Preparing for 2006: A Constitutional Argument for Closing the 527 Soft Money Loophole

Jeffrey P. Geiger

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PREPARING FOR 2006: A CONSTITUTIONAL ARGUMENT FOR CLOSING THE 527 SOFT MONEY LOOPHOLE

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INTRODUCTION

In the 2004 election, 527 political organizations emerged from the fringes of the American election system to become defining and dominating players in a close electoral contest. The names of these organizations were just as familiar as the candidates themselves: MoveOn.org, Swift Boat Veterans for Truth, The Media Fund, and Progress for America Voter Fund, to name a few. Unlike the candidates, these organizations operated with few restraints on their financial ability to affect the outcome of the 2004 election. As a result, 527 political organizations produced and disseminated communications that defined and dominated the 2004 election. Their political communications were often the most "hard-hitting and misleading" of the campaign. To protect the integrity of our election system, reform is needed.

The 527 political organizations achieved their dominance by raising and spending "soft money." The term soft money denotes unlimited monetary contributions provided by a single source that is given outside the reach of federal campaign finance law. In the

1. The 527 political organizations are formed for the specific purpose of influencing elections; they are organized under section 527 of the Internal Revenue Code. See infra notes 80-83 and accompanying text; see also discussion infra Part II.A.


3. See generally Nelson, supra note 2 (reporting the significance of the fact that voters no longer need an explanation of 527 organizations).

4. See infra notes 117-20 and accompanying text.

5. See generally Howard Kurtz, Ads Aiming Straight for the Heart, WASH. POST, Oct. 27, 2004, at A1 (describing various 527 organizations that were active in the 2004 election).

6. Id. (quoting Brown University Professor Darrell West).

7. Richard Briffault, McConnell v. FEC and the Transformation of Campaign Finance Law, 3 ELECTION L.J. 147, 150 (2004). "Soft money" is everything that is not "hard money." "Hard money" refers to monetary contributions made to federal candidates or political parties for the purpose of "expressly advocating the election or defeat of federal candidates" and is limited by federal election law. Id. For a discussion on the hard money limits, see infra
2004 election, 527 political organizations received more than $400 million. The soft money was raised from individuals, corporations, and labor unions interested in a specific electoral outcome. The most generous of these contributors made donations ranging from $3.9 million to $30 million. Their contributions funded television advertising, partisan voter registration, and partisan get-out-the-vote efforts.

The emergence of these 527 political organizations was a direct result of the enactment of the Bipartisan Campaign Reform Act of 2002 (BCRA). BCRA sought to eliminate single-source contributions that ran into the hundreds of thousands or millions of dollars

Part I.A.


by restricting the ability of political parties to raise soft money to influence federal elections. Prior to BCRA, soft money contributions were channeled through the national political parties. Stymied by BCRA's ban, the political parties sought a new method of raising soft money. They turned to 527 political organizations. The 527 political organizations are independent groups organized for the primary purpose of influencing elections. Operating as independent groups, 527 political organizations may exist beyond the reach of hard money limits. Thus, they are able to raise soft money in order to try to influence the outcome of federal elections.

Reform legislation was introduced in 2004 to stop the circumvention of BCRA's intent and protect the integrity of the American election system by closing this 527 soft money loophole. The legislation proposed bringing 527 political organizations that promote, attack, support, or oppose an identified federal candidate within the scope of the hard money limits. Although this legislation was not acted on in the 108th Congress, congressional campaign reform advocates continued their efforts to close the loophole.

