>250</sup> The Sinclair Broadcasting Group, for instance, a conservative media conglomerate owning sixty-two television stations broadcasting all five major networks, mandated that every one of its stations preempt network programming to air an hour-long documentary special entitled *Stolen Honor: Wounds That Never Heal* in the nights leading up to the 2004 election.<sup>251</sup> The piece was highly critical of Senator Kerry, and the Sinclair Broadcasting Group fired its Washington bureau chief after he called it “propaganda.”<sup>252</sup> It can be difficult to determine the source of funding for such programs, which tend to blur the line between fact and opinion. As long as donors can effectively channel their soft money contributions through tax-deductible 527 groups, they have less incentive to spend their money on taxable filmmaking—and those few films they do produce can receive the critical skepticism they deserve.<sup>253</sup> The 527 Reform Act, however, is likely to push much of this cash upstream and out of the tax code’s disclosure requirements. Because “sunlight is the best disinfectant,”<sup>254</sup> as a matter of policy Congress should not push soft money to the shadows.

The FEC’s adopted rules, on the other hand, maintain the soft money incentives that keep donors reporting their contributions. Although the rules significantly constrict the fundraising ability of 527 groups, they still

<sup>249</sup> Moreover, political documentaries can time their publicity to influence elections. Witness the DVD release of *Fahrenheit 9/11* only a month before the 2004 ballot. See DVD Details for *Fahrenheit 9/11*, <http://www.imdb.com/title/tt0361596/dvd> (last visited Nov. 17, 2004).

<sup>250</sup> See John O. McGinnis, *Against the Scribes: Campaign Finance Reform Revisited*, 24 HARV. J.L. & PUB. POL’Y 25 (2000) (arguing that campaign finance laws have disproportionately empowered the established media at the expense of individuals by granting them an exclusive role in shaping political discourse).

<sup>251</sup> Howard Kurtz & Frank Ahrens, *Family TV’s Clout in Bush’s Corner: Sinclair Orders 62 Stations to Air Anti-Kerry Film*, WASH. POST, Oct. 12, 2004, at A1. Popular outcry eventually forced Sinclair to broadcast only a portion of the original film and on only forty of its sixty-two stations, filling up the rest of the time with a reflection piece on the role of the media in political campaigns. Bill Carter, *Broadcaster’s Stock up After Change on Kerry Film*, N.Y. TIMES, Oct. 21, 2004, at A27.

<sup>252</sup> Julian Borger, *TV Chain Sacks Journalist Who Accused It of Propaganda*, GUARDIAN (London), Oct. 20, 2004, at 15.

<sup>253</sup> *Fahrenheit 9/11*, for instance, spawned at least two counterpoint documentaries, *Celsius 41.11*, which was released “to refute the propaganda of Michael Moore’s film ‘Fahrenheit 9/11,’” and *Fahrenheit 9/11*, which was written by the authors of the book *Michael Moore Is a Big Fat Stupid White Man*. Manohla Dargis, *Lowering the Subtlety of Political Discourse*, N.Y. TIMES, Oct. 22, 2004, at E1.

<sup>254</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 n.80 (1976) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” (quoting LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (Nat’l Home Library ed., 1933) (1914))).

allow the groups to raise half of their contributions in soft money. Permitting soft money contributions grants 527 groups room to function in today's expensive political environment, and provides that soft money donations can increase as long as popular support (in the form of hard money) keeps pace. This ensures that "issue advocacy" groups focus on the issues important to a wide array of members and not merely the candidates their wealthiest contributors support. Due to the FEC's rules, for example, the relative influence of legitimate issue advocacy groups such as the Sierra Club (with a large membership base that contributes over forty-five percent of the group's funds)<sup>255</sup> will likely rise. At the same time, the influence of more questionable groups such as America Coming Together (which raises only two percent of its funds through hard money) is likely to decline.<sup>256</sup>

#### IV. AGAINST THE VOX POPULII: THE OVERLOOKED POTENTIAL OF 527 GROUPS TO RESOLVE MARKET IMPERFECTIONS IN THE ELECTORAL PROCESS

Despite the significant problems with the "major purpose" test and 527 Reform Act outlined above, the FEC's newly adopted regulations are routinely denounced.<sup>257</sup> Many of their critics assume that little good can come from any role for soft money in the political process.<sup>258</sup> From an economic perspective, however, soft money contributions to uncoordinated 527 groups could have a highly positive result. Specifically, by allowing 527 groups to continue accepting some soft money, the new FEC rules help the groups mitigate several imperfections in electoral markets.

