SYMPOSIUM ISSUE

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The subject of today's Symposium is "Campaign Finance Reform After Federal Election Commission v. McConnell." While that phrase may sound dry and technical, in fact the controversy over government regulation of political contributions and expenditures exposes a tension between two of our most cherished American political ideals: the ideal of a society where individual citizens enjoy freedom of political speech, and the ideal of a deliberative democracy in which our elected representatives act in furtherance of the public interest, without being unduly influenced by self-interest or by the interests of the wealthiest.

The ideal of Freedom of Speech is set forth in the text of our written Constitution. The First Amendment famously guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]." This constitutional guarantee of freedom of speech has long been understood, at its very core, to protect the right of dissenting individuals to criticize the government and its officials, loudly and publicly. Besides being a hallmark of a free and open society, the freedom of individuals to publicly criticize the government has also been understood to facilitate the marketplace of ideas that undergirds our democracy. In the timeless words of Justice Louis Brandeis:

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1 See, e.g., Elrod v. Burns, 427 U.S. 347, 374 n.29 (1976):

[T]he purpose of the First Amendment includes the need . . . 'to enable every citizen at any time to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.' (quoting Wood v. Georgia, 370 U.S. 375, 391-92 (1962) (quoting 2 T. COOLEY, CONSTITUTIONAL LIMITATIONS 885 (8th ed. 1927))).

2 See also McConnell v. FEC, 124 S. Ct. 619, 720 (2003) (Scalia, J., concurring in part and dissenting in part) (characterizing "the right to criticize the government" as "the heart of what the First Amendment is meant to protect").

3 See, e.g., Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), arguing that:

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freedom to think as you will and to speak as you
think are means indispensible to the discovery
and spread of political truth; that without free
speech and assembly discussion would be futile;
that with them, discussion affords ordinarily
adequate protection against the dissemination of
noxious doctrine; that the greatest menace to
freedom is an inert people; that public
discussion is a political duty; and that this
should be a fundamental principle of the
American government.5

In addition to protecting the right of dissenters to publicly criticize the
government, the First Amendment also guarantees the right of the people to
communicate directly with their elected and appointed representatives.6 In
language that has been characterized as creating a constitutional right to lobby,7
the Petition Clause of the First Amendment specifically protects "the right of the
people . . . to petition the Government for a redress of grievances." Under this
Clause, every person is constitutionally entitled to write to her Congress Member
or state legislator, to encourage others to write or otherwise contact legislators,
and to make speeches and publish articles designed to influence legislators.9 The
Petition Clause, whose roots date back to the English Magna Carta of 1215,10

the ultimate good desired is better reached by free trade in
ideas – that the best test of truth is the power of the thought
to get itself accepted in the competition of the market, and
that truth is the only ground upon which [the exercise of
popular sovereignty] safely can be carried out. That at any
rate is the theory of our Constitution.

5 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added),
6 See McDonald v. Smith, 472 U.S. 479, 482 (1985) (noting that "James Madison made clear in the
congressional debate on the proposed [First] [A]mendment that people 'may communicate their
will' through direct petitions to the legislature and government officials" (citing 1 ANNALS OF
CONG. 738 (Joseph Gales ed., 1789))).
(recognizing that "the right to lobby is constitutionally protected" (citing Regan v. Taxation With
Representation, 461 U.S. 540, 552 (1983))).
8 U.S. CONST. amend. I.
(refusing to impute a regulatory purpose to the Sherman Act that would effectively deny people's
right to petition legislators); United States v. Harriss, 347 U.S. 612, 625-26 (1954) (holding that
disclosure requirements imposed by the Federal Regulation of Lobbying Act of 1946 did not
prohibit the public from petitioning elected representatives).
10 The Magna Carta guaranteed that "If [the British monarchy should] offend in any respect against
any man, or transgress any of the articles of the peace or of this security, [then] . . . the said
twenty-five barons, they shall come to [the King] to declare it and claim immediate redress."
serves to ensure that the government remains in tune with, and accountable to, the needs of the people.\textsuperscript{11} Both the Speech Clause and the Petition Clause protect, and reflect, foundational American ideals of freedom, democracy, governmental accountability, and, ultimately, popular sovereignty. For this reason, American courts during the past half-century have afforded especially strong protection to individuals and corporations seeking to exercise these rights.\textsuperscript{12} Indeed, today, courts generally will presume unconstitutional any statute that seeks to limit or abridge cherished individual rights of Free Speech, unless the government can prove that the restriction is narrowly tailored to achieve a compelling government interest.\textsuperscript{13}

At the same time, American democracy has long also rested on an additional pillar: the principle that government should not become corrupted or co-opted by the strong and powerful, and used as a tool to oppress the weak and powerless. In the Federalist No. 10, James Madison expressed fear that a democratic form of government might fall under the control of "a faction," which Madison defined as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."\textsuperscript{14} Indeed, Madison particularly worried that these self-interested and powerful factions would exercise their power through corrupt elected officials. Even while arguing for ratification of the Constitution, Madison acknowledged that "Men of factious tempers, of local prejudices, or of sinister designs, may, by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interests of the people."\textsuperscript{15} Madison did not propose to solve the problems of faction and governmental corruption via any regulatory program. Rather, his proffered solution was to create an extended American Republic so large and diverse that no individual faction would ever be able to dominate its government.\textsuperscript{16} As we all know,

\textsuperscript{11} Norman B. Smith, "Shall Make No Law Abridging...": An Analysis of the Neglected, But Nearly Absolute, Right of Petition, 54 U. Cin. L. Rev. 1153, 1178-80 (1986) (discussing the purposes of petitioning as well as interests served thereby).

\textsuperscript{12} See, e.g., United Mine Workers of Am. v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) ("[T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected... with the other First Amendment rights of free speech and free press.").

\textsuperscript{13} See, e.g., United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest. If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." (citing Reno v. Am. Civil Liberties Union, 521 U.S. 844, 874 (1997))).

\textsuperscript{14} The Federalist No. 10, at 78 (James Madison) (1787) (Clinton Rossiter ed., 1961).

\textsuperscript{15} Id. at 82.

\textsuperscript{16} See id. at 83:
Madison succeeded in his campaign for ratification of the Constitution and the creation of an extended American Republic, governed by a United States Congress. Unfortunately, however, the size of the Republic did not deter factional interests from trying to bribe or otherwise influence certain Members of Congress. Accordingly, after a few well-publicized incidents, Congress in 1862 enacted the first federal statute that made it a crime to corruptly give or promise anything of value to a public official with the intent to influence any official act. That 1862 statute, as amended, remains on the books today.

Many states followed suit, and some went farther. In Georgia, for example, the post-Reconstruction Constitution of 1877 prohibited lobbying of state legislators altogether. More typical was a Massachusetts statute enacted in 1890, which required lobbyists to register and to disclose who was paying their expenses — prophylactic requirements that Congress first adopted in 1946.

Anti-bribery statutes prohibit the tender of cash or valuable gifts directly to incumbent politicians, but they do not generally prohibit contributions to campaign funds. Accordingly, interest groups seeking to curry political favor were often able to do so by making large campaign contributions. In 1907, Congress first sought to regulate such practices by enacting the Tillman Act, which prohibited corporations and national banks from contributing money in

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19 See generally Note, Control of Lobbying, 45 HARV. L. REV. 1241 (1932) (surveying early twentieth century state laws regulating legislative lobbying).

20 See GA. CONST. of 1877, art. I (Bill of Rights), § 2, par. V, available at http://www.cvoig.uga.edu/Projects/gainfo/con1877b.htm (“Lobbying is declared to be a crime, and the General Assembly shall enforce this provision by suitable penalties.”).


connection with federal elections. This prohibition was extended by the
Corrupt Practices Act of 1925 to cover non-monetary contributions by
corporations. The Taft-Hartley Act of 1947 prohibited labor unions from
making contributions in connection with federal elections. All of these
statutes, however, were riddled with loopholes and therefore were difficult to
enforce.

The modern era of campaign finance reform began with the Federal Election
Campaign Act Amendments of 1974, which was enacted in the wake of the
Watergate scandal. That statute set limits on campaign contributions and
expenditures in Presidential and Congressional election campaigns, provided
public "matching funds" for qualified candidates, and established the Federal
Election Commission to administer and enforce the law. Beginning with the
landmark case of *Buckley v. Valeo*, a series of Supreme Court decisions
addressed the constitutionality of the 1974 Act, upholding some provisions and

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United States*, 290 U.S. 534 (1934), the Supreme Court sustained this statute against constitutional
challenge.
(1976))). The history and scope of Taft-Hartley's campaign finance provisions are discussed in
*United Auto. Workers*, 352 U.S. at 578-84. In 1976, Congress incorporated the substance of
those provisions into the comprehensive Federal Election Campaign Act Amendments of 1976,
27 Cf. ESKRIDGE, FRICKEY & GARRETT, supra note 21, at 228 (3d ed. 2001) ("Because of the
vagueness of these early laws, unions and corporations were able to make contributions virtually at
will.").
Act, which was enacted in the wake of the Watergate scandal, substantially superseded the
(1972), which had been enacted less than three years previously. Cf. McConnell v. FEC, 124 S. Ct.
619, 645 (2003) ("As the 1972 presidential elections made clear, however, [the 1971 Act's]
passage did not deter unseemly fundraising and campaign practices.").
335, 338 (2000).
30 See McConnell v. FEC, 124 S. Ct. 619, 646 (2003):

The 1974 amendments ... limited individual political contributions to any single candidate to $1,000 per
election, with an overall annual limitation of $25,000 by
any contributor; imposed ceilings on spending by
candidates and political parties for national conventions;
required reporting and public disclosure of contributions
and expenditures exceeding certain limits; and established
the Federal Election Commission (FEC) to administer and
enforce the legislation. (citation omitted)
striking down others. At the same time, campaign finance lawyers grew increasingly sophisticated at discovering the loopholes in the Act.\textsuperscript{33}

In March 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the McCain-Feingold Act.\textsuperscript{34} This statute is perhaps the strongest and most sweeping regulation of campaign finance ever enacted by Congress.\textsuperscript{35} In its core provisions, the Act prevents national political parties from soliciting, accepting, and spending "soft money" — money used for "party building" activities rather than direct advocacy for or against a federal candidate.\textsuperscript{36} The Act also places significant restrictions on "issue ads" funded by soft money.\textsuperscript{37} These provisions were recently sustained by the Supreme Court in

\begin{footnotesize}

\textsuperscript{33} See, e.g., 147 CONG. REC. S300 (daily ed. Jan. 22, 2001) (statement of Sen. Thad Cochran), stating that new campaign finance legislation was needed because:

\begin{quote}
The purpose of the campaign finance laws was to let the American people know from where the money was coming, how it was being used, how much money was being raised by the candidates and spent by the candidates. We have now lost the right to know because of the loopholes that have been developed and perfected by those who are involving themselves in the election process.
\end{quote}

See also S. REP. NO. 105-167, vol. 4, at 4611 (1998) (concluding that the "soft money loophole" had led to a "meltdown" of the campaign finance system that had been intended "to keep corporate, union and large individual contributions from influencing the electoral process"), quoted in McConnell v. FEC, 124 S. Ct. 619, 652 (2003).


a 300-page opinion in *McConnell v. Federal Election Commission*.\(^{38}\) The Court’s opinion is hard to summarize succinctly, and I will not try. You will hear a lot about it today, from a variety of perspectives.

Today’s Symposium addresses a topic of great current importance. We are now entering an exciting Presidential election season in which unprecedented sums of money – hundreds of millions of dollars – will be contributed to, and spent by, each of the leading candidates for office.\(^{39}\) Many proponents of campaign finance reform argue that the need for candidates to raise such exorbitant sums to remain competitive exerts a corrupting influence on politics and on the candidates’ politics and policies.\(^{40}\) Critics, in contrast, argue that these contributions and expenditures facilitate civic engagement and a robust, high-profile national political debate.\(^{41}\) Today you will hear views, expressed by eminent scholars, from all sides of this debate. Everyone speaking here today is profoundly committed to maintaining the health and vitality of our system of American democracy. I believe that everyone speaking here today agrees that freedom of speech must be protected and that bribery of elected officials must be punished. The debate over campaign finance reform, writ large, can thus perhaps be seen as a debate over where the line between advocacy and corruption should be drawn.

With these remarks, I have attempted to paint in broad strokes a picture of the legal, political, and philosophical problems raised by campaign finance reform, and to rough out some of the primary notions that have been articulated by each side in the ongoing debate. In today’s exciting program, our four speakers will engage in an in-depth discussion of these issues.

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\(^{38}\) *McConnell v. FEC*, 124 S. Ct. 619, 650-52 (2003) (discussing the types of “issue ads” that were funded by “soft money” prior to the enactment of BCRA). In the 2000 election, 130 groups spent over an estimated $500 million on more than 1,100 different “issue ads.” *Id.* at 651 n.20. Two out of every three dollars spent on “issue ads” in the 2000 election cycle were attributable to the two major parties and six major interest groups. *Id.*

\(^{39}\) See *James Harding, Cost of Election Expected to Break Record*, FIN. TIMES, Mar. 8, 2004, at 7, available at 2004 WL 70209703:

As John Kerry’s campaign prepares for a 20-state fund-raising drive and George W. Bush continues to add to his $150 [million]-plus budget, the 2004 presidential race is set to funnel more money into fewer hands than any contest in US election history. Rampant inflation has become a fact of American political life, but the early forecasts suggest this contest will break previous financial records. “You could well have $1 [billion] spent on this presidential election,” said Thomas Mann, political analyst at the Brookings Institution and prolific writer on campaign finance. His calculation is based not only on what the candidates raise, but also their parties and allied groups. (foreign currency translation omitted)


\(^{41}\) See, e.g., Bopp & Coleson, *supra* note 40.
distinguished speakers will paint in some detail various aspects of the broad strokes that I have set forth.
THE BIPARTISAN CAMPAIGN REFORM ACT: LIMITS AND OPPORTUNITIES FOR NON-PROFIT GROUPS IN FEDERAL ELECTIONS

by Craig Holman*

"McCain-Feingold is a major assault on the average citizen's ability to participate in the political process because it targets and imposes severe restrictions on two key citizen groups . . .: issue advocacy groups and political parties."


"McCain-Feingold . . . is dead on arrival in the federal courts."


"This law will not remove one dime from politics . . .

Soft money is not gone – it has just changed its address."

-- Sen. Mitch McConnell, press release (Dec. 10, 2003), following the Supreme Court ruling upholding BCRA.

Senator Mitch McConnell (R-Ky.) spearheaded both the congressional attacks and the court challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA), also known as the "McCain-Feingold" law after its key senate sponsor.

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* Craig Holman, Ph.D. Legislative Representative, Public Citizen.

1 107 CONG. REC. S3131 (statement of Sen. McConnell).

2 Id. at S3133.


sponsors. While first failing to strike fear of the sweeping changes posed by the McCain-Feingold bill to prevent its passage, McConnell then sought to defeat the law in the courts. After being rebuffed by the courts, McConnell finally asserted that the law will not meet its intended purposes anyway. Which McConnell is correct?

The Bipartisan Campaign Reform Act is widely credited as the most significant campaign finance legislation affecting federal elections in more than a quarter century. Whether seen as a positive reform or a negative reform, most observers agree that BCRA has significantly re-written the rules of the game of campaign financing.

Just as notably, the Supreme Court opinion of the law in *McConnell v. FEC* rivals in scope and significance any ruling by the Court in the same field. It is the longest Supreme Court decision in campaign finance history; in fact, the *McConnell* decision is the second longest opinion in the Court's history. More to the point, however, is the dramatic and decisive tone of the decision, upholding not only BCRA but many of the core principles at the heart of regulating money in politics in general.

Nevertheless, the ability to regulate money in politics exactly as intended has long eluded legislators and campaign finance reformers. The stakes for corporations, unions, special interest groups and even individuals in the outcome of governmental decisions can be very great. Money is such a determinative factor in selecting who governs and in shaping the political agenda that all of these entities are willing, if not compelled, to find ways to advance their interests through campaign contributions or political expenditures. As such, the regulation of money in politics is often compared to a sieve, in which plugging one loophole leaves another one open. In the concluding words of the *McConnell* court: "Money, like water, will always find an outlet."  

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5 Connecticut Representative Christopher Shays, one of the principal sponsors of the campaign finance law, said: "This is huge. It means the shakedown by federal officeholders of unions, corporations and other groups will end." John A. MacDonald, *Soft Money Ban Upheld; Presidential Candidates Praise Court's Ruling*, HARTFORD COURANT, Dec. 11, 2003, at A1.  
6 Justice Clarence Thomas, in his dissenting opinion, called the majority opinion "the most significant abridgement of the freedoms of speech and association since the Civil War." *McConnell v. FEC*, 124 S. Ct. 619, 729 (2003) (Thomas, J., dissenting).  
8 In terms of word count, *McConnell v. FEC* came in second at 89,694 words. The longest ruling by the Supreme Court was the 1857 *Dred Scott* opinion, *Dred Scott v. Sandford*, 60 U.S. 393 (1856), at 109,163 words. The *McConnell* decision, however, was the longest ruling in terms of pages, though not words. BNA, *Supreme Court McConnell Case Had Biggest Page Count of Any Opinion Issued by the Supreme Court*, MONEY & POL. REP. (Dec. 22, 2003).  
9 It is perhaps one of the great ironies of the campaign finance debate that the name "McConnell" will now be used to describe the constitutional precedent upholding the regulatory regime of the new and far more comprehensive campaign finance environment.  
10 *McConnell*, 124 S. Ct. at 707.
This research examines one of the more pressing and debatable issues of the potential impact of BCRA and the McConnell decision on the campaign finance environment: whether the growing use of Section 527s and 501(c) non-profit groups in electioneering activities will effectively undermine the ban on soft money in federal elections. Part I of this analysis documents the problems and abuses associated with the old campaign finance regime prior to the BCRA. Part II traces the key provisions and objectives of the BCRA as intended by Congress and as interpreted by the Federal Election Commission (FEC). Part III provides a brief synopsis of the McConnell decision, paying special attention to its definition of "federal election activity" subject to regulation. Part IV charts the differences between the elections code that governs political committees and the tax code that governs electioneering non-profit groups. Part V discusses the emerging role of non-profit groups in the new campaign finance environment and assesses the successes and failures of BCRA in achieving its objectives.

I. FECA: THE OLD CAMPAIGN FINANCE REGIME

Federal campaign finance law has long been governed by the Federal Election Campaign Act (FECA) of 1971 as interpreted by the U.S. Supreme Court's 1976 landmark decision, Buckley v. Valeo.

FECA established a series of mandatory limits on contributions to candidates and mandatory ceilings on expenditures by candidates and committees. The central question addressed by the court in the Buckley decision was posed by Justice White: Is money speech and speech money? A majority of the court ruled that money as an expenditure is in essence free speech. Thus, the Court opined that it is unconstitutional for the government to mandate ceilings on political expenditures. Candidates, committees, special interest groups and individuals have the constitutional right to spend all the money they wish for campaign advertisements.

However, the Court added an important caveat. While money as an expenditure is tantamount to free speech and not subject to mandated limits, money as a contribution to others is equivalent to proxy speech – that is, money in the latter case simply serves to help enable someone else to speak on your
behalf.\textsuperscript{19} As proxy speech, contributions are not entitled to the same constitutional protections as expenditures. The "quantity of the communication by the contributor does not increase perceptibly with the size of the contribution."\textsuperscript{20} In this instance, First Amendment considerations are outweighed by the potential for actual or perceived corruption caused by large contributions. Thus, governments may mandate limits on contributions to candidates and committees – but only on the grounds to prevent actual corruption or the appearance of corruption.

A. Issue Advocacy

While drawing a distinction between campaign expenditures and campaign contributions in terms of First Amendment rights, the \textit{Buckley} decision also drew a distinction between campaign advertisements, subject to campaign finance regulation, and issue ads, which fall outside the regulatory regime.\textsuperscript{21}

After considering FECA and its amendments in \textit{Buckley v. Valeo}, the Supreme Court found several of the provisions regulating expenditures to be unconstitutional.\textsuperscript{22} Specifically, the Court found that the language used by Congress to regulate all expenditures by parties and groups "relative to a clearly identified candidate,"\textsuperscript{23} and "for the purpose of influencing an election" was far too broad, thus posing a serious threat to the speech of these groups.\textsuperscript{24} In an attempt to resurrect the disclosure provisions and source limitations for election advertising, the Court changed FECA’s language regulating party and group expenditures “relative to a clearly identified candidate” to apply only to those expenditures that “expressly advocate” the election or defeat of a candidate.\textsuperscript{25}

Ruling without the benefit of empirical evidence or experience in actual campaign practices, the Court determined that the distinction between “campaign advertising” which is subject to regulation, and “issue advocacy” which is not, can be determined by assessing whether the ad uses “explicit words of election or defeat.”\textsuperscript{26} In the now-famous footnote fifty-two of the \textit{Buckley} opinion, the Court listed eight examples that constituted “express words of advocacy.” These were: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject.”\textsuperscript{27} Without these words of

\textsuperscript{19} See \textit{id.} at 21.
\textsuperscript{20} Id.
\textsuperscript{21} \textit{Buckley}, 424 U.S. at 79-80.
\textsuperscript{22} Id. at 51, 54, 58-59.
\textsuperscript{23} Id. at 41.
\textsuperscript{24} See \textit{id.} at 39.
\textsuperscript{25} \textsc{Glenn Moramarco, Regulating Electioneering: Distinguishing Between ‘Express Advocacy’ and ‘Issue Advocacy’} 5 (1998).
\textsuperscript{26} \textit{Buckley}, 424 U.S. at 44.
\textsuperscript{27} Id. at 44. The Court recognized that using such a “magic words” standard of express advocacy was untested at the time and could conceivably be subject to abuse. In its \textit{Buckley} decision, the
express advocacy or something comparable, ads by parties and groups would be viewed as educational rather than electioneering, and thus exempt from FECA regulation.28

In what is now facetiously known as the “magic words” test, the Court’s examples of words of express advocacy as given in footnote fifty-two of the Buckley decision (and subsequently modified by the courts) had become the standard for distinguishing campaign advertisements from issue advocacy.

Candidate advertisements, of course, are assumed to be campaign ads, and are thus subject to regulation and disclosure rules. Political advertisements, on the other hand, could avoid campaign finance regulations as long as they did not employ one of the “magic words.

As a result of the “magic words” test, the following advertisement, aired just days before the 2000 presidential primary election, was considered an issue ad. That designation allowed the ad to be financed by soft money and the sponsors to be hidden from the public:

Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush’s clean air laws will reduce air pollution more than a quarter million tons a year. That’s like taking [five] million cars off the road. Governor Bush, leading so each day dawns brighter.29

Since the ad did not contain any of the “magic words” associated with express advocacy, it was treated as an issue ad beyond the reach of state and federal disclosure laws.30 The only disclosure of who paid for the ad was a tag line reading: “paid for by Republicans for Clean Air.” No campaign finance reports were filed with the Federal Election Commission. Many voters assumed the ad was financed by an environmental group. Only later was it revealed that

Court lamented: “It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate’s campaign.” Id. at 45.

28 Id. at 44-45.
30 Id.
the ad was paid for by Charles and Sam Wyly, two Texas billionaires who were long-time friends and contributors to George Bush.31

The Wyly issue ad cited above serves as an ideal example of “sham issue advocacy” – exploiting the “magic words” test to finance ads designed to influence elections but which legally fall outside the scope of campaign advertisements. Until fairly recently, however, the practice of using issue advocacy for electioneering purposes had not been all that common. Usually, such electioneering issue ads were sponsored by only a few groups or individuals who sought to avoid the reporting requirements for whatever reason.32 On occasion, issue advocacy was used by unions and corporations to sidestep the source prohibitions against treasury monies being spent in connection with candidate campaigns.33 But it was not until the FEC adopted a similar loophole, known as “soft money,” that the use of issue advocacy as a means of evading source prohibitions really began to take hold.34

B. Soft Money

In the late 1970s, concern arose over the regulation disparities between political parties and independent issue advocacy groups. To address this, the FEC decided to allow national parties to finance some of their party-building activities with “soft money.” In theory, the funds raised through ”soft money” contributions were intended to support non-electioneering party activities, and to place parties on par with the rising campaign activity of independent groups.

Under the old campaign finance regime, “hard money” must be used by candidates, parties and groups to pay for ads that fall under the category of express advocacy, i.e., ads that expressly advocate the election or defeat of a clearly identified candidate. “Hard money” consists of funds raised within the contribution and source limitations of FECA and must be publicly disclosed to the Federal Election Commission. Issue advocacy, on the other hand, includes communications by parties or groups intended to influence a political issue, legislative proposal or public policy — not to advocate the election or defeat of candidates. Issue ads are thus beyond the realm of any federal campaign regulations, and may be paid for with “soft money” — funds not subject to contribution limitations and, depending on the sponsor, not subject to disclosure requirements.

The FEC expanded the soft money exemption for party-building activities into a gaping loophole in the law. The FEC determined that soft money could be used by parties and groups in part to pay for issue ads, even those broadcast on

32 See HOLMAN & MCLoughlin, supra note 29, at 25.
33 Id.
television. The elections agency developed regulations applying an “allocation ratio” detailing how much soft money versus hard money could be used by party committees to finance these types of ads in the late 1980s.\textsuperscript{35} In response to a request from the Kansas Republican Party on how to allocate expenditures that evenly benefited federal and state election activities, the FEC ruled that the party could use soft money to pay their estimate of nonfederal costs.\textsuperscript{36} A 1988 federal court order, in a case pursued by Common Cause, required the FEC to develop specific allocation formulas for hard money and soft money to prevent parties from abusing their new soft money privileges.\textsuperscript{37} The FEC issued an “allocation ratio” regulation that permits national party committees to use soft money to pay for 35\% of various activities, including ads that do not expressly advocate the election of a federal candidate.\textsuperscript{38} The regulation is based on the assumption that a portion of national party “issue advocacy” will support generic party-building activities and state and local party activities. In the same regulation, the FEC offered a formula that permits state party committees a much higher ratio of soft money to hard money in airing their “issue ads” on the assumption that ads sponsored by state parties would accrue a greater benefit to state election activity than to federal election activity. The allocation ratio is a complicated formula based on number of state and federal candidates on the state ballot and other criteria. State ratios of soft money to hard money generally average about 60\% soft money to 40\% hard money.

In the 1996 presidential election, Democratic party campaign consultants finally realized the potential financial bonanza for electioneering that had previously lain dormant.\textsuperscript{39} By combining the soft money loophole with electioneering issue advocacy, an unlimited amount of union treasury money could be employed to pay for so-called issue ads designed to help Democratic candidates. These ads were free from oversight as long as they did not contain one of the “magic words.” The AFL-CIO declared that it would spend $20.7 million in union treasury funds on issue ads in the 1996 election in an effort to win Democratic party control of Congress.\textsuperscript{40} Their opponents learned from this innovation. In 1996, thirty-three business organizations including the National Association of Manufacturers and the U.S. Chamber of Commerce formed an organization called “The Coalition: Americans Working for Real Change” to counter the AFL-CIO’s electioneering issue ad attack with thousands of electioneering issue ads of their own.\textsuperscript{41}

\textsuperscript{35} Id.

\textsuperscript{36} Id.


\textsuperscript{38} 11 C.F.R. § 106.5(b) (2004).


\textsuperscript{40} Eliza Newlin Carney, Airstrikes, 28 NAT’L J. 1313 (1996).

\textsuperscript{41} Peter Stone, Business Strikes Back, 29 NAT’L J. 2130, 2130-33 (1997).
C. The Floodgates Open Wide

Using a unique database of political television commercials from the Campaign Media Analysis Group (CMAG), developed by Professor Ken Goldstein at the University of Wisconsin, the Brennan Center for Justice at New York University analyzed the abuses of electioneering issue advocacy and soft money in the 1998 and 2000 general elections.

Television ads sponsored by the political parties, like most campaign ads by candidates or special interest groups, tend to avoid using the “magic words” of express advocacy. Only about 2.3% of party ads concluded with such express advocacy terms as “vote for” or “elect”; 3% of group ads employed the “magic words” that would categorize the advertisements as campaign ads; and even among candidates, all of whose ads are automatically defined as campaign ads by the law, only 10% of candidate ads used any of the “magic words.”

With the exception for candidates, if not defined as express advocacy by the “magic words” test, these ads are defined as issue advocacy: designed to further important political issues or legislation and even to strengthen the party organizations. As issue advocacy, the money that pays for these ads is treated differently under the law. Money that would otherwise be illegal for electioneering purposes – money from corporate and union treasuries or in excess of legal contribution limits (“soft money”) – can be used to finance these types of ads.

Whether or not party ads pass the “magic words” test of issue advocacy, the ads aired in the 2000 election by the parties universally failed the “reasonable person” test of this study. Coders at the University of Wisconsin viewed all 234,000 party ads as electioneering in nature – that is, designed to campaign for or against candidates. Not a single genuine issue ad was to be found among party-sponsored advertisements. The findings of the coders were confirmed by objective accounts of the content of these ads: almost 96% of all party ads promoted or attacked candidates, mentioning a candidate’s name or picturing a candidate’s likeness or image. These ads were not concerned about issues; they were focused on electing or defeating candidates (see Table One).

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43 HOLMAN & MCLoughlin, supra note 29.
44 Id. at 61.
45 Id. at 64.
Table One
Political Parties Dominate the Category of Issue Ads that Avoid Regulation

<table>
<thead>
<tr>
<th>Magic Words</th>
<th>No Magic Words</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>Percentage</td>
</tr>
<tr>
<td>Party</td>
<td>6,988</td>
</tr>
<tr>
<td>Group</td>
<td>2,936</td>
</tr>
</tbody>
</table>

Meanwhile, All Party Ads Are Perceived as Electioneering Rather than Genuine Issue Ads

<table>
<thead>
<tr>
<th>Electioneering Ad</th>
<th>Genuine Issue Ad</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>Percentage</td>
</tr>
<tr>
<td>Party</td>
<td>234,490</td>
</tr>
<tr>
<td>Group</td>
<td>82,534</td>
</tr>
</tbody>
</table>

Party Ads Nearly Always Depict a Candidate Whether or Not the Ad Uses the Magic Words

<table>
<thead>
<tr>
<th>Electioneering Ad</th>
<th>Magic Words</th>
<th>No Magic Words</th>
</tr>
</thead>
<tbody>
<tr>
<td>Count</td>
<td>Percentage</td>
<td>Count</td>
</tr>
<tr>
<td>No Mention</td>
<td>233</td>
<td>3.3%</td>
</tr>
<tr>
<td>Mention</td>
<td>6,755</td>
<td>96.7%</td>
</tr>
</tbody>
</table>


More so, party ads in the 2000 election also were not concerned about party-building activities. Only about 8% of all party ads discussed a party. Almost 92% of party ads never talked about a political party, let alone encouraged voters

46 Id. at 64.
to register with the party, volunteer with the local party organization or support the party (see Table Two). 47

Financed largely by $274 million in soft money transfers from the national parties to state parties in the 2000 election – Democrats transferred $145 million in soft money and Republicans $129 million 48 – the Democrats and Republicans buy more television time in relationship to federal elections through their state party committees. 49 Overall, 77% of party-sponsored political commercials relating to federal elections in the 2000 election were paid for by state parties. 50 The national party committees and federal congressional committees combined purchased about 23% of the party airwaves that addressed federal elections. 51 Not surprisingly, most of this state party spending activity took place in the nation’s most competitive states: Florida, Pennsylvania, California, Michigan, Washington, and Ohio. 52

<table>
<thead>
<tr>
<th>Party Ads Mentioning the Name of a Party</th>
</tr>
</thead>
<tbody>
<tr>
<td>Opposing party</td>
</tr>
<tr>
<td>Favorable party</td>
</tr>
<tr>
<td>No party mentioned</td>
</tr>
</tbody>
</table>

92%


47 Id.
49 See HOLMAN & MCLoughlin, supra note 29, at 62-64.
50 Id.
51 Id.
52 Id.
Applying the soft money allocation ratios for each state, a reasonably clear picture of party soft money spending on television advertising emerges. The *Buying Time 2000* study found that — contrary to the spirit if not the letter of federal law — soft money in the 2000 elections comprised the single largest source of funding for party ads promoting the election or defeat of federal candidates. More than 56% of funds that paid for party ads across the nation were soft money; only 44% of the funds paying for these ads came from hard money raised within the limits of federal law.

In House races, state party committees spent $17,825,893 in soft money to buy party television commercials, or 66% of the total spent by state parties on such ads. In Senate races, state party committees spent $21,622,159 in soft money on party television advertising, or 62% of the total spent by state parties on such ads. And in the presidential race, state party committees spent $36,663,636 in soft money on electioneering ads designed to promote the election or defeat of presidential candidates, or 63% of all such spending by state parties. Even when combined with soft money spending by the national party committees, unlimited and unregulated soft money remained the primary source of funds for federal electioneering campaign ads sponsored by the parties.

Beyond television advertising, soft money also played a key role in electioneering for party activities. The original intent of the soft money loophole — to provide parties with additional resources to mobilize voters — bore very little significance to the actual use of soft money by the parties. In another study sponsored by NYU’s Brennan Center for Justice, which compiled party disclosure records filed with the Federal Election Commission from the 2000 election cycle, a picture emerged of the purposes and beneficiaries of soft money that is quite at odds with its ostensible justification. In fact, only 8½ cents out of every soft money dollar was spent by the parties on activities associated with mobilizing voters, such as get-out-the-vote drives, party registration efforts, absentee ballot mailings, party slate mailings, phone banks, and other activities intended to fortify a party’s electoral base. Instead, the largest bulk of party soft money is allocated to buying the television ads discussed above, as well as radio ads, and direct mail electioneering issue ads. Running a distant second,

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53 *Id.* at 64.
54 *Id.*
55 See HOLMAN & MCLoughlin, supra note 29, at 64.
56 *Id.*
57 *Id.*
59 *See HOLMAN & MCLoughlin, supra note 29, at 66.
60 A similar study on soft money spending by the state and national parties reached somewhat different conclusions by classifying all party direct mail as “voter mobilization” activity rather than “issue advocacy.” By classifying all direct mail as “voter mobilization,” the percentage of the soft money dollar spent on mobilizing voters increases from 8½ cents to about 15 cents. *See, e.g., Ray*
third, and fourth place behind electioneering ads in soft money spending are administration, fundraising, and party salaries, respectively (see Table Three). By far, the single greatest share of soft money dollars spent by the parties relative to federal elections goes into electioneering advertising for or against candidates.