13. See infra Part I.C.
14. See Balz & Edsall, supra note 10; Edsall, supra note 8.
15. See Balz & Edsall, supra note 10; Edsall, supra note 8.
16. "Independent groups may make unlimited 'independent expenditures' in connection with federal elections." Fed. Election Comm'n, The FEC and the Federal Campaign Finance Law 4-5 (2004), available at http://www.fec.gov/pages/brochures/fec_feca_brochure.pdf (last visited Aug. 19, 2005). Groups maintain their independent status by not making political communications in "cooperation, consultation or concert with, or at the request or suggestion of, any candidate or his/her authorized committees, or a political party." Id. If a political communication is coordinated with a candidate, political committee, or political party, then it is considered a direct contribution subject to the applicable contribution limit. See Kenneth Gross, The New Federal Campaign Finance Act—in a Nutshell, CAMPAIGNS & ELECTIONS, July 2002, at 25.
17. See infra Part II.A.
18. See infra Part II.B.
19. See infra Part I.B.
21. See infra notes 127-28 and accompanying text; infra Part III.
by introducing similar legislation in the next congressional session. This Note examines whether the basic framework proposed in the reform legislation is constitutional. Part I provides an overview of federal campaign finance law. Part II summarizes the history of 527 political organizations and their role in the American election system. Part III discusses the basic framework of the proposed reform legislation and the constitutional arguments leveled against it. Part IV examines the constitutionality of bringing 527 political organizations within the scope of the federal hard money limits. This Note concludes that the basic framework of the proposed legislation provides a constitutional reform of the election system, a reform that will protect the integrity of the system from wealthy individuals seeking to influence the outcome of an election for their favored candidate.

I. OVERVIEW OF FEDERAL CAMPAIGN FINANCE LAW

A. Current Federal Campaign Finance Law

The financing of federal elections is governed by the Federal Election Campaign Act (FECA). FECA was enacted in response to the concern that large monetary contributions were being made to influence elections and secure political favors. To help maintain the integrity of the election system, FECA limits contributions to federal candidates and requires public disclosure of funds raised


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and spent to influence federal elections. The application of FECA varies depending on the actor and the type of electioneering activity.

Under FECA's requirements, federal candidate committees, party committees, political committees, and certain independent groups must disclose contributions and expenditures of more than $200. Independent groups who spend more than $10,000 airing television ads that can be received by 50,000 or more persons in the federal candidate's district thirty days before a primary election or sixty days before a general election must disclose contributions of more than $1000 and expenditures of more than $200. Public disclosure is achieved by filing periodic reports with the Federal Election Commission (FEC). The FEC then makes these disclosures available to the public.

FECA's hard money limits are based on the recipient's classification. A federal candidate's committee is limited to receiving $2100 per election from an individual. Federal committees run by national parties are limited to receiving $26,700 per election from individuals; state and local party federal committees are limited to $10,000. Political committees are limited to receiving $5000 per election from individuals. Additionally, individuals may give up to $101,400 in federal contributions every two years. FECA also

26. See id.
27. Political committees are organizations formed for the major purpose of influencing elections; their expenditures are used for political communications that expressly advocate the election or defeat of a clearly identified federal candidate. See infra notes 48-51 and accompanying text. For additional discussion on the political committee definition, see infra Part II.B.
28. FED. ELECTION COMM’N, supra note 16, at 4. Prior to the enactment of BCRA, independent groups were not required to disclose money they raised and spent. After BCRA, they must only disclose if they engage in electioneering communication. See infra Part I.B-C.
31. Id.
32. FED. ELECTION COMM’N, supra note 16, at 6-7. This hard money limit is increased for inflation in odd-numbered years. Id.
33. Id. The national political party hard money limit is also increased for inflation in odd-numbered years. Id.
34. Id.
35. Id.
prohibits corporations, labor organizations, government contractors, and foreign nationals from contributing funds or expenditures to influence federal elections. Independent groups such as 527 political organizations are not subject to any of these contribution limits unless their activities qualify them as a political committee.

B. First Attempt to Limit Contributions to Certain Independent Groups

With FECA, Congress originally sought to bring certain independent groups within the scope of the political committee contribution limits. To do so, Congress created a very broad definition for the term “political committee.” Under the definition, an independent group would be considered a political committee if it “receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1000.”