To be sure, the rules are not perfect. Limiting corruption and the appearance of corruption is essential to the campaign finance regime,<sup>259</sup> and greater transparency in funding results in less opportunity for compromising donations. By statute the IRS already posts donors to 527 groups in an online database,<sup>260</sup> but finding that information requires both the awareness that the information is even available and the technical knowledge to wade

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<sup>255</sup> See *Sierra Club: Top Contributors, 2004 Election Cycle*, OPENSECRETS.ORG, <http://www.opensecrets.org/527s/527cmtedetail.asp?ein=943244759&cycle=2004&format=&name=Sierra+Club> (last visited Dec. 1, 2005).

<sup>256</sup> See Edsall, *supra* note 38. The point was validated in late 2005 when America Coming Together essentially disbanded due to the lack of a broad constituency. See Thomas B. Edsall, *Soros-Backed Activist Group Disbands as Interest Fades*, WASH. POST, Aug. 3, 2005, at A6.

<sup>257</sup> See, e.g., Editorial, *Close the Loophole on 527 Committees*, CONN. POST (Bridgeport, Conn.), Feb. 25, 2005, at A10; Suzanne Nelson, *Bill on 527s May Be on Fast Track*, ROLL CALL, Feb. 3, 2005, at 3.

<sup>258</sup> See, e.g., Editorial, *What Campaign Finance Reform?*, POST & COURIER (Charlotte, S.C.), Nov. 3, 2004, at A12 (arguing that BCRA roundly failed in its effort to reform campaign finance because it still permits some soft money contributions).

<sup>259</sup> See, e.g., *McConnell v. FEC*, 540 U.S. 93, 221 (2003).

<sup>260</sup> 26 U.S.C. § 527(k) (Supp. 2003).

through the IRS website.<sup>261</sup> However, as economist Anthony Downs argues, political information should be made as accessible as possible at the lowest cost if citizens are to make the most rational voting decisions.<sup>262</sup> To ease some of these difficulties, Congress could require that advertisements by 527 groups display a direct Internet link and mailing address where voters can access a clear and regularly updated list of all contributions over the hard money limit of \$2000. Advertisements by 527 groups are already required to display the name of the group funding them,<sup>263</sup> but more specific information about a group's constituency could provide far deeper insight into what the group stands for.<sup>264</sup>

The idea of increasing access to information so that voters can make informed decisions about whether they find political advertisements compelling reveals something about elections that may not be apparent at first glance. In many respects, elections are similar to economic capital markets.<sup>265</sup> Voters, like consumers, make predictive cost-benefit analyses about where they should best spend their resources (votes) based on the products (candidates) they feel will best fit their needs.<sup>266</sup> Competition between candidates leads each to improve, to the long-term benefit of the citizen-consumer.<sup>267</sup> Indeed, representative democracy is itself remarkably market-

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<sup>261</sup> At the time of this writing, reaching the IRS page to search 527 disclosure reports required no less than six clicks (assuming knowledge of site navigation), and an eventual choice between searching "Form 8871," "Form 8872," or "Form 990." See IRS, Political Organization Disclosure, <http://forms.irs.gov/politicalOrgsSearch> (last visited Nov. 9, 2004). Needless to say, the IRS's reports of contributions to 527 groups are not easily accessible.

<sup>262</sup> ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 207–19 (1957).

<sup>263</sup> General organizational disclosure requirements apply to any group's electioneering communications. 2 U.S.C. § 441d(a) (Supp. 2003). Candidates have the additional requirement to approve their advertisements with an image and voiceover, due to the "Stand By Your Ad" provisions of BCRA. *Id.* § 441d(d). The *McConnell* Court found the provisions constitutionally acceptable because they "bear[] a sufficient relationship to the important governmental interest of 'shedding the light of publicity' on campaign financing." *McConnell*, 540 U.S. at 231 (quoting *Buckley v. Valeo*, 424 U.S. 1, 81 (1976)).