In the 2000 elections, the flood of soft money into party and independent group coffers— and the way in which the parties and groups learned to use this new pool of money— spelled the end of campaign finance law at the federal level. The false “magic words” distinction between express advocacy and issue advocacy was exploited by the parties and groups to run costly electioneering campaigns for and against candidates, financed with unlimited and unregulated soft money. As such, FECA’s source and contribution limits were rendered largely irrelevant to campaign activity in federal elections.

Then came BCRA.


This research does not agree with the findings of La Raja & Shean. Most direct mail expenditures in this study have been classified in the media-issue advocacy category. The Brennan Center study found that much of this direct mail advertising resembled the content and tone of television and radio electioneering issue ads. The direct mail appeals were generally non-personalized mass appeals and electioneering in nature, mostly mailed as Election Day neared, frequently negative in tone, and usually paid for by soft money. These are patterns identical to televised electioneering issue ads.

61 See HOLMAN & MCLoughlin, supra note 29, at 66.
62 Id.
II. BIPARTISAN CAMPAIGN REFORM ACT OF 2002

The Bipartisan Campaign Reform Act was signed by the President and enacted on March 27, 2002. BCRA capped a seven-year effort by its congressional sponsors to change federal campaign law and marked the most significant amendment to the Federal Election Campaign Act (FECA) in more than a quarter century. The Senate version of the final bill, S. 27, principally sponsored by John McCain (R-Ariz.) and Russell Feingold (D-Wis.) initially passed the Senate on April 2, 2001. The House version, H.R. 2356, principally

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sponsored by Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.) passed the House on February 14, 2002. On March 20 of that year the Senate approved the House version by a 60-40 vote in order to avoid a conference committee that would have been composed by many of the leading opponents of the bill. A series of technical amendments were ratified by the House and the Senate over the next two days, and the bill was finally sent to the President.

A. Twin Pillars of BCRA

BCRA is divided into five titles, with the first two comprising the key twin pillars of the new law: the ban on raising and spending “soft money” by the national parties and federal officeholders and candidates (Title I); and the redefinition of what constitutes a campaign advertisement to include “electioneering communications,” subject to campaign finance disclosure requirements and contribution limits (Title II).

1. Soft Money Ban

“Soft money” in federal elections is money that is otherwise prohibited for campaign purposes. It is defined as funds coming directly from corporate or union treasuries or funds given in excess of the individual and PAC contribution limits. Corporate money was originally banned from electioneering activity in 1907 with the Tillman Act. A ban on direct union contributions in federal campaigns came in the 1943 War Labor Disputes Act (Smith-Connolly Act), renewed permanently in 1947 as the Taft-Hartley Act. FECA in the mid-1970s then established a series of contribution limits for individuals and PACs.

“Hard money” stands in contrast to soft money. When it comes to money in campaigns, most people think in terms of hard money – money for federal

65 See Karen Hosler, Daschle Urges Quick Review of Campaign Bill; Finance Reform Measure Passes House 240-189, BALTIMORE SUN, Feb. 15, 2002, at 4A.
67 See HOLMAN & MCLoughlin, supra note 29, at 61.
68 The definition of “soft money” often changes with jurisdictions, depending on state and local campaign finance laws. States that do not prohibit direct corporate or union campaign contributions would not define such funds as soft money. Similarly, states without contribution limits would also not view large contributions from wealthy individuals as soft money. For a discussion of problems associated with defining soft money across jurisdictions, see Institute for Money in State Politics, State Secrets: A Joint Investigation Into Party Money in the States (June 25, 2002), at http://followthemoney.org/research/special-topics.phtml (last visited Apr. 9, 2004).
70 War Labor Disputes Act (Smith-Connolly Anti-Strike Act), ch. 144, § 9, 57 Stat. 167 (1943).

candidate campaigns that comes from legal sources, subject to contribution limits, and reported to the Federal Election Commission.\(^7\)

Title I of the Bipartisan Campaign Reform Act reaffirms the ban on soft money in federal elections.\(^7\) National party committees are explicitly prohibited from raising or spending soft money for any purpose.\(^7\) This ban applies to any entity that is established or controlled by a national party committee.\(^7\) As the law reads: "A national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act."\(^7\)

Just as importantly, BCRA also prohibits federal officeholders or candidates from raising or spending soft money in connection with federal election activities. This includes a ban on soliciting soft money for other groups, except for limited activities of non-profit groups.\(^7\) Federal officeholders and candidates may not raise or spend soft money for state and local candidates and parties (i.e. Levin funds).\(^7\) Federal officeholders and candidates, however, may raise up to $20,000 in soft money from individual contributions for voter mobilization activities of each Section 527 or 501(c) non-profit group.\(^8\) Officeholders and candidates may raise unlimited soft money for 501(c) non-profit groups so long as the funds are not used in connection with federal election activity.\(^8\)

"Federal election activity" is defined rather broadly as any advertisement that promotes or attacks a federal candidate, generic party campaign activity, voter mobilization activity in general, and voter registration drives within 120 days of a federal election.\(^8\) As a general rule, if federal candidates are on the ballot, activity affecting that election is classified as federal election activity.\(^8\)

The sweeping prohibitions imposed by BCRA have been mitigated to a significant extent by subsequent FEC rulemaking. The Federal Election

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\(^7\) See HOLMAN & McLOUGHLIN, supra note 29, at 23.


\(^9\) Id.

\(^10\) Id. § 441i(a)(1).

\(^11\) Id. § 441i.

\(^12\) As part of a congressional compromise to secure passage of BCRA, the Levin amendment was added to the law that allows for a limited soft money exception for voter registration activities of state and local party committees. Each state and local party committee may receive up to $10,000 in soft money per source if permissible under state law. Money raised under this exception may not be used for federal candidate specific or generic advertising, and the funds cannot be transferred between party committees.


\(^14\) Id.


\(^16\) Id.
Commission, considered by many as hostile to the campaign finance law, has promulgated a series of regulations designed to curtail the law's restrictions on soft money in federal elections.\textsuperscript{84} Some of these regulations are as contrary to the law as the agency's original "allocation ratio" regulation. For example, FEC regulations provide that:

- Federal officeholders and candidates may participate in soft money fundraising efforts, such as serving as a keynote speaker at a fundraising event, so long as they do not specifically ask for a soft money contribution.
- National parties could establish soft money surrogate committees, staffed by former party officials and campaign consultants, if these shadow committees were established prior to the effective date of BCRA (November 6, 2002). Numerous such shadow groups have since been created.
- Non-party committees may be closely coordinated with the campaign committees of federal candidates, through employing the same campaign consultants and services, and still be classified as "independent" from the federal candidate and eligible to raise and spend soft money in the campaign. Committees are deemed coordinated only if the common consultants are controlling agents in the campaign and acting with the intent of coordination.
- Convention host committees may raise and spend unlimited soft money for party nominating conventions, in coordination with the national party committees.\textsuperscript{85}

\textsuperscript{85} Id.
The FEC soft money regulations are viewed as so counter-productive to the letter and intent of the law that the congressional sponsors of BCRA have filed a separate lawsuit to overturn the regulations.86

2. Electioneering Communications

The "electioneering communications" provision of BCRA is an expansion of the class of advertisements defined as campaign ads rather than issue ads, and thus subject to regulation.87 In addition to the "magic words" standard of express advocacy, any broadcast ad that refers to a clearly identified federal candidate within sixty days of a general election, or thirty days of a primary election, and which targets that candidate's constituency, is also classified as a campaign advertisement.88 An ad is considered targeted to a candidate's constituency if it can be received by 50,000 or more persons in the candidate's district (as determined by the Federal Communications Commission).89 "Broadcast ads" include television, radio, cable or satellite advertisements, but do not include Internet advertisements.90

Electioneering communications and express advocacy communications must be paid for with hard money and the source of funds and expenditures disclosed to the Federal Election Commission.91 Corporations and unions are prohibited from making electioneering or express advocacy communications, except through a separate segregated fund.92 Individuals, unincorporated 527s and 501(c) groups, and political committees may all participate in such electioneering advertising, subject to federal election law.93 Incorporated non-profit groups may also participate in electioneering communications, provided they qualify as an MCFL-type incorporated non-profit.94

86 Shays v. FEC, Civ. No. 02-CV-1984 (filed 2003). The case had been on hold awaiting a ruling in the McConneii case, but the case is now on track in U.S. District Court in the District of Columbia before Judge Colleen Kollar-Kotelly. A decision is expected by summer of 2004.
88 Id.
89 Id.
90 Id.
91 Id.
92 Id.
94 Qualified non-profit corporations, also known as MCFL-type non-profits, are incorporated ideological groups that meet specific criteria for political participation. In 1986, the Massachusetts Citizens for Life Committee (MCFL) challenged FECA's ban on direct corporate involvement in express advocacy communications. The right-to-life group conducted an independent expenditure campaign on behalf of candidates, financed by its soft money corporate treasury funds that were derived from individual donors. The Court supported MCFL's position, ruling that the ban on direct corporate expenditures for or against federal candidates could not constitutionally apply to expenditures by non-profit ideological corporations that are not financed by other corporations or unions. FEC v. MCFL, 479 U.S. 238 (1986). The MCFL exemption is extended to electioneering
Title II of the BCRA is expected to capture the bulk of electioneering advertisements by parties and groups within the campaign finance regulatory regime. The Buying Time studies have well documented that so-called "issue ads" that do not use the "magic words," but air within the sixty-day window of an election and depict a candidate, are in fact nearly always electioneering ads and the "functional equivalent of express advocacy."\(^{95}\)

B. Additional Provisions of BCRA

The BCRA also imposed a number of additional changes in the federal campaign finance regime. Titles III and IV of BCRA increased the individual contribution limits to federal candidates from $1,000 per election to $2,000.\(^{96}\) The BCRA also increased the aggregate contribution limit from individuals to all candidates from $25,000 per year to $95,000 per two-year election cycle to all candidates and committees allocated as follows: $37,500 per cycle to all candidates and $57,500 per cycle to all parties and committees.\(^{97}\) The individual contribution limits are also indexed for inflation.\(^{98}\) Contributions from minors were prohibited (though this provision was invalidated by the court).

A variable contribution limit has been established for federal candidates in races against wealthy self-financed opponents, known as the "millionaire's amendment."\(^{99}\) The limits on individual contributions increase exponentially when a Senate or House candidate is opposed by a wealthy candidate who exceeds specified thresholds on self-financing.\(^{100}\)

Title V of BCRA imposed some additional disclosure requirements upon broadcasters. Broadcasters are required to keep public records of the sponsors, cost and timing of all political broadcast advertisements - electioneering ads and genuine issue ads - by candidates, parties and groups, including non-profit organizations.\(^{101}\) These records must be made available to the public.\(^{102}\)

The law also included an assortment of other miscellaneous provisions, such as required verbal disclosure at the end of candidate ads stating that the candidate authorized the ad,\(^{103}\) extended "lowest unit charge" rates for broadcast communications as well. Though a small group of non-profit groups satisfy the MCFL exemption, some of these groups include politically-powerful organizations, such as the National Rifle Association (NRA), National Abortion Rights Action League (NARAL), and Massachusetts Citizens for Life (MCFL).

\(^{97}\) Id.
\(^{98}\) Id. at § 441a(a).
\(^{100}\) Id.
ads to parties as well as candidates, revised rules on coordinated campaign activity, and imposed criminal violations for serious offenses.

III. *McConnell v. FEC*

Immediately after passage of the BCRA, eighty-four plaintiffs — ranging from Sen. Mitch McConnell to committees of the Democratic and Republican parties to the NRA and ACLU — filed eleven different lawsuits challenging the new campaign finance law.\(^{104}\) The U.S. Department of Justice and the Federal Election Commission (FEC) were the lead defendants in the suits, supported in their defense of BCRA by the principal congressional sponsors of the law, who intervened in the case.\(^{105}\) More than twenty provisions of the new law as well as established provisions of the Federal Election Campaign Act (FECA) were challenged.\(^{106}\) All the lawsuits were consolidated into one case, *McConnell v. FEC.*\(^{107}\)

After a mixed ruling by a lower three-judge federal panel last May, which was suspended on appeal, the Supreme Court took the case on a fast-track review schedule.\(^{108}\) The Court even cut short its summer vacation in order to hear oral arguments, which took an extraordinarily long four hours.\(^{109}\) But the Court did not dawdle in issuing a timely ruling — and the Court did not leave much ambiguity in its thinking. In a five-to-four decision, the majority of the court ruled:

> [T]he statute’s two principal, complementary features — Congress’ effort to plug the soft money loophole and its regulation of electioneering communications — must be upheld in the main.\(^{110}\)

The majority opinion, written by Justices John Paul Stevens and Sandra Day O’Connor, upheld the two key provisions of the campaign finance law: the ban on soft money in federal elections, and the regulation of campaign advertisements disguised as “issue ads.”\(^{111}\) The Court did not stop there — nearly

\(^{104}\) Zeleny & Zuckman, *supra* note 63, at 1.


\(^{106}\) Id.

\(^{107}\) Id.


\(^{109}\) See Charles Lane, *Justices Split on Campaign Finance: Court will Debate Case This Fall,* WASH. POST, Sept. 9, 2003, at A1.

\(^{110}\) *McConnell,* 124 S. Ct. at 627.

\(^{111}\) Id.
every element of BCRA in particular, and campaign finance regulation in general, was supported in the ruling.112

Specifically, the Court upheld:

- The ban on national parties and officeholders raising and spending "soft money" — the unlimited contributions to parties from corporations, unions and wealthy individuals.
- The limit on state parties spending soft money that affects federal elections.
- The new definition of campaign advertisements subject to campaign finance regulation and disclosure, as any broadcast ad aired immediately before an election that depicts a federal candidate and targets that candidate's constituency (known as "electioneering communications"). Such ads are now covered under campaign finance limits and disclosure requirements if they are aired sixty days before a general election or thirty days before a primary election.
- The requirement that special interest groups use only regulated "hard money" to pay for electioneering communications and disclose the source of these funds. Hard money consists of contributions from individuals or political action committees (PACs), subject to contribution limits and disclosure requirements.
- The mandate that broadcast stations compile a public record of political ads and who paid for them.113

The Court invalidated only two provisions of the law: the ban on campaign contributions from minors,114 and the requirement that parties choose between making either independent expenditures or coordinated expenditures on behalf of

112 Id.
113 Id. at 698.
114 Id. at 711.
candidates. The Court affirmed most other aspects of campaign finance regulation and disclosure, and even admonished the Federal Election Commission for letting money in politics get so out of hand. FEC regulations, noted the Court, created the problem of soft money. In the words of the Justices, "the FEC regulations permitted more than Congress, in enacting FECA, had ever intended." Just as important, the Court rejected out-of-hand the very narrow justification for campaign finance laws used by opponents of regulating money in politics—that campaign finance regulations are only justifiable to curtail the type of corruption that causes a change in legislative votes. The Court expounded upon the fact that soft money leads not only to a possible change in legislative votes, but also to "manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation." To claim that such legislative scheduling actions do not change legislative outcomes, says the Court, "surely misunderstands the legislative process." As such, campaign finance regulation need not be based on such a narrow interpretation of corruption. This latter point is critical to mapping out the potential future impact of BCRA and McConnell. Though the McConnell Court couched all of its rationale upholding BCRA in language that made reference to corruption or the appearance of corruption, the Court most notably expressed considerable deference to Congress in determining whether any given campaign finance policy is appropriate to meet the corruption standard. "The less rigorous standard of review we have applied to contribution limits shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise," wrote Justices Stevens and O'Connor for the majority. "It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."

IV. THE LAWS REGULATING ELECTIONEERING NON-PROFIT GROUPS

The BCRA, along with the new Brady-Lieberman Section 527 disclosure law, has fundamentally transformed the role of non-profit organizations in

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115 Id. at 704.
116 McConnell, 124 S. Ct. at 660.
117 Id. at 664.
118 Id.
119 Id.
120 Id. at 656.
121 Id.
federal elections. Non-profit organizations face both new constraints on electioneering activity and new opportunities to play a larger role in the electoral arena.

It is critical in attempting to understand the permissible political activities of non-profit organizations to realize that two different sets of laws regulate these activities: the Federal Election Campaign Act (FECA), as amended by BCRA, and the Internal Revenue Code. Both laws use different definitions of "electioneering" activities and seek different objectives in the regulation of organizations.

The FECA specifically regulates campaign activity of candidates and political committees. In so doing, FECA operates on a very narrow definition of electioneering activity. Under the FECA, electioneering activity includes:

- *express advocacy* communications, which employ the "magic words" of "vote for," "vote against," "elect" or comparable expressions; and
- *electioneering communications*, which depict a federal candidate within sixty days of a general or runoff election or thirty days before a primary election, and which target the voting constituency in that election.\(^\text{123}\)

The Internal Revenue Code (IRC) specifically regulates the tax status of organizations. As such, the tax code uses a broad definition of *political activity*, which not only differs from FECA's concept of electioneering, but also is perceived differently within the different sections of the tax code itself, depending on which type of organization it applies (i.e., Section 501(c)(3) as opposed to a Section 527). More often than not in the tax code, political activity is defined as: "participating in, or intervening in (including the publishing or distributing of statements), any political campaign in support of (or opposition to) any candidate for public office or attempting to influence any segment of the general population with respect to elections."\(^\text{124}\) This includes federal, state and local elections as well as any activity that affects these elections, such as voter registration drives and get-out-the-vote efforts.\(^\text{125}\) Revenue Rulings from the IRS

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\(^{124}\) Definition of political activity provided by the Internal Revenue Service in its Instruction Booklet for filling out Line 85d on Form 990.

\(^{125}\) See 26 U.S.C. § 527 (2003). The definition of political activity for Section 527 groups, known as "exempt activity," reads: "Influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, of the election of Presidential or Vice-Presidential electors, whether such individual electors are selected, nominated, elected, or appointed." *Id.* § 527(e)(2).
even go so far as to classify such activities as rating candidates for public office and publishing and distributing voter information pamphlets as potentially constituting intervention in political campaigns, depending on the facts and circumstances of each particular activity. Many of these activities commonly are not included in FECA's definition of electioneering.

To compound matters, the laws apply differently to specific classes of organizations. Political committees or PACs, which fall under FECA's definition of electioneering, must register with the Federal Election Commission and abide by all the contribution limits and reporting requirements of federal campaign law. Non-profit groups that avoid the express advocacy or electioneering communications definitions of FECA, but which pursue other electioneering activity as their primary purpose, must register with the IRS as Section 527 groups. Business, labor, and ideological groups that intend to conduct substantial amounts of electioneering activity, but not as the primary purpose of the organization, may register with the IRS as Section 501(c)(4)-(6) non-profit groups. This entitles them to dramatically reduced disclosure requirements of which Section 527s must adhere. Finally, groups that do not plan on conducting substantial lobbying and electioneering activity may register as a 501(c)(3) charity, entitled to generous tax benefits. All these classes of non-profit groups file their financial activity reports with the IRS and not the FEC, despite their level of electioneering activity.

The most significant changes in federal election law that affect non-profit organizations are three-fold. First, BCRA places strict limits on the use of soft money by federal officeholders and candidates and the national parties. Second, BCRA extended the definition of campaign activity subject to federal election law to include electioneering issue ads designed to promote or attack a candidate but without using the "magic words." Finally, the Brady-Lieberman Section 527 disclosure law, approved in 2002, imposes stringent disclosure requirements on 527 electioneering activity but not on electioneering Section 501(c) non-profits conducting much of the same type of political activity.

A. Types of Non-Profit Groups

There are two primary categories of non-profit groups pertinent to the regulation of electioneering activity under the tax code: Section 527s and 501(c) non-profits. The basic nature of these groups is discussed below.

130 Id. at § 501(c)(3).
1. Section 527 Organizations

The origin of Section 527 of the Internal Revenue Code was not to evade the federal campaign finance law. In fact, it was originally designed as part of the reform movement. In order to shield contributions and transfers to political parties from taxation, Congress developed a unique provision in the tax code (Section 527) primarily for party committees as part of the post-Watergate campaign reforms. At the time, it was widely assumed that the financial activity of Section 527 committees would remain fully disclosed since parties were explicitly required to file regular disclosure reports with the Federal Election Commission.

Two decades later, however, non-profit groups transformed Section 527 into a campaign finance loophole. The Sierra Club was the first non-profit to register as a 527, quickly followed by dozens of other non-profits. What these groups discovered was not so much the tax benefits of Section 527 status, but the fact that federal law did not require non-party 527s to disclose their contributions and expenditures. For groups that were not party committees, Section 527 status was subject only to the tax code, which did not require public disclosure of financial activity, rather than the elections code, which did require disclosure. Section 527s became known as "Stealth PACs" and mushroomed in number and spending activity in the mid-1990s.

Finally, in the 2000 presidential primary election, one Stealth PAC called "Republicans for Clean Air" ran a series of ads depicting John McCain as a friend of polluting coal-burning power plants and ending with the slogan: "Bush, leading so each day dawns brighter." The true identity of the group sponsoring the ad evaded the press and public for some time, until the sponsors — Sam and Charles Wyly, two millionaire friends of George Bush — called a press conference to boast of their handiwork. A slightly chagrined Congress responded with a law in July 2000 requiring all 527s to file regular financial disclosure reports with the Internal Revenue Service (IRS).

The disclosure requirements applicable to 527s were improved even further with passage of the Brady-Lieberman disclosure law in 2002. The newest law became effective in July 2003. Among its most important provisions, Section 527 groups are required to file regular reports with much of the same disclosure information that is required of FECA-regulated political committees, and the reports must be filed electronically and made easily available on the IRS Web site in a searchable and downloadable format.

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Section 527 groups may still solicit and spend soft money in federal elections, though not for express advocacy or electioneering communications (broadcast ads mentioning a candidate immediately before an election). This continues to make Section 527s an attractive avenue for those who wish to stay in the soft money game and use this money to promote and attack federal candidates. Even though the financial activity of 527s will no longer remain so well hidden, there is still plenty of room for cloaking the sources of funds and purposes of expenditures of Section 527 groups. The financial reports of these groups, for example, do not disclose which candidates are being targeted for election or defeat by the electioneering activities. Many of these groups have been established and financed by federal officeholders, national party leaders and other well-connected political operatives, yet coordination with these connected committees may be difficult to prove, given the FEC’s “grandfather clause” for criteria that determine coordinated activity.

While Section 527 groups appear quite popular among federal officeholders and party leaders wishing to evade the soft money ban and disclosure requirements, an additional impact of the new campaign finance law is likely to be the elevation of 501(c) non-profit groups as the new “Stealth PACs” of choice.

2. Section 501(c) Non-Profit Groups

The new Section 527 disclosure law does not address other non-profit groups involved in federal elections – specifically, 501(c)(4)s through 501(c)(8)s. Social welfare groups (§ 501(c)(4)), labor unions (§ 501(c)(5)), business leagues (§ 501(c)(6)), social clubs (§ 501(c)(7)), and fraternal organizations (§ 501(c)(8)), are non-profit entities treated quite distinctly by the IRS from Section 527 groups. While the primary purpose of 527 groups is electioneering activity, 501(c) non-profits may conduct electioneering activity, just not as their primary purpose. Similar to their 527 counterparts, however, 501(c) non-profits are regulated under the tax code, not the election code.

Non-profit groups are established within the Internal Revenue Code primarily to pursue objectives related to the needs of the organization. As a result, 501(c) non-profits are envisioned by the tax code essentially as lobbying organizations seeking to influence legislation and public policy in ways that are compatible with the mission of the organizations. Labor unions are expected to lobby on labor matters; businesses lobby for business-friendly policies.

139 Compare id. § 501(c) with id. § 527 (2000).
140 Id. § 501 (2000).
141 See id.
Section 501(c) non-profits may also conduct substantial electioneering activities, so long as those activities are pertinent to the interests of the organization. Precisely how much electioneering activity is permissible is an issue to be decided by the facts-and-circumstances of each particular case—in other words, it is a gray area. It is perhaps easier for the IRS to determine when the electioneering activities of a non-profit group have exceeded the legitimate interests of the organization than to define when an organization is in compliance with the tax code.

This opens up 501(c) non-profits as a potentially more lucrative soft money conduit than even Section 527s. Non-profits may conduct substantial electioneering activities as defined by the IRS and pay for these activities with soft money (except for express advocacy and electioneering communications). Unlike Section 527 groups, however, the reporting and disclosure requirements for non-profits remain lax. Non-profit groups file annual financial activity reports with the IRS—in paper format—and the information is not made available on the IRS’ Web site. The financial activity reported by non-profit groups is just summary data; no itemized contributions and expenditures are publicly disclosed. And the paper financial activity reports are difficult to obtain, requiring either a written request or a trip to the organization’s headquarters.

Not only are the disclosure laws much weaker for 501(c) non-profits than for 527 groups, but BCRA’s ban on soft money fundraising by federal officials does not apply to 501(c) non-profit groups. Federal officials may still raise soft money without limit for non-profits provided the solicitation is not specifically for federal election activity. Federal officials may even raise unlimited soft money for the general funds of an organization so long as its “principal purpose” is not to conduct political activity such as voter registration, voter identification and get-out-the-vote activities.

3. Qualified Non-Profit Corporations (QNC)

An old twist in federal campaign finance law has resurfaced in the new environment. Despite the clear language of a provision of BCRA known as the “Wellstone Amendment,” which applied the ban on corporate money in waging and electioneering communications to all incorporated non-profits, the FEC and the Court ruled that “qualified non-profit corporations” (QNC) may continue to make independent expenditures and electioneering communications directly from their own treasury funds. Qualified non-profit corporations are a small class of incorporated non-profits that accept little or no corporate or union

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142 Id.
treasury funds, are not affiliated with any corporation or union, and whose exclusive purpose is political rather than business-oriented.\textsuperscript{146}

One such example is the Massachusetts Citizens for Life Committee (MCFL), which in 1986 challenged FECA's ban on direct corporate involvement in express advocacy communications.\textsuperscript{147} The right-to-life group conducted an independent expenditure campaign on behalf of candidates, financed by its soft money corporate treasury funds that were derived from individual donors.\textsuperscript{148} The U.S. Supreme Court supported MCFL's position, ruling that the ban on direct corporate expenditures for or against federal candidates could not constitutionally apply to expenditures by non-profit ideological corporations that are not financed by other corporations or unions. Other incorporated non-profits include groups like the National Rifle Association (NRA) and the National Abortion Rights Action League (NARAL).\textsuperscript{149}

This ruling opened up a potential loophole in BCRA for non-profits directly engaged in advocating the election or defeat of candidates. Though qualified non-profit corporations and MCFL-type groups are subject to most contribution limits and reporting requirements, these requirements apply only to an independent expenditure on an express advocacy advertisement or electioneering communications.\textsuperscript{150} All other financial activity of the non-profit corporation falls outside federal campaign finance law and public disclosure. As a result, a QNC may accept unlimited and unreported soft money and spend it to support its organizational activities (including staff, rent, fundraising expenses, and overhead).

\section*{B. The Soft Money Spigot to Non-Profit Groups}

Just as important for the new and expanded role of non-profit groups in the soft money game encouraged by BCRA and the tax code, the FEC issued a series of controversial regulations that make it easier for non-profits to step into the old shoes of federal officials and national party leaders to raise soft money.\textsuperscript{151} Many of these regulations are currently being challenged in a separate lawsuit filed by the congressional sponsors of BCRA.\textsuperscript{152}

\begin{footnotesize}
\textsuperscript{146} See id.
\textsuperscript{147} FEC v. MCFL, 479 U.S. 238 (1986).
\textsuperscript{148} Id. at 242-45.
\textsuperscript{149} In a subsequent challenge to FECA's ban on corporate involvement in federal elections, the North Carolina Right-to-Life group filed a suit to allow direct campaign contributions from qualified non-profit corporations. In FEC v. Beaumont, 123 S. Ct. 2200 (2003), the U.S. Supreme Court ruled that the MCFL exemption does not apply to direct campaign contributions from incorporated non-profits.
\textsuperscript{150} 11 C.F.R. § 114.10(c) (2004).
\textsuperscript{152} Shays v. FEC, Civ. No. 02-CV-1984 (filed 2003).
\end{footnotesize}
Among these controversial regulations, the FEC weakened the definition of coordinated and affiliated entities with the intent of allowing closer cooperation between federal officeholders, parties, and so-called independent groups.\(^{153}\) The agency then created a "grandfather" clause of its regulations to ignore events that would suggest coordination between entities that occurred before the effective date of BCRA.\(^{154}\) The facts-and-circumstances that went into the creation of non-profit groups by federal officeholders and the national parties prior to November 6, 2002, will not be considered by the FEC in determining whether the non-profit group is coordinated with the officials.\(^{155}\) After November 6, however, if the group is coordinated or affiliated, it cannot solicit or spend soft money. If not coordinated or affiliated, the group is free to raise and spend unlimited amounts of otherwise illegal money in federal elections, as long as it is not used for express advocacy andelectioneering communications.\(^{156}\)

Federal officeholders and party officials were quick to exploit this loophole. A flurry of nearly two dozen Section 527 groups were established within the last few days of the election cycle, many on November 4 and November 5. These groups frequently were created by the federal officeholders or party officials, financed by the sponsoring official or party, and continue to be staffed by former members of the campaign team. Such groups included: the Leadership Forum, created on November 4 by the National Republican Congressional Committee (originally with a $1 million transfer from the party, but which has since been returned);\(^{157}\) the media Fund, created on November 5 and run by Harold Ickes, former deputy chief of staff in the Clinton White House; the Democratic Majority Senate PAC – Non-Federal Account, formed on the same day by the Democratic Senate Majority PAC – Federal Account, staffed by a former aide to Al Gore;\(^{158}\) and the Democratic State Party Organization, also created on November 4, but by the former chair of the Assembly of Democratic Chairs. The objective of these shadow committees is explicit: "to support [the party's] candidates and committees."\(^{159}\) Many additional shadow committees by officeholders and the parties have been established as 501(c) non-profit groups, but registration records of these organizations are not readily available.

\(^{153}\) 11 C.F.R. § 109.23 (2004). The Federal Election Commission weakened the definition of coordinated and affiliated entity despite the fact that BCRA specifically revoked the prior regulation defining coordination for being under-inclusive and directing the agency to develop a stronger definition.
\(^{154}\) 11 C.F.R. § 300.2(c)(3) (2004).
\(^{155}\) Id.
\(^{156}\) Id.
\(^{159}\) Democratic Senate Majority PAC – Non-Federal Account, Notice of Section 527 Status, Form 8871 (filed with the Internal Revenue Service, Nov. 4, 2002).
Far more ominous for BCRA’s attempt to ban soft money in federal elections is the phenomenal surge in financial activity of electioneering non-profit groups, largely from groups supporting Democratic candidates.

Since the mid-1990s, Section 527s have played an increasing significant role in federal elections. In the 2002 election cycle, more than 19,900 Section 527 groups were registered with the Internal Revenue Service. Most of these groups, however, focused on state and local election activity. Only about 200 of the registered Section 527s reported significant financial expenditures affecting federal elections. An analysis by Public Citizen found that the 200 largest Section 527s involved in federal elections raised $175.4 million in the 2002 election cycle. Of these groups, 126 Section 527s were controlled by officeholders and candidates accounting for about 40% of the total funds raised; seventy-four Section 527s were controlled by interest groups and raised a total of $105.6 million.

Section 527 groups tend to raise the bulk of their money from relatively few donors. In the 2002 election cycle, unions ($43,092,169) and individuals ($27,357,579) accounted for most of the money flowing into interest group Section 527s, with corporations ($10,790,150) coming third in rank. The top union contributors included: American Federation of State, County, and Municipal Employees (AFSCME) ($23,897,007), AFL-CIO ($5,643,946), Laborers’ Political League ($3,378,488), Communications Workers of America (CWA) ($3,141,301), and United Food and Commercial Workers ($2,678,427). Top individual donors were philanthropist Jay Harris ($1,575,000), software engineer Paul Brainerd ($1,425,000), movie producer Steve Bing ($1,377,089), Internet entrepreneur Steven Kirsch ($1,142,000), and Rockefeller family heir Alida Messinger ($1,108,000). The leading corporate donors included: AT&T ($908,700), Pharmaceutical Research and Manufacturers of America ($841,980), Woodland Group Indiana ($835,000), Association of Trial Lawyers of America ($670,000), and Mortgage Insurance Companies of America ($562,500). Only about fifty union, individual and corporate donors accounted for more than half of the total finances of interest-group 527s.

If left unchecked, Section 527 fundraising in the 2004 election cycle will break all previous records. The latest flood of soft money into electioneering non-profits has primarily been initiated by labor unions and Democratic allies seeking to offset the prolific hard money fundraising machine of the Republican party and the Bush campaign.

Over the years, the national Republican party has usually managed to raise and spend more funds than the national Democratic party, but usually not by an

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161 See http://www.citizen.org/congress/forms/527search.cfm (last visited Apr. 9, 2004).
162 Id.
163 Id.
overwhelming amount. As shown in Table Four, the national parties have more or less remained competitive when it came to raising total funds.\textsuperscript{164}

### Table Four

**Fundraising by the National Party Committees, 1992 – 2002 Election Cycles**

(Millions of Dollars)

<table>
<thead>
<tr>
<th></th>
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<th></th>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Democrats</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Federal</td>
<td>$163.3</td>
<td>$132.8</td>
<td>$221.6</td>
<td>$160.0</td>
<td>$275.2</td>
<td>$217.2</td>
</tr>
<tr>
<td>Non-Federal</td>
<td>$36.3</td>
<td>$49.1</td>
<td>$123.9</td>
<td>$92.8</td>
<td>$245.2</td>
<td>$246.1</td>
</tr>
<tr>
<td>Total</td>
<td>$199.6</td>
<td>$181.9</td>
<td>$345.5</td>
<td>$252.8</td>
<td>$520.4</td>
<td>$463.3</td>
</tr>
</tbody>
</table>

| **Republicans** |      |      |      |      |      |      |
| Federal | $264.9 | $244.1 | $416.5 | $285.0 | $465.8 | $441.6 |
| Non-Federal | $49.8 | $52.5 | $138.2 | $131.6 | $249.9 | $250.0 |
| Total | $314.7 | $296.6 | $554.7 | $416.6 | $715.7 | $691.6 |
| Grand Total | $514.3 | $478.5 | $900.2 | $669.4 | $1,236.1 | $1,154.9 |


The greatest advantage in Republican party fundraising has been in hard dollars.\textsuperscript{165} Democrats have managed to hold their own against the Republicans in soft money fundraising. But in hard dollars, it has not been uncommon for Republicans to raise 30% more than their counterparts in contributions from individuals and PACs. Ever since the late 1980s, partly due to the help of direct-mail guru Richard Viguerie and partly due to a more willing contributor base, the national Republican party has been able to solicit and receive more funds from individuals and PACs within the contribution limits than the Democratic party.