This attempt to capture independent groups within federal campaign finance law was challenged as an unconstitutional infringement on First Amendment rights. The Supreme Court considered the constitutionality of the political committee definition under strict scrutiny review because of the First Amendment implications. The Court held that the government had a compelling interest in enacting FECA—preventing corruption and the appearance of corruption in the election system. This compelling interest was derived from the risk to the election system presented by the mere possibility of giving federal candidates unlimited

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36. *Id.* at 4.
37. *See infra* notes 44-50 and accompanying text.
40. *Buckley*, 424 U.S. at 25, 64 (describing the review as “closest scrutiny” and “exacting scrutiny” (quoting *NAACP v. Alabama*, 357 U.S. 449, 461 (1958))).
campaign contributions in exchange for political favors. The Court did not agree, however, that the political committee definition was sufficiently narrow to achieve this compelling interest.

The Court determined that the political committee definition could be construed so broadly that it would unconstitutionally infringe on the First Amendment rights of independent groups. The Court found that independent groups were vital participants in the discussion of public issues and in the debate on the qualifications of candidates. The Court believed that this role was vital to the operation of the American system of government. Thus, the Court stated: "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Rather than invalidate the political committee definition, the Court narrowed its breadth by providing a new definition. The Court stated that an independent group does not fall within the political committee definition unless its major purpose is to influence elections and it makes expenditures in an aggregate amount exceeding $1000 for communications that expressly advocate the election or defeat of a clearly identified candidate.

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42. See Whittaker, supra note 24, at 1073. For example, corruption involving monetary contributions in the early 1970s included bribes, money laundering, and efforts to circumvent the spirit of FECA before the law took effect. See id. at 1069-70, 1074. Wittaker also discusses the savings and loan industry's use of large contributions to members of Congress to curry favor for deregulating the industry during the 1980s. See id. at 1064-65.

43. Buckley, 424 U.S. at 78-80; see also Briffault, supra note 7, at 155 (stating that the Court recognized that FECA's political committee definition could be interpreted to apply to groups engaged solely in issue advocacy); Craig Holman & Joan Claybrook, Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision, 22 YALE L. & POL'Y REV. 235, 239 (2004) (stating that the Court found FECA's language—which regulated expenditures by parties and groups regarding a "clearly identified candidate")—to be overly broad).

44. Buckley, 424 U.S. at 79.

45. See id. at 14.

46. See id.

47. Id. (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).


49. Buckley, 424 U.S. at 79-80; see also Holman & Claybrook, supra note 43, at 239-40 (explaining the Court's reinterpretation of the political committee definition). The Buckley test is commonly referred to as the "express advocacy" test, see Heather L. Sidwell, Taming the Wild West: The FEC's Proposed Regulations to Bridle "527" Political Groups, 56 ADMIN.
Express advocacy was defined as public communications that use magic words such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." Thus, an independent group was considered a political committee within the scope of FECA only if the group's major purpose was to influence elections and the group expended more than $1000 of its resources on communications of express advocacy containing the magic words.

The Court's decision had the effect of creating two different forms of advocacy—express advocacy and issue advocacy. Express advocacy constitutes political communication using the magic words. Issue advocacy is all other political communication. Independent groups that engage in only issue advocacy thereby do not meet the new political committee definition and are not required to comply with the hard money limits.

C. The Political Party Soft Money Loophole

At first, only independent groups engaged in issue advocacy (issue advocates) could influence elections without complying with the hard money limits. However, political parties realized there were ways around the law. They convinced the FEC to exempt certain activities from the hard money limits. These exempted

L. REV. 939, 947 (2004), or the "magic words" test, see Holman & Claybrook, supra note 43, at 240.

50. Buckley, 424 U.S. at 44 n.52.

51. Prior to enactment of BCRA, independent groups engaged in express advocacy did not have to comply with any of the requirements of FECA. For further discussion, see infra Part II.