<sup>264</sup> See Nicholas Stephanopoulos, Comment, *Stand by Your First Amendment Values—Not Your Ad: The Court's Wrong Turn in McConnell v. FEC*, 23 YALE L. & POL'Y REV. 369, 374 (2005) (arguing that without more, mere identification of the group or candidate funding an advertisement does not serve an anticorruptive purpose). Indeed, the "Stand By Your Ad" requirement has been criticized from the perspective of anonymous pamphleteering of the Thomas Paine variety. See Richard M. Cardillo, Note, *I am Publius, and I Approve This Message: The Baffling and Conflicted State of Anonymous Pamphleteering Post-McConnell*, 80 NOTRE DAME L. REV. 1929 (2005).

<sup>265</sup> The first analogues between democratic decisionmaking and economic markets were developed in the 1950s by economists such as Anthony Downs. See DOWNS, *supra* note 262. A more direct comparison between economic markets and political campaigns was elucidated in the early 1970s by University of Chicago professor George Stigler, who mathematically demonstrated that "political competition, even between parties, basically resembles economic competition." George Stigler, *Economic Competition and Political Competition*, 13 PUB. CHOICE 91, 91 (1972).

<sup>266</sup> See DOWNS, *supra* note 262, at 36 ("The benefits voters consider in making their decisions are streams of utility derived from government activity.").

<sup>267</sup> In economic terms, "[t]he rivalry among candidates to obtain (temporary) property rights to operate the production apparatus of the public sector will, in the ideal, serve to protect the sovereignty of

like in its reliance on voters to choose the representatives best able to advocate on their behalf.<sup>268</sup> When no candidates fit that bill, the market's "invisible hand"<sup>269</sup> brings new faces forth to fill the vacuum in supply.<sup>270</sup>

Elections and markets are also similar in that both suffer imperfections that can limit their ability to accurately reflect demand.<sup>271</sup> Economic markets reveal such imperfections when, for example, monopolistic practices stifle competition or limit innovation.<sup>272</sup> This can decrease a market's efficiency when responding to elasticity in demand. Governments seek to correct inefficiencies in economic markets, called "market failures," with regulation and enforcement.<sup>273</sup> Antitrust and securities law are examples of such economic controls.<sup>274</sup> The same cannot be said of elections, however, as they have certain rigid aspects that severely limit the effect regulators can have.<sup>275</sup>

Professor George Priest has identified three market failures inherent in elections that can distort their ability to accurately register voter demand.<sup>276</sup> First, elections are time-locked. Because they only take place at particular intervals, they disproportionately reflect voters' concerns at the time of the poll.<sup>277</sup> Economic markets, on the other hand, are more perpetually open.

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individual voter-consumers." W. Mark Crain, *On the Structure and Stability of Political Markets*, 85 J. POL. ECON. 829, 830 (1977).

<sup>268</sup> This observation is based on the formative notion in public choice theory, which adopts as axiomatic the view that elected representatives balance the costs and benefits of every action as to its affect on their reelection or political advancement. See DOWNS, *supra* note 262, at 27–28; Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (discussing the role of interest groups in public choice theory).

<sup>269</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 194 (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) (1776).

<sup>270</sup> Some scholars maintain that the two-party dominance of American politics undermines the competitive marketplace of political ideas. See DOWNS, *supra* note 262, at 137 (arguing that under the two-party system, parties become addicted to "equivocation and ambiguity"); Richard L. Hasen, *The 'Political Market' Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 726–27 (1998) (questioning the market benefits of the duopolistic party system). *But see* Karen I. Chang, Comment, *The Party's over: Establishing Nonpartisan Municipal Elections in New York City*, 11 J.L. & POL'Y 579, 612 (2003) ("Partisan election systems, in which political parties are granted preferred organizational status, are . . . beneficial as formalized mechanisms for generating competition, one of the vital forces behind a thriving democracy." (citing EUGENE C. LEE, THE POLITICS OF NONPARTISANSHIP 161 (1960))).

<sup>271</sup> George Priest, *Buying Democracy: A New Look at Campaign Finance 'Reform'* (Mar. 2000) (unpublished paper, on file with author).

<sup>272</sup> *Id.* at 6.

<sup>273</sup> *Id.* *But see* Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 336 (1974) (arguing that the market failure explanation does not adequately describe the reasons for government regulation).

<sup>274</sup> Priest, *supra* note 271, at 6.