BCRA’s ban on soft money inevitably has a partisan tilt. Though both parties raised equivalent amounts of soft money, soft money has provided a larger share of the Democrats’ total budget. Many Democratic constituencies are concerned that their party will not be able to keep pace in the new campaign finance environment.


\textsuperscript{165} See id.
At the same time that the Democratic party is struggling in the post-BCRA world, Republican presidential candidate George W. Bush has put together a formidable campaign fundraising machine. Relying on an extensive network of wealthy individual “bundlers,” the Bush campaign is headed toward raising a $200 million campaign war chest in the 2004 primary election alone, even though Bush faces no opposition in the primaries.166

None of the Democratic presidential candidates have been able to put together a comparable fundraising machine. By early 2004, the Bush campaign thus far has raised $175 million largely through his bundling program, while Democratic candidates John Kerry raised $87 million, and before dropping out

166 See generally Public Citizen, Bundling Contributions for Favors, Aug. 2003, available at http://www.whitehouseforsale.org/documents/bundling_2.pdf (last visited Apr. 14, 2004). The Bush bundling program was first employed in the 2000 election cycle. Orchestrated by the Bush campaign committee, bundlers were assigned a tracking number by the campaign. These bundlers would in turn ask each of their solicited contributors to write the tracking number on their checks, and then mail in the checks on their own. This way, the bundler would get credit by Bush for the contribution, yet avoid any need to disclose to the public that the contribution was in fact solicited through a conduit bundler.

Corporate executives, lobbyists and other well-connected business leaders would receive tracking numbers from the Bush campaign, and solicit bundled contributions from their employees, associates, friends or business colleagues to be mailed independently with the tracking number. Bundlers who could raise at least $100,000 through this method were given the honored title of “Pioneer” and privileged treatment by the campaign committee.

One such solicitation letter by Bush Pioneer Thomas Kuhn, head of the Edison Electric Institute, the lobbyist group for much of the energy industry, read as follows:

As you know, a very important part of the campaign's outreach to the business community is the use of tracking numbers for contributions. Both Don Evans [then chair of the campaign] and Jack Oliver [then finance director of the campaign] have stressed the importance of having our industry incorporate the #1178 tracking number in your fundraising efforts.

Kuhn received credit from the Bush campaign for the contributions, yet Kuhn did not have to disclose his fundraising activities to the public. (President Bush is now promoting the Clear Skies Act, an effort to weaken the Clean Air Act, advocated by Kuhn and the energy industry.)

Through the Pioneer bundling program, the Bush campaign raised at least $22 million from 212 Pioneers for the 2000 primary election. Previously undisclosed records that have since been made available to the public in the court case challenging the constitutionality of BCRA – McConnell v. FEC – suggest that the number of Pioneers and the amounts they raised for the Bush campaign was considerably greater.

The Bush campaign is now waging a similar bundling campaign in the 2004 election – but Bush has ratcheted up the stakes. The Pioneer program remains in effect. But, with the doubling of the individual contribution limits from $1,000 to $2,000 under BCRA, Bush believes he is benefitting from a whole new class of “Rangers” – bundlers who can raise $200,000 or more. In 2003, approximately 70% of all contributions received by the Bush campaign came in $2,000 checks.
of the race, Howard Dean $52 million, John Edwards $15 million, and Joseph Lieberman $12 million.\footnote{Federal Election Commission, campaign finance disclosure database, through Year End 2003 reports. See http://www.whitehouseforsale.org (last visited Apr. 9, 2004).}

As a result, some of the former soft money contributors to the Democratic party have moved into building a well-financed soft money campaign operation through Section 527s and 501(c) non-profit groups. Allegedly uncoordinated with the Democratic presidential candidates or the Democratic party, or at least uncoordinated by FEC standards, billionaire George Soros, the AFL-CIO, SEIU, and other labor unions and environmental groups have begun to pour millions of dollars in soft money into a network of non-profit groups with the explicit intention to oppose the election of George Bush.

America Coming Together (ACT), a Section 527 led by Steve Rosenthal, former political director of the AFL-CIO, and Ellen Malcolm, president of EMILY’s List, is designed to spearhead this effort. Hoping to raise $94 million in soft money,\footnote{Eliza Newlin Carney, Peter Stone & James Barnes, New Rules of the Game, 35 NAT’L J. 3803 (2003).} ACT is planning on conducting a massive field effort to register new Democrats and get them out to vote to “defeat George Bush in 2004.”\footnote{Thomas Edsall, Liberals Form Fund to Defeat President, WASH. POST, Aug. 8, 2003, at A3.} ACT’s ground war is targeting seventeen key states that could determine the outcome of the presidential election.\footnote{See http://www.act4victory.org (last visited Apr. 9, 2004).}

ACT will also coordinate its efforts with another Section 527, The Media Fund. The purpose of The Media Fund is to run broadcast ads supporting the Democratic presumptive nominee in the period from the primary elections in March, 2004, through the Democratic convention in July, 2004 – after which the nominee receives a $75 million grant in public funds to pay for the general election campaign. (George Bush is also expected to re-join the presidential public financing program for the general election only and accept the $75 million grant and spending ceiling.)

Partnership for America’s Families, a Section 527 also run by Rosenthal, plans on spending $12 million in soft money for voter mobilization drives in urban communities. Voices for Working Families will complement that voter mobilization drive by focusing on minority voters likely to cast Democratic ballots. America Votes and Grassroots Democrats are two more Section 527s intending on raising and spending soft money on behalf of Democratic candidates.\footnote{See http://www.americasfamilies.com/about/index.cfm (last visited Apr. 10, 2004).}

Strategists behind this electioneering non-profit drive on behalf of Democrats hope to raise and spend somewhere between $200 million and $300 million total in soft money\footnote{Carney, Stone & Barnes, supra note 168, at 3804.} – an estimated goal that may well be overly...
optimistic. If this goal were to be achieved, it would amount to about half of the total soft money BCRA removed from federal elections via the national parties.

While Republican fundraising efforts in the 2004 elections have focused on bundling hard money contributions to the campaign and party committees, some Republicans are also turning to electioneering non-profit groups to affect federal elections. The Leadership Forum, a Section 527 headed by Susan Hirschmann, former Chief of Staff to Rep. Tom DeLay, and Julie Wadler, former deputy finance director for the National Republican Congressional Committee, plans on raising and spending soft money on broadcast electioneering issue ads.173 Americans for a Better Country, a Section 527, and Americans for Job Security, a 501(c)(6) organization, also intend to finance pro-Republican electioneering “issue” ads with soft money, while attempting to steer clear of the express advocacy and electioneering communications standards of campaign advertising.174

V. THE POST-BCRA CAMPAIGN FINANCE ENVIRONMENT

The greatest measure of success or failure of BCRA will be determined by the emerging role of non-profit groups in the new political environment.

Campaign 2004 is the first election cycle under the campaign finance law. Senator Mitch McConnell predicted that BCRA’s ban on soft money would not reduce the flow of special interest dollars in federal elections, but merely redirect the money to electioneering non-profit groups and erode the power of the political parties.175

Though it is too early to tell, there are clear signs that some soft money players at least envision using non-profit groups to complement, if not supplant, the role of parties in federal elections. If the flow of special interest soft money remains unabated – and if officeholders remain beholden to the fortunes of a few corporations, unions and wealthy individuals – BCRA will not have lived up to its promise.

The indictments against BCRA frequently voiced by opponents of the campaign finance law are three-fold:

174 Id.
• Political parties will be starved for funds and their function in elections seriously undermined.
• Soft money in federal elections will not be substantially curtailed.
• Electioneering fundraising and spending will be pushed underground into the realm of non-profit groups.176

A. Adaptable Political Parties

The national political parties have not ended up starved for cash under BCRA. In fact, the national parties combined raised more money in hard dollars in 2003 than they raised in hard and soft dollars combined in 1999. The national Democratic and Republican parties raised $302 million in hard money alone in the first year of the new political environment, compared to $266 million raised in hard and soft money in the prior non-election year during the 2000 presidential election cycle.

The 2003 hard money fundraising figures represent a significant decline from the combined hard and soft money fundraising in 2001, but the numbers clearly score a tremendous boost in hard money fundraising by both parties over any comparable year.

Though the Republican party has fared much better than the Democrats in raising hard money, both parties have significantly increased their hard money fundraising prowess over previous years. The Republican party bested their previous fundraising, collecting $207 million in hard money by the end of the 2003 non-election year, compared to $156 million in hard and soft money combined in 1999. The national Democratic party fell slightly short of their previous goal. Democrats raised $95 million in hard money in 2003, compared to $110 million in hard and soft money in 1999. Nevertheless, this represents a tremendous growth in hard money fundraising by both parties since BCRA took effect.177

Even when compared to fundraising activity by the national parties in 2001, each national party committee upped their hard money fundraising numbers. The national committees, senatorial committees, and congressional committees all enhanced their ability to raise hard money from individuals and PACs (see Table Five).

176 Id.
Table Five
(in Millions of Dollars)

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<tr>
<th></th>
<th>1999</th>
<th>2001</th>
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<tr>
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<tr>
<td>Grand Total</td>
<td>265.5</td>
<td>362.3</td>
<td>302</td>
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</table>

Source: Federal Election Commission.

Since the ban on soft money fundraising took effect at the end of 2002, both national parties have re-invested heavily into developing their hard money fundraising base. The Democratic National Committee (DNC), for example, has increased its fundraising over the Internet by 600% and expanded its small donor fundraising base from 400,000 donors to over one million donors. Terry McAuliffe, head of the DNC, asserted that the McConnell decision upholding the soft money ban “could have spelled disaster for Democrats, but we have
prepared for this day by creating an effective and competitive fundraising system. Democrats will not miss a beat in our 2004 campaign.”

The party fundraising sums defy predictions made at the end of 2002, and represent a concerted and successful effort by the parties to reach out to their constituency base. Rather than relying on a small number of large soft money donors, the parties are now turning to large numbers of small donors. BCRA has not under-cut the ability of the parties to support their candidates in federal elections.

B. The Sum of Soft Money

Given that non-profit groups are the primary recipients of soft money contributions under BCRA, it will not be possible to provide an accurate estimate of the amount of soft dollars in the 2004 federal elections for at least a year after the cycle. Though Section 527s must file monthly reports during the course of the 2004 elections, 501(c) non-profits still file only annual reports. More so, 501(c) non-profit groups routinely receive extensions from the IRS on their filing deadlines of six months or more.

Self-proclaimed accounts place the possible figure of soft money in the 2004 elections somewhere between $200 million and $300 million, presumably with additional soft money spending by Republican-leaning groups. While these reports may be exaggerated, the figures nevertheless represent a significant reduction in soft money in federal elections. The national parties alone raised and spent about $500 million in soft money in each of the last two election cycles; Section 527s reported an additional $175 million in soft money spending in the 2002 election cycle under the old campaign finance regime. That means, if the self-proclaimed estimates are in fact realistic, it is reasonable to expect a substantial reduction in soft money in federal elections because of BCRA.

The 2003 year end financial filings of selected Section 527s, following a full year of implementation of BCRA, show that these groups are falling far short of their fundraising goals. The two highest-profile Democratic-leaning groups – America Coming Together and The Media Fund – each of which has projected raising nearly $100 million in the 2004 election cycle, have mustered only $15.5 million in combined receipts by the end of 2003.

Simply put, making soft money contributions is not as attractive in the new campaign finance environment. There is an arm’s-length distance between

180 Id. § 501(c).
181 Id.
183 Doyle, supra note 177.
electioneering non-profit groups and officeholders and candidates. Under the old regime, party officials served as a direct link between large soft money contributors and the public officials they wished to influence. Both major parties established programs of selling access to officeholders and candidates in exchange for soft money contributions.

These access-for-cash programs wrought particular scorn from the U.S. Supreme Court and were cited as grounds to uphold the soft money ban. As the Court noted:

So pervasive is this practice that the six national party committees actually furnish their own menus of opportunity for access to would-be soft money donors, with increased prices reflecting an increased level of access. For example, the DCCC [Democratic Congressional Campaign Committee] offers a range of donor options, starting with the $10,000-per-year Business Forum program, and going up to the $100,000-per-year National Finance Board program. The latter entitles the donor to bimonthly conference calls with the Democratic House leadership and chair of the DCCC, complimentary invitations to all DCCC fundraising events, two private dinners with the Democratic House leadership and ranking members, and two retreats with the Democratic House leader and DCCC chair in Telluride, Colorado, and Hyannisport, Massachusetts.

As the record demonstrates, it is the manner in which parties have sold access to federal candidates and officeholders that has given rise to the appearance of undue influence. . . . It is no surprise then that purchasers of such access unabashedly admit that they are seeking to purchase just such influence.

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185 Id. at 666.
186 Id.
Today's electioneering non-profit groups do not have this connection with officeholders and can make no such promises of access in exchange for a soft money contribution.

Much more to the point, a reduction in the amount of soft money in federal elections has never been a stated objective of BCRA. Instead, the objective of BCRA is to break the nexus between large soft money contributors and officeholders so scorned by the Court. If an unintended consequence is a reduction in the amount of soft money as well as the privileged access it buys, BCRA can take some additional credit.

C. The Underground Campaign

Section 527s are no longer "Stealth PACs." These non-profit groups are used to sidestep disclosure requirements. Ever since the 2000 presidential election, however, section 527 groups have been required to file financial activity reports with the IRS. The disclosure requirements were strengthened in 2002 with the Brady-Lieberman 527 disclosure act.

Today, section 527s must report the names and contact information of their major officers; names and addresses of any related entities; itemized contributor information, including the name, address, occupation and employer of all persons that contributed $200 or more to the group; and itemized expenditure information, including the purpose and recipients of all expenditures of $500 or more by the group. These disclosure reports must be electronically filed on a quarterly basis during non-election years and monthly during election years. The information is then uploaded onto the IRS's Web site and made available to the public in a searchable and downloadable format.

Who is financing the electioneering activity of a Section 527 is therefore public information.

None of this is true, however, for 501(c) non-profit groups. The disclosure requirements for 501(c) non-profits are very lax, poorly enforced, and not timely. Furthermore, the information is not made easily available to the public. These non-profit groups file annual paper reports with the IRS, which are not placed on the Internet, and can only be obtained through a formal written request or by visiting the central headquarters of each group.

187 See 26 U.S.C. § 527 (1994). This previous version of the statute did not contain any disclosure requirements. Id.
191 Id. § 527(i)(3)(d).
192 Id. § 527(j)(2).
193 Id. § 527(k).
Finally, the information provided in IRS Form 990 financial disclosure reports for 501(c) non-profits is wholly inadequate. For example, even though Form 990 requests a breakdown of expenditures by lobbying activity versus political activity, very few groups acknowledge any political expenditures in their disclosure reports. A review of the reports by these non-profit groups found that even the most politically active non-profits, which financed millions of dollars of television ads promoting or attacking federal candidates shortly before the 2000 general election - such as the Chamber of Commerce, Americans for Job Security, and the Business Roundtable - reported making no political expenditures at all that year. All such expenditures were aggregated in one lump-sum as a lobbying expenditure, making it impossible to discern any electioneering activity by these electioneering groups. Additionally, 501(c) non-profits do not disclose their contributor base. (See Appendix B for a sample television advertisement placed by the Chamber of Commerce during the 2000 general election.)

To the extent that soft money is used to finance the electioneering activities of 501(c) non-profits, contributor and expenditure information will remain cloaked under current law.

The appropriate remedy to this problem is not to abandon BCRA and return to the corrupting system of unregulated soft money, but to enhance the disclosure requirements applicable to 501(c) non-profit groups. This should be done through three steps.

First, the IRS needs to be prodded into clarifying its disclosure requirements. Under IRS regulations, non-profit groups are required to report separately their political expenditures on Line 81 of Form 990 from their aggregate lobbying expenditures on Line 85. The IRS defines a "political expenditure" broadly as any activity that could affect an election at the federal, state or local level, including voter mobilization drives and publications that assess the strengths and weaknesses of specific candidates. The timing and nature of advertisements also may be factors in determining whether an activity is political by IRS standards. The Internal Revenue Service should issue a revenue ruling clarifying the distinction between political activities and lobbying activities and detail specific examples of each. This clarification should be repeated in the instruction booklet for filling out Form 990.

Second, the IRS must enforce its disclosure requirements. Currently, very few enforcement actions are ever initiated by the agency for reporting violations. More so, penalties for reporting violations are negligible at best. In the unlikely event that penalties would be imposed for incorrect filings, the organization could be fined $20 a day until the errors are corrected, not to exceed $10,000,

and the individual responsible for the incorrect information could be fined $10 a
day, not to exceed $5,000.\textsuperscript{196} In order to correct the deficiencies of inaccurate
information that currently plagues 501(c) financial reports, the IRS must exert
greater oversight over the process and stiffen its penalties for reporting
violations.

Third, the disclosure forms for 501(c) non-profit organizations must require
greater detail of expenditure activity. Many of these non-profit groups are in
fact shadow groups whose major purpose is to promote the election or defeat of
specific federal candidates.\textsuperscript{197} But as long as electioneering expenditures on
broadcast and direct mail advertisements targeting specific candidates can be
recorded as generic lobbying activity on the disclosure reports, neither the IRS
nor the public will have cause to look closer into the groups’ financial activity.
The IRS should amend Form 990 to require a breakdown of expenditures by
various categories of political activity. Furthermore, the Internal Revenue Code
itself should be amended to require – borrowing a passage from BCRA – that all
public communications by non-profits that “promote, support, attack, or oppose a
candidate for political office (regardless of whether the communication expressly
advocates a vote for or against a candidate)”\textsuperscript{198} be classified as political rather
than lobbying activity for disclosure purposes.

Reports that show more than a substantial portion of a 501(c) non-profit’s
budget is spent on political activities would raise a red flag for closer inspection
by the IRS and the public. In some cases where political activities are a major
purpose of a 501(c) non-profit group, it may be determined that the group
violated its tax status and should be reclassified as a Section 527 or even a PAC,
subject to more extensive disclosure and regulation. This would provide the
means for weeding out electioneering non-profit groups while not being overly-
burdensome on legitimate 501(c) organizations.

D. \textit{New Limits on Section 527s and Non-Profits?}

It first began with boasts from George Soros that he would give millions of
his own personal fortune to finance Section 527 groups publicly devoted to
“beating Bush in 2004.”\textsuperscript{199}

Soros’ public statements were then followed by charges from the Republican
party and Republican members of Congress that Democrats were by-passing the
soft money ban through non-profit groups.\textsuperscript{200} Stirred into a frenzy by the

\textsuperscript{197} See http://www.citizen.org/congress/campaign/issues/nonprofit/articles.cfm (last visited Apr. 9,
2004).
\textsuperscript{199} Byron York, \textit{By George: The Democratic Party Is Now Brought to You by Super-Investor
allegations from the Republican National Committee (RNC), Rep. Robert Ney (R-Ohio) hastily called a hearing of the House Administration Committee in November 2003 over the objections of Democratic members of the committee. Chair Ney asked several Section 527 groups to testify before the committee to explore the financial activity and intentions primarily of six Democratic-leaning organizations. All six Democratic groups—the AFL-CIO-backed Voices for Working Families, Partnership for America’s Families, America Coming Together, America Votes, and the Democratic Senate Majority Fund—refused to attend the hearing.201 Steve Rosenthal of Partnership for America’s Families, said in a statement prior to the hearings: “It is clear that President Bush and the Republican Leadership are intimidated by the prospect of our registering, educating and turning out hundreds of thousands of progressive voters in 2004 so they’ll do whatever they can to hamstring our operations and attempt to harass us . . . . We will not be bullied by partisan abuse of congressional power.”202

The hearing degenerated into partisan bickering among members of the committee, with one Democratic member charging that Ney had allowed the committee to be “hijacked to carry out the national Republican party’s political attack agenda.”203 The Republican majority asserted its authority and granted the chair subpoena power over the Section 527 groups for a later hearing.

In the meantime, a Republican-leaning 527 group, Americans for a Better Country, and the Republican party petitioned the Federal Election Commission for regulations clarifying whether non-profit groups can be used as conduits for unregulated soft money.204 “It is now incumbent upon the FEC,” wrote RNC lawyer Charles Spies in a separate petition, who had previously opposed any ban on soft money, “to not sanction the undermining and evasion of the law through the activities of newly-formed 527 organizations dedicated to electing or defeating specific federal candidates.”205

RNC Chair Ed Gillespie pointedly requested his counterpart at the DNC, Terry McAuliffe, to co-sign the petition to the FEC.206 McAuliffe responded that he would consider the request if Gillespie would expand the petition to capture pro-Republican 501(c) non-profit groups, such as Progress for America and the United Seniors Association, under FECA’s limitations as well. “I look forward to your reply,” McAuliffe concluded in his “Dear Ed” letter.207 No reply was forthcoming.

Several scholars have since argued that the FEC, using the reasoning in the McConnell decision, does indeed have the authority to regulate the financing of

201 Id.
202 Id.
203 Id.
205 Edsall, supra note 182, at A4.
206 Id.
207 Id.
election activities of at least some Section 527s under federal campaign finance law.\textsuperscript{208} Other scholars have sharply disagreed.\textsuperscript{209}

The argument for greater regulation of Section 527s is that these "political organizations" were born of a loophole created in FECA by the 1976 \textit{Buckley} decision. While FECA sought to regulate "federal election activity" in general, the Court determined that "federal election activity" subject to regulation must meet the "magic words" standard of express advocacy.\textsuperscript{210} But the \textit{McConnell} decision expanded the permissible types of election activity subject to regulation. The new standard is much broader and can include messages that "promote, support, attack or oppose" candidates. This new standard of election activity subject to regulation applies to any and all "political committees."\textsuperscript{211} And a "political committee" is defined in part by statute and in part by Court construction according to a two-part test: (1) the organization raises or spends $1,000 or more in federal elections (statutory definition),\textsuperscript{212} and (2) the organization has as its "major purpose" the election or defeat of candidates (judicial construction).\textsuperscript{213}

Section 527 groups have as their "primary purpose" activities that affect federal elections as defined in the broader sense of election activities by the tax code. The definition of election activities under FECA, which had been narrowed to the express advocacy standard under the \textit{Buckley} decision, has been opened up by the \textit{McConnell} decision, potentially to include the broad meaning of the term established under the tax code. If the FEC were to expand the definition of federal election activity under FECA to resemble the broad definition of the tax code, Section 527s could be reclassified as "political committees" subject to the source prohibitions, contribution limits and reporting requirements of FECA.

This is precisely the case being put before the Federal Election Commission by the Republican party and some campaign finance reform groups.

The effort is being staunchly opposed by Section 527s and much of the non-profit community. In one letter of opposition to extending FECA requirements to Section 527s, signed by 324 environmental and civil rights organizations spearheaded by People for the American Way, these non-profit groups argued that (1) BCRA and Congress specifically focused the soft money ban on parties and officeholders and never intended to extend it to independent groups; and (2)


\footnotesize{\textsuperscript{210} McConnell v. FEC, 124 S. Ct. 619, 683 (2003).}

\footnotesize{\textsuperscript{211} Id.}

\footnotesize{\textsuperscript{212} 2 U.S.C. § 431(4) (2000).}

\footnotesize{\textsuperscript{213} Buckley v. Valeo, 424 U.S. 1, 79 (1976); FEC v. MCFL, 479 U.S. 238, 262 (1986).}
such a construction of BCRA and the *McConnell* decision could potentially capture the political activities of the entire non-profit community, including 501(c) groups, who have as a major purpose monitoring and critiquing officeholders based on policy issues.\(^{214}\)

Opponents of expanded regulation to non-profits argue that the BCRA was carefully crafted by its sponsors to be a narrowly-tailored and appropriate response to electioneering issue advocacy. It expanded the definition of campaign advertisements to capture not only express advocacy communications but also electioneering communications broadcast with sixty days of a general election and thirty days of a primary election. This expanded definition of electioneering activity would capture not just express advocacy and broadcast ads within a narrow time window as intended under BCRA, but also all print, direct mail and Internet communications, as well as broadcast ads, that praise or criticize candidates at any time in the entire election cycle. Thus, the carefully crafted and narrowly circumscribed limits of BCRA’s electioneering communications provisions could be rendered superfluous.

Furthermore, such an expanded definition places the activity of electioneering, rather than the type of group doing the activity, at the central focus of the regulatory regime. Any type of group, Section 527s and 501(c) non-profits, could be subject to the demands of FECA if their efforts significantly influence federal elections under the expanded definition of election activity. The key safeguard for 501(c) non-profits would be whether their election activity amounts to a “major purpose” of the organization, as required in the *Buckley* decision. But neither *Buckley* nor federal statutes have yet defined “major purpose” in this context.\(^{215}\)

The Federal Election Commission has so far decided to take a pass on this issue and leave it for congressional action, if any.

Whatever the outcome of this policy debate, it marks a significant impact of BCRA and the *McConnell* decision on the campaign finance environment. Though it remains unclear to what extent Section 527s and 501(c) non-profit groups will benefit as new recipients of soft money under BCRA, the new regulatory regime has cast renewed attention on the role of these groups in the political process. BCRA’s ban on soft money to the parties makes electioneering non-profit groups a substitute recipient to those who wish to keep the soft money


The same issue of FEC regulation of Section 527s will emerge on the Commission’s agenda throughout the next year, as other groups have also requested advisory opinions or submitted petitions on the subject. For example, America Coming Together (ACT) has requested an advisory opinion on permissible voter mobilization activities of Section 527s, and Democracy 21, the Campaign Legal Center and Center for Responsive Politics have submitted a complaint to the FEC alleging improper political activity by three Section 527 groups.

\(^{215}\) *Buckley*, 424 U.S. at 44.
spigots open. At the same time, BCRA cast its regulatory net over electioneering broadcast ads sponsored by these groups, which had not been regulated before.\(^{216}\)

More importantly, perhaps, the sweeping indictment by the *McConnell* Court of the former campaign finance regime, under the ill-stewardship of the FEC, has opened new avenues for additional campaign finance reforms. Federal election activity may, constitutionally, be defined in much broader terms, leading to contribution limits and disclosure requirements for electioneering activity disguised as issue advocacy and for the regulation of a larger pool of political players. Even Section 527s are in play for potential regulation of their sources and amounts of electioneering contributions.

VI. BCRA, *MCCONNELL*, AND FINISHING THE REFORM AGENDA

The BCRA constitutes a narrowly-tailored and appropriate response to the complementary problems of unregulated soft money and electioneering issue advocacy. The ever-increasing flood of soft money into the coffers of the national parties and leadership PACs, at the behest and benefit of federal candidates and officeholders, all but rendered the contribution limits of FECA irrelevant. The 2000 presidential election marked the end of limits in the campaign finance regime.

BCRA’s primary goal is to salvage FECA’s campaign finance regulatory regime of prohibitions on potentially-corrupting corporate and union donations, limits on the amount of contributions from individuals and PACs, and disclosure of who is financing broadcast advertisements designed to influence federal elections. BCRA poses a moderate – though nonetheless necessary – re-writing of the campaign finance law in order to save it from years of regulatory missteps.

Reducing the aggregate amount of money in politics is not one of the stated objectives of BCRA. Nor does BCRA seek to replace private funding of campaigns. These are reforms that will have to be pursued another day.

What BCRA does accomplish is its stated twin-pillars of reform: removing unregulated and unlimited soft money from the national parties and federal officeholders and candidates, where it poses the greatest potential for corruption; and capturing the bulk of electioneering issue advertising by parties and independent groups designed to promote the election or defeat of federal candidates under federal campaign finance law.

But that is not to say that BCRA did not change the political landscape in some unexpected ways. The role of non-profit groups in the new campaign finance environment is foremost among these changes.

While non-profit groups – both Section 527s and 501(c) organizations – have played a significant role in politics over the last few decades, BCRA’s ban

on soft money to the national parties and federal officeholders and candidates has been to the advantage of electioneering non-profit groups. So far, the ban on soft money does not apply to non-profits, though how these groups can use the money is subject to regulation under BCRA. Non-profits cannot use soft money to finance electioneering communications within sixty days of a general election or thirty days of a primary election. They can use the money to finance mail and print electioneering ads and voter mobilization activities.

BCRA has always been offered as a partial step toward cleaning up elections. The next steps to be taken in the reform agenda:

- Strengthening the presidential public financing program and extending public financing of campaigns to congressional races. A strong public financing program can more than offset many of the problems associated with imbalances in campaign resources.

- Capturing the politically-charged electioneering activities of Section 527s—which have come into existence only as a loophole in FECA—under federal campaign finance law, all the while ensuring that the legitimate political activities of 501(c) non-profits remain free from FECA’s regulatory constraint. Regulating 527s is likely to make 501(c) groups even more attractive for those who wish to hide their finances for political front groups. So, the next reform measure is appropriate.

- Enhancing the disclosure requirements of expenditures by 501(c) non-profit organizations in order to weed out “shadow groups” that are primarily electioneering fronts for soft money funders and serve little advocacy or educational value. But protecting the rights of the 501(c) non-profit community to engage in political advocacy must be foremost in priority.

The reform agenda is far from finished, but reformers have been given new tools for curtailing corruption and the appearance of corruption in politics with the sweeping implications of the McConnell decision. Let us use these tools prudently but effectively.

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217 Id. tit. II, § 203.
218 Id.
The First Amendment Is Still Not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy

by James Bopp, Jr. & Richard E. Coleson†

In McConnell v. Federal Election Commission (FEC), the Supreme Court upheld the provision of the Bipartisan Campaign Reform Act of 2002 (BRCA) that bans corporations and unions from using general treasury funds to broadcast "electioneering communications," i.e., communications that merely refer to a federal candidate in the month or two before elections. While McConnell did

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2 "Electioneering communication" is defined at 2 U.S.C. § 434(f)(3) (2003) and 11 C.F.R. § 100.29 (2003). It is a broadcast, cable, or satellite communication that is publicly distributed for a fee, references a clearly identified candidate for federal office for sixty days before a general election (or thirty days before any primary, caucus, or convention that nominates candidates), and is targeted, i.e., receivable by 50,000 or more of the candidate’s intended constituents. Under this definition and some enumerated exceptions, it does not include, inter alia, print, phone bank, or internet communications; news stories, editorials, and commentaries by TV and radio stations (with a restriction if the station is owned by a candidate, political party, or political committee); a communication that is reportable as an independent expenditure because it contains express advocacy; candidate debates or forums; broadcast ads by state and local candidates that do not reference federal candidates; broadcast ads by organizations that are nonprofit under 26 U.S.C. § 501(c)(3); and communications not publicly distributed for a fee, e.g., public service announcements that would otherwise qualify as an electioneering communication but are broadcast without charge. 11 C.F.R. § 100.29 (2003).
not apply the Supreme Court’s “express words of advocacy test” to strike down the electioneering communication ban on its face, as was widely expected, the significance of McConnell is not that it eliminated the express advocacy test, for it did not, but that there is now a McConnell exception to the express advocacy test protecting issue advocacy that was created in Buckley v. Valeo and FEC v. Massachusetts Citizens for Life (MCFL). Part I of this article discusses the history of the express advocacy test, what McConnell did and did not do with regard to that test, and the continuing validity of the test.

Part II demonstrates that MCFL’s major purpose test remains unchanged in the wake of McConnell. That test establishes whether an organization that makes “independent expenditures” may be treated as a political committee (PAC). The test considers only (1) an organization’s declared purpose and (2) “contributions” and “expenditures” in determining whether the organization’s “major purpose... is the nomination or election of a candidate” and does not include other activities defined in BCRA, such as “electioneering communications” or “federal election activities.”

Part III deals with whether all I.R.C. § 527 organizations should be treated the same as political party committees in the wake of McConnell if they do such non-express-advocacy activities as voter registration and mobilization. That discussion will demonstrate that there is no authority in the Federal Election Campaign Act (FECA) or McConnell to so expand the concept of a political party committee.

Part IV discusses how McConnell sowed the seeds of its own reversal by its disingenuous interpretation of Buckley and MCFL and its failure to protect the core of the First Amendment - the right of citizens of ordinary means to participate freely in American democracy by pooling their resources to effectively criticize government officials and advocate for and against legislation and government policy.

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1 Buckley v. Valeo, 424 U.S. 1, 44 n.52 (1976).
2 The Court said that the express advocacy test was not constitutionally mandated, but it did so in the context of considering a statutory formulation that it considered to be the “functional equivalent” of the express advocacy test. McConnell, 124 S. Ct. at 696. Consequently, the Court requires either the express advocacy test or its functional equivalent. So conceptually, the Court did not strike down, eliminate, or abandon the express advocacy test, but instead broadened its formulation.
5 An independent expenditure is an expenditure for a communication that contains express advocacy and is not coordinated with a candidate. MCFL, 479 U.S. at 249.
6 Id. at 252 n.6 (quoting Buckley, 424 U.S. at 79), 262.
7 “Federal election activity” includes (1) voter registration within 120 days of any federal election, (2) voter identification and get-out-the-vote activity, (3) generic campaign activity (promoting a political party), and (4) issuing any public communications that promote/support or attack/oppose a referenced federal candidate (“whether or not the communication expressly advocates a vote for or against a federal candidate”). 11 C.F.R. § 100.24 (2003).
I. **McConnell Reaffirmed Buckley's Express Advocacy Analysis with an Exception**

The most important analytical point about McConnell's treatment of the electioneering communication ban\(^\text{10}\) is that the Court considered the ban under the Buckley/MCFL express advocacy rubric. Even though McConnell declared that the express advocacy test is not compelled by the Constitution, it nonetheless required that there be something functionally equivalent to the express advocacy test if the express advocacy test is not employed to analyze statutes for constitutionality.\(^\text{11}\)

\(^{10}\) In his dissent, Justice Kennedy cogently argues that BCRA § 203 is indeed a sweeping ban. When would-be speakers "face severe criminal penalties for broadcasting advocacy messages that 'refer[r] to a clearly identified candidate,'" McConnell, 124 S. Ct. at 762, the practical effect is to "prohibit[] a mass communication technique favored in the modern political process for the very reason that it is the most potent." Id.

He notes that although "[t]he Government is unwilling to characterize § 203 as a ban, citing the possibility of funding electioneering communications out of a separate segregated fund," the option "does not alter the categorical nature of the prohibition on the corporation." Id. at 766. The law "prohibits corporations and labor unions from using money from their general treasury to fund electioneering communications," id. at 762, because what it allows "- permitting the corporation "serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates" - 'is not speech by the corporation.'" Id. at 766 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 681 n. * (1990) (Scalia, J., dissenting)).