<sup>275</sup> *Id.* at 7.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 8; *see also* Sam Peltzman, *How Efficient Is the Voting Market?*, 33 J.L. & ECON. 27, 28 (1990) ("The broad consensus in [Public Choice] literature is that voters in congressional and presiden-

Manufacturers must constantly improve their products to maintain consumer support, while elected officials usually serve their entire term with no opportunity for voter referendum.<sup>278</sup>

Second, although most federal elections are constrained by geography, elected representatives can affect parts of the country far outside their constituency.<sup>279</sup> Powerful politicians that chair committees or introduce divisive legislation might well rouse the ire or support of many people outside their home districts. In successful economic markets, resources are freely available for allocation in the most efficient way. In representative elections, however, individuals outside the allotted geographies have little ability to influence those important ballots.<sup>280</sup>

Third, elections that give an equal vote to every citizen have no way to register the intensity of each voter's support.<sup>281</sup> There is no doubt that one person-one vote is an important facet of a democratic political system, but it results in a distortion of the apparent demand in the voting market.<sup>282</sup> Whereas consumer products can be purchased repeatedly or in volume if a buyer feels they will be effective at achieving a desired result, voters feeling strongly drawn to one candidate have only as much say as an apathetic voter who chooses a different candidate.

Priest views these market failures of temporality, geography, and intensity as systemic defects that are only exacerbated by campaign finance legislation.<sup>283</sup> Priest believes that while government regulation would be an

tial elections . . . myopically ignore any information beyond the recent past, say, prior to the election year.”).

<sup>278</sup> Priest, *supra* note 271, at 8. The daily polling conducted by firms such as the Gallup Organization may serve to regularly inform elected officials of voters' preferences; however polling is a fallible and uncertain science. See Christopher Wlezien, *On Forecasting the Presidential Vote*, 34 POL. SCI. & POL. 24 (2001) (explaining difficulties faced by pollsters forecasting the 2000 election). While polling may affect the actions of elected representatives, its inexactitude necessarily distorts candidates' perceptions of the actual political marketplace.

<sup>279</sup> Priest, *supra* note 271, at 7.

<sup>280</sup> *Id.* at 10 (“In the marketplace, though from Connecticut, I can encourage greater investment in a particular California vineyard or tomato garden or encourage the expansion of product choices by a Yosemite clothing maker. The possibilities of my making political investments that might increase or enrich choices in California are not closely similar.”).

<sup>281</sup> *Id.* at 9. (“The electoral problems of vote-cycling and indeterminacy . . . derive from this feature of elections. Perhaps most serious is the potential coercion of non-mobilized minorities which allows electoral pluralities—like market monopolies—to redistribute resources despite having a negative effect on aggregate welfare.”).

<sup>282</sup> See *id.* at 11.

<sup>283</sup> *Id.* at 15. Priest is not the only scholar to suggest that campaign finance regulation serves to exacerbate, not correct, electoral market failures. See Samuel Isacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 690 (1998) (arguing that campaign finance regulation entrenches political parties because it raises the market's barriers to entry, resulting in the “oligarchical capture” of politics by parties); David R. Lagasse, Note, *Undue Influence: Corporate Political Speech, Power, and the Initiative Process*, 61 BROOKLYN L. REV. 1347 (1995) (describing how federal campaign finance regulation has increased the ability of corporations to exploit the ballot initiative processes in many states).

adequate solution to an economic market failure, electoral market failures are intractable. The best solution, according to Priest, would be to eliminate campaign finance laws entirely and remedy the corruption threat through a wholesale reduction in the size of government.<sup>284</sup>

Priest's solution, however, suffers from a fatal flaw. Legislators have little incentive to reduce the aggregate size of government once in office.<sup>285</sup> Indeed, during the past century, federal spending as a percentage of GDP has continuously expanded regardless of the party in power.<sup>286</sup> Without the sort of dramatic reduction in the size of government that Priest envisions, the campaign finance laws are necessary to curtail the historically clear potential for corruption in the political process.<sup>287</sup>

Another mechanism is available to remedy those market failures, however—one that, although previously overlooked, provides a solution to the problems of temporality, geography, and intensity without creating an increased risk of political corruption. That mechanism is the 527 group. Despite the strong animosity voiced from almost every corner, 527 groups are well suited to remedy all the electoral market failures identified by Priest while still permitting Congress to realize the important governmental interest in preventing corruption.

First, 527 groups overcome the temporal failures in elections because they are organized to spend and receive monetary donations at any time. As independent issue advocacy organizations, 527 groups are comparable to special interest groups for voters. Like special interest groups, they focus on recurring issues rather than periodic elections, and 527 groups are thus more efficient than individuals at overcoming the tragedy of the commons and concentrating significant resources on particular issues.<sup>288</sup> Individuals

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<sup>284</sup> Priest, *supra* note 271, at 15. The idea is that by reducing the size of government, elected officials will have fewer "rents" they can extract from groups interested in their decisions once elected. See John R. Lott, Jr., *A Simple Explanation for Why Campaign Expenditures Are Increasing: The Government Is Getting Bigger*, 43 J.L. & ECON. 359, 363 (2000) (demonstrating mathematically that "the more transfers the government has to offer, the more resources people will spend to obtain them"). In non-economic terms, Priest's point is that the less elected officials have to offer in exchange for contributions, the fewer reasons special interests have to spend potentially corrupting money on political influence in the first place. Priest, *supra* note 271, at 15.

<sup>285</sup> John O. McGinnis & Michael B. Rappaport, Editorial, *Hey Big Spenders: There's a Law That Could Stop You!*, WALL ST. J., Feb. 4, 2004, at A16. Some scholars have suggested that appreciably limiting the spending of the federal government would require a constitutional amendment. *Id.*

<sup>286</sup> Federal spending has steadily increased over the past century under both Democratic- and Republican-controlled Congresses, from less than two percent of GDP to nearly twenty-percent in 2004. *Id.*

<sup>287</sup> The corruptive potential may be quite strong indeed. A recent study drew direct links between corporate campaign contributions and a legislator's reputation for supporting a given corporation. See Randall S. Kroszner & Thomas Stratmann, *Corporate Campaign Contributions, Repeat Giving, and the Rewards to Legislator Reputation*, 48 J.L. & ECON. 41 (2005).

<sup>288</sup> See George Stigler, *Free Riders and Collective Action: An Appendix to Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 359 (1974).

who contribute to 527 groups effectively register their opinions of policy choices between elections, ensuring their strong feelings about an issue will have a voice in the political marketplace of the next campaign.

Second, 527 groups are able to spend and receive money anywhere in the nation. In that way, they pool information and experience from diverse sources to better advocate for issues that cross geographic boundaries, leading to greater efficiency in the market. By leveraging the comparative advantages of a far-flung membership—such as income and experience—527 groups can more effectively address issues important to their constituents, even if those issues are not crucial to local voters. Thus a gun-advocacy group based in Texas can have a voice, no matter how unwelcome, in the election of a Senator from Vermont who happens to chair an important committee. If the Vermont voters find irrelevant what the Texas group has to say, they can simply choose to ignore its ads; if they learn information that helps them make a more intelligent choice, so much the better.

Finally, 527 groups provide an avenue for people who strongly believe in a particular issue to contribute more than people who believe only moderately in an opposing one. Much was made of the Democratic success in raising money from 527 groups in the 2004 election<sup>289</sup>—a fact that could well indicate not that Democrats were wealthier, but that they were more openly antagonistic toward President Bush than Republicans were supportive.<sup>290</sup> Similarly, the committed loyalty of the supporters of the Swift Boat Veterans for Truth allowed the opinions of a small number of individuals, right or wrong, to reach a wide audience.<sup>291</sup> The interests of democracy are served best by allowing the widest number of people to register their political views, contributing to the broadest and most inclusive debate.<sup>292</sup>

The new FEC rules permit 527 groups to optimally mitigate electoral market failures as well as ensure that their advocacy poses little threat of corruption. And from the amount of ink spilled criticizing 527 groups during the 2004 race, prior to the new rules they clearly manifested an appearance of corruption (at least to journalists) that *McConnell* authorized Congress to cure. But 527 groups, particularly as they mature, will likely have an enormous positive effect on the election process as well. They could focus candidates' attention on issues that voters feel are important, and allow for a more accurate representation of constituencies. Voters frustrated with the political process due to the limited impact of their single vote could be satisfied by the more dramatic impact they might have by

<sup>289</sup> See Katharine Q. Seelye, *Money-Rich Advocacy Groups, Formed for Bush-Kerry Race, Look Far Beyond Election Day*, N.Y. TIMES, Oct. 17, 2004, at A31.

<sup>290</sup> See Sara Fritz, *Cracks Appear in Bush's Armor*, ST. PETERSBURG TIMES (Fla.), Sept. 14, 2003, at 1A.