First, the persona of the new association is inherently political and "[a] requirement that coerces corporations to adopt alter egos in communicating with the public is, by itself, sufficient to make the PAC option a false choice for many civic organizations." Id. at 768. In fact, for this very reason, some non-profit corporations cannot, by their charter, form a Political Action Committee (PAC). Id. at 768 (referring to the ACLU).

Second, the supposedly simple mechanism for unfettered speech entails a panoply of regulation that "create[s] major disincentives for speech, with the effect falling most heavily on smaller entities that often have the most difficulty bearing the costs of compliance." Id. at 767. He further stated,

> Even worse, for an organization that has not yet set up a PAC, spontaneous speech that refers to a clearly identified candidate for Federal office becomes impossible, even if the group's vital interests are threatened by a piece of legislation pending before Congress on the eve of a federal election.

Id. (internal citations omitted).

Justice Kennedy dismissed the law's exception for speech not "targeted" to the mentioned candidate's electorate as "analogous to a law, unconstitutional under any known First Amendment theory, that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him." Id. at 769 (internal citations omitted). At bottom, Kennedy argues, the majority in McConnell approved "a prohibition, with . . . crude temporal and geographic proxies," and "a severe and unprecedented ban on protected speech." Id. at 768.

\(^{11}\) McConnell, 124 S. Ct. at 686-97.
The Court thereby reaffirmed Buckley's general rule protecting issue advocacy against encroachment from vague and overbroad restrictions by means of the express advocacy test and created a narrow exception for a statute that (1) is not vague and (2) is not overbroad because there is sufficient evidence demonstrating that the targeted communication is the "functional equivalent" of express advocacy and the restriction is supported by the same justifications. Consequently, as developed in detail below, vague statutes that border on issue advocacy still require the express advocacy construction imposed in the Buckley and MCFL statutory constructions, and statutes bordering on issue advocacy that regulate more than express advocacy communications must meet the McConnell exception.

Of course, the Court's express advocacy construction still governs key definitions in the Federal Election Campaign Act (FECA), in FEC regulations, and in numerous state restrictions (either by express language or by judicial construction). So the express advocacy analysis remains alive and broadly applicable after McConnell. To place McConnell in its correct context, it is helpful to look first at the creation of the express advocacy test and then at how BCRA's sponsors drafted, and then litigated the defense of, BCRA's electioneering communication ban.

A. Buckley and MCFL Created the Express Advocacy Test, Which Was Applied by Numerous Other Courts

The express advocacy test was developed in the Supreme Court's decisions in Buckley and MCFL, which together construed three provisions to require application of the express advocacy formula. Buckley first considered § 608(e)(1), which imposed spending limits on independent expenditures.

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12 Id. at 688-89.
13 Id. at 650-51, 686-89, 696-97.
14 Id. at 689.
15 Part I.C.7., infra, will further discuss how this analysis has already been applied by the United States Court of Appeals for the Sixth Circuit in Anderson v. Spear, 356 F. 3d 651 (6th Cir. 2004).
17 11 C.F.R. § 100.16 (2003) (definition of "independent expenditure").
18 The only plausible exception to states applying the Buckley construction to statutes affecting political speech was removed in 2002, when California applied it to its Political Reform Act. See Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1098 (9th Cir. 2003) ("[I]n Governor Gray Davis Committee v. American Taxpayers Alliance, the California Court of Appeal interpreted the PRA definition of independent expenditure narrowly to apply only to those communications that contain express language of advocacy with an exhortation to elect or defeat a candidate." (internal citations omitted)).
19 18 U.S.C.A. § 608(e)(1) (1974) (repealed 1976) provided: No person may make any expenditure relative to a clearly identified candidate during a calendar year which, when added to all other expenditures by such person during the year advocating the election or defeat of such candidate, exceeds $1,000" (emphasis added).
Troubled by the vagueness of capping expenditures "relative to a clearly identified candidate," the Court first construed "relative to" with the provision's parallel phrase, "advocating the election or defeat of such a candidate." But the Court said that the resulting phrase, which would be "advocating the election or defeat of a clearly identified candidate," simply "refocus[ed]" the vagueness problem in a way that could "only" be fixed by prefixing "explicit words" or "expressly" to the phrase.

So the phrase "advocating the election or defeat of a clearly identified candidate," although much sharper than "relative to a clearly identified candidate," was still vague (which is noteworthy as a benchmark for testing other statutory formulations that usually are more vague than this rejected phrase). But the Court's resulting formulations, "expressly advocating the election or defeat of a clearly identified candidate for federal office" and "explicit words advocating the election or defeat of a clearly identified candidate for federal office," would not be vague.

*Buckley* referred to an "express words of advocacy" test, not requiring that there be any so-called "magic words" but that the explicit words of the communication itself expressly advocate the election or defeat of a clearly identified candidate. A central focus of the express advocacy test was to

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21. Id. at 42.
22. Id. at 43-44. Even after construing the statute in an effort to save it, the Court ultimately decided there was no constitutional justification for capping independent expenditures. Id. at 44-45.
23. Id. at 44.
24. Id.
25. Id. at 44 n.52 ("[T]his construction would restrict the application of § 608(e)(1) to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'") (emphasis added).

A word about biased terminology is appropriate in a discussion of campaign finance regulation because advocates often attempt to win by employing pejorative or favorable terms. The *Buckley* test requires "express words of advocacy" so it is correctly called an "express words of advocacy" test (or the shorter "express advocacy" test) and not the pejorative "magic words" test. The latter terminology is inaccurate because there are no per se "magic words," not even the words used in *Buckley* 's footnote 52. Rather, the express advocacy test requires that there be explicit words expressly advocating the election or defeat of a clearly identified candidate for federal office. 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." Similarly, the use of the phrases "so-called issue advocacy" or "sham issue advocacy" attempts to win by casting aspersions upon activity that was perfectly legal until BCRA (and remains legal outside the electioneering communications blackout periods). Cf. *McConnell*, 124 S. Ct. at 762 (Kennedy, J., dissenting as to BCRA § 203, joined by Rehnquist, C.J., and Scalia, J.) ("[I]t is a measure of the government's disdain for protected speech that it would label as sham the mode of communication sophisticated speakers choose because it is the most powerful.").

The pejorative use of the term "special interests" by campaign finance "reformers" to refer to authentic citizen groups (as opposed to business interests, where the notion might have some applicability) displays a profound ignorance of constitutional right and of the vital contribution
promote robust political debate by providing a bright-line test that focused on the actual words of the communication, so that speakers would not have to "hedge and trim" but could engage in robust political advocacy without the danger posed by a test focusing on the intent of the speaker or whether the effect of the message would be to influence an election:

[W]hether words intended and designed to fall short of invitation [to vote for or against a candidate] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.

Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.26

Buckley next considered § 434(e), which "require[d] direct disclosure of what an individual or group contributes or spends [over $100]" "for the purpose of... influencing" the nomination or election of candidates for federal office."27 The Court said that "the ambiguity of this phrase... poses constitutional

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such organizations make as mediating elements in the social structure. "Soft money" also has negative connotations, so a more neutral approach is to speak of federal funds (those subject to the FECA source, amount, and reporting requirements) and non-federal funds (those subject to state regulation) as the FEC does. See, e.g., FEC Advisory Op. 2003-37.

Finally, while "reform" has good connotations, and the present authors are all for reforming things needing it, they believe the First Amendment was the first, and remains the best, reform with respect to the right of people of ordinary means to pool their resources to amplify their voices in the democratic marketplace of ideas and to criticize government officials. Consequently, the authors object to the term "reform" being co-opted for campaign finance restrictions that burden First Amendment rights.

26 Buckley, 424 U.S. at 43 (citation and quotation marks omitted) (emphasis added).
27 Id. at 74-75 (citation omitted) (emphasis added).
ISSUE ADVOCACY

problems" and construed it "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." MCFL applied the express advocacy construction to the prohibition on corporate and labor union expenditures at 2 U.S.C. § 441b. The phrase "expenditure in connection with any [federal] election" was construed to mean expenditures expressly advocating the election or defeat of a clearly identified candidate for federal office.

Consequently, in election law the phrases "relative to," "for the purpose of influencing," "in connection with," and "advocating the election or defeat of a clearly identified candidate" now bear permanent "express advocacy" glosses. Congress and the FEC responded by incorporating the express advocacy requirement in the definition of "independent expenditure." Numerous courts have construed other extant vague provisions with the express advocacy gloss. The express advocacy test has been a bright-line rule widely used by the courts as a tool to overcome vagueness and overbreadth for nearly three decades and is now woven into the fabric of the law.

Numerous federal and state courts recognized the Supreme Court's express advocacy test, with its commentary distinguishing between "discussion, laudation, [and] general advocacy," on the one hand, and "solicitation" on the other hand, as a constitutional mandate to protect issue advocacy. The

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28 Id. at 77.
29 Id. at 80.
31 Id. at 248 (quoting 2 U.S.C. § 441b (2003)) (emphasis added).
33 See infra note 36.
34 Id.
36 The weight of authority recognizing the express advocacy test as constitutionally mandated was overwhelming. See, e.g., Chamber of Commerce v. Moore, 288 F.3d 187 (5th Cir. 2002); Beaumont v. FEC, 278 F.3d 261 (4th Cir. 2002), cert. granted, NO. 02-403, 2002 WL 3107585 (U.S. Nov. 18, 2002); Va. Soc'y for Human Life v. FEC, 263 F.3d 379 (4th Cir. 2001); Lamar v. Fla. Right to Life, 238 F.3d 1288, aff'd Fla. Right to Life v. Mortham, No. 98-77OCIVORL19A. 1999 WL 33204523 (M.D. Fla. Dec. 15, 1999); Citizens For Responsible Gov't State PAC v. Davidson, 236 F.3d 1174, 1194 (10th Cir. 2000) (holding statutes unconstitutional where they could not be narrowly construed to apply "only to expenditures for communications that contain explicit words advocating the election or defeat of a clearly identified candidate"); Perry v. Bartlett, 231 F.3d 155, 161 (4th Cir. 2000) ("[I]t is therefore clear that courts have only allowed regulation of campaign speech when there are words of express advocacy in the communication itself."); Vt. Right To Life Comm. v. Sorrell, 221 F.3d 376, 386 (2d Cir. 2000) (noting that subject regulations were "necessarily unconstitutional unless they apply only to advertising . . . that expressly advocate the election or defeat of a clearly identified candidate," and such standard was adopted "to insure that these regulations were neither too vague . . . nor intrusive on protected 'issue discussion'"); Iowa Right To Life Comm., Inc. v. Williams, 187 F.3d 963, 969-70 (8th Cir. 1999); N.C. Right To Life, Inc. v. Bartlett, 168 F.3d 705, 713 (4th Cir. 1999) ("The statute subjects groups engaged in only issue advocacy to an intrusive set of reporting requirements. . . . Burdening speech of this sort is unacceptable in an area of such crucial import to our representative
Supreme Court in *Ashcroft v. Free Speech Coalition* recently reiterated that "[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse." So it was widely believed that BCRA’s “electioneering communication” ban was unconstitutional because it swept in issue advocacy that Congress could not restrict so long as the restricted communications fell short of “express words of advocacy.”

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B. *BRCA's Advocates Drafted and Litigated McConnell Within the Buckley/MCFL Framework*

The approach of BCRA's sponsors in drafting BCRA was not to incorporate "electioneering communication" into the definition of "independent expenditure" (nor into "expenditure," "contribution," or "political committee"). That approach was considered early on and rejected by BCRA's sponsors.³⁹

Had Congress incorporated electioneering communications into the meaning of independent expenditure, then independent expenditures would not continue to be defined solely by the express advocacy test and electioneering communications would have been automatically banned for corporations and labor unions under 2 U.S.C. § 441b. So there would have been no need for Congress to tack electioneering communications on to § 441b as an additional activity banned. There also would have been no need for the Court to declare that the exception for independent expenditures by certain nonprofits established in MCFL ⁴⁰ also applied to electioneering communications. ⁴¹ If Congress had incorporated electioneering communications into independent expenditures, then MCFL-type corporations would have been able to do independent expenditures (including electioneering communications), as they now do (and would include electioneering communications within the independent expenditures they report to the FEC). Their independent expenditures other than electioneering communications would still have been identified by the presence of explicit words expressly advocating the election or defeat of a clearly identified candidate. So even under such an incorporation approach the concept of express advocacy would have retained some vitality in FECA.

BCRA's sponsors did not incorporate electioneering communications into the definition of expenditure. Rather, electioneering communication was added to FECA as another sort of activity tacked onto the list of things required to be reported ⁴² and onto § 441b as another activity prohibited to corporations and unions (along with contributions and expenditures). ⁴³

As a result, even under BCRA, the express advocacy test is alive and well, both in FECA and the FEC regulations, as that which distinguishes an independent expenditure communication from an electioneering communication and from an issue advocacy communication. Up until sixty days before a general


⁴³ *Id.* § 441b.
election (thirty days before primaries), the express advocacy test separates independent expenditures from issue advocacy. Within the thirty/sixty day blackout period, the express advocacy test separates electioneering communications from independent expenditures. If any entity makes what would otherwise be an electioneering communication, it is not considered an electioneering communication and reportable as such if it is reportable as either an “expenditure” (reportable by PACs) or an “independent expenditure” (which is distinguished by express advocacy and is reportable by both PACs and MCFL-type corporations). 44

Given this ongoing vitality of the express advocacy test, and doubtless gauging what might be required to muster a majority on the Court, the campaign finance “reform” community’s legal strategy was not to argue that the express advocacy analysis should be overruled, but to interpret it as a statutory construction tool designed to avoid vagueness and provide guidelines into which the electioneering communication restriction nicely fit: “It was, after all, principally a concern for clarity that first led this Court to adopt the ‘express advocacy’ test as a gloss on FECA’s language,” they argued to the Supreme Court. 45 The Intervenor Defendants (Sen. McCain, Sen. Feingold, Rep. Shays, Rep. Meehan, et al.) asserted that the express advocacy analysis was a “roadmap” with two principal concerns: (1) eliminating vagueness and (2) assuring that restrictions are “directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.” 46 “Those are precisely the precepts to which Congress adhered in framing Title II,” the Intervenors proclaimed. 47

44 11 C.F.R. § 100.29(c)(3) (2003). Electioneering communication excludes communications that “constitute[] an expenditure or independent expenditure provided that the expenditure or independent expenditure is required to be reported under the Act or Commission regulations.” Id. Presumably this means “reportable” in the case of independent expenditures by non-PACs that are below the reporting threshold of $250. 11 C.F.R. § 114.10(e) (2003).

Even at the most practical level of reporting, it matters whether a PAC does express advocacy because what would otherwise be considered an electioneering communication is reported on one line (either Line 21 or 29) of FEC Form 3X if it does not contain express advocacy (and the form does not even require detail as to the candidate named) and on another line (Line 24) if it does contain express advocacy (with full detail as to what candidate was supported). An MCFL-type corporation would use Form 9 to report electioneering communications and Form 5 to report independent expenditures, again dependent on whether there is express advocacy.


46 Id. at 62 (quoting Buckley, 424 U.S. at 80).

47 Id.
C. The Supreme Court Decided McConnell as an Exception to the Buckley/MCFL General Rule Protecting Issue Advocacy

The 5-4 Supreme Court majority followed the lead of BCRA’s sponsors and evaluated the electioneering communication ban within the Buckley framework, agreeing that the definition of electioneering communication was not vague and that it targeted the “functional equivalent” of express advocacy. This permitted the Court to give a nod to stare decisis. Examining what the Court actually did, and how it went about its analysis, provides guidance for future legislation and litigation.

1. McConnell Rejects Balancing, Recites Precedent, and Requires Strict Scrutiny

The Supreme Court’s analysis of the electioneering communication ban under the Buckley/MCFL rubric also meant that the majority did not embrace Justice Breyer’s balancing analysis, which would have rejected reliance on precedent and strict scrutiny. Justice Breyer had set out his views on campaign finance reform in a 2002 lecture and article at New York University School of Law. Breyer declared that he could not “find an easy answer to the constitutional questions in language, history, or tradition,” noting that the First Amendment “does not define the ‘freedom of speech’ in any detail.” Rather, he would “refer to the Constitution’s general participatory self-government objective.” This he described as a “protection of ‘active liberty,’” asserting that “the First Amendment’s constitutional role is not simply one of protecting the individual’s ‘negative’ freedom from governmental restraint.” The First Amendment’s role, according to Breyer, is “to sustain the democratic process both by encouraging the exchange of ideas needed to make sound electoral decisions and by encouraging an exchange of views among ordinary citizens necessary to their informed participation in the electoral process.” Because “campaign finance laws also seek to further the latter objective,” Breyer continued, “a court should approach most campaign finance questions with the understanding that important First Amendment-related interests lie on both sides

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48 McConnell, 124 S. Ct. at 696.
49 Although the assertion that the express advocacy test in Buckley and MCFL was employed solely to avoid vagueness (and without any substantive constitutional intent of protecting issue advocacy) was unconvincing, see infra Part IV, that fact does not alter the analytical importance of the Court’s decision to operate within the Buckley/MCFL framework.
51 Id. at 252.
52 Id.
53 Id.
54 Id. at 253.
of the constitutional equation, and that a First Amendment presumption hostile to government regulation, such as ‘strict scrutiny,’ is consequently out of place.” 55 Instead, Breyer advocated a judicial balancing approach, coupled with “deference” to legislatures in “matters about which the legislature is comparatively expert,” such as campaign finance. 56

While deference to Congress shows up in the McConnell opinion, 57 the Stevens-O’Connor joint opinion in McConnell (joined by Justices Souter, Ginsburg, and Breyer) did not embrace Breyer’s balancing without regard to precedent and his abandonment of traditional strict scrutiny when considering electioneering communications. 58 McConnell examined the electioneering communication definition under the Court’s precedents, concluding that the definition “raises none of the vagueness concerns that drove our analysis in Buckley,” 59 and then declared: “Nor are we persuaded, independent of our precedents that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy.” 60 In its analysis of the electioneering communication ban, the Court used language indicating a traditional strict scrutiny analysis, finding that Congress had a “compelling” interest 61 and rejecting “plaintiffs’ argu[ment] that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications.” 62

Consequently, McConnell requires generally that laws restricting free association and speech that border on issue advocacy continue to be reviewed for constitutionality under the traditional strict scrutiny standard, i.e., they must be

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55 Id. (footnote omitted).
56 Breyer, supra note 50, at 253-54.
57 See, e.g., McConnell v. FEC, 124 S. Ct. 619, 645, 673, 676, 684 n.72 (2003). The propriety of this deference was hotly contested by dissenters who pointed out that what Congress really had expertise in was incumbent protection, with which BCRA was rife. Id. at 753-54 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).
58 The McConnell Court did speak of “preserving the integrity of the electoral process, preventing corruption, and sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government” as being “interests of the highest importance,” id. at 696 n.88 (internal quotation indicators omitted) (citing Buckley and Bellotti, citations omitted), but it did this under a traditional compelling interest analysis within its traditional campaign finance precedents, not as a free-floating balancing of Court-perceived ideals to enhance American democracy. See id. at 695.
59 Id. at 689; see also id. at 688 (distinguishing Buckley and MCFL).
60 Id. at 688-89.
61 Id. at 695.
62 Id. at 696. While the Court talked expressly about a “compelling” interest, its discussion of narrow tailoring was blurred with its discussion of facial-challenge overbreadth, see id. at 697, thereby surreptitiously shifting the burden of proof from defendants to plaintiffs. This is irrelevant for the present argument that the Court purported to apply strict scrutiny, which is therefore required in future analyses, but it is relevant to Subpart I.C.5, infra, about the necessity of allowing for facial challenges, where the Court’s flawed analysis will be developed, and to Part IV, infra, which talks about the vulnerability of the decision to reversal.
narrowly tailored to a compelling state interest. Within strict scrutiny precedents, *McConnell* requires that statutes bordering on issue advocacy must be analyzed under the *Buckley*, *MCFL*, and now *McConnell* line of precedents so as to employ the express advocacy test or its functional equivalent. As shown below, this line of precedents requires that statutes bordering on issue advocacy that place any significant burden on issue advocacy must (a) avoid vagueness by employing the express advocacy test or its functional equivalent and (b) avoid overbreadth by targeting express advocacy or by proving a functional equivalent; functional equivalents must be proven by substantial evidence to implement the same justifications underpinning the express advocacy test, and where there are facial determinations the option of as-applied challenges must be left open.

2. *McConnell* Requires that Statutes Not Be Vague

As to vagueness, *McConnell* discussed the express advocacy constructions in *Buckley* as necessary "to avoid problems of vagueness and overbreadth." But, it continued, "we nowhere suggested that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line." The Court returned to the vagueness theme to conclude its discussion of the definition of electioneering communication:

Finally we observe that the new . . . definition of "electioneering communication" raises none of the vagueness concerns that drove our analysis in *Buckley*. The term "electioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period,

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63 *McConnell*, 124 S. Ct. at 695.
64 Id. at 696.
65 There was broad support on the Court for requiring disclosure of electioneering communication expenditures, while support for the electioneering communication ban was narrow. *Cf. McConnell*, 124 S. Ct. at 689-94 (majority) with id. at 762-69 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.). Although there is little explanation of the point by the Justices who objected to the ban but not the disclosure, their support doubtlessly rested on the facts that disclosure is a significantly lighter burden than a ban, that no disclosure is required until $10,000 has been expended, and that only donors of $1,000 or more need to be disclosed (as compared to the $200 level for independent expenditures). Id. at 690 (describing provisions of BCRA § 201 codified at 2 U.S.C. § 434(f)). The Court left open the possibility of as-applied challenges to the donor disclosure requirement for organizations that can demonstrate a "reasonable probability" of "economic reprisals or physical threats as a result of dispelled disclosure." Id. at 692.
66 Id. at 688-89, 697.
67 Id. at 692.
68 Id. at 688.
69 Id.
and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable. Thus, the constitutional objection that persuaded the Court in *Buckley* to limit FECA's reach to express advocacy is simply inapposite here.\(^7\)

So the electioneering communication definition is very clear, providing a bright-line test as required of any statute bordering on issue advocacy. Statutes that target communications defined in terms that are more vague than the formulation that the Court rejected in *Buckley* and *MCFL* — i.e., “relative to,” “for the purpose of influencing,” or “in connection with” either elections or candidates, and even “advocating the election or defeat of a clearly identified candidate for federal office”\(^7\) — should be construed to meet the express advocacy line (but only if reasonably susceptible to such a saving construction).\(^7\) Unsalvageable provisions must simply be declared unconstitutionally vague.\(^7\)

\(^7\) id. at 689 (citations omitted).
\(^7\) See supra note 31 and accompanying text.
\(^7\) The *McConnell* Court rejected a vagueness challenge to a portion of the definition of "federal election activity," i.e., “a public communication that refers to a clearly identified candidate for Federal office... and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office.” 2 U.S.C.A. § 431(20)(A)(iii) (2003) (emphasis added). But this support/oppose definition is not suitable for general application to restrictions on issue advocacy because it was given in special contexts and because the test does not come close to the level of specificity the Court approved in connection with the electioneering communication definition.

The Court first considered the support/oppose language in connection with a ban on using non-federal funds by state, district, and local political parties for public communications that support/oppose a federal candidate. *McConnell*, 124 S. Ct. at 675 n.64; 2 U.S.C. § 441l(b) (2003). The Court noted that these terms applied to “party speakers” and decided that the words ‘provide explicit standards for those who apply them.’” *McConnell*, 124 S. Ct. at 675 n.64 (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). “This is particularly the case here,” the Court continued, “since actions taken by political parties are presumed to be in connection with election campaigns.” Id. (citing Buckley v. Valeo, 424 U.S. 1, 79 (1976) (holding that a general provision requiring a political committee to report all its expenditures was not vague because political committee expenditures “are, by definition, campaign related”)). A lower vagueness standard was clearly applied because of the political, and politically sophisticated, nature of the speaker.

When the Court reached a ban on such support/oppose communications by state candidates and officeholders, 2 U.S.C. § 441l(f)(1) (2003), it merely declared “[w]e have already rejected” the vagueness argument, apparently assigning to these individuals a political, and politically sophisticated, nature that would enable them to know when they were supporting or opposing a federal candidate so as to use hard money to fund their communications. *McConnell*, 124 S. Ct. at 684. While the notion that a state governor cannot spend a dime to criticize, for example, President George W. Bush’s actions and policies (especially those affecting the governor's state) is
In discussing vagueness, a word should be added about language that McConnell employed to describe why the "sham issue ads" it focused this facial attack upon may be regulated. The Court said, "The justification for the regulation of express advocacy applies equally to ads aired during those periods if the ads are intended to influence the voters' decisions and have that effect."\(^{74}\) This language goes to the governmental interest underpinning the electioneering communication test, i.e., that the Court found that there was substantial evidence that what it called "sham issue ads" (as distinguished from what it called "genuine issue ads" or "pure issue ads"),\(^{75}\) were the "functional equivalent of express advocacy."\(^{76}\)

Words used to describe the justification or interest supporting a statute are not adequate as a statutory formulation implementing that justification in a narrowly-tailored fashion. A statute requiring that all communications that "are intended to influence the voters' decisions and have that effect" be done through a PAC would be unconstitutionally vague. It must be recalled that the Supreme Court has already imposed the express advocacy gloss on the phrase "for the purpose of influencing,"\(^{77}\) and it specifically rejected any requirement that an express advocacy test (or its functional equivalent) could depend on "intent and... effect" because this would:

> put[] the speaker... wholly at the mercy of the varied understanding of his hearers and... whatever inference may be drawn as to his intent and meaning.

> Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."\(^{78}\)

problematic to the traditional concept of robust American democracy, the Court apparently felt that politicians would have no trouble understanding when they had done such an "attack."

But the Court nowhere assigned such political nature and sophistication to other entities that were not political party committees or politicians. Given the Court's assertion that it employed the express advocacy test to eliminate vagueness with respect to the phrases described *supra* in text, and its heavy emphasis on the extensive detail and consequent lack of vagueness in the electioneering communication definition that made it equivalent in specificity to the express advocacy test, there is no warrant to use anything less specifically detailed in drafting any proposed exception to the general rule of Buckley, MCFL, and McConnell protecting issue advocacy with the express advocacy test.

74 McConnell, 124 S. Ct. at 696 (emphasis added).
75 Id. at 696 n.88, 697.
76 Id. at 696.
77 Buckley v. Valeo, 424 U.S. 1, 80 (1976).
78 Id. at 43 (citation and quotation marks omitted) (emphasis added).
The electioneering communication test was found acceptable as to a vagueness challenge precisely because its rigid, bright-line formulation would not cause a speaker to "hedge and trim."\(^{79}\)

3. *McConnell* Requires that Statutes Not Be Overbroad

In *MCFL*, the Supreme Court said that it had adopted the express advocacy test in *Buckley* (and was doing the same in *MCFL*) to avoid problems of both vagueness and overbreadth.\(^ {80}\) *McConnell* recited this fact, but attempted to avoid the *overbreadth* implications as to issue advocacy by focusing on the fact that *MCFL* referred to the analysis in *Buckley* as a "construction."\(^ {81}\)

In deciding the *McConnell* facial challenge, the Court focused only on "sham issue ads" and decided that the electioneering communication ban was not overbroad because the government had proven that such ads were the "functional equivalent" of express advocacy.\(^ {82}\) The Court's overbreadth discussion was problematic in lacking analytical clarity, but that will be discussed *infra* under the topic of how *McConnell* left open as-applied challenges to resolve a number of issues in this area. For present, it is sufficient that the *McConnell* analysis, done under the rubric of *Buckley* and *MCFL*, still requires either the application of the express advocacy test or its proven functional equivalent to eliminate overbreadth. The express advocacy test clearly maintains vitality if it remains the benchmark against which functional equivalents are measured.

That the express advocacy test yet retains vitality in *McConnell* is also evident in the Court's analysis concerning the exemption for *MCFL*-type nonprofit corporations.\(^ {83}\) In *MCFL*, the Court had first held that the phrase "in connection with any election," in 2 U.S.C. § 441b, had to be read with the express advocacy gloss to be constitutional.\(^ {84}\) Then the Court decided that ideological, non-stock, nonprofit corporations could not be required to make independent expenditures (defined as containing express advocacy) through a PAC.\(^ {85}\)

In *McConnell*, the Court was faced with an electioneering communication ban that lacked an exception for *MCFL*-type corporations.\(^ {86}\) This was obviously a substantial amount of overbreadth for a whole class of entities for whom there was no recognized governmental interest sufficient to prohibit them from making

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\(^{79}\) *McConnell*, 124 S. Ct. at 689 ("[T]he definition of 'electioneering communication' raises none of the vagueness concerns that drove our analysis in *Buckley*.")


\(^{81}\) *McConnell*, 124 S. Ct. at 688, 688 n.76.

\(^{82}\) *Id.* at 696.

\(^{83}\) *Id.* at 698-99.

\(^{84}\) *MCFL*, 479 U.S. at 249.

\(^{85}\) *Id.* at 264.

\(^{86}\) *McConnell*, 124 S. Ct. at 699.
express advocacy communications (independent expenditures), let alone
electioneering communications. The Court acknowledged that the ban reached
constitutionally-protected activity and so gave it "a reasonable limiting
construction" by applying the exception for MCFL-type corporations to the
electioneering communications ban on the assumption that Congress had to
know about the exception when enacting BCRA and intended it as an exception.
This recognition of the MCFL exception is especially important
because it means that the regulation of corporations just because they have
adopted a state-created form is not unlimited – even if they engage in express
advocacy. To say that just because an organization chooses the corporate form it
is therefore subject to governmental regulation without a close nexus to actually
recognized compelling interests is simply not narrowly tailored.

4. McConnell Requires Substantial Proof for “Functional Equivalents”

The Court restated in McConnell what it had said in Nixon v. Shrink
Missouri Government PAC, that “[t]he quantum of empirical evidence needed to
satisfy heightened judicial scrutiny of legislative judgments will vary up or down
with the novelty or the plausibility of the justification raised.” This quotation
and its application in both McConnell and Shrink was to “heightened judicial
scrutiny” in the context of contribution limits, not strict scrutiny in connection
with burdens on issue advocacy. In fact, the Court in Shrink expressly made this
distinction and indicated that the evidence required for strict scrutiny was higher,
as seen in another, similar quotation from Shrink:

87 Id. There is irony here that the Court used the term “construction” to describe its avoidance of
overbreadth alone (for there is no question of vagueness here), but elsewhere put in italics the word
“construction” in an effort to prove that Buckley and MCFL were not likewise avoiding
unconstitutional overbreadth in addition to resolving vagueness problems. Id. at 688 n.76.

We noted [in MCFL] that Buckley had limited the statutory
term 'expenditure' to words of express advocacy 'in order
to avoid problems of overbreadth.' 479 U.S. at 248. We
held that 'a similar construction' must apply to the
expenditure limitation before us in MCFL and that the
reach of 2 U.S.C. § 441b was therefore constrained to
express advocacy.

MCFL, 479 U.S. at 249 (emphasis added).
88 McConnell, 124 S. Ct. at 699. Of course, as the dissent noted, the exception Congress granted to
MCFL-type corporations in the Snowe-Jeffords amendment was taken away by the Wellstone
amendment, with both left in BCRA to preserve severability. Id. at 771 (Kennedy, J., dissenting,
joined by Rehnquist, C.J., and Scalia, J.). Consequently, the statute was not readily susceptible to
the majority’s construction.
89 Id. at 661 (quoting Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 391 (2000) (Shrink)).
The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible. See 424 U.S. at 27, and n. 28. Respondents are wrong in arguing that this Court has “supplemented” its *Buckley* holding with a new requirement that governments enacting contribution limits must demonstrate that the recited harms are real, not merely conjectural, a contention for which respondents rely principally on *Colorado Republican Federal Campaign Comm. v. Federal Election Comm’n*, 518 U.S. 604 [(1996)]. This Court has never accepted mere conjecture as adequate to carry a First Amendment burden, and *Colorado Republican* deals not with a government’s burden to justify contribution limits, but with limits on independent expenditures by political parties, which the principal opinion expressly distinguished from contribution limits. *Id.* at 615-618.  

So strict scrutiny dealing with independent expenditures is not governed by a mere “novelty and plausibility” sliding scale but does require that the government go beyond conjecture to demonstrate that the interests it asserts as compelling are proven to be real by at least “substantial evidence,” which is what the Court found the government had provided with respect to BCRA’s restrictions on non-federal money. 91 The evidentiary record in *McConnell* was voluminous, submitted to the trial court on twenty-two CD-ROM disks by plaintiffs and six disks by defendants. The Joint Appendix in the Supreme Court contained six volumes (and there were also volumes of materials submitted with several jurisdictional statements). The Supreme Court began its opinion with an extended historical and evidentiary discussion to which it often returned. For example, as to the decision of Congress to ban electioneering communications for broadcast ads but not Internet or print communications, the Court declared  

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90 Shrink, 528 U.S. at 378-79.  
91 *McConnell*, 124 S. Ct. at 666.  
92 *Id.* at 643-54.
that “[t]he record amply justifies Congress’ line drawing.” And of course, the Court cited the record for the key finding that Congress had proved that “sham issue ads” were the “functional equivalent of express advocacy.”

McConnell demonstrates that any effort to establish exceptions to the general Buckley/MCFL  general rule protecting issue advocacy by means of an express advocacy test must be supported by substantial empirical evidence showing that the state interests are real and not conjectural.

Proposed exceptions must also be proven to advance the same interests advanced by the express advocacy test, as McConnell said that the electioneering communications ban did. As the Court said, “[t]he justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence voters and have that effect.”

5. McConnell Requires As-Applied Options

McConnell followed the proposal by Intervenors to leave as-applied challenges as the solution for sorting out communications, such as grass-roots lobbying that urge constituents to contact their legislators about pending

fails to the extent that the issue ads broadcast during the [blackout periods] are the functional equivalent of express advocacy. The justifications for the regulation of express advocacy apply equally to ads aired during those periods if the ads are intended to influence the voters’ decisions and have that effect.

Id. (emphasis added). Of course the “intent” and “effect” language the McConnell majority uses in justifying the electioneering communication ban cannot be used as a substitute for compelling interests identified by the Court. Id. at 666. Specifically, the Court said plaintiffs’ argument that the electioneering communication is “overbroad,”

Id. at 696 (emphasis added). In these two sentences, the phrases “functional equivalent” and “intended to influence . . . and have that effect” are used as parallel thoughts and the latter must be understood in light of the former (which the Court said had been proven in this case).

Government cannot simply regulate any speech that might have the intent or effect of influencing election for at least four reasons. First, Buckley expressly rejected any statutory formulation that relied on intent or effect, 424 U.S. 1, 43 (1976), and McConnell says it is consistent with Buckley. Second, the McConnell language quoted couples the “intent” and “effect” language with its “functional equivalent” finding, so that the two may not be conceptually uncoupled. Third, a restriction on anything having the intent or effect of influencing elections would not be narrowly tailored and would be substantially overbroad because it would sweep in, inter alia, endorsements and appearances with a candidate by celebrities from entertainment, business, and politics as well as news stories, commentaries, and editorials. Fourth, “for the purpose of influencing” language, for which this formulation would be an equivalent, already has a necessary express advocacy gloss attached to it because it is vague. Buckley, 424 U.S. at 80.
legislation, that are undeniably issue advocacy and central to American democratic participation in government. Consequently, the Court brushed aside concerns about "genuine issue ads" in this facial challenge and focused solely on what it called "sham issue ads," calling them the "functional equivalent" of express advocacy.

The fact that the Court left open the option of as-applied challenges is clear in how it treated the overbreadth challenge to the electioneering communication ban. After the McConnell majority decided there was a compelling interest, the next step in its strict scrutiny analysis was to decide whether Congress had narrowly tailored the ban to effectuate only the established interest. But the Court did not use the term "narrow tailoring." Instead the Court said that "plaintiffs . . . challenge the [electioneering communications ban] on the ground that it is . . . overbroad" because "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications."

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97 [Redacted] Brief for Defendant Intervenors at 64, McConnell v. FEC, 124 S. Ct. 619 (2003) (No. 02-1674). The intervenors noted:

Title II poses little risk of the sort of chilling effect that can justify the facial invalidation of an overbroad law. These corporations . . . are not likely to be chilled in their speech, or to be unable to assert their rights if and when there is a realistic threat that the Act may be applied to them in some unconstitutional way. In these circumstances, awaiting as-applied challenges, arising in specific factual contexts, is by far the wiser course.

Id. (emphasis added).

98 The present reach of BCRA's regulation of "electioneering communications" is allowable, the Court said, because

[The] vast majority [of] the issue ads broadcast during the [thirty] and [sixty] day periods preceding federal primary and general elections are the functional equivalent of express advocacy [and] corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.

McConnell, 124 S. Ct. at 696 (emphasis added). Elsewhere, the Court noted that "[t]he proliferation of sham issue ads has driven the soft-money explosion," and "state and local candidates and officeholders will become the next conduits for the soft-money funding of sham issue advertising," the prescient staunching of which overrides First Amendment concerns. Id. at 684.

99 Id. at 695 (emphasis added).

100 Id. at 696.
By simply referring to an overbreadth challenge, without more precision, the Court muddied the waters in a way that obscured its analysis of the second prong in a strict scrutiny analysis, i.e., narrow tailoring (whether a means that Congress has chosen to regulate speech that may be regulated also regulates speech that may not be regulated).

But BCRA’s plaintiffs did not just allege that the ban was “overbroad,” as the Court stated. They were very clear in their insistence that the electioneering communication was not narrowly tailored to a compelling governmental interest, as is required under strict scrutiny for such an abridgement of core political speech. For example, the “Business Plaintiffs” had a section plainly titled, “The Electioneering Communication Standard Is Not Narrowly Tailored.” The AFL-CIO had a section captioned, “The Primary Definition Is Not Narrowly Tailored.”

It is true that plaintiffs often complain that a statute is “overbroad” when they mean that it is not narrowly tailored to effectuate only its compelling interest. In *Austin v. Michigan State Chamber of Commerce*, the Supreme Court did the same when it was conducting a narrow tailoring analysis under strict scrutiny and spoke at one point of its analysis in overbreadth terminology. The present authors have done so in this article to a certain extent, supra, because “overbroad” was used in *McConnell*, and because the present analysis had not yet occurred to separate its two meanings.

But using “overbroad” to mean “not narrowly tailored” can be confusing because in First Amendment jurisprudence there is also the “substantial overbreadth” doctrine, which has to do with facial challenges and permits a form of third party standing. It is necessary to keep them distinct, and much ink has

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103 Brief of AFL-CIO Appellants/Cross-Appellees at 16, McConnell v. FEC, 124 S. Ct. 619 (2003) (No. 02-1755). The brief’s previous heading also made it clear that narrow tailoring was in focus: “Union and Corporate Speech About Matters of Public Concern Enjoys the Highest First Amendment Protection, and Restrictions Must Be Narrowly Tailored to Serve a Compelling Governmental Interest.” Id. at 14.

104 Cf., Brief for Appellants/Cross-Appellees Sen. Mitch McConnell et al. at 50, McConnell v. FEC, 124 S. Ct. 619 (2003) (No. 02-1674) ("[T]he 'electioneering communications' provisions are so overbroad that they cannot be sustained under any theory consistent with the First Amendment.").


been expended in sorting out the differences, although an exhaustive study is beyond the scope of this article. 107

The narrow-tailoring version of "overbreadth" was described in SUNY v. Fox, 108 where the Supreme Court said that "[t]he person invoking the . . . narrow-tailoring rule asserts that the acts of his that are the subject of the litigation fall outside what a properly drawn prohibition could cover." 109 The facial-challenge (and standing) variety of "overbreadth" arises when a defendant whose conduct may be regulated (e.g., he has been charged for publishing obscene material) argues that, while his activity may be regulable, the statute under which he is charged is written so broadly that it reaches substantial amounts of the activity of others, not before the court, that is not regulable (e.g., librarians making available to library patrons photographs of Michelangelo's nude paintings in the Sistine Chapel). In the example given, the obscenity publisher is allowed to raise the rights of librarians in what amounts to (for them) a facial challenge. Because constitutional challenges need not await enforcement proceedings to be brought as facial challenges, a substantial overbreadth facial challenge may be brought by someone arguably affected by the challenged statute (establishing standing) without there ever being an enforcement action or a declaration of whether the plaintiff's own conduct may be restricted. 110

Returning to the McConnell case, a proper strict scrutiny analysis places the burden on the government to prove that its restriction on free expression is narrowly tailored to a compelling governmental interest. 111 In a substantial overbreadth facial challenge, the burden is on the plaintiff to prove that the statute has so many unconstitutional applications that it must be struck on its face. 112

One might expect that if the Supreme Court was going to engage in a strict scrutiny analysis it would first finish that analysis before moving on to a substantial overbreadth analysis, i.e., establish first whether there were any applications of the ban that were unconstitutional before asking whether those applications were a substantial part of the reach of the ban. It certainly seems logically required to first determine if there are any unconstitutional applications (and what they might be) before determining whether the lack of narrow tailoring is substantial enough to permit a statute to be struck facially.


109 Id. at 482 (emphasis omitted).

110 An example is Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), which was a pre-enforcement facial challenge to a federal anti-pornography statute that was declared unconstitutional due to its substantial overbreadth because it would reach films with artistic merit.


BCRA's sponsors argued things in this sequence. They first argued in their brief, in a section entitled "Title II Is Narrowly Tailored To Serve Compelling Public Interests," that the electioneering communication ban passed constitutional muster because it was narrowly tailored to a compelling interest. Then they argued, in a section entitled "Facial Invalidation Of Title II Would Be Especially Inappropriate" and in a subsection entitled "Plaintiffs Have Not Demonstrated Substantial Overbreadth," that facial invalidation would be inappropriate absent proof of substantial overbreadth.

But the Court conflated the two analyses by saying that the plaintiffs' challenge was about overbreadth (without distinguishing which kind), then declaring that there was a compelling interest (the first step of strict scrutiny), then moving on to an "overbreadth" analysis that concluded with the words, "We are therefore not persuaded that plaintiffs have carried their heavy burden of proving that [the electioneering communication ban] is overbroad." Since plaintiffs do not bear the burden of proving narrow tailoring, the Court obviously slid past the narrow tailoring prong of the strict-scrutiny analysis and right into a substantial overbreadth analysis.

While the analysis was sloppy (and perhaps designedly so), the Court's discussion plainly indicates that the Court decided to treat this case only as a facial challenge case and it was declining to deal with whether the ban was narrowly tailored. The Court conceded that the ban reaches protected speech that Congress may not regulate (thereby implying that the tailoring was not narrow), but it wanted to deal with such issues on an as-applied basis, i.e., the Court did not believe the facial overbreadth was substantial.

114 Id. at 62.
115 Id. at 64.
116 McConnell, 124 S. Ct. at 695-97.
117 That engaging in the appropriate tailoring question was the proper next step was demonstrated by the Court itself. It is puzzling that the Court employed formal tailoring analysis when answering the argument that § 323(b) "is substantially overbroad because it federalizes activities that pose no conceivable risk of corrupting or appearing to corrupt federal officeholders," id. at 673, but did not do so in answering the similar argument that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." Id. at 696.
118 The Court's treatment of what constitutes "substantial" for purposes of facial overbreadth is rather loose. In Mills v. Alabama, 384 U.S. 214 (1966), the Court struck a ban on speech which affected only one day — .27% — of possible speech. The record evidence here was that between 7% and 64% of the communications during the applicable period before the 1998 elections were not "sham" at all, or, in other words, that the regulation of as little as 36% of the ads encompassed by BCRA was supported by the interests proffered by the government. McConnell v. FEC, 251 F. Supp. 2d 176, 309-10 (D.D.C. 2003) (Henderson, J.). But, in any event, since the Court focused on the "sham issue ads," the precedential effect is limited to the same.
The Court did this first by declaring that plaintiffs' lack-of-narrow-tailoring argument, which the Court reclassified as a facial overbreadth challenge, "fails to the extent that the issue ads broadcast during the [thirty] and [sixty] day periods preceding federal primary and general elections are the functional equivalent of express advocacy." Of course, this was only demonstrated with respect to what the Court styled as "sham issue ads" and not as to such other public communications as grass roots lobbying. Because a radio ad run by the ACLU asking listeners to call a legislator who happens to be a candidate to vote for a bill to be considered in Congress in three days is not a "sham issue ad" and was never of a type proven to be the "functional equivalent" of express advocacy, such an ad is unsupported by any governmental interest and therefore barring the ACLU from running it would be unconstitutional.

Second, the Court acknowledged that there was an evidentiary dispute as to "[t]he precise percentage of issue ads that clearly identified a candidate and were aired during those . . . time spans but had no electioneering purpose," insisting that "the vast majority of ads clearly had such a purpose." This of course acknowledges that there are some issue ads that may not constitutionally be regulated by Congress but that under a facial challenge the ban must be upheld because the overbreadth had not been proven to be "substantial." The necessary implication is that those other issue ads must be the subject of as-applied challenges.

Third, the Court acknowledges in footnote eighty-eight that it "assume[s] that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." Consequently, the Court has decided that questions about those "genuine issue ads" would not be sorted out in McConnell but would be carved out a chip at a time in as-applied litigation until the full outline of permissible regulation under McConnell's exception takes visible shape.

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119 McConnell, 124 S. Ct. at 696 (emphasis added).
120 Id. at 696.
121 Id. at 697.
122 Id. at 696 n.88.
123 The Court also cavalierly declared that

[W]hatever the precise percentage may have been in the past [of the electioneering communication ban's impingement on 'genuine issue ads'], in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific references to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.

Id. This bit of obiter dictum has absolutely no application to grass roots lobbying during the electioneering communication blackout periods, in which, e.g., it is necessary to quickly contact an
While this requires of those doing “genuine issue ads” the heavy burden of pursuing further expensive litigation to protect their rights to participate in American democracy, the message is clear that as-applied challenges must be permitted.

6. Deference Has Limits: Alternative Communication Means Are Required

In several places, *McConnell* spoke of giving deference to Congress. Interestingly, the term does not occur beyond the discussion of Title I (non-federal money ban).

One of the most curious discussions of deference is in footnote seventy-two where the majority responds to Justice Kennedy’s assertion that no deference should be afforded Congress because BCRA reads like an incumbent protection plan. The majority’s response is, in part, that undecided legislator’s constituents asking them to call their legislator and urge her to vote for legislation to be voted on within a week.

This is such core First Amendment activity in American democracy that it cannot be brushed aside so blithely. The most effective means of reaching constituents quickly and getting their attention is by broadcast advertising on their favorite TV shows and commuting radio programs. The most effective means of gathering, analyzing, and disseminating the necessary legislative information is through watchdog groups, which range all across the political and social spectrum on issues that constituents find vital and want information about from the groups with which they have chosen to associate. The most effective form of existence for these citizen groups is the nonprofit corporate form (for protection from individual liability of its board of directors and officers, not for acquiring capital from business activities). It is no good to say the communication can be made sooner or later. There is no other available time than that week in which the voters can receive the necessary information when it matters. It is no good to say don’t mention the name of the legislator and candidate. Grass roots lobbying is impossible without telling constituent to whom their call should be made.

It is also no good to say use your PAC. As noted above, *supra* note 10, some organizations cannot by their charter have a PAC. If the issue arises on short notice there simply is no time to organize a PAC and go through the time-consuming, cumbersome process of raising PAC funds from an organization’s “members” (who must fit certain criteria to qualify for solicitation). The PAC alternative in such situations is a complete ban and amounts to having to obtain an advance government license before being permitted to speak, which ought to be considered an unconstitutional condition and prior restraint.

Most tellingly, the fact that grass roots lobbying was argued strenuously to the Court and it utterly ignored the argument indicates that such considerations were left for another, as-applied challenge. The Court concluded its discussion of the “overbreadth” challenge to the electioneering ban with a statement that again contains the implicit recognition that the ban reaches some “pure issue ads” but that sorting those out awaits another day: “Far from establishing that BCRA’s application to *pure issue ads* is substantial, either in an absolute sense or relative to its application to election-related advertising, the record strongly supports the contrary conclusion.” *Id.* at 697 (emphasis added).

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125 *Id.* at 684 n.72.
[any concern that Congress might opportunistically pass campaign-finance regulation for self-serving ends is taken into account by the applicable level of scrutiny. Congress must show concrete evidence that a particular type of financial transaction is corrupting ... and that the chosen means of regulation are closely drawn to address that real or apparent corruption.]

There is some logic to this argument, i.e., Congress has to make a showing to satisfy the Court so the restrictions cannot just be incumbency protection. But then the logic collapses because the Court goes on to point out that the Court employs "less rigorous scrutiny [for campaign contribution regulations] - which shows a measure of deference to Congress in an area where it enjoys particular expertise."[2]

Putting these thoughts together yields the following logic: campaign finance restrictions cannot constitute incumbent protection because the Court employs a lowered standard of scrutiny to guard against such things out of deference to the special expertise of Congress in this area. In a more folksy fashion, it looks like the Court is saying that there can't be any chicken snitchin' at the hen house because they have employed Mr. Fox as their new guard (in place of that strict old guy) - out of deference to his special expertise on the subject of chickens.

But there must be limits to deference. Legislatures cannot properly view the Court's approval of the electioneering ban as carte blanche to start banning all communications that might have the intent or effect of influencing elections.[12] Congress banned broadcast electioneering communications, and the Court said that was not underinclusive because there was ample evidence for Congress to conclude that broadcast ads were the most serious problem, and in any event, Congress is permitted to take one step at a time in regulating problems it perceives.[12]

What if Congress or a state legislature decides to proscribe all communications that mention a candidate for a prescribed period?[3] Should

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126 Id.
127 Id.
128 See supra note 96 (explaining why such a formulation of either a restriction or a justification would be inadequate).
129 McConnell, 124 S. Ct. at 697.
130 See, e.g., Right to Life of Mich., Inc. v. Miller, 23 F. Supp. 2d 766 (W.D. Mich. 1998); Planned Parenthood Affiliates of Mich., Inc. v. Miller, 21 F. Supp. 2d 740, 746 (E.D. Mich. 1998) (holding that a Michigan law affecting communications made within forty-five days of an election that merely contained the "name or likeness of a candidate" was facially overbroad); Vt. Right to Life Comm., Inc. v. Sorrell, 221 F.3d 376, 380 (2d Cir. 2000) (considering Vermont's "notice of expenditure" statute affecting activities including "the name or likeness of a candidate for office"
deference simply be accorded on the theory that legislatures know best about these things and that *McConnell* implicitly approved second and third steps by describing the broadcast electioneering communication ban as a first step? Clearly at some point the burden on free expression would become so great that it could not be tolerated, even if Congress thought further restrictions were a good idea. *McConnell* provided no explicit guidance on when that line might be crossed, but it did provide some guidelines that pose problems for expanding the forms of communication banned as electioneering communications.

First, government would have the heavy evidentiary burden of proving that there was a problem with "electioneering communications" in newspaper advertisements, or billboards, handbills, phone banks, and internet communications. Sociology studies and a congressional hearing were cited in *McConnell* as proof that "sham issue ads" were the functional equivalent of express advocacy. Such an effort would be required with respect to non-broadcast means to show functional equivalence of a problem communication area, if there is one. Could a study prove that, e.g., newspaper ads had the same impact as broadcast ads and so posed problems similar to that perceived in connection with the current broadcast electioneering communications? Certainly to be avoided is an auto-expanding rationale that says broadcast ads are banned but print ads are okay and then uses the expansion of print ads as evidence that those must also be banned. By logical extension, such an auto-expanding rationale could eventually lead to a ban on citizens talking to each other about candidates. But surely at some point the burden would simply become too great for even a *McConnell* majority to justify such pervasive regulation in an area where the First Amendment says Congress should "make no law."

Second would be the problem of devising a non-vague formulation of the prohibition. One of the reasons the *McConnell* majority sustained the electioneering communication against vagueness was its multi-part definition having to do with broadcast communications, referencing a candidate, for prescribed periods, that were targeted to the relevant audience using FCC broadcast data on the population reach of broadcast facilities. If the ban were expanded to print communications, the referencing candidates and blackout periods could be the same, but how would the problem of defining targeting be solved? No known federal (or state) agency tracks the circulation totals and occurring "within 30 days of a primary or general election"; Perry v. Bartlett, 231 F.3d 155, 159 (4th Cir. 2000) (considering North Carolina law requiring that expenditures for communications must be reported "if the printed material or advertisement names a candidate").

\[131\] *McConnell*, 124 S. Ct. at 762.

\[132\] One of the problems with the whole *McConnell* decision is that in *Buckley* and *MCFL* the Court said that corporations and unions could publish issue ads by any means so long as they did not engage in express advocacy, but when organizations actually went and did what the Court said was legal, that legal activity was branded as circumvention and used as evidence of impropriety requiring restrictions. Such auto-expanding rationales have no limit once unleashed on the public.
locales for national, regional, and local newspapers and magazines, let alone the viewers of billboards, posters, yard signs, and internet pages. If the targeting requirement is dropped, would not the ban be "overbroad" (either for lack of narrow tailoring or for substantial overbreadth) because it would ban a yard sign in Maine about a public figure who happened to also be a candidate in California? How would you define targeting on the Internet? These and more questions show the intractable problems of expanding electioneering communications.

Third, expanding electioneering communications to more forms of communication would increase the burden and call for more exceptions, either defined in the statute or sorted out through as-applied challenges. For example, to the current exception for news coverage and commentary would surely have to be added an educational exception, so that contemporaneous political science and civics curricula about elections could be published for school districts. Or would it be permitted for small school corporations but not large ones, based on some numerical cutoff? The complexities abound as the restrictions expand.

There is also the problem of making sure that there are adequate alternative means of communication. As already noted, some corporations by their very nature cannot have a PAC, so it is not enough to say "just use your PAC!" On short notice, when an urgent need for public communication on an issue of vital public importance arises overnight, it is impossible to organize a PAC and raise federal funds from members to make an electioneering communication. One consolation under the broadcast-communications-only scheme is that at least an organization can go to other forms of communication, even if they have lost the most effective one. But if print or all forms of communication are also banned, then there are no ample, adequate, alternative means of communication. This necessity of alternatives applies to time, place, and manner restrictions, as the Court explained in *Ward v. Rock Against Racism*, so a fortiori it applies to strict scrutiny.

7. The Sixth Circuit Has Already Recognized that *McConnell* Created an Exception to the *Buckley/MCFL* General Express Advocacy Rule

Shortly after *McConnell* was decided, the United States Court of Appeals for the Sixth Circuit decided *Anderson v. Spear*, in which it decided that the express advocacy test still played a vital role. Hobart Anderson was a write-in candidate for Kentucky Governor in 1999. He wanted to distribute literature

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133 See *supra* note 10.
136 Id. at 653-54.
on how to cast a write-in vote to persons preparing to vote, but Kentucky's Public Financing Campaign did not permit any 'electioneering' within five hundred feet of polling places.”

"[E]lectioneering" was defined as "the displaying of signs, the distribution of campaign literature, cards, or handbills, the soliciting of signatures to any petition, or the solicitation of votes for or against any candidate or question on the ballot in any manner, but shall not include exit polling,” and the Kentucky State Election Board's counsel advised Anderson that distributing instructions on write-in voting would be considered "electioneering."

The Sixth Circuit recited Buckley's establishment of the express advocacy test and noted that McConnell recognized that it was done to overcome "a substantial statutory vagueness and overbreadth issue." The Sixth Circuit then observed that McConnell had said both that the express advocacy test would not be required where a statute was neither vague nor overbroad and that the electioneering communication was neither vague nor overbroad. Anderson also noted McConnell's reliance on "substantial evidence" pertinent to electioneering communications.

But the Sixth Circuit then said that, while McConnell had found the express advocacy test not to be constitutionally mandated where there is no vagueness or overbreadth, "it nonetheless left intact the ability of courts to make distinctions between express advocacy and issue advocacy, where such distinctions are necessary to cure vagueness and overbreadth in statutes which regulate more speech than that for which the legislature has established a significant government interest." It added that "McConnell in no way alters the basic principle that the government may not regulate a broader class of speech than is necessary to achieve its significant interest."

"Unlike the statute at issue in McConnell," the Sixth Circuit said, "Kentucky's statute is vague" and the Election Board's interpretation is "overbroad." "Also unlike McConnell," the court continued, "the record here is devoid of evidence that such a broad definition is necessary to achieve the State's interest in preventing corruption — or, to use McConnell's words, that an express advocacy line would be 'functionally meaningless' as applied to electioneering proximate to voting places."

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137 Id. at 654, 663.
138 Id. at 663 (quoting KY. REV. STAT. ANN. § 117.235(3) (Banks-Baldwin 1998)).
139 Id.
140 Id.
141 Id.
142 Id.
143 Anderson, 356 F.3d at 664 (citing FEC v. McConnell, 124 S. Ct. 619, 688-89 (2003)).
144 Id.
145 Id. at 664-65.
146 Id. at 665.
The Sixth Circuit then identified the relevant state interests as “prevent[ing] intimidation and election fraud,” decided that Kentucky had failed to demonstrate why it needed such a broad “electioneering” definition to further those interests, and applied “a narrowing construction” limiting the term “electioneering” “to speech which expressly advocates the election or defeat of a clearly identified candidate or ballot measure.” The court also noted that the legislative history supported the notion that the five hundred foot ban on “electioneering” was largely motivated by the desire of voters to be left alone and not be bothered by people trying to communicate with them, which the Court noted was not a constitutionally cognizable justification. On this point, the Court concluded that “[a]ccommodating the desire of voters to completely avoid contact with anyone handing out legitimate electioneering communications is a far cry from preventing voter intimidation and voter fraud.

While the Anderson treatment of McConnell is profitable reading in full, for present purposes enough has been provided to show that the express advocacy test retains usefulness in the wake of McConnell. The test is a familiar, easily-applied constitutional adjudication tool with which the courts have become comfortable over the years as it has been woven into the fabric of the law for nearly three decades. It is a bright-line test that resolves vague statutes in a constitutionally defensible way. It is a reliable cure for vagueness and overbreadth — all of which is probably why it was adopted by the Supreme Court in the first place and has served so many courts so well for so many years.

The Anderson analysis also demonstrates the proper analysis in the wake of McConnell’s treatment of electioneering communications. First, is the statute vague? If so, then if the statute is reasonably susceptible to a saving construction, apply the express advocacy gloss to cure the vagueness. Second, is it overbroad, i.e., does it reach beyond express advocacy or an already proven functional equivalent? If so, then examine whether the government has provided substantial evidence to prove that there is a functional equivalent that is narrowly tailored to advance the proper compelling interests.

II. McConnell Did Not Revise the Major Purpose Test

The major purpose test, which establishes whether an organization may be treated as a political committee, was established in Buckley. In the process of construing the FECA definition of “expenditure” to encompass only express advocacy, the Supreme Court noted that the definition of “political committee”

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147 Anderson, F.3d at 665. The Sixth Circuit then proceeded to dismiss a parade of horribles and to also hold that the five hundred foot chute was overlong. Id. at 665-66.
148 Id. at 659-60.
149 Id. at 659.
shared a similar fatal vagueness to what it had noted in the definition of "expenditure":

The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," [footnote] and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. [footnote] To fulfill the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.\(^{151}\)

So for government to treat an organization as a political committee, the organization must be "under the control of a candidate or [have] the major purpose [of] ... nominati[ng] or electi[ng] ... candidate[s]."\(^{152}\) In MCFL, the Court cited this passage, and spelled out the two ways an organization could be found to have such a major purpose: (1) on the basis of its organizational purpose or (2) on the preponderance of expenditures for certain activities, as set out below.\(^{153}\)

In MCFL, the Supreme Court considered the case of Massachusetts Citizens for Life (MCFL), a nonstock, nonprofit corporation whose declared mission was "to foster respect for human life and to defend the right to life of all human beings, born and unborn ...."\(^{154}\) MCFL published a newsletter on occasion and had published a "Special Edition" before the 1978 primaries.\(^{155}\) It exhorted readers to vote prolif e and described which candidates were prolif e.\(^{156}\)

\(^{151}\) Id. (emphasis added).
\(^{152}\) Id.
\(^{153}\) FEC v. MCFL, 479 U.S. 238, 252 n.6 (1986).
\(^{154}\) Id.
\(^{155}\) Id. at 242-43.
\(^{156}\) Id. at 243.
Responding to a complaint, the FEC initiated an investigation followed by an enforcement action against MCFL.\textsuperscript{157}

The Supreme Court found that the costs of producing the special newsletter constituted an “expenditure” as defined by 2 U.S.C. § 431(9)(A)(i) (“for the purpose of influencing”), which was forbidden to corporations by § 441b (“in connection with any election”).\textsuperscript{158} In response to MCFL’s claim that the “in connection with any election” language of § 441b should be construed to apply only to express advocacy, as had been done with similar provisions in Buckley, the Court noted that Buckley had employed the express advocacy test “in order to avoid problems of overbreadth” (which MCFL described as “distinguish[ing] discussion of issues and candidates from more pointed exhortations to vote for particular persons”).\textsuperscript{159} The Court construed § 441b to apply only to express advocacy and then decided that the special edition newsletter in fact contained express advocacy (and was not entitled to the press exemption because of its non-routine features).\textsuperscript{160}

The Court next turned to considering the constitutionality of § 441b’s ban on such independent expenditures, developing the major purpose test in response to the FEC’s assertion that there was no burden on MCFL because the organization could simply make independent expenditures through a PAC.\textsuperscript{161} The major purpose test as developed in MCFL established when an entity that makes independent expenditures may be treated as a PAC, with all the attendant burdens of regulatory compliance.\textsuperscript{162}

The major purpose test is distinct from the question of whether an organization is an MCFL-type organization, to which question the Court turned after its major purpose analysis, because the MCFL-type organization analysis evaluates whether a corporation may make independent expenditures. By contrast, the major purpose test decides whether an organization that does make independent expenditures may simply report the occasional independent expenditures or must register as a political committee, report all its expenditures, and meet other PAC compliance requirements.\textsuperscript{163} An organization may be an MCFL-type corporation (so that it may make independent expenditures), but may be exempt from treatment as a PAC under the major purpose test.

The Court in MCFL began its major purpose analysis with the observation that “[i]ndependent expenditures constitute expression ‘at the core of our electoral process and of the First Amendment freedoms.’ We must therefore

\textsuperscript{157} Id. at 244-45.
\textsuperscript{158} Id. at 245-48.
\textsuperscript{159} MCFL, 479 U.S. at 248-49.
\textsuperscript{160} Id. at 249-51.
\textsuperscript{161} Id. at 251-56.
\textsuperscript{162} Id.
\textsuperscript{163} See id. at 252-54 (detailing the different requirements).
determine whether the prohibition of § 441b burdens political speech, and, if so, whether such a burden is justified by a compelling state interest."\textsuperscript{164}

As noted, the FEC had asserted that there was no burden because of the PAC option.\textsuperscript{165} The Court first listed MCFL's minimal reporting requirements (resulting from having made independent expenditures) "[i]f it were not incorporated\textsuperscript{166} and concluded that "[a]ll unincorporated organizations whose major purpose is not campaign advocacy, but who occasionally make independent expenditures on behalf of candidates, are subject only to these regulations."\textsuperscript{167} Then the Court listed all the PAC registration, recordkeeping, organizational, reporting, and disclosure requirements—along with the severely limited PAC fundraising options (especially for organizations without "members")—to which MCFL would be subject if it did independent expenditures as a corporation.\textsuperscript{168} The Court concluded that it was "evident . . . that MCFL is subject to more extensive requirements and more stringent restrictions than it would be if it were not incorporated. These additional regulations may create a disincentive for such organizations to engage in political speech."\textsuperscript{169}

Because "the avenue [§ 441b] leaves open is more burdensome than the one it forecloses," which may have the "practical effect" of "discourag[ing] protected speech," the Court declared § 441b "an infringement on First Amendment activities."\textsuperscript{170} In fact, the Court declared the burden "a severely demanding task."\textsuperscript{171} Interestingly, the McConnell majority (including Justice O'Connor) refused to employ the analysis that the PAC option was too burdensome as applied to electioneering communications (at least facially) even though MCFL had held that it was too burdensome with respect to independent expenditures (and Justice O'Connor concurred specially in MCFL to point out the inadequacy of the PAC option).\textsuperscript{172}

The Court then went on to decide whether there was any "compelling state interest" as applied to MCFL and decided that organizations with the characteristics of MCFL posed none of the corruption threats that justified regulating corporations, i.e, it recognized the MCFL exception.\textsuperscript{173} There have

\begin{footnotesize}
\begin{enumerate}
\item[164] \textit{Id.} at 251-52 (quotation marks and citations omitted).
\item[165] \textit{MCFL}, 479 U.S at 252.
\item[166] \textit{Id.}
\item[167] \textit{Id.} at 252-53 (emphasis added).
\item[168] \textit{Id.} at 253-54.
\item[169] \textit{Id.} at 254.
\item[170] \textit{Id.} at 255.
\item[171] \textit{MCFL}, 479 U.S. at 256.
\item[172] \textit{Id.} at 265-66.
\item[173] \textit{Id.} at 256-63.
\end{enumerate}
\end{footnotesize}
been some interesting decisions with respect to the exception for MCFL-type
corporations, but those are beyond the scope of this article.174

What factors should be examined in determining the major purpose of an
organization? In MCFL the Court cited Buckley for the proposition that the
organization that may be treated as a political committee is one that “is either
‗under the control of a candidate or the major purpose of which is the
nomination or election of a candidate.‘”175 This is the controlling phrase, as
MCFL acknowledged by quoting Buckley, so when MCFL also employs the
more amorphous phrase, “organizations whose major purpose is not campaign
advocacy,”176 or speaks of an organization whose “major purpose may be
regarded as campaign activity,”177 the phrase “campaign advocacy” must be
understood as synonymous with the phrase “the nomination or election of a
candidate.”178

In deciding whether an organization’s major purpose is nominating or
electing candidates, MCFL indicated that courts must look at two things.179
First, the Court required examination of the organization’s “central
organizational purpose.”180 Immediately after citing Buckley for the nominating
or electing candidates formula, MCFL said that “[i]t is undisputed on this record
that MCFL fits neither of these descriptions. Its central organizational purpose
is issue advocacy, although it occasionally engages in activities on behalf of
political candidates.”181 This was obviously based on the “corporate purpose”
the Court recited at the beginning of MCFL (“[t]o foster respect for human life
. . . through educational, political and other forms of activities . . .”) taken from
MCFL’s articles of incorporation.182

Second, MCFL said that “should MCFL’s independent spending become so
extensive that the organization’s major purpose may be regarded as campaign
activity, the corporation would be classified as a political committee.”183 So an

174 All Circuits that have considered the issue reject the FEC’s position that if a group receives any
business income or business corporation contributions it doesn’t qualify for the exception, and
these courts have permitted such income and contributions, as long as they were “de minimis” and
not “substantial.” See FEC v. NRA, 254 F.3d 173, 192 (D.C. Cir. 2001); Minn. Citizens
Concerned for Life, Inc. v. FEC, 113 F.3d 129, 130 (8th Cir. 1997); Day v. Holahan, 34 F.3d 1356,
1363–65 (8th Cir. 1994); N.C. Right to Life, Inc. v. Bartlett, 168 F.3d 705, 714 (4th Cir. 1999);
absolute amount received: if $1,000, the group qualifies, but $7,000 is too much. See NRA, 254
F.3d at 192.
175 MCFL, 479 U.S. at 252 n.6 (quoting Buckley v. Valeo, 424 U.S. 1, 79 (1976)).
176 Id. at 252 (emphasis added).
177 Id. at 262 (emphasis added).
178 Id. at 252 n.6 (quoting Buckley, 424 U.S. at 79).
179 Id. at 252 n.6, 262.
180 Id. at 252 n.6.
181 MCFL, 479 U.S. at 252 n.6 (emphasis added).
182 Id. at 241.
183 Id. at 262.
organization's major purpose may be established by examining its central organizational purpose, as established in its organic documents, or by examining its spending to see if independent expenditures (or contributions) had become the organization's major purpose, which would necessarily require comparing independent spending with overall spending to determine whether the former had become the "major" financial purpose of the organization. 184

In examining an organization's central organizational purpose and expenditures for the purpose of nominating or electing candidates, the two specific activities to examine are contributions and independent expenditures. The FECA and FEC regulations both define a political committee as "any ... group of persons which receives contributions ... or which makes expenditures aggregating in excess of $1,000 during a calendar year." 185

_Buckley_ construed the contribution provision in § 434(e) ("for the purpose of ... influencing the nomination or election of candidates for federal office") 186 "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 187 _MCFL_ construed the § 441b ban on corporate and union expenditures to reach only express advocacy. 188 So in determining whether an organization's major purpose is the nomination or election of a candidate, it is only proper to examine the organization's express advocacy activity.

In the wake of _BCRA_ and _McConnell_, has anything changed? As noted early in this article, _BCRA_ 's sponsors chose to tack the electioneering communication onto a disclosure requirement and onto the ban at § 441b, not to include it in the definition of expenditure, contribution, or political committee. Therefore, nothing has changed with respect to the major purpose test. The lack of statutory change to the functional definitions means that no other activities, such as "electioneering communications" or "federal election activities" 189 may be considered in determining whether an organization's major purpose is the nomination or election of candidates absent a change in the statute.