<sup>291</sup> See Centanni et al., *supra* note 29.

<sup>292</sup> See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 593 (2005) (“Greater participation by individual donors serves the primary goal of campaign finance regulation—combating quid pro quo corruption by special interests—because it dilutes their power.”).

contributing on a single issue.<sup>293</sup> The FEC's rules ensure that 527 groups advocate for issues and not candidates, and encourage the groups to remain a key failure-correcting component of the competitive electoral market.

Congress made significant strides in preventing the possibility or appearance of corruption with the noncoordination provisions in BCRA.<sup>294</sup> Congress was not trying to, and indeed is prevented from, regulating independent issue advocacy.<sup>295</sup> As long as the FEC enforces BCRA's noncoordination measures to their full extent,<sup>296</sup> 527 groups could serve a vital and beneficial role in American elections. Instead of seeking to eliminate 527 groups, legislators and commentators should consider embracing them and their corrective impact on the electoral marketplace.

## V. CONCLUSION

As demonstrated above, the rules adopted by the FEC are the most likely to prevent 527 groups from gaining a corruptive sway over elected leaders and avoid undue trampling on the groups' First Amendment rights. Limiting corruption has always been the guiding force behind the nation's campaign finance laws, and corruption has been drastically reduced by BCRA and will be diminished further by the FEC's new rules. Despite widespread support from scholars for the "major purpose" test and politicians for the 527 Reform Act, the cost to open political participation and genuine issue advocacy from those measures would be too great to countenance. Moreover, permitting 527 groups to continue accepting some soft money contribution has a positive impact on elections from a market perspective.

The new FEC rules do not end the possibility that voters in 2006 will see divisive advertisements from 527 groups like the "We're Being Misled" ad described in the introduction. But that may not be such a bad thing. In an interview during 2004, FEC Chairman Bradley Smith was asked by reporters what he thought about the Swift Boat Veterans for Truth's controversial advertisements. "I think it's great," Smith replied. "[W]e live in a

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<sup>293</sup> Peltzman argues that, rationally, individual voters should be uninterested in actually voting because "a vote is costly and the likelihood that one's vote will alter the election is vanishingly small." Peltzman, *supra* note 277, at 28. 527 groups provide a different avenue for political participation, one that is not subject to those limitations.

<sup>294</sup> See 2 U.S.C. § 441a(a)(7) (Supp. 2003).

<sup>295</sup> See *supra* text accompanying note 151.

<sup>296</sup> In a September 2004 decision, a district court in Washington, D.C., struck down several of the FEC's rules regarding coordination as too lax. *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). None of the implicated rules affects the issues addressed in this Comment. See Recent Cases, *District Court for the District of Columbia Invalidates Regulations Implementing Bipartisan Campaign Reform Act*, 118 HARV. L. REV. 2453 (2005) (discussing effect of *Shays*). During the 2004 election, the most public potential violation of BCRA's antcoordination rules occurred when an attorney for the Bush campaign admitted giving legal advice to the Swift Boat Veterans for Truth. Amy Keller, *Ginsberg Flap Puts Focus on Murky Rules*, ROLL CALL, Aug. 30, 2004, at 3.

country where 260 average guys can go out and put their point of view out there before the public and influence a major presidential race.”<sup>297</sup>

Indeed, spirited and controversial advertising from unaffiliated groups may ultimately have a positive effect on the national dialogue. As long as contributions are openly disclosed, “[i]t may be that it takes some group, whether it’s from the right or the left, to reinvent and reinvigorate the language of American politics from generation to generation. Otherwise we all just sort of go to sleep, and that’s bad for us.”<sup>298</sup> Perhaps, in the end, the politicians and commentators railing against the FEC’s new rules should temper their zeal for unreflective reform, and give 527 groups the chance to fulfill their potential as valuable participants in the national political debate.

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<sup>297</sup> Michael Forsythe, *Federal Election Commission Chairman Defends Swift Boat Ads*, BLOOMBERG.COM, Aug. 24, 2004, <http://quote.bloomberg.com/apps/news?pid=10000103&sid=aleXxo.8.2ll&refer=us>.

<sup>298</sup> *Negativity High in 2004 Campaigns* (Nat’l Pub. Radio broadcast Oct. 31, 2004) (interviewing Prof. Shura Grees), available at <http://www.npr.org/rundowns>.