But did _McConnell_ say anything that would indicate that broadening the concept of major purpose could be constitutionally warranted if a statutory change were made? _McConnell_ described electioneering communications as the "functional equivalent" of express advocacy. 190 Would Congress then be

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184 See id.
187 Id. at 80.
188 _MCFL_, 479 U.S. at 249.
189 "Federal election activity" includes: (1) voter registration within 120 days of any federal election, (2) voter identification and get-out-the-vote activity, (3) generic campaign activity (promoting a political party), and (4) issuing any public communications that promote/support or attack/oppose a referenced federal candidate ("whether or not the communication expressly advocates a vote for or against a Federal candidate"). 11 C.F.R. § 100.24(b)(1)-(3) (2003).
warranted in redefining the terms "contribution," "expenditure," or "political committee" to include electioneering communications? One very good reason for a negative answer is that the full outline of the electioneering communication domain has not been shaped by the inevitable series of as-applied challenges that the Court necessitated by refusing to engage in a narrow tailoring analysis to separate out the things permissibly excluded from the facially-approved ban.\textsuperscript{191} Grass roots lobbying is a clear example of activity that should be excluded in a facial challenge.\textsuperscript{192}

Two other serious contenders for as-applied exemptions are legislative score cards (telling voters how legislators voted on issues of vital importance) and voter guides (telling voters the positions of candidates on vital issues). While these latter two are usually not broadcast, there is no reason they could not be,\textsuperscript{193} and if an electioneering communication ban were expanded by Congress or a state to reach print media, these two traditionally print media communications would be clearly at issue. Surely there will be an as-applied exception for organizations that have good reasons for not wanting a PAC, such as the ACLU has stated concerning itself.\textsuperscript{194} These and other as-applied issues are currently bound up in the electioneering communication ban waiting to be liberated. But until they are, any major purpose test that includes electioneering communications would convert into PACs organizations that simply urge the public to contact their candidate-legislator and advise him or her how to vote on an immediately pending bill. This would be damaging to our American system of participatory democracy and inconsistent with the Supreme Court's instruction that "major purpose" must be based on activities furthering the nomination or election of candidates.\textsuperscript{195}

Even further afield would be any notion of including within the major purpose test whether an organization engages in federal election activities. Voter registration bears little resemblance to the express advocacy activities approved to date. BCRA expressly indicated that nonprofit corporations would be able to engage in "federal election activity" because it referred to them doing just such activity in 2 U.S.C. § 4411(e)(4), wherein it provided rules governing the solicitation by federal officials of funds for section 501(c) organizations that engage in "federal election activities," including those whose "principal purpose

\textsuperscript{191} See discussion \textit{supra} Part I.C.5. and related notes.
\textsuperscript{192} See \textit{supra} note 123.
\textsuperscript{193} In a case brought by Hawaii Right to Life against the FEC in the United States District Court for the District of Columbia, plaintiff alleged plans to broadcast radio advertisements comparing the positions of the candidates on pro-life issues. After a preliminary injunction for plaintiff, the FEC agreed to declaratory and permanent injunctive relief for plaintiff on the basis that it was an \textit{MCFL-type organization despite receipt of de minimus business activities and contributions from business corporations. See Hawaii Right to Life v. FEC, No. 02-02313 (D.D.C. Dec. 16, 2002) (Final Order).
\textsuperscript{194} See \textit{McConnell}, 124 S. Ct. at 768; \textit{supra} note 10.
\textsuperscript{195} FEC v. \textit{MCFL}, 479 U.S. 238, 252 n.6 (1986).
is to conduct" voter registration, voter identification, get out the vote (GOTV), or promoting political parties, all of which were noted in *McConnell*.\(^{196}\) Moreover, regulation of "federal election activity" was imposed on political *parties* in BCRA, not even on political committees in general, let alone other organizations.\(^{197}\) *McConnell* decided, in response to an equal protection claim that BCRA "discriminates against political parties in favor of special interest groups such as the National Rifle Association (NRA), American Civil Liberties Union (ACLU), and Sierra Club" with the federal election activity restriction, that political parties differed from those citizen groups and the difference justified the differing treatment.\(^{198}\) *McConnell* expressly said that "[i]nterest groups ... remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications)."\(^{199}\) There is no suggestion in the opinion that such groups would be converted to PACs for doing this federal election activity.\(^{200}\)

Finally, it should be noted that 2 U.S.C. § 431 defines a "political committee" as an organization that receives *contributions* (i.e., donations intended to be used to make contributions to candidates or for express advocacy) of $1,000 or more in a calendar year or makes *expenditures* (i.e., express advocacy communications) of $1,000 or more in a calendar year.\(^{201}\) The trigger amount of $1,000 must be for financial transactions that have been construed, as noted above, to encompass only contributions to candidates or express-advocacy

\(^{196}\) See *McConnell*, 124 S. Ct. at 682 (emphasis added).


\(^{198}\) *McConnell*, 124 S. Ct. at 685.

\(^{199}\) Id. at 686.

\(^{200}\) In a recent application of the major purpose test, the Fourth Circuit rejected a test that created a rebuttable presumption that an organization was a political committee if it expended three thousand dollars or more on contributions or expenditures, noting that

[...]

N.C. Right to Life, Inc. v. Leake, 344 F.3d 418, 430 (4th Cir. 2003), *petition for cert. filed* Dec. 22, 2003. As to elements to examine in determining major purpose, the Fourth Circuit approved "examining an entity's stated purpose ... and the extent of an entity's activities and funding devoted to pure issue advocacy versus electoral advocacy." Id. at 430 (noting that MCFL described MCFL's "central organization purpose" as "issue advocacy," id. at 430 n.4 (citation and quotation marks omitted)).

independent expenditures. Because BCRA did not incorporate electioneering communications into the definition of "political committee," "contribution," or "expenditure," an organization cannot be treated as a political committee unless it receives contributions for or makes expenditures for express advocacy or contributions to candidates. The practical effect of how Congress designed BCRA is that an organization may have the major purpose (i.e., spend the majority of its funds) on electioneering communications and not be treated as a political committee so long as it makes no candidate contributions or express advocacy expenditures (or receives contributions for such purposes), or if it does, it keeps "contributions" and "expenditures" under $1,000 in a year. The organization would be required to report the electioneering communications under BCRA, but would not be converted to a PAC by such electioneering communication activity.

III. MCCONNELL DID NOT REVISE STANDARDS UNDER I.R.C. § 527

McConnell also did not revise the standards for organizations known as "political organizations" under § 527 of the Internal Revenue Code (I.R.C.). BCRA changed FECA, not the tax code. While I.R.C. political organizations and FECA political committees might seem to have some similarities, § 527 "exempt function" activity is much broader than the activity that defines FECA political committees.

Section 527 deals with taxation of "political organizations," which are defined as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." Section 527 exempts "political organizations" from tax on "exempt function" income but imposes tax on "exempt functions" done by nonprofit organizations, such as those under I.R.C. § 501(c)(4) (social welfare organizations, the common form for citizens' issue advocacy groups), § 501(c)(5) (labor organizations), and § 501(c)(6) (business leagues).

So the concept of "exempt function" is key to the reach of § 527. Section 527 defines "exempt function" as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors . . . ."
The § 527 concept of "influencing" is very broad under the I.R.C., as is the concept of "political intervention," which is prohibited to organizations exempt under § 501(c)(3).\textsuperscript{208} For example, IRS Revenue Ruling 2004-6, says that if a § 501(c) organization engages in express advocacy, it clearly has engaged in an exempt activity.\textsuperscript{209} But even if it does not engage in express advocacy it may have engaged in an "exempt function" communication, based on (but not limited to) six factors: (1) candidate identification, (2) proximity to an election, (3) targeting of voters, (4) identifying a candidate’s position on the issue topic of the communication, (5) identifying a candidate’s position on an issue distinguishing the candidate that was raised in the campaign, and (6) whether the communication was part of a series on the issue.\textsuperscript{210} By its terms, this ruling goes beyond express advocacy, and clearly such broad criteria could sweep in issue advertising, grass roots lobbying, legislative scorecards, and voter guides.\textsuperscript{211} Because the definition of "influencing" in § 527 has not been narrowed by express advocacy glosses, "exempt function" activity is broader than the activity that would subject an organization to regulation under FECA, and the concept of "political organization" under § 527 is broader than "political committee" is under FECA.\textsuperscript{212} An organization may be a "political organization," because it is organized or functions primarily to engage in "exempt function" activity, but not be a "political committee" because it is not under the control of a candidate and its major purpose is not the nomination or election of candidates for federal office.\textsuperscript{213}

For campaign finance law purposes, FECA defines "political committee" in relevant part as "any ... group of persons which receives contributions ... or which makes expenditures aggregating in excess of $1,000 during a calendar year."\textsuperscript{214} The FECA definitions of "contribution"\textsuperscript{215} and "expenditure"\textsuperscript{216} both

\textsuperscript{208} In an Internal Revenue Service (IRS) publication for IRS agents, a section heading dealing with 501(c)(3) organizations asks the question, "Is it feasible for the Service to adopt the FEC 'express advocacy' standard?" The manual’s answer is “No, it is not feasible for the Service to adopt the FEC 'express advocacy' standard to determine when participation or intervention in a political campaign on behalf of or in opposition to a candidate for public office has occurred” (and proceeds to give examples of non-express advocacy activity that the IRS would consider to be political intervention). \textsc{Internal Revenue Service, Exempt Organizations: Technical Instruction Program for FY 2002} at 346 (nd).


\textsuperscript{210} Id.

\textsuperscript{211} The revenue ruling declares that “[c]ertain broadcast, cable, or satellite communications that meet the definition of 'electioneering communications' are regulated by [BCRA] ... an exempt organization that violates the regulatory requirements of BCRA may well jeopardize its exemption or be subject to other tax consequences.” \textit{Id.}


\textsuperscript{215} \textit{Id.} § 431(8).

\textsuperscript{216} Id. § 431(9).
rely on the phrase "for the purpose of influencing" and have been construed to require express advocacy as previously discussed. Because BCRA did not incorporate electioneering communications into the definitions of contribution, expenditure, or political committee, the meaning of political committee has not been broadened by BCRA (or McConnell).

Despite the fact that § 527 encompasses much more activity than FECA regulates, the FEC General Counsel recently sought to conflate the two — and to extend the effect of BCRA and McConnell in an unwarranted fashion — in a draft response to an advisory opinion request (AOR 2003-37) from a § 527 organization, Americans for a Better Country ("ABC").

ABC sought FEC advice on how it should allocate expenditures between federal and non-federal fund accounts following BCRA and McConnell. The draft opinion was written in broad terms that would logically have extended to myriad nonprofit organizations and required them to spend federal money (raised under FECA source, amount, and reporting restrictions) for a wide variety of democracy-promoting activities, including communications that refer to federal officeholders that could be interpreted as promoting, supporting, attacking, or opposing candidates; voter registration; and get-out-the-vote activity. The draft opinion was the subject of a flurry of comments from nonprofits, and the eventual advisory opinion expressly sought to limit it to the facts of ABC: "The fact that ABC is a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt

218 The breadth of § 527 compared to FECA is also demonstrated by contrasting an IRS private ruling and an FEC ruling on the subject of state ballot initiatives. In IRS Private Ruling 9249002, 1992 PRL Lexis 1865 (June 30, 1992) (note: private rulings may not be used or cited as precedent), the IRS allowed a § 527 political organization to not pay tax on money spent in connection with state ballot referenda (that amounted to about 30% of its expenditures), considering the expenditures to be exempt function activity because they also promoted the campaigns of state and local candidates in various states by raising issues important to candidate's campaigns and forcing candidates to take public positions on the issues. See also IRS Private Revenue Ruling 199925051, 1999 PRL Lexis 500 (Mar. 29, 1999) (including non-neutral voter guides, voting records, and grass roots lobbying within § 527 exempt function activity and so forbidden to a § 501(c)(4) nonprofit under the I.R.C.).

219 By contrast, the FEC has stated that such mere expenditures on ballot initiatives would not be governed by FECA: "The Commission has stated that contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act. Advisory Opinions 1984-62, fn.2, and 1980-95. See also Advisory Opinion 1982-10." FEC Advisory Op. 1989-32 at 4 (noting the advisory opinion found that under certain unusual circumstances, such as in the case under consideration where the expenditures for the initiative were made by a "controlled committee" and the initiative was sponsored and promoted by a candidate and the initiative by law bore his name, ballot measure expenditures could be considered FECA expenditures).

220 Id.
The final advisory opinion required a wide range of ABC's activities to be paid for, in whole or in part, with federal money, including voter identification, registration, and mobilization activities.

Because the general counsel's opinion was the focus of such debate, it serves as a useful analytical tool to show how BCRA and McConnell do not warrant such expansion of federal restrictions on the activities of citizen groups. The approach taken in the General Counsel's draft ignored the limited nature of what Congress did in BCRA and what the Supreme Court said in McConnell. Instead, it proposed to dramatically expand the prohibitions in law on the basis of erroneous premises. Basically, the draft argued that the political party "federal election activity" restrictions should be applied beyond their narrow statutory context of political parties to § 527 organizations that are not political parties, and by logical extension to § 501(c) organizations that are neither political parties nor § 527 organizations. Neither extension is justified, as discussed below.

Insightful comments were provided on the draft response, including the comments of Public Citizen, which supported the apparent goal of the draft opinion but questioned the means chosen and noted that incorporating "federal election activity" within the definition of "expenditure" cannot be limited to § 527 organizations, and the excellent comments on behalf of America Coming Together ("ACT"), prepared by Judith L. Corley and Laurence E. Gold, which contained twenty pages of analysis. Especially in light of the extensive analysis of the ACT Comments, there is no need to restate many of the flaws of the draft response. Rather, a few concise points will be made.

As to non-party federal PACs (such as ACT), the draft opinion argued that federal PACs are similar to political party committees because they "are focused on the influencing of Federal elections" and because their "communications have no less a 'dramatic effect' on Federal elections." As a result, the General Counsel argued that (1) it would be "equally appropriate" to use "federal election activities" "as a benchmark for determining whether communications

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222 FEC Advisory Op. 2003-37. The advisory opinion further added that “[i]n making this determination, the Commission is in no way addressing the legal status of organizations that are not political committees under the Act, including organizations operating under section 501(c)(3) and section 501(c)(4) of the Internal Revenue Code. The Commission will address the legal status of such organizations in a rulemaking this Spring.” Id. at 3 n.3.

223 See id.

224 "Federal election activity” includes: (1) voter registration within 120 days of any federal election, (2) voter identification and get-out-the-vote activity, (3) generic campaign activity (promoting a political party), and (4) issuing any public communications that promote/support or attack/oppose a referenced federal candidate (“whether or not the communication expressly advocates a vote for or against a Federal candidate”). 11 C.F.R. § 100.24 (2003).

225 The comments are available under “Comments on Draft AO” under “AOR 03-37” at the FEC’s website, at http://www.fec.gov/aoreq.html (last visited Mar. 9, 2004).

made by political committees must be paid for with Federal funds,” and (2) they should automatically have the expertise (as McConnell said regarding political parties) to know what the seemingly vague phrase “promotes or supports, or attacks or opposes” means as applied to a referenced federal candidate. Consequently, federal PACs may not allocate “federal election activity” to non-federal accounts, but must pay for it all with federal money.

The draft opinion’s approach was erroneous because it extended BCRA provisions applicable only to political parties to § 527 political organizations that are not political parties and do not share the critical characteristics of political parties that the McConnell Court said justified the more severe limitations on them. By logical extension, because the General Counsel would incorporate “federal election activities” into “expenditures,” the draft response’s analysis would be equally applicable to § 501(c) groups, whose major purpose is not political activity. This would mean that not only federal political committees, but also § 527 political organizations and § 501(c) citizen groups and labor unions would be prohibited from nonpartisan voter registration and get-out-the-vote activities and from publicly referring to public officials in ways that might be considered attacking, opposing, promoting, or supporting the candidate throughout the year and by communications through any means.

There was nothing to keep the inclusion of “federal election activity” in the meaning of “expenditure” from extending to all other groups through the prohibitions of § 441b and the political committee definition of § 431(4). As Public Citizen pointed out in its comments, “the draft opinion focuse[d] its ruling on the activity subject to regulation — communications that ‘promote or support, or attack or oppose a clearly identified federal candidate’ — rather than the class of groups subject to regulation.”

Nor could voter mobilization activity be excluded from the incorporation of “federal election activities” into “expenditures,” as the General Counsel’s draft appeared to do. “Federal election activity” is a statutorily defined package, providing no authority for FEC subdivision. Likewise, all these activities affect elections, without differentiation. The application to all parts of “federal election activity,” like the application to all groups governed by “expenditure,” is an all-or-nothing package.

Furthermore, BCRA expressly contemplates that nonprofits would be able to engage in “federal election activity,” because it referred to them doing just such activity in 2 U.S.C. § 441i(e)(4), wherein it provided rules governing the classification of “political activity” for purposes of public funding.

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227 Id.
228 Id.; 11 C.F.R. § 100.24(b)(3) (2003).
solicitation by federal officials of funds for § 501(c) organizations that engage in “federal election activities,” including those whose “principal purpose is to conduct” voter registration, voter identification, get out the vote, or promoting political parties. 233 If hard-money was required to conduct “federal election activities,” it would be illegal for incorporated § 501(c) organizations to engage in these activities under § 441b, and incorporated and unincorporated § 501(c) organizations would be considered federal PACs if these activities were considered their major purpose. Congress would not write solicitation rules for activities that it would be illegal for groups to conduct and for groups that would not exist.

The Supreme Court in McConnell also recognized that § 501(c) organizations and § 527 organizations would continue to be involved in “federal election activity.” “Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than “electioneering communications),” 234 indicating that these organizations would operate under rules different from those governing political parties. The Court even rejected an equal protection challenge by political parties that political parties could not do “federal election activities,” while other groups were able to do so. 235

Furthermore, § 527 organizations, and certainly § 501(c) organizations, do not share the characteristic of political parties that the McConnell Court found decisive in upholding the “federal election activities” restrictions on political parties.

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. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress’ efforts at campaign finance regulation may account for these salient differences. 236

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233 Id. at 682.
234 Id. at 686.
235 Id.
236 Id.
The FEC General Counsel’s draft opinion for ABC, and the final advisory opinion,\(^\text{237}\) also relied on the notion that § 527 political organizations must declare themselves to the IRS as political organizations, so that they acknowledge that they are “organized and operated primarily for the purpose of” engaging in exempt function activity, i.e., “influencing” elections. In particular, ABC announced that it had the purpose of electing President Bush.\(^\text{238}\) The FEC’s notion says in effect, “well, they’ve said they’re political anyway, so we can treat them the same as a political committee.”

But as noted above, the concept of “exempt activity” under § 527 is broad, so that an organization could have a primary purpose of “exempt activity” without having the major purpose of nominating or electing candidates.

The test for a political committee is not what an organization says about itself but the nature of the organization. For example, a § 501(c)(3) nonprofit could have the purpose of electing Bush and yet operate wholly within the law permitting it to be recognized as nonprofit under § 501(c)(3). A citizen watchdog group under § 501(c)(4) could also have the purpose of electing Bush, but do all express advocacy and electioneering communications through a connected PAC and nonpartisan voter registration activity in permissible ways through a connected educational entity (under § 501(c)(3)), so as to be wholly in compliance with all laws permitting it not to be classified, or treated, as a political committee. In fact, the FEC has already been instructed on the closely related issue of when an organization is a political committee under the major purpose test by a federal court in a way that forecloses the FEC’s present argument.

In \textit{FEC v. GOPAC, Inc.},\(^\text{239}\) the FEC filed an action against GOPAC, Inc. alleging that it was a political committee and had failed to register and report under FECA.\(^\text{240}\) The FEC asserted that in 1989 and 1990, GOPAC was a political committee “because (1) its ‘major purpose [was] electoral activity,’ and (2) it made expenditures and received contributions of $1,000 or more for the purpose of influencing federal elections.”\(^\text{241}\) The FEC conceded that GOPAC had made no direct contributions to federal candidates in the disputed years, focusing in those years on contributions to state and local candidates, but the FEC focused on GOPAC’s stated purpose “to help the Republican Party ‘to become competitive in more congressional districts’ and ‘to win a majority in the U.S. House of Representatives’ . . . ‘with an eye to 1991.’”\(^\text{242}\) The court’s declared rule clarified that an organization’s actual activities must bear out any


\(^{240}\) \textit{id.} at 852.

\(^{241}\) \textit{id.} at 853 (citation omitted).

\(^{242}\) \textit{id.} at 853-54 (citations omitted).
proclaimed purpose before an entity may be declared a political committee: "an organization is a 'political committee' under the Act if it received and/or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office."\textsuperscript{243}

So under \textit{GOPAC}, it is not enough for an organization to declare a political purpose to be treated as a political committee. Rather, the actual expenditures of the organization must reflect that it has the major purpose of supporting or opposing particular candidates. Consequently, the fact that an organization is an I.R.C. "political organization" is not sufficient reason to treat it as an FECA "political committee."

\textbf{IV. \textit{McConnell} Sowed the Seeds of Its Own Narrow Limitation and Reversal}

The electioneering communication ban was upheld by a narrow 5-4 majority. The analysis was obviously disingenuous at two crucial analytical points: (1) the Court's sleight of hand in substituting substantial overbreadth analysis for narrow tailoring analysis when it purported to be engaging in strict scrutiny and (2) the majority's refusal to be governed by stare decisis and acknowledge that the express advocacy test was about more than constructions to avoid vagueness.

The opinion was also flawed because it revealed a shocking disregard for the First Amendment, especially the right to criticize government officials by the most effective means, and the right of people of ordinary means to participate in the American system of government by pooling their resources in citizen groups to amplify their voices in the marketplace of ideas. Consequently, \textit{McConnell} sowed the seeds of its own narrow limitation and eventual reversal. Such flawed decisions fail the test of time.

\textbf{A. McConnell Blinded When Confronted with Narrow Tailoring, Leaving a Fatally Flawed Decision and the Necessity for Expensive, Burdensome As-\textsc{Applied} Litigation}

The Court's prestidigitation to escape the narrow-tailoring prong of "strict scrutiny" has been examined\textsuperscript{244} and needs no repetition except to note that (a) it brushed aside by legerdemain the central legal issue, i.e., narrow tailoring, over which the parties and district court had contended for months and upon which they had expended enormous resources in studies, expert witnesses, counsel time, argumentation, judicial resources, and lower-court opinion pages; (b) it revealed the flawed analysis that the \textit{McConnell} majority felt compelled to

\textsuperscript{243} \textit{Id.} at 862.
\textsuperscript{244} \textit{See supra} Part I.C.5.
employ to defendant its position, and (c) it presages further narrowing litigation of as-applied issues.

B. McConnell’s Pretense That the Express Advocacy Test Was Just About Constructions Does Not Square With Buckley and MCFL

In order to uphold theelectioneeringcommunication ban, the majority had to pretend that there was no substantive, constitutional protection of issue advocacy in Buckley and MCFL and insist that those cases were just about “constructions” to avoid vagueness. This flawed analysis has been touched upon at various points in this article, but a careful study of Buckley and MCFL shows just how badly flawed was the McConnell majority’s assertion. The following exegesis of Buckley and MCFL on the express advocacy test was set before the Court in briefing (in expanded form), and the Court’s failure to address the argument speaks plainly about the short shrift given to stare decisis.

When Buckley considered § 608(e)(1)’s spending limits on independent expenditures and construed “relative to a clearly identified candidate” to require explicit words express advocating the election or defeat of a clearly identified candidate, what was the fatal defect the Court sought to avoid when it said that “advocating” was too vague absent the “expressly” modifier? The Court immediately answered this question: “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.”

So the dichotomy Buckley established in its primary discussion of the express advocacy test was between (1) “discussion of issues and candidates,” commonly known as issue advocacy, and (2) “advocacy of election or defeat of candidates,” commonly known as express advocacy. The express advocacy test was designed to protect the former, i.e., issue advocacy. The distinction between the two was necessary because “[c]andidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of their positions on various public issues, but campaigns themselves generate issues of public interest.” In other words, issue advocacy that includes discussion of candidates and issues is essential to citizens’ participation in our representative democracy.

\[246\] Buckley v. Valeo, 424 U.S. 1, 42-44, 80 (1976).
\[247\] Id. at 42 (emphasis added).
\[248\] Id.
\[249\] Id.
\[250\] See id.
The Court then quoted approvingly the Court of Appeals' recognition that issue advocacy would influence elections:

Public discussion of public issues which also are campaign issues readily and often unavoidably draws in candidates and their positions, their voting records and other official conduct. Discussions of those issues, and as well more positive efforts to influence public opinion on them, tend naturally and inexorably to exert some influence on voting at elections.\(^{251}\)

Issue advocacy, then, includes discussion of candidates and their positions, records, and conduct; it goes beyond mere "discussion" to "more positive efforts to influence public opinion on them."\(^{252}\) These constitutionally protected actions may "exert some influence on voting at elections," but they are protected nevertheless.\(^{253}\)

The Court went on, in *Buckley*, to flesh out the breadth of issue advocacy with a quote from *Thomas v. Collins*\(^{254}\) indicating that express advocacy cannot depend on intent or effect and that issue advocacy extends to "discussion, laudation, [and] general advocacy," so that only "solicitation" or "invitation" (i.e., "advocacy of election or defeat of candidates") can be regulable express advocacy:

[\(W\)hether words intended and designed to fall short of *invitation* [to vote for or against a candidate] would miss the mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation . . . . [T]he supposedly clear-cut distinction between *discussion*, *laudation*, *general advocacy*, and *solicitation* puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning.]

\(^{251}\) *Id.* at 43 n.50 (citation omitted).
\(^{252}\) *Buckley*, 424 U.S. at 43 n.50.
\(^{253}\) *Id.*
\(^{254}\) 323 U.S. 516, 535 (1945).
Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim.  

So the "free discussion" that requires the "security" of the express advocacy test is this broadly described issue advocacy. The reason the Court was concerned with "vagueness" was not only that some language was ambiguous, but that the language substantively regulated this "free discussion."

Thus, while the Court spoke of vagueness in these passages, there was an underlying overbreadth concern. "The constitutional deficiencies described in *Thomas v. Collins* [to] be avoided" were not fuzzy words (vagueness), but the failure to protect "discussion, laudation, [and] general advocacy" (i.e., issue advocacy) from regulation. Avoiding these deficiencies meant avoiding the abridgment of issue advocacy. *Buckley* said, "[s]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."

Further, since the express advocacy test was narrow and citizens remained free "to promote [a] candidate and his views" through issue advocacy, this Court fully recognized that it was permitting communications that would affect an election: "It would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefitted the candidate's campaign." But the Court was permitting such unfettered issue advocacy because it is vital to our representative democracy:

Discussion of public issues and debate on the qualifications of candidates [i.e., issue advocacy] are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

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255 *Buckley*, 424 U.S. at 43 (quotation marks and citation omitted) (emphasis added).

256 *Id.* at 43.

257 *Id.*

258 *Id.* at 45.

259 *Id.*

260 *Id.* at 14 (citation omitted).
The Supreme Court in *Buckley* declared, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs, ... of course including discussions of candidates,” including the right of citizens to band together to engage in issue advocacy.

In construing § 434(e)’s “require[d] direct disclosure of what an individual or group contributes or spends [over $100] ... for the purpose of ... influencing’ the nomination or election of candidates for federal office” to require express advocacy, the Court said that “the ambiguity of this phrase ... poses constitutional problems” of the same sort encountered in dealing with the independent expenditure cap: “it shares the same potential for encompassing both issue discussion and advocacy of a political result.” Therefore, the concern about the “ambiguity” was over whether the provision was overbroad for sweeping in protected issue advocacy – the same concern the Court had just addressed with respect to § 608(e)(1). As with the prior provision, the Court addressed the overbreadth concern by applying the express advocacy test: “To insure that the reach of § 434(e) is not impermissibly broad, we construe ‘expenditure’ for purposes of that section in the same way we construed the terms of § 608(e) – to reach only funds used for communications that expressly advocate [footnote] the election or defeat of a clearly identified candidate.”

\[\text{\textsuperscript{261}}\textit{Buckley}, 424 U.S. at 14 (citation omitted) (emphasis added).\]
\[\text{\textsuperscript{262}}\textit{Buckley} recognized the constitutional right of people to associate in ideological corporations for issue advocacy: \]

\begin{quote}
The constitutional right of association ... stemmed from the Court’s recognition that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. Subsequent decisions have made clear that the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses the right to associate with the political party of one’s choice.
\end{quote}

\[\text{\textsuperscript{ld. at 15} (internal quotation indicators and citations omitted).}\]
\[\text{\textsuperscript{263} Id. at 75-77 (citation omitted).}\]
\[\text{\textsuperscript{264} Id. at 77.}\]
\[\text{\textsuperscript{265} Id. at 79.}\]
\[\text{\textsuperscript{266} Id. at 80. That the Court’s intent was to protect issue advocacy here is further borne out by its plain statement that issue advocacy is not mere discussion: “As narrowed, § 434(e), like § 608(e)(1), does not reach all partisan discussion for it only requires disclosure of those expenditures that expressly advocate a particular election result.” Id. at 80 (emphasis added). This last phrase, “advocate a particular election result” refers solely to that which may be constitutionally regulated under § 608(e)(1), which the Court had just said are expenditures “for...} \]
MCFL removed any doubt that the "vagueness" concerns in Buckley were focused on protecting issue advocacy from overbroad legislation. MCFL said that the express advocacy test was imposed on the FECA "expenditure" definition "to avoid problems of overbreadth." The dichotomy affirmed in MCFL was between "[1] discussion of issues and candidates and [2] advocacy of election or defeat of candidates," which it established in its introduction of the express advocacy test. Removing all doubt, the MCFL Court reiterated the dichotomy in other terms with identical meaning: "Buckley adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons." MCFL reiterated that the express advocacy test required express words of advocacy, such as those in Buckley's footnote fifty-two, which should remove all doubt that some other "express advocacy" test could be substituted.

In sum, careful textual analysis of Buckley and MCFL reveals that the Supreme Court established the constitutionally-mandated principle that wherever legislation or regulation borders on issue advocacy — whether it is § 608(e)(1), § 434(e), or § 441b — issue advocacy must remain unfettered and protected by a bright-line test that requires explicit words expressly advocating the election or defeat of a clearly identified candidate.

Not only did the McConnell majority disregard these plain statements from Buckley and MCFL, but it even stole the language about the sometime practical difficulty of distinguishing a discussion of issues and candidates from expressly advocating for the election or defeat of a candidate and used it to claim that Buckley supported the argument that issue advocacy could not be effectively distinguished from express advocacy so that the former must be regulated. Of course, this goes to the very core of the McConnell majority's sea change concerning the First Amendment, as discussed next.

communications that expressly advocate the election or defeat of a clearly identified candidate." Id. Consequently, the phrase "advocate a particular election result" can only mean "expressly advocate the election or defeat of a clearly identified candidate." See id. So any effort to draw a false dichotomy between "issue discussion and advocacy of a political result" must therefore be rejected.

268 Id. at 249 (quoting Buckley, 424 U.S. at 42) (emphasis added).
269 Id.
270 Id. MCFL's discussion of the express advocacy in MCFL's newsletter did not expand the reach of the express advocacy test. The newsletter identified pro-life candidates and urged the reader to vote "pro-life." Id. This Court said this "provides in effect an explicit directive" and the slightly less direct exhortation "does not change its essential nature." Id. (emphasis added). But this does not establish a test looking to the "effect" or "essence" of a communication, only that if A=B and B=C, then A=C.
C. McConnell Abandoned Free Expression and People of Ordinary Means

In *Buckley* and *MCFL*, the Court still saw itself as the protector of the free speech liberty. So if issue advocacy and express advocacy were sometimes difficult to separate, then a bright-line test had to be employed to be certain free speech was not trampled. Consequently, the express advocacy test says that, even if issue advocacy affects elections, the core right of the people to criticize incumbents and speak out on public issues (in the most effective ways possible, including organizing into nonprofit advocacy corporations and using broadcast ads) is so sacrosanct that some influencing of elections must be permitted in order to protect free speech. In short, *Buckley* and *MCFL* agreed with the Court’s constitutional principle underlying the Court’s recent declaration in *Ashcroft v. Free Speech Coalition* that “[t]he Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.”

The *McConnell* majority switched the presumption that had favored free speech, abandoned its role as guardian of the First Amendment and the people’s liberty, and aligned itself with incumbent politicians. *McConnell* said that “*Buckley*’s express advocacy line ... has not aided the legislative effort to combat real or apparent corruption, and Congress enacted BCRA to correct the flaws it found in the existing system.” The dissent ably articulated that BCRA’s legislative history and design reads like an incumbent protection plan (to which, as noted *supra*, the Court responded that it had taken care of that problem with a lowered standard of review out of deference to Congress’ political expertise). The *McConnell* approach says that avoiding (its newly expanded concept of) corruption is the ultimate goal, and the right of the people to broadcast criticisms of government officials and comments on vital public issues must be subordinated.

The two presumptions are starkly different and bear repetition. *Buckley* and *MCFL* presume that free speech is so important, in itself and as an essential part of American democracy, that even if some of it influences elections it must be permitted because of the greater good of liberty and participatory government. *McConnell* presumes that helping Congress inhibit circumvention is so important that the liberty of the people to speak and participate in democracy must be suppressed.

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273 *McConnell*, 124 S. Ct. at 689.
274 See *id.* at 720-21, 728-29 (Scalia, J., dissenting); *id.* at 753-54 (Kennedy, J., dissenting, joined by Rehnquist, C.J., and Scalia, J.).
275 See *supra* notes 125-27 and accompanying text.
Buckley and MCFL protected the person of ordinary means. McConnell protects incumbents, wealthy individuals, celebrities, and giant media corporations at the expense of the ordinary person.

The very reason there are advocacy groups is to allow persons of ordinary means to band together (the right to associate) to amplify their voices (the right to speak) to participate in the marketplace of ideas (American participatory democracy) by encouraging public officials (the right to petition) to implement policies that the individuals believe are vital to the public interest. To effectively affect public policy, people of ordinary means must pool their resources to form citizen groups that provide the technical and informational expertise in tracking public policy issues that ordinary people lack. The people identify with these groups, read their newsletters and emails, and give sacrificially to them because they care about the direction of this nation. The people expect their advocacy organizations to speak for them. They expect them to do so in the most effective means possible, by incorporating for liability protection and by speaking out when needed through broadcast ads.

Incumbent politicians can still be heard in the marketplace after BCRA (no longer bothered by pesky watchdog groups yapping at their heels). Wealthy persons can still be heard after BCRA. Celebrities can still be heard after BCRA. Giant media conglomerates can still be heard after BCRA. But the voice of the common man is lowered to a whisper that may be readily disregarded.

BCRA was pushed through Congress by incumbents and lauded by media corporations, both of whom stood to benefit from the silencing of citizen groups. People of ordinary means looked to the Court, as guardian of the First Amendment, to protect their rights. It was, after all, out of the people's fear that government might try to silence them that they refused to ratify the Constitution until there was appended the guarantee in the Bill of Rights that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." But the Court failed the people.

Lady Liberty sits defamed, disgraced, and destitute awaiting a champion to restore her honor. Champions were found in the McConnell dissent. More will come.

276 U.S. Const. amend. I.
THE "MAJOR PURPOSE" TEST: DISTINGUISHING BETWEEN ELECTION-FOCUSED AND ISSUE-FOCUSED GROUPS

by Edward B. Foley*

This essay addresses a constitutional question unresolved by McConnell v. FEC,¹ a question crucial to the current controversy over the regulation of non-party interest groups. The question is whether it is permissible to limit the contributions that non-party groups receive from individual donors to a specified amount – for example, $5000 per donor per year – when any electioneering activities undertaken by the group are conducted independently from the activities of political parties and their candidates. Drawing on the foundational precedent of Buckley v. Valeo,² this essay argues that the answer to this constitutional question should turn on whether the non-party group is either election-focused or issue-focused in the predominant portion of its activities.³

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¹ 124 S. Ct. 619 (2003). Subsequent citations to specific pages of McConnell are to the slip opinion available on the Supreme Court’s web page.

² 424 U.S. 1 (1976) (per curiam).

³ This essay builds upon an article I co-authored with my colleague Donald Tobin. See Edward B. Foley & Donald Tobin, Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold, 72 U.S.L.W. 2403 (Jan. 20, 2004). I have endeavored to make this new essay a “stand-alone” piece, without repeating except as absolutely necessary points made in the earlier article. For readers interested in exploring more details concerning the statutory issues related to the regulation of non-party groups under federal campaign finance laws, including the treatment of “527 groups” (named after section 527 of the Tax Code), I recommend that they consult the earlier article.
Now that *McConnell v. FEC* has settled that it is constitutional for Congress to limit the amount of money an individual may contribute to a political party for activities designed to influence federal elections, questions remain concerning similar limits on contributions to other types of political or ideological groups. Political parties are hardly the only kind of organization interested in influencing the outcome of federal elections. Independent political committees, or PACs (as they are more colloquially called), by definition have influencing federal elections as their "major purpose," even if they do not coordinate their own election-motivated activities with a political party or a candidate's own campaign committee.\(^4\) In other words, a group of citizens may form an organization for the avowed purpose of a defeating an incumbent candidate – "Citizens Seeking Change" they might call it – and yet remain unaffiliated with a political party or the campaign committee of the incumbent's opponent. Given its self-proclaimed purpose, this group would be a political committee under the Federal Election Campaign Act (FECA), as interpreted by the Supreme Court in *Buckley v. Valeo*. But it remains unsettled whether contributions from individuals to this group may be subject to the same kind of dollar limit that *McConnell* ruled permissible with respect to political parties.

Moreover, ideological groups that do not have influencing elections as their *major purpose* nonetheless may seek to influence a federal election as a secondary objective that is ancillary to their primary ideological purpose. Such ideological groups may be devoted to a single issue, like gun control or environmental protection, or an array of issues, like making America a more just society with respect to the availability of health care, education, and other basic needs. If an environmental group believes that winning a certain election is important to its overarching goal of protecting the environment, then it will spend a portion of its resources on activities specifically designed to achieve this electoral result. Likewise, a group devoted to the general cause of making America more just – let's call it "Citizens for a Better America" – might believe that winning a particular election was crucial to its cause and, therefore, allocate a significant portion of its available assets to this specific purpose. For simplicity's sake, we can refer to these ideological groups as "issue-focused" groups, to distinguish them from election-focused "political committees," while recognizing that these issue-focused groups will undertake some measure of election-specific activities.

Presumably, it would be impermissible to limit the amount of money that an individual may give to an issue-focused group to advance its ideological purpose, or to prohibit the group from using those contributions to promote its ideological

\(^4\) In addition to addressing the statutory dimensions to the "major purpose" test in the article co-authored with Professor Tobin (see Foley & Tobin, *supra* note 3), I also discuss these statutory details in comments submitted to the FEC in connection with its Notice of Proposed Rulemaking on "Political Committee Status," 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004). These comments are attached to this article as an Appendix.
objective, including by the specific means of activities designed to achieve a particular electoral result (if the group thought those specific electoral activities the best way to further its ideological mission). But there is no Supreme Court case that directly resolves this question, and one might try to argue that any money that any group spends on a well-defined category of activities that are understood to be specifically electoral in aim—public messages supporting or opposing candidates, messages urging voters to go to the polls, and the like—should be paid for with funds that have been subject to contribution ceilings. Yet such an argument would rub up against the fact that individuals can spend as much of their own money as they wish for these election-specific activities. Therefore, why should not individuals be entitled to get together in groups, and to pool their resources when they share an ideological objective, leaving it to the collective judgment of the group to determine when it can best serve the shared ideological objective by spending a portion of the group’s assets specifically on electoral activities? The likelihood that the Supreme Court would wish to protect this associational freedom and the strong grounds in First Amendment jurisprudence the Court would have for doing so are reasons to accept as a baseline proposition that it would be unconstitutional to limit the contributions that individuals may give to ideological groups to be used for electoral purposes.

But why then would it be constitutional to limit contributions that individuals make to political committees, like Citizens Seeking Change, with the avowed purpose of defeating an incumbent candidate? The individuals wishing to contribute to this group have a right to spend as much of their own money as they wish on independent activities designed to secure this electoral result. Why then should these individuals not be entitled to give as much of their money as they wish to this group, just as (we are presuming) they would be entitled to do with respect to an ideological group, like Citizens for a Better America, that decides to use these unlimited contributions to pay for activities specifically designed to achieve the same electoral result?

To answer this crucial question, we need to recall that individuals do not have a First Amendment right to give unlimited sums to political parties to spend on activities designed to secure an electoral result. They lack this right, even though they do have a First Amendment right, acting by themselves, to spend as much of their own money as they wish on the same activities. The reason for this distinction is twofold: first, according to longstanding Supreme Court doctrine, their interest in giving money to a political party has less strength

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5 *MCFL* comes closest, in holding that an issue-focused ideological group that meets certain conditions must be exempt from disclosure requirements applicable to election-focused political committees. See *Massachusetts Citizens for Life v. FEC*, 479 U.S. 238 (1986). *MCFL*, however, did not directly address whether Congress could write a statute providing that all federal electioneering, clearly defined, must be paid for with “hard” money (i.e., funds raised in compliance with FEC’s contribution limits and source requirements).

6 *Buckley*, 424 U.S. at 20-23; accord *McConnell*, slip op. at 24-27.
under the First Amendment than their interest in spending their own money for their own political activities; and, second, the risk that winning candidates will become improperly beholden to the financial largess of individuals is less when individuals spend their money acting on their own than when individuals gives the money to a political party (this second point being true in part because individuals are less likely to be motivated by an improper desire to produce an indebted candidate when they pay for their own electoral activities undertaken on their own initiative than when they simply write checks to a political party).

The question, then, is whether contributions to a political committee are more like contributions to a political party or, instead, more like contributions to an ideological group that is not a political committee. In other words, should contributions to our hypothetical Citizens Seeking Change be grouped together with contributions to a political party, because Citizens Seeking Change has declared its primary purpose to be defeating an incumbent candidate? Or, alternatively, should contributions to Citizens Seeking Change be put in the same category as contributions to Citizens for a Better America, which lacks the defeat of an incumbent as its primary purpose but nonetheless spends a significant portion of its resources on activities designed to secure this electoral result as a secondary objective that is derivative of its primary ideological mission?

For reasons I shall explain in Part One, in my judgment contributions to political committees should be classified under the First Amendment with contributions to political parties, rather than with contributions to ideological organizations that lack an electoral objective as their primary purpose. Maintaining this position, however, requires a sound basis for distinguishing political committees from these other ideological organizations, and I shall attend to that distinction in Part Two. Finally, even if there is a sound basis for distinguishing between these two kinds of groups, the distinction will be futile if political committees in practice are able to structure their operations to mimic the activities of these other ideological organizations. Therefore, in Part Three, I will discuss the kind of accounting rules that are necessary to make the regulation of political committees meaningful in practice.

I. THE CONSTITUTIONAL JUSTIFICATIONS FOR DISTINGUISHING BETWEEN POLITICAL COMMITTEES AND ISSUE-FOCUSED GROUPS

Political committees differ from political parties in several basic respects. First of all, candidates run for office in the name of political parties: they each appear on the ballot as the designated candidate of a particular political party. Second, political parties form majority and minority caucuses in Congress that organize the structure and agenda of the legislative process. Third, political parties necessarily coordinate closely with their candidates, both during elections and (with respect to incumbents) during the legislative process. All this means that there are special reasons to believe that large-dollar contributions to a
political party may result in improper leverage over the legislative activities of officeholders who ran as candidates of that party and benefited from the party’s financial support. 7

Nonetheless, political committees— even those that operate independently from parties and their candidates—share an essential feature with political parties: they exist to win elections. By virtue of the Supreme Court’s “major purpose” test, political committees necessarily have as their overriding objective the election or defeat of candidates running for federal office. They are not merely ideological organizations that happen to participate in election-specific activities incidental to their central ideological mission. Rather, their reason for being is specifically electoral: their central mission is to secure the election or defeat of a candidate.

Given the central electoral mission of political committees, two points are true. First, large-dollar contributions to political committees present risks of improper influence over elected candidates, comparable to the risks of large-dollar contributions to political parties, and greater than the risks of large-dollar contributions to ideological groups that are not political committees. Second, an individual’s interest in giving a large-dollar contribution to a political committee is comparable to the individual’s interest in giving a large-dollar contribution to a political party or a candidate’s own official campaign committee, and quite distinct from an individual’s interest in giving to an ideological organization that is not a political committee.

When an organization has as its central mission the election of a particular candidate, anyone who wishes to purchase improper influence over that candidate would naturally gravitate to that organization as a vehicle for bestowing influence-purchasing funds. In other words, the individuals who donate large sums of money to a political committee may not all have the purely civic-minded desire to see the candidate win election because of a belief that the candidate is more likely to act in the public interest than the candidate’s opponent. Instead, individuals who are blocked by campaign finance law from giving large sums directly to the candidate, but who wish to “invest” in the candidate’s election solely in order to reap legislative favors from the candidate once elected to office, will see a political committee that exists to promote the candidate’s election as an efficient “investment” opportunity. Because the political committee has the candidate’s election as its main objective, money given to this committee is well spent if the donor’s goal is to curry favor with the candidate. 8

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7 The Court in McConnell emphasized these points. See McConnell, slip op. at 81.

8 There is no doubt that, if the contribution caps were lifted on money given to political committees, then in every hotly contested race “unofficial” surrogate committees would sprout up in an effort to assist a candidate’s election: “Friends of Senator Smith,” “Citizens Supporting Smith,” and so forth. Even if effective anti-coordination rules could guarantee that these surrogate groups remained completely independent from the candidate’s own campaign committee, the
Likewise, any candidate who might be tempted to bestow improper favors on large-dollar donors to the candidate’s election efforts would be especially receptive to the large-dollar donors to political committees that were set up specifically to promote the candidate’s election. Since there would be no large-dollar donors directly to the candidate’s own campaign committee, the first place the influence-peddling incumbent would look to identify big-money contributors to his electoral success would be the list of largest contributions to political committees established specifically to secure his victory. Accordingly, large-dollar contributions to political committees present risks of improper influence that are essentially the same as large-dollar contributions to political parties.

Indeed, large-dollar contributions to a single-candidate political committee are a much more direct means of obtaining improper influence over that candidate than large-dollar contributions to the candidate’s political party. Because political parties exist to elect a wide array of candidates, any contribution to the party (without earmarking) is necessarily a somewhat inefficient means of obtaining improper influence over a particular candidate. By contrast, when a political committee is focused on electing one particular candidate (or defeating that candidate’s opponent), a large-dollar gift to that political committee is almost as good as a large-dollar gift to the candidate’s own campaign would be as a means to secure improper favoritism from that candidate once in office.

In *McConnell*, the Court observed that “lobbyists, CEOs, and wealthy individuals alike all have candidly admitted donating substantial sums [to political parties] not on ideological grounds, but for the express purpose of securing influence over federal officials.” The Court recognized, too, that these large-dollar contributions were successful in achieving their insidious
purposes. Quoting one former Senator, the Court bluntly opined: "Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about – and quite possibly votes on – an issue?" What is more, the Court cited evidence in the record linking large-dollar contributions to parties with "manipulations of the legislative calendar, leading to Congress' failure to enact, among other things, generic drug legislation, tort reform, and tobacco legislation."

What is true with respect to large-dollar contributions to parties would be equally or even more so with respect to large-dollar contributions to political committees. The same improper motive would underlie many such contributions. The same improper effect would result from such large-dollar gifts. And the public's business would be just as improperly derailed by officeholders acting "not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder." As the Supreme Court itself realized in McConnell, once cut off from the ability to make large-dollar contributions to political parties, influence-seeking donors would turn to the next-best source, which would be political committees designed to secure the election of candidates. Consequently, "federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the [political] parties."

Large-dollar donations to issue-focused groups are a different story. Money given to such a group does not directly benefit a federal candidate in the same way as money given to a political committee that exists to help that candidate win the election. This is true even if the issue-focused group does spend a significant portion of its funds to promote the candidate's election and, if the issue-focused group is a large one with considerable financial assets, this "significant portion" amounts to a large sum of money in absolute terms (for example, several million dollars).

Money given to the issue-focused group serves the group's ideological agenda generally. The group may use this money on election-specific activities, to be sure, but the group may also use this money on other ways to further its issue-focused mission – ways that are unrelated to elections specifically. An environmental group, for example, may spend the contributions it receives on a public awareness campaign designed to highlight the threat of global warming. This public awareness campaign may occur in an "off-year" during an election cycle (1997, 2001, 2005, etc.), and it may never mention the name of any politician. Large-dollar contributions to the environmental group that are used to pay for this kind of public awareness campaign quite obviously do not present

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12 ld. at 39 (quoting former Senator Alan Simpson of Wyoming).
13 ld. at 40.
14 ld. at 44.
15 ld. at 57.
the same risk of producing beholden officeholders as contributions to a political committee.

The same point is true with respect to issue-focused groups, like our hypothetical Citizens for a Better America, that devote themselves to a wide spectrum of political issues. Large-dollar donations to CBA might be used for a public awareness campaign designed to highlight the plight of the "working poor" in America today, urging that these fellow Americans deserve better. This public awareness campaign might be unconnected to any election and omit references to any politicians, incumbent or otherwise. Obviously, large-dollar donations used for this purpose raise little or no risk of corrupting any officeholder.

When a donor gives a large contribution to an issue-focused group to use in whatever way the group thinks will best serve its ideological agenda, the donor does not know whether the group will use it for something like the public awareness campaigns just described, which are unconnected to elections, or instead will use it in election-specific ways to promote candidates who support the group's ideological mission. Likewise, when a donor gives this kind of unrestricted contribution to an issue-focused group, a candidate cannot presume that the contribution was intended to benefit his election campaign, and this is true even when the group uses the contribution to promote his election. Accordingly, unrestricted contributions to an issue-focused group — even in large amounts — are not an efficient means for donors to signal their support for candidates, or for candidates to recognize their biggest financial backers. The connection between the contribution and the campaign spending is too diffuse.

To be sure, if a donor gives a large sum of money to an issue-focused group specifically for the purpose of spending that money to support the election of a candidate who agrees with the group's ideological goals, this kind of "earmarked" contribution raises the same risk of improper influence over the candidate as a contribution to a political committee that exists to promote that candidate's election. For that reason, an issue-focused group receiving such earmarked contributions should be required to put them in a separate account subject to the same regulations as contributions to a political committee, including caps on the amount an individual may give for such election-specific purposes. But with respect to unrestricted contributions to an issue-focused group, they should remain uncapped in the amount an individual may give, and the issue-focused group should be free to spend this money in any way that serves its issue-focused agenda, including on election-specific activities (so long as those election-specific activities do not become so large as portion of the group's endeavors as to convert the group into a political committee).

16 See Buckley v. Valeo, 424 U.S. 1, 24 n.24 (1976) (such "earmarked" donations count as "contributions" regulated under FECA).
It is not that unrestricted gifts to issue-focused groups raise no risk of improper candidate indebtedness at all. If an individual gives $10 million to Citizens for Better America to spend on its anti-poverty agenda as it sees fit, and CBA having an annual budget of $15 million spends $5 million on election-specific activities to support a particular Senate candidate who shares CBA’s vision for an economically fairer America, it is indeed possible that the candidate will feel indebted to the individual who single-handedly provided two-thirds of CBA’s annual budget. Even so, this individual’s support for the candidate’s campaign is less direct — and therefore presents less risk of improper indebtedness — than if the individual gave $5 million to a political committee whose reason for being is to promote this candidate’s election. In this latter situation, the individual gives the $5 million gift knowing that it will be used to promote the candidate’s election, and the candidate knows that the individual knew this when giving the gift. The opportunity for an improper understanding between the donor and the candidate, where the donor gives with the expectation that it will produce favors in return and the candidate recognizes this expectation and feels obligated to reciprocate — is much more salient in the case of the large-dollar donation to the political committee than in the case of the large-dollar donation to the issue-focused group.

Not only are the risks of improper indebtedness greater with large-dollar gifts to political committees than (unrestricted) large-dollar gifts to issue-focused groups, but also the donor’s First Amendment interests in giving the donation are somewhat diminished. When donating to a political committee, the donor has only the specific First Amendment interest in contributing to an organization that seeks an electoral result. It is not that this interest counts for nothing. As the Supreme Court has recognized with respect to donations to political parties or to a candidate’s own campaign committee, an individual citizen does have a First Amendment interest in contributing to organizations intent on winning elections. But as the Court has also recognized, that First Amendment interest is less weighty than an individual’s interest in either undertaking one’s own personal political activities or contributing to an organization that engages in a broader political mission that just seeking specific electoral results. Moreover, this First Amendment interest in contributing to an organization that seeks a

17 See, e.g., McConnell, slip op. at 25.
18 Id. The interest in giving money to candidates (or political committees that exist to support candidates) is less weighty than the interest in giving to issue groups because giving money to politicians raises the specter of bribery. Although this point might seem to smuggle the “government’s interest” side of the balancing test into determining the weight of the “individual interest” at stake, the longstanding threat to the integrity of the political system that arises whenever individuals give money to politicians is a reason to weigh the individual’s interest in giving money to candidates less than the individual’s interest in giving money to issue groups. The Supreme Court explicitly recognized this point in McConnell: contribution limits are “subject to a less rigorous standard of review” than expenditure limits because they pose particularly a particularly acute threat to “the integrity of the [political] process.” Id. at 26-27.
specific electoral result is largely (although not completely) satisfied by
permitting the individual to make a contribution to the organization up to a
certain generous, but not enormous, amount – for example, $5000 per year, as
current law provides. An individual who contributes $5000 to a political
committee dedicated to electing a particular candidate to the Senate is able,
through that contribution, to express support for the political committee’s
electoral objective, just as the individual is by giving $2000 directly to the
candidate’s own campaign. But any contribution to the political committee
larger than $5000, while indicating only increased levels of support for the
candidate’s campaign (depending, of course, on the donor’s overall available
wealth), and thus adding relatively little on the First Amendment side of the
equation, raises the risk of improper influence because of its increased size.
Thus, permitting individuals to give $5000 to political committees enables them
to express support for a candidate’s election without threatening the integrity of
the electoral process in the same way as does permitting individuals to give
$2000 to the candidate’s official campaign committee.

But a rule that limited individuals to giving $5000 per year to issue-focused
groups would be far more burdensome on an individual’s First Amendment
interests. It would curtail not only an individual’s ability to express support for a
candidate’s election but also – and far more broadly – an individual’s ability to
express support for ideological causes in general. If limited to giving $5000 a
year to Citizens for a Better America, or Citizens for a Cleaner Environment, or
Citizens for Gun Control, the ability of citizens to participate in political causes
would be radically (and unjustifiably) restricted. Even if the rule were that these
issue-focused citizen groups could not spend funds for election-specific activities
unless those funds were raised in amounts not exceeding $5000 per gift
(although these groups could use larger gifts for other non-electoral activities),
the consequence would be too great a constraint on First Amendment freedoms.
Individuals give to such issue-focused groups with the expectation that these
groups will use these gifts in ways that best served their shared ideological
objectives, and if these groups were not permitted to use these gifts for
specifically electoral activities when doing so would best serve the group’s
ideological mission, then the ability of individuals to promote that ideological
mission would be substantially curtailed. When the risk of candidate
indebtedness from unrestricted donations to issue-focused groups is attenuated, it
is too much of an intrusion on First Amendment rights to constrain such
unrestricted giving and its use by these groups.19

19 If these citizen groups organize themselves as corporations, then the relevant considerations are
different. Even so, if as non-profit corporations they refrain from accepting contributions from
business corporations or labor unions, then presumably under MCFL they could not be subject to
rule that requires them to spend for their election-specific activities only contributions limited to
$5000 in amount.
By contrast, as we have seen, with respect to large-dollar gifts to political committees, the risks are much greater and the extent of the constraint much less. Accordingly, contributions to political committees should be treated under the First Amendment in the same way as contributions to political parties and candidates' campaign committees. Political committees, like these other election-focused organizations, exist to win elections. Therefore, gifts to them are necessarily election-specific in nature. These gifts may be limited in amount, in the interest of protecting the integrity of the electoral process from the direct and real threat that these election-specific gifts will secure improper influence over elected officeholders, without imposing excessive burdens on the ability of individuals to participate in political causes.

Indeed, it is precisely because we have already determined that individuals should have an unlimited right to give unrestricted funds to issue-focused groups that we have grounds for concluding that limits on contributions to political committees will not excessively burden First Amendment freedoms. Individuals are free to give as much as they wish to Citizens for a Better America, or comparable issue-focused groups, and these groups are free to use these unrestricted gifts to further their ideological missions. These First Amendment freedoms give individuals ample opportunities to associate together in political causes, including election-specific activities that further their shared ideological objectives. Given these robust associational freedoms, telling individuals that they can give only $5000 per year to political committees organized specifically to promote the election of candidates, just as they can give only $2000 per year to a candidate's official campaign committee, is not unduly restrictive. They still have the freedom to give to the election-specific organization up to the (rather generous) dollar amount, and their inability to give larger amounts to these election-specific organizations is justified by the distinct and direct dangers of candidate indebtedness that result from large-dollar gifts to organizations devoted specifically to achieving election victories.

II. THE "MAJOR PURPOSE" TEST AS THE CONSTITUTIONAL DIVIDING LINE

Given the crucial difference between political committees and issue-focused groups, it is essential that there be a clear and principled test for distinguishing between these two categories. If a group does not know to which category it belongs, there is the chance that it could be deemed a political committee — subject to the extra regulatory constraints upon political committees, including the $5000 limits on the contributions it receives — when it intended instead to operate as an issue-focused group. The Federal Election Commission is currently considering rules that would specify when a group will be classified as a political committee, and it is important that the FEC adopt the correct set of specifications, both to protect issue-focused groups from erroneous classification
as political committees and, at the same time, to correctly classify as political committees those groups that need to be regulated as such.20

The basic criterion of this dividing line has already been articulated by the Supreme Court. It is the "major purpose" test set forth in Buckley v. Valeo and subsequently referenced in MCFL. Under this test, a group is a political committee if its "major purpose" is to promote the election or defeat of a candidate for federal office.

Questions, however, inevitably arise concerning how to implement this "major purpose" test. How does one know whether a group has influencing a federal election as its "major purpose"? Must a group spend a majority of its efforts on this objective, or would a plurality suffice? May a group have more than one "major purpose," with something other than influencing elections being its primary purpose, and yet still have influencing elections as one of its "major purposes," so that the group falls within the category of political committees subject to the extra regulations applicable to such committees? The Supreme Court has never had occasion to answer such questions, but the reasons for distinguishing between political committees and issue-focused groups — including the relevant constitutional considerations — suggest answers to these questions.

The major purpose test should restrict itself to identifying whether the primary purpose of an organization is to influence a federal election. The reason is that the category of political committees should be confined to those groups that are devoted primarily to achieving the election or defeat of federal candidates. If the designation of being a political committee were to attach to groups devoted significantly but secondarily to influencing federal elections, then this designation would inappropriately capture issue-focused groups that seek to influence federal elections as a secondary objective ancillary to their primary ideological mission.

For this reason, it would be wrong for the FEC to set an absolute dollar figure — for example, $1 million — and say that any group that spends more than this amount per year on election-specific activities has influencing elections as a "major purpose," regardless of how much money the group spends on other non-electoral activities. To be sure, spending $1 million (or more) on election-specific activities is a significant sum — and will get the attention of the candidates in the race — but this $1 million expenditure may actually be a fairly modest portion of the organization's overall annual budget. A large environmental, civil rights, or other issue-focused group might spend ten or more times that amount on non-electoral ways to achieve its ideological agenda. Just because in absolute terms it spends a large sum of money on election-specific activities, this spending does not convert it into an election-focused political committee or require that it be treated as such. (Again, unrestricted gifts to an

20 See supra note 4.
issue-focused group that spends most of its money on issue-focused activities unrelated to elections do not raise the risks of corruption associated with large-dollar gifts to election-focused political committees.) Thus, only if election-specific activities are the primary use to which a group puts its available resources should the group be classified as a political committee.

It is possible that a group could spend more on election-specific activities than on other categories of spending, and yet this election-specific spending could still be less than a majority of the group’s total spending. For example, a group might spend 40% on election-specific activities, 35% on non-electoral public awareness campaigns, and 25% on “public interest” litigation that promotes its ideological mission – counting only its programmatic activities and putting aside administrative and other basic operating expenses. Under a plurality test for measuring a group’s primary purpose, this group might be considered a political committee, since it spends more on election-specific activities than on any other particular category of programmatic activity.

Yet to employ such a plurality test would be out of step with the basic reason for distinguishing between political committees and issue-focused groups in the first place. The designation of political committee is supposed to be reserved for only those groups that have as their main objective the election or defeat of a federal candidate. The aforementioned group that hypothetically spends a plurality of its funds on election-specific activities is better characterized as an issue-focused rather than election-focused group. Yes, it spends the largest share of its resources on election-specific activities, rather than public awareness campaigns or public-interest litigation, as the best means to achieve its issue-focused agenda, but it still has an ideological objective rather than an electoral objective as its central mission. The category of political committee should be confined to those organizations that devote a majority of their programmatic spending to election-specific activities. That way the “major purpose” test will capture within this category those groups, but only those groups, that have influencing elections as their main objective. (Of course, if a group publicly acknowledges that its main objective is to influence a federal election, that self-declaration should suffice to categorize the group as a political committee without regard to its actual spending practices. An examination of a group’s actual spending practices is necessary only with respect to those groups that deny that influencing federal elections is their main purpose and yet their activities belie their denial.)

Thus, a majority-of-programmatic-spending test, or what one could call the “50 percent rule,” is the best means of implementing the dividing line between election-focused political committees and issue-focused ideological groups.

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Like any other bright-line test, it is not absolutely perfect. It will classify as political committees some groups, just above the 50 percent threshold, that are relatively unlikely to present the same risks of candidate indebtedness as a group that devotes 100 or 90 percent of its programmatic spending to election-specific activities. Likewise, it will fail to classify as political committees some groups that lurk just below the 50 percent threshold and whose non-electoral spending is just a camouflage for their primary electoral mission, which large-dollar donors seek to exploit in an effort to secure improper influence over the candidates benefited by these substantial electoral activities.

But no other rule can avoid such imperfections. Even some large-dollar contributions directly to a candidate’s official campaign committee will be “pure of heart,” given solely because of the donor’s ideological agreement with the candidate and without any expectation of improper favors in return. Likewise, even independent spending by a wealthy individual acting alone to promote a candidate may be motivated by the impure desire to secure improper legislative favors for that wealthy individual’s business interests. The line between regulated and unregulated uses of an individual’s wealth that may have the purpose or effect of influencing a federal election is necessarily an imperfect one. This line must reflect the inevitable balancing of competing considerations, weighing the relative risks of improper influence against the relative burden on an individual’s expressive and associational freedoms.

For reasons we have seen, the line that divides an individual’s gifts to election-focused groups from gifts to issue-focused groups is a sound one in principle, even though the issue-focused group might use the gift for election-specific activities, just as the individual acting alone might do. Moreover, for reasons we have also seen, this line is best implemented through a fifty percent rule, which classifies an organization as election-focused when over fifty percent of its spending is for election-specific activities, but not when its election-specific spending falls below this majority threshold. In the main, this fifty percent rule will tend to treat as political committees those groups deserving of that designation because, given their election-specific focus, gifts to them present the greatest risk of improper candidate indebtedness. At the same time, this fifty percent rule will tend to leave in the category of issue-focused groups those that, because of their greater devotion to achieving their overall ideological objectives through non-electoral means, present relatively less opportunity for (and thus relatively less risk of) favoritism-inducing donations.²²

²² It is possible that the 50 percent could apply to time spent, rather than money spent, by a group to influence federal elections (or both). Yet measuring only the time a group spends, without considering its monetary spending, to determine its major purpose would seem inadequate. The idea that a group could devote most of its money to winning federal elections and still escape regulation as a political committee because it devoted more time to other activities seems contrary to the basic purposes of campaign finance regulation, which is to prevent the use of money from corroding the integrity of the election process. Therefore, in fleshing out the details of the 50
One point, however, should be absolutely clear about the implementation of this fifty percent rule. The set of election-specific activities used to measure whether a group has crossed this fifty-percent threshold should be all those activities commonly undertaken by organizations devoted principally to securing the election of a candidate, and not just a subset of those activities. Thus, for example, as both the Congress and the Court have recognized, political parties intent on winning elections engage in such election-motivated activities as campaign advertisements that promote their candidates or attack their opponents. Likewise, in their efforts to win elections, political parties urge voters to go to the polls and urge citizens to register to vote (so that they can do the same). Indeed, if the record in McConnell made one fact clear, it is that political parties do not confine themselves to messages of “express advocacy” (such as “Vote for Smith” or “Vote against Jones”) in order to achieve their electoral objectives.

Consequently, in determining whether a particular organization has achieving a candidate’s election as its primary purpose, such that it should be classified as a political committee, it makes no sense to examine only whether the organization spends a majority of its resources on “express advocacy” or some other narrow subset of election-specific endeavors. To do so would be to classify as an issue-focused ideological group, rather than as an election-focused political committee, an organization that devotes a full 100 percent of its programmatic spending on campaign advertisements that support or attack a particular candidate running for federal office. This absurd result – and I use the word “absurd” advisedly – would be to repeat precisely the same kind of mistake that the Supreme Court in McConnell condemned with respect to the use of the “express advocacy” test as the sole means of determining whether a political advertisement is election-focused or issue-focused.23

Instead, to tell if an organization is a political committee with the primary purpose of promoting a candidate’s election (or defeat), one should look to see whether a majority of the organization’s programmatic spending is for the same kinds of election-motivated activities undertaken by other organizations, like political parties and a candidate’s own official campaign committee, that have winning elections as their central mission. As we have seen, these election-motivated activities include advertising that promotes or attacks a candidate even though it lacks “express advocacy,” as well as voter mobilization and registration drives.24 Classifying a group as a political committee if a majority of its resources is devoted to such election-specific activities imposes no inappropriate

percent rule, a determination of how much money a group spends to influence federal elections is an essential component of the inquiry. Moreover, for the sake of simplicity, it makes sense to limit the inquiry to money spent, without regard to time spent, unless and until there develops a regulatory need to put both into the equation.

23 McConnell, slip op. at 86.
24 I discuss these election-motivated activities and their role in implementing the “major purpose” test in much greater detail in my comments submitted to the FEC. See supra note 4 and Appendix.
burden or risk of unfair surprise on issue-focused ideological groups. On the contrary, any group that spends a majority of its resources on these election-oriented activities is acting just like a political committee whose primary purpose is to achieve election victories — and therefore the group should be classified accordingly.

III. THE SECONDARY PURPOSES OF POLITICAL COMMITTEES

It is not enough to classify as a political committee a group that devotes the majority of its programmatic spending to activities designed to influence federal elections. It is necessary also to assure that all donations to the group that are used to advance its primary electoral purpose comply with the dollar limit on these donations (currently $5000 per year, as we have seen).

One might think that enforcing this contribution cap would be a relatively straightforward task: the FEC simply could insist that all donations received by a political committee must be limited to this dollar amount. But problems and complexities have arisen on the supposition that political committees might have secondary purposes other than their primary purpose of influencing federal elections. Perhaps they might secondarily wish to influence state rather than federal elections. Or, alternatively, they might secondarily wish to advance issue-oriented ideological objectives, just as issue-focused groups have ideological objectives as their primary purpose might secondarily wish to engage in election-motivated activities. Either way, the FEC has assumed that political committees cannot be capped in the donations they receive to advance their secondary purposes, even as the FEC must enforce the $5000 cap on the contributions political committees receive to advance their primary purpose of influencing federal elections. Problems and complexities have especially arisen as a result of the FEC's belief that political committees may undertake some activities to serve both their primary and secondary purposes and, therefore, they may pay for these joint-purpose activities with a combination of funds, some of which comply with the contribution caps applicable to primary-purpose activities and some of which do not.

There should be no doubt that Congress could constitutionally limit federal political committees — those with the primary purpose of influencing federal elections — to receiving only funds that comply with the $5000 cap, just as Congress may limit national political parties to similarly capped contributions. It would be questionable whether Congress could impose the same kind of cap on all funds received by a state political committee having the primary purpose of influencing state elections. But we need not consider that question, because there would be no need for Congress to impose that kind of across-the-board contribution cap on state political committees, as long as Congress retains the constitutional authority to impose on state political committees the same kind of more circumscribed contribution cap that Congress has imposed on state
political parties (and which the Court upheld in *McConnell*). Under this more circumscribed contribution cap, any political committee devoted primarily to securing the election of candidates for state office would need to comply with the $5000 cap only with respect to those activities advancing its secondary purpose of electing federal candidates.

Congress, however, has not adopted the same sort of "soft money" limits on political committees that it adopted for political parties in the Bipartisan Campaign Reform Act (BCRA). Thus, even with respect to federal political committees—those having the primary purpose of influencing federal elections—it must be acknowledged that they are entitled to receive money not subject to the $5000 cap in order to achieve whatever secondary objectives they might have besides seeking to influence federal elections. Still, it is a mistake to think—as the FEC has—that, absent legislation of the kind adopted in BCRA, federal political committees must be permitted to use uncapped donations to pay a portion of the costs of those activities that advance both their primary and secondary objectives.

FECA, as it currently exists, already limits federal political committees to $5000 per donor with respect to donations having the purpose of influencing federal elections—in other words, those donations that share the political committee’s primary purpose. Presumably, then, any unrestricted donations to a political committee are given with the knowledge of the committee’s primary purpose and share that purpose. Money given to a political committee might be specifically designated for some secondary purpose, and set aside to pursue that secondary purpose, but unrestricted donations to a political committee should be deemed as sharing the political committee’s primary objective of influencing federal elections—and thus all such unrestricted donations should be capped at $5000.

Similarly, any money used by a political committee to advance its primary purpose was presumably given to the political committee to pursue that purpose, even if its use for that primary purpose also happens at the same time to advance the political committee’s secondary purposes. In other words, unless specifically designated solely to advance the political committee’s secondary purposes, money that is given to a political committee and is used to accomplish its primary objective is being used as intended, whatever else it might also accomplish. Thus, all money that a political committee uses to pursue its primary objective should be subject to the $5000 cap. The upshot, then, is that a political committee can receive specially designated funds for secondary purposes and use those earmarked funds for activities that promote those secondary purposes exclusively. Subject to this narrow exception, however, all money raised and spent by a political committee promotes—and was intended to promote—the political committee’s primary purpose and thus should be subject to the statutory requirement that any money given to the committee for this purpose must be capped at $5000 per donor.
It imposes no hardship on prospective donors to deem their contributions to a political committee, unless specifically designated otherwise, as intended to advance the committee's primary purpose. After all, if the donor wishes to pursue some other purpose and wants to do so in a way that is unencumbered by this rule, the donor need only to make the required specific designation or else give an unrestricted donation to a group that is devoted to the purpose the donor wishes to achieve. Remember, here, that by hypothesis the donor wishes to advance some purpose other than the electoral objective that is the political committee's primary purpose. Suppose, for example, that the donor wishes to pursue the ideological objective of improving environmental protection. Then the donor can give as much as she wishes to the myriad of issue-focused environmental groups that exist to promote this ideological cause, and the group of her choice can spend her unlimited donation to pursue that goal (including by means, if it sees fit, of supporting or opposing the election of specific candidates). If, for some reason, this donor wishes to advance the issue of environmental protection by giving to a political committee that is dedicated primarily to achieving the election of a particular federal candidate, then she may designate the gift as specifically for issue of environmental protection, so that the political committee can set aside this gift to use in ways that advance the issue of environmental protection through non-electoral means. If she so designates, then her pro-environment gift to the political committee may be unlimited in amount. Otherwise, her gift must comply with the $5000 cap applicable to political committees, because she has chosen to pursue her issue-focused goal of environmental protection through an organization devoted primarily to electing a candidate to federal office.

The same point holds true for a donor who wishes to promote a candidate running for state rather than federal office. This donor can give to a state political committee to pursue this purpose, without being subject to the special constraints that FECA imposes on federal political committees that exist primarily to promote federal candidates. If, however, a donor wishes to promote a state candidate by means of a gift to a federal political committee, then the donor should be expected to specifically designate that the donation is for this purpose, so that it can be set aside from the money used to achieve the federal political committee's primary objective of electing federal candidates. If the donor does not so designate, then the donation should be subject to the $5000 limit, and no amount beyond that limit should be permitted to pay (even in part) for activities that advance the committee's primary purpose of promoting federal candidates.

IV. CONCLUSION

There always will be those who are philosophically opposed to contribution limits of any sort, believing instead that disclosure rules should be the only form
of campaign finance regulation. The majority of the Supreme Court, however, rejected that position in *Buckley* and rejected it again in *McConnell*. Given those precedents, the question is where to draw the line between constitutionally permissible and impermissible forms of contribution limits. For reasons I have articulated, the line should be drawn between election-focused and issue-focused groups, with the consequence that contributions by individuals to the former may be capped, whereas contributions to the latter may not (unless contributions to the latter are earmarked specifically for electioneering purposes).

This line is preferable to one that would leave contributions to election-focused groups uncapped if these groups operate independently from a candidate’s own campaign. Although drawing the line in either location involves a balancing of competing considerations under the First Amendment, the balance is better served ultimately if all election-focused groups operate under the constraint of contribution limits, leaving all issue-focused groups fully free to receive unlimited contributions and to spend them (as they see fit) to pursue their ideological goals even by means of electioneering activities. This line recognizes the distinctive risks of corruption associated with unlimited financial contributions to any group whose main mission is to achieve a candidate’s election, yet makes sure that public debate on public issues remains entirely unfettered, with participation by individuals and groups to the full extent that they desire to do so.
April 5, 2004

Ms. Mai T. Dinh
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463
email: pcstestify@fec.gov

Re: Rulemaking on “Political Committee Status,” 69 Fed. Reg. 11,736

Dear Ms. Dinh:

Pursuant to the Notice of Proposed Rulemaking issued on March 11, I hereby submit these comments and request to testify at the forthcoming hearing.

My comments draw upon academic work I have done on the definition of “political committee” under FECA, the constitutionality of enforcing that definition and related FECA rules with respect to non-party groups that operate independently from candidates and parties, the relationship of FECA to section 527 of the Internal Revenue Code, and other issues relevant to this rulemaking. This academic works includes an article I co-authored with my colleague Donald Tobin, Tax Code Section 527 Groups Not an End-Run Around McCain-Feingold, 70 U.S.L.W. 2403 (January 20, 2004), as well as a new paper, The “Major Purpose” Test: Distinguishing Between Election-Focused and Issue-Focused Groups, 27 Northern Kentucky L. Rev. ___ (forthcoming 2004), a copy of which is attached to these comments (and hereinafter cited as The “Major
I also testified at the Senate Rules Committee hearing on these issues, held on March 10.

I submit these comments solely in my capacity as a professor of law who specializes in the fields of election law and constitutional law. These comments in no way purport to represent the views of the Moritz College of Law at the Ohio State University, where I teach. And while I served as a consultant to the Intervenors in *McConnell v. FEC*, these comments in no way purport to represent the views of the Intervenors, but are solely my own.

Two Key Points

There are two key points in connection with this rulemaking, both emanating directly from *Buckley v. Valeo*. First, the definition of "political committee" under FECA must not be so broad as to encompass groups that do not devote themselves predominantly to seeking the election or defeat of federal candidates. Second, and conversely, the definition of "political committee" does reach — and, in order to serve the purposes of FECA, must reach — all groups that are predominantly devoted to the election or defeat of federal candidates.

These two key points have implications for the proposed rules. The first point entails that the Commission should reject any idea of a flat threshold disbursement amount, such as the $50,000 threshold in the proposed 11 CFR 100.5(a)(2)(iii), as a trigger for finding "political committee" status. Instead, the rulemaking should make clear that a group is susceptible to designation as a "political committee" only through a proportionality analysis, which determines whether the group devotes more than half its activities to influencing federal elections (unless of course the group's own public pronouncements forthrightly declare that its predominant mission is to influence one or more federal elections, in which case the group should be regulated as a "political committee" under the Buckley "major purpose" test for that reason alone).

Using this kind of "50 percent" rule, a version of which is contained in proposed 11 CFR 100.5(a)(2)(ii) — rather than the flat threshold in subsection (iii) — is necessary to protect groups that engage in election-related activities only as subsidiary endeavors, ancillary to their larger, non-electoral objectives. These issue-oriented groups do not present the same need for regulation under FECA as groups that are focused on winning elections, as Buckley itself recognized. (I discuss this point at greater length in Part II of the attached article, *The "Major Purpose" Test.*) Furthermore, because embracing these issue-oriented groups within the category of "political committee" would be far more intrusive upon First Amendment interests than designating all election-focused groups as "political committees" under FECA, these issue-focused groups must be left outside the "political committee" definition. Employing a 50
percent rule, but not a flat threshold, serves this purpose. Therefore, non-profit groups under 501(c)(4) of the Tax Code have no cause for concern with an FEC rulemaking that adopts a 50 percent rule and rejects a flat threshold. Indeed, to retain their tax-exempt status under (c)(4), groups cannot let their election-oriented activities exceed 50 percent, and thus no legitimate (c)(4) group would be subject to “political committee” designation under an FEC-adopted 50 percent rule.

The second key point requires that no group whose predominant focus is to elect or defeat a federal candidate should escape “political committee” designation on the ground that it refrains from “express advocacy,” as Buckley defines that term. According to some advocates who misread Buckley, a group could devote 100 percent of its activities to electing a particular candidate, or defeating that candidate’s opponent, and yet escape regulation as a “political committee” as long as that group eschews “express advocacy,” which—as we all know—is so easy to do without diluting the clear electoral import of a campaign message. But Buckley recognized that, “[t]o fulfill the purposes of [FECA],” it was necessary that the definition of “political committee” encompass all groups “the major purpose of which is the nomination or election of a candidate.” (424 U.S. at 79.) Therefore, it would contradict Buckley to say that, even if a group has as its avowed overriding objective the election or defeat of a particular candidate, and even if that group devotes all of its activities to campaign messages praising one candidate or attacking the other, nevertheless this group cannot be regulated as a “political committee” under FECA.

Buckley adopted the “express advocacy” test, not to narrow the definition of “political committee” (a task already accomplished through the separate “major purpose” test), but instead to protect those groups that would not come within the definition of “political committee” under the “major purpose” test. If a group is not a political committee under FECA, then Buckley provides that its expenditures cannot be regulated under FECA unless they meet the “express advocacy” test. By contrast, under Buckley, the spending of a “political committee” is properly regulated under FECA without regard to whether it meets the “express advocacy” test.

Buckley makes this point clearly: it states that the “[e]xpeditures of candidates and ‘political committees’ so construed [i.e., as limited by the ‘major purpose’ test] . . . are, by definition, campaign related.” (Id.) Then, having made this point, the Buckley opinion then immediately goes on to say: “But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a ‘political committee’—[FECA must be] construed to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.” (Id. at 79-80.) The immediate juxtaposition of these two propositions in Buckley
establishes that the “express advocacy” test applies only to those groups that are not “political committees” under the “major purpose” test. Simply put, “political committees” do not get the benefit of the “express advocacy” test. They do not need the protection of that stringent test because, by definition (under the “major purpose” test), their predominant focus is achieving an election victory or defeat.

Thus, a proper understanding of Buckley requires adoption of a 50 percent rule that designates a group as a “political committee” when more than 50 percent of its spending in any given year is devoted to election-motivated activities broadly conceived, without regard to the much narrower category of “express advocacy.” This kind of 50 percent rule properly “fulfill[s]” what Buckley recognizes as the “core” regulatory function of FECA, whereas it would defeat FECA’s core function to leave unregulated groups just because they do not devote more than 50 percent of their spending to express advocacy. Therefore, it is necessary both that the FEC adopt a 50 percent rule and that this 50 percent rule count not just spending for express advocacy, but spending for a wider array of election-motivated activities, as is provided in proposed 11 CFR 100.5(a)(2)(ii).

The argument is sometimes made that, to be a “political committee” under FECA, it is not enough that an organization meet the “major purpose” test, but that it also make $1000 of “expenditures” (or receive $1000 of “contributions”) as defined by FECA and that, even if the “major purpose” test looks to a category of electoral activities broader than “express advocacy,” the definition of “expenditure” under FECA – 2 U.S.C. 431(9)(A)(i) – is separately constrained by the “express advocacy” test. But this argument makes the same mistake about Buckley as the one discussed above. Under Buckley, as the foregoing analysis shows, the “express advocacy” test constrains FECA’s definition of “expenditure” only with respect to those groups that are not political committees by virtue of the “major purpose” test. When an organization has the election or defeat of a federal candidate as its major purpose, then all of its spending motivated by this objective is “for the purpose of influencing a [federal] election” and thus within the definition of “expenditure” under FECA without regard to whether it is express advocacy. By contrast, it is only when an organization is not a political committee under the “major purpose” test that its spending is not deemed to be “for the purpose of influencing a [federal] election” unless it is spent for express advocacy. Consequently, the “express advocacy” test poses no barrier to the regulation of a group as a “political committee” under FECA because, as established in Buckley, the interpretive gloss of the “major purpose” test on the definition of “political committee” obviates the need to apply the interpretive gloss of the “express advocacy” test on the definition of “expenditure.” In other words, the interpretative glosses adopted in Buckley are mutually exclusive: the one applies when the other does not, and vice versa.
It bears emphasis, however, that the Commission has no power to expand the definition of "expenditure" under FECA beyond "express advocacy" for groups that are not political committees by virtue of the "major purpose" test. Consequently, the Commission should disavow any intent to do so. Regrettably, the Notice of Proposed Rulemaking contains an Alternative 1-B, including proposed section 100.116, which (as the Notice itself acknowledges) would significantly expand the definition of "expenditure" for "all persons, not just political committees," by encompassing, not just "express advocacy," but all public communications that "promote, support, attack or oppose a clearly identified federal candidate." 69 Fed. Reg. at 11,741. In adopting a final rule, the Commission should reject Alternative 1-B on the ground that it would be beyond the scope of the Commission's authority under FECA, as authoritatively construed in Buckley.

FECA, Not BCRA, Defines "Political Committee"

It is important to understand that the foregoing analysis concerning the definition of "political committee" - including the two key points and their implications for this rulemaking - is based entirely on FECA and Buckley, not on BCRA and McConnell. The proper understanding of the dichotomous relationship of the "major purpose" and "express advocacy" tests, described above, was as true in 1976 when Buckley was issued as it is today and has remained the same throughout this entire period. In other words, in 1980, and in 1990, and again in 2000, all before BCRA was ever enacted or McConnell ever decided, the meaning of "political committee" under FECA - as authoritatively set forth in Buckley - entails that an organization is a political committee if the majority of its activities are devoted to electing or defeating a federal candidate, without regard to whether the organization confines these electoral activities to what counts as express advocacy.

Nothing in BCRA or McConnell in any way negates this correct understanding of FECA and Buckley. BCRA, quite clearly, did not purport to address the definition of "political committee." As has often be observed, it was concerned with the regulation of parties, not non-party groups designated as "political committees" under the "major purpose" test. BCRA also supplemented the restrictive category of "express advocacy" with the new category of "electioneering communications," but did so for all persons, not just political committees, imposing a disclosure requirement on any person spending more than $10,000 on these electioneering communications. (Congress, not the Commission, had the authority to expand the regulation of all persons under FECA in this way.) Thus, BCRA left in place exactly the same definition of "political committee" as preceded BCRA and that definition, properly understood, requires that all organizations that devote the major portion of their
activities to winning federal elections be designated "political committees," not merely those organizations that devote the major portion of their activities to express advocacy.

Moreover, although *McConnell* does not directly involve an interpretation of the term "political committee" in FECA, it confirms that the "express advocacy" test does not operate as a constitutional constraint on the scope of that term. Prior to *McConnell*, the primary argument advanced by those believing that the "express advocacy" test must constrain the definition of "political committee" was a supposition that the express advocacy test, as a bedrock requirement of First Amendment law, established the outer boundary of all campaign finance regulation. But *McConnell* made clear that this supposition was an erroneous view of First Amendment law. Thus, there never was any reason to think that the express advocacy test limited the definition of political committee. Instead, all along, the correct understanding of FECA as interpreted in *Buckley* – consistent with the correct understanding of the First Amendment as articulated in *McConnell* – is that the "major purpose" test determines which groups come within the definition of "political committee" without regard to the separate "express advocacy" test, which applies to only those groups that fall outside this definition.

Some argue, however, that the enactment of BCRA was premised on the assumption that definition of political committee under FECA encompasses only those groups that spend the majority of their funds on express advocacy. To support this argument, they rely upon a provision in BCRA – 2 U.S.C. 441i(e)(4)(B) – which permits the solicitation of up to $20,000 per individual per year for tax-exempt groups "whose principal purpose" is to engage in certain forms of "federal election activities," as defined elsewhere in BCRA, 2 U.S.C. 431(20)(A)(i) & (ii). Invoking this provision, they observe that political committees under FECA are not permitted to receive more than $5000 – not $20,000 – per individual per year, and therefore the assumption of this provision must be that these tax-exempt groups with this "principal purpose" are not political committees. From this premise, they conclude that the category of political committee under FECA must be confined to solely those groups with a primary purpose of engaging in express advocacy and cannot extend to groups having a primary purpose of engaging in a broader array of election-related activities. But the conclusion does not follow from the premise.

BCRA enumerates three distinct kinds of "federal election activities." The first, subsection (i) of 2 U.S.C. 432(20)(A), is "voter registration activity" within 120 days of a federal election. The second, subsection (ii), is "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears
on the ballot).” The third, subsection (iii), is a “public communication” that “promotes,” “supports,” “attacks,” or “opposes” a clearly referenced federal candidate “regardless of whether the communication expressly advocates a vote for or against [the] candidate.”

Notably, the solicitation provision in 2 U.S.C. 441(e)(4)(B) applies only to tax-exempt groups that engage in the first two kinds of “federal election activities” but not the third. This distinction makes sense because a group that devotes itself primarily to voter registration and/or voter mobilization is not necessarily a group that has as its major purpose the election or defeat of a candidate. Some groups genuinely are devoted to nonpartisan voter registration or get-out-the-vote drives, because they wish to encourage civic participation and the exercise of the franchise, without regard to which candidates or parties the voters choose to support (because increased voter registration and turnout results in a more robust democracy). Such truly nonpartisan groups, lacking a view on which side should win the election, clearly are not political committees under FECA.

By contrast, a group that devotes itself principally to the third kind of “federal election activity” is appropriately deemed a political committee under FECA. Public communications that “promote, support, attack, or oppose” a federal candidate clearly take a position with respect to the candidate. They are not neutral, indifferent to the voter’s view of the candidate. Whereas a group that makes such communications only as a minor portion of its overall activities should not be regulated as a political committee (because this particular group does not have electing or defeating a candidate as its major focus), a group that does devote a majority of its spending in a given year on such candidate-approving or candidate-disapproving messages should be regulated as a political committee (because this group by the totality of its actions does display as its predominant objective the election or defeat of a candidate).

Thus, just because a group devoted primarily to nonpartisan voter participation efforts is not a political committee, it does not follow that a group is a political committee only if it is devoted primarily to express advocacy. Instead, a group devoted primarily to disseminating messages that “promote, support, attack, or oppose” a candidate deserve the political committee designation, whether or not its message contain express advocacy. The careful distinction between subsections (i) & (ii), one the one hand, and subsection (iii), on the other, of 2 U.S.C. 431(20)(A) in BCRA’s solicitation provision recognizes this truth. In any event, it certainly shows that BCRA is not predicated on a premise that the political committee category must be confined by the express advocacy test.
Since BCRA neither expanded nor contracted the definition of political committee under FECA, but simply left it as it was pursuant to Buckley, the Commission still faces the task under FECA of specifying the scope of election-motivated activities that count when applying the “major purpose” test and its ancillary 50 percent rule. This task is just the same after BCRA’s enactment as it was before and, under Buckley, it calls for a functional approach so that the definition of “political committee,” as Buckley mandated, “fulfil[l]s” the “core” regulatory objectives of FECA. The proper inquiry here is to identify those kinds of activities that one would expect to be undertaken by a group dedicated to the election or defeat of a federal candidate. If a group devotes the preponderant share of its efforts to these sorts of activities, then it is acting just like any other group whose primary objective is to elect or defeat a federal candidate. In other words, this particular group would be functioning as a political committee and, accordingly, under FECA should be classified as one.

What sorts of activities are these? As just discussed above, they include not only express advocacy (even as supplemented by the new category of electioneering communications), but also the broader category of public messages that “support, promote, attack, or oppose” a candidate: any group that spends over 50 percent of its funds on these kinds of messages is acting as a political committee with the predominant objective of electing or defeating the candidate. Also included with the sorts of activities that we expect of political committees is partisan voter drives that reference a federal candidate and encourage potential voters to register to vote, or go to the polls, in order to support a particular federal candidate and that candidate’s team. Some of the communicative activity that forms these partisan voter drives, including one-on-one conversations between the voters and the drive’s campaign workers, is likely to constitute “express advocacy” – for example, the door-to-door message “you should register to vote so that you can help get rid of Bush” – but voter drives conducted with the declared purpose of supporting or opposing a particular federal candidate should count towards the 50 percent rule without regard to whether particular communications within the voter drive constitute express advocacy.

Thus, while we would not expect political committees dedicated to electing or defeating particular candidates to engage in nonpartisan voter drives, we would expect them to engage in partisan voter drives. The “major purpose” test, and its ancillary 50 percent rule, should take account of this distinction and include the latter, but not the former, when determining whether the majority of a group’s spending is devoted to achieving electoral outcomes. The Notice of Proposed Rulemaking appropriately observes this distinction, but it is imperative that the final rule make clear that the consideration of partisan voter drives (without regard to the express advocacy test) to determine whether a group is a “political committee” does not mean that partisan voters drives can be...
considered “expenditures” under FECA when conducted by groups that are not political committees (unless the spending for these voter drives does meet the express advocacy test). Again, the consideration of partisan voter drives as part of a broader category of election-motivated activities than express advocacy, just like the consideration of messages that “promote, support, attack, or oppose” a candidate, must be limited in use to implementing the “major purpose” test and its ancillary 50 percent rule and cannot be used to regulate the spending of groups that fall short of “political committee” status under this 50 percent rule.

There is, however, an additional wrinkle involving the consideration of partisan voter drives to implement the 50 percent rule. Some partisan voter drives are not specific to any federal candidate. Rather, they urge voters to register, or go to the polls, to support Democrats or Republicans generally. A group that devotes itself primarily to these generic partisan voter drives cannot necessarily be presumed to be a political committee under FECA, since its “major purpose” might be to support state party, rather than federal party, candidates. Of course, if a group declares that the purpose of a particular voter drive is to assist the election or defeat of a particular federal candidate, then the voter drive is not generic and it can be counted when implementing the 50 percent rule, even if the group’s communications with the voters that form this drive refer only to seeking a “Democratic” or “Republican” victory (or defeat).

In this regard, it is worth recalling that the 50 percent rule is only one of two independent ways to determine whether a group’s “major purpose” is to elect or defeat a federal candidate. The other is to examine whether the group has issued public pronouncements declaring its primary objective, or core mission (or “major purpose” in similarly equivalent terms), to be the election or defeat of a federal candidate. If so, then the group has self-declared that it meets the “major purpose” test, and it should be classified as a political committee without further inquiry. The Notice of Proposed Rulemaking reflects this important point, although proposed 11 CFR 100.5(a)(2)(i) should be revised to eliminate the $10,000 disbursement threshold: under Buckley, if a group declares its major purpose to be the election or defeat of a federal candidate, it is a political committee under FECA unless its spending for this purpose falls below $1000 per year. See Buckley, 424 U.S. at 79 n.107 (only if a group “primarily organized for political activities” spends less than $1000 per year is it not a “political committee” under FECA).

Once a group has self-declared that its predominant objective is to elect or defeat a federal candidate – and thus it is a political committee – then any voter drive conducted by that group is appropriately presumed to be motivated by the group’s predominant objective. (This point relates to the allocation rules applicable to political committees.) In other words, the Commission need not look for evidence that the declared purpose of a particular voter drive is to assist
the election or defeat of a federal candidate. Determination of the group’s purpose, rather than the particular drive’s purpose, is enough. In this respect, the operation of FECA’s regulations once a group has been determined to be a political committee because of its own public pronouncement of its major purpose differs from the implementation of the 50 percent rule in order to determine, in the absence of such a public pronouncement, whether the group in fact meets the major purpose test. With respect to the latter, but not the former, the Commission must find evidence that the declared purpose of the particular voter drive is to assist the election or defeat of a federal candidate. Thus, some voter drives – even some partisan voter drives (those that are purported to be generic and for which there is no evidence otherwise) – do not count when applying the 50 percent rule to determine, without regard to the group’s own public pronouncements, whether the group is functioning as a political committee and thus must be classified as one.

In sum, the category of election-motivated activities that count when applying the 50 percent rule is not precisely congruent with the category of “federal election activities” as specified in BCRA, although there is considerable overlap between the two categories. It is not surprising that they are not congruent, because they serve different regulatory purposes. BCRA’s specification of “federal election activities” exists to define the scope of the soft-money ban applicable to state and local political parties. By contrast, the category of election-motivated activities that we have now been considering is necessary to determine whether a non-party group has electing or defeating federal candidates as its major purpose. Nor is it surprising that, even if not congruent, there is substantial overlap between the two categories. Political committees, by definition (as articulated in Buckley), are inherently electoral organizations, motivated primarily by the goal of winning elections. In this regard, they share important similarities with political parties – explaining why, like political parties, they are regulated under FECA. Thus, a test that is designed to examine a group’s activities to see whether they are predominantly devoted to achieving electoral outcomes, so that the group is properly classified as political committee to fulfill FECA’s regulatory objectives, is likely to have affinities with a statutory term that implements the regulation of political parties, which are also inherently electoral organizations. But the important point here remains that the category of election-motivated activities necessary to implement the “major purpose” test under Buckley would exist even if BCRA and its definition of “federal election activities” never existed. This Buckley-based category of election-motivated activities is dependent on a functional analysis of FECA’s regulatory objectives with respect to political committees, as required by Buckley, and it is the same both before and after BCRA’s enactment.
FECA and 527s

The Notice of Proposed Rulemaking raises the question whether reference to section 527 of the Tax Code, and groups qualifying under that provision, should be incorporated into the Commission’s rules for implementing the “major purpose” test under Buckley. The answer is no. As the Commission itself recognizes, a group can qualify under 527 and have influencing state, rather than federal, elections as its major purpose. Likewise, as the Commission also recognizes, a 527 group can have influencing the appointment of individuals to non-electoral offices as its major purpose. Thus, the fact that a group qualifies as a 527 does not make it necessarily, or even presumptively, a political committee under FECA.

More importantly, FECA is an entirely separate statute from the Tax Code, serving entirely different governmental objectives. The designation of certain groups as political committees under FECA is a regulatory function pursuant to, and part of, the overall reasons why FECA regulates campaign finance (to protect the integrity of elections and so forth). The designation of certain groups as tax-exempt under 527 is a tax-based subsidy that is pursuant to, and part of, the overall set of incentives and disincentives the government wishes to create at the same time as the government raises revenue through the Tax Code. The Commission, charged with the enforcement of FECA and its distinctive regulatory objectives, should implement the “major purpose” test to serve those regulatory objectives without regard to the tax status of a group under the Tax Code.

In other words, it should be a factor neither in favor or nor against political committee designation that a group is a 527. Instead, the Commission independently should determine whether the major purpose of the group is to elect or defeat one or more federal candidates by asking, in the alternative, whether the group’s public pronouncements so demonstrate, or whether 50 percent of the group’s spending is devoted to those election-motivated activities characteristic of groups with this major purpose. A positive answer to either branch of this inquiry should be enough to classify a group as a political committee, whatever its tax status. Likewise, a negative answer to both of these inquiries should be enough to exclude the group from the political committee classification, even if it is a 527 under the Tax Code. Thus, the Commission should adopt a final rule that embraces provisions along the lines of those contained in proposed subsections (i) and (ii) of 11 CFR 100.5(a)(2), as modified in some details by previous analysis in these comments, but should entirely jettison the approach reflected in either alternative of proposed subsection (iv) – as well as entirely rejecting the proposed subsection (iii) for reasons stated earlier.
It has been suggested by some that in recent years Congress has adopted new rules for 527 groups, specifically disclosure rules, premised on the view that 527 groups are not subject to regulation as political committees unless they voluntarily register as such. This suggestion is misplaced and cannot yield the results that those who advance it wish it would. True enough, Congress has adopted new rules for 527 groups, but it has done so by amending the Tax Code and not FECA – and has imposed these new obligations on 527s whether or not they are political committees under FECA. (For example, under the new rules, a 527 group devoted solely to influencing state elections, and therefore undoubtedly not a political committee under FECA, must make certain disclosures to the IRS if not required to make equivalent disclosures under state law to a state agency.) These amendments to the Tax Code in no way constitute an implied repeal of the meaning of “political committee” under FECA. Thus, if the correct understanding of the definition of “political committee” under FECA entails a 50 percent rule that encompasses 527 groups when (but only when) they spend a majority of funds on election-motivated activities (without regard to the express advocacy test) – and, for the reasons already elaborated, Buckley mandates that this is the correct understanding – then this understanding was true before Congress tinkered with section 527 of the Tax Code, and this understanding remains true after these Tax Code amendments.

To be sure, Congress may have been motivated to amend the Tax Code in part because of regulatory inaction concerning the definition of political committee and this Commission’s failure to enforce FECA with respect to those 527 groups that meet the definition. Even so, this congressional frustration with the Commission’s inaction under FECA is all the more reason for the Commission now to enforce the definition of political committee, as properly understood pursuant to Buckley. Amendments to the Tax Code, whatever their motivation, cannot and do not negate that proper understanding of FECA mandated by Buckley, and this proper understanding should be effectuated in this rulemaking, without further delay.

Timing of this Rulemaking

It has been suggested that the Commission should postpone this rulemaking until after this year’s elections. This suggestion is predicated on the assumption that to adopt rules that implement the “major purpose” test under Buckley would be to “change the rules” in the middle of an election year, contrary to the will of Congress (as evidenced by the provisions in BCRA that delayed its effective date until after the 2002 elections and required expedited consideration of McConnell so that its validity could be finally determined in advance of this year). But this suggestion is based on a false premise: a rulemaking that implements the correct definition of “political committee” as mandated by Buckley does not “change the rules mid-election”; instead, it simply confirms what has been the law all along.
Even without this rulemaking, the Commission is required to enforce the proper definition of "political committee." And the proper definition of "political committee" under *Buckley* requires examination of a group's "major purpose," as revealed either by its own public pronouncements or by how the group spends the majority of its resources. Thus, to enforce the definition of "political committee" in the absence of this rulemaking—in response to a complaint, for example, that a particular group has not registered as a political committee when it is required to do so—the Commission would need to utilize the kinds of "public pronouncement" and "50 percent" rules that the Notice of Proposed Rulemaking discusses. Thus, the proposal to formally adopt these "public pronouncement" and "50 percent" rules simply confirms and clarifies what, under *Buckley* and prior to BCRA, the Commission would be required to do in any event.

Moreover, it is untenable to suggest that the enactment of BCRA precludes the completion of this rulemaking on the definition of "political committee" during this election year. The Commission began an earlier version of this rulemaking in 2001, shortly before BCRA's enactment, but suspended this rulemaking to await the enactment of BCRA and the resolution of the inevitable judicial challenges to its validity. Now that BCRA is in place and its validity confirmed by *McConnell*, it is time to resume what was already postponed, not time for further postponement.

When this rulemaking was postponed initially, there was a cloud hanging over all of campaign finance law. This cloud was the contention, advanced by many, that the "express advocacy" test constrained the entire structure of FECA as a constitutional roadblock set up by the First Amendment. *McConnell* has dispelled this cloud, and thus the Commission should proceed with enforcing the definition of "political committee" as mandated in *Buckley*, unclouded by an erroneous view of the express advocacy test.

**Allocation**

The Notice of Proposed Rulemaking itself recognizes that, at the same time as adopting rules to implement the definition of "political committee," the Commission should address the related "allocation" question: how a political committee, which has influencing federal elections as its "major purpose," should allocate the money it receives between this purpose and other (secondary) purposes. I discuss this allocation question in Part III of the attached article, *The "Major Purpose" Test*, and I incorporate that discussion by reference. The essential point of that discussion is that all funds received by a "political committee" should be considered as having been given to advance the committee's major purpose, unless specifically designated for the committee's
secondary purposes, and thus should be subject to the $5000 limit applicable under FECA to contributions given by individuals to political committees.

The Commission may also wish to consider rules concerning the affiliation of political committees with other organizations. When a political committee and a (c)(4) entity, or a "state" 527, exist side-by-side as two arms of the same overall organization, questions arise concerning whether the actions and objectives of the one should be attributed to the other. Obviously, if the (c)(4), or "state" 527, arm of the organization were itself to cross the line under the 50 percent rule, then it would need to register as a political committee in its own right. But what if the (c)(4), or "state" 527, stays below 50 percent, and yet its activities are undertaken at the direction of its affiliated political committee, which has publicly avowed purpose of electing (or defeating) a particular federal candidate? Should the public pronouncement of this electoral motivation be attributable to the affiliated (c)(4), or "state" 527, such that this affiliated entity must register as a political committee under the "public pronouncement" rule, without regard to an examination of its spending under the "50 percent" rule? Or, alternatively, under the "public pronouncement" rule should a political committee and all affiliated entities be considered a single unified organization, one that collectively is a single "political committee" under FECA, with the consequence that all funds received and spending undertaken by any arm of the organization is regulated as the activities of a single political committee?

These comments do not take a position on the exact rule the Commission should adopt to address such affiliation questions. In principle, it should be clear that an entity should not escape designation as a political committee when it is operating as part of a political committee, pursuant to the political committee's avowed primary goal of achieving an election victory. At the same time, however, any affiliation rule that the Commission were to adopt should make sure that it does not operate in practice as an excessively stringent "relationship" test, since legitimately operating (c)(4) and state-527 groups do not themselves become federal political committees simply because they have relations with such committees. Presumably, doctrines and principles within the law of agency, as well as the law of corporations, can assist the Commission in determining when two purportedly separate entities are actually operating as divisions of the same overall organization.

Conclusion

For the foregoing reasons, this Commission should forthwith issue a final Rule that contains proposed 11 CFR 100.5(a)(2)(i) & (ii) - the "public pronouncement" and "50 percent" rules - as modified in some details: specifically, the Commission should reject the $10,000 threshold in subsection (1); and should modify subsection ii(C) so that, with respect to voter drives, it
encompasses only those that have a declared purpose of seeking the election or defeat of a federal candidate.

The Commission, however, should reject proposed subsection (iii), as well as both alternatives of proposed subsection (iv) of section 100.5(a)(2).

Moreover, the Commission should adopt Alternative 1-A, and reject Alternative 1-B, making it clear that the meaning of “expenditure” extends beyond “express advocacy” only with respect to those organizations that are determined to be political committees under the “major purpose” test.

Request to Testify

As stated at the outset of these comments, I hereby request to testify at the hearing to be held in connection with this rulemaking. At the hearing, I would be happy to address any questions the Commission might have concerning these comments, the rulemaking, or my academic work relating to these topics.

Respectfully submitted,

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Robert M. Duncan/Jones Day
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