53. See Briffault, supra note 7, at 150 ("The FEC held that political party committees could pay for a significant portion of [activities benefitting federal candidates] with ... soft money."); Briffault, supra note 52, at 629; Holman & Claybrook, supra note 43, at 239-40 (stating that "[w]ithout these words of express advocacy or something comparable, ads by parties and groups would be viewed as educational rather than electioneering in nature"); see also McConnell v. FEC, 540 U.S. 93, 142 & n.44 (2003) (blaming the FEC for subverting FECA and permitting the use of more soft money than Congress had intended). For a discussion of the FEC's role in enforcing FECA, see FED. ELECTION COMM'N, supra note 16, at 9-11.
party activities included “independent issue advocacy,” voter mobilization, and party infrastructure development. By carving out these activities from the hard money limits, the political parties created a soft money loophole. The political parties used this loophole to generate large soft money contributions from individuals seeking to curry favor with federal candidates and officeholders.

Soft money donations reached their peak in the 2000 election, when political parties received almost $500 million. The vast majority of the soft money raised was used to run television advertisements consisting of so-called independent issue advocacy. To the average viewer, however, these hard-hitting independent issue advertisements were virtually equivalent to express advocacy. These advertisements effectively advocated for or opposed an identified candidate, but did not use the magic words. For example, in the 1996 presidential election, the Democratic National Committee spent millions of dollars of soft money touting the accomplishments of the Clinton administration and criticizing the Republican Congress without using the magic words.

Political parties were not the only ones engaged in running persuasive issue ads known as “sham issue advocacy.”

54. Briffault, supra note 52, at 629.
58. Brennan Center Democracy Program, supra note 56. The most common way around the express advocacy test “[was] to include some language calling for the reader, viewer, or listener to respond to the message by doing something other than voting.” Richard Briffault, Issue Advocacy: Redrawing the Elections/Politics Line, 77 TEX. L. REV. 1751, 1759 (1999). This practice became known as “sham issue advocacy.” Pratt, supra note 57, at 1675. Approximately eighty percent of issue advertisements in the 1998 election called upon voters to “call” or to ‘tell’ an elected official something or call the sponsoring organization.” Briffault, supra, at 1760.
59. Briffault, supra note 52, at 632.
60. See supra note 58.
groups were also running these ads. 61 Sham issue advocacy was, for all practical purposes, the functional equivalent of express advocacy—both sought to influence voters by urging them to take action. 62 Thus, political parties and independent groups were able to do what FECA, as interpreted, sought to limit—they raised soft money to fund express advocacy to influence the outcome of elections.

D. Closing the Political Party Soft Money Loophole

This circumvention of federal campaign finance law was significantly curtailed with the enactment of BCRA in 2002. 63 BCRA closed the political party soft money loophole and shed light on sham issue advocacy. 64 In support of BCRA’s enactment, Congress

61. See Holman & Claybrook, supra note 43, at 240 (stating that issue advocates followed the parties’ example and began their own wave of sham issue advocacy). The 2000 election provided two excellent examples of sham issue advocacy by independent groups. One organization, Americans for Job Security, ran an advertisement criticizing Al Gore for proposing a gasoline tax increase by telling voters, “Don’t be Gored at the gas pump.” Id. at 241. Another organization, Republicans for Clean Air, ran an advertisement that criticized Senator John McCain for favoring the use of coal-burning plants that pollute the air and concluded with the statement: “Governor Bush, leading so each day dawns brighter.” Holman, supra note 11, at 247. The advertisement contained no magic words, enabling two of Governor Bush’s billionaire friends to use soft money to pay for the ad. See id. at 247-48. For a description of advertising devoid of magic words by 527s in the 2004 elections, see Paul Farhi, Two Political Ads Share More Than Fame and Controversy, WASH. POST, Sept. 7, 2004, at A2; Kurtz, supra note 5.


63. See Editorial, No Winks or Nods, WASH. POST, June 14, 2004, at A16 (commenting on BCRA’s effectiveness in slowing soft money contributions from corporations to political parties).

64. See Hearing to Examine the Scope and Operation of Organizations Registered Under Section 527 of the Internal Revenue Code Before the S. Comm. on Rules Administration, 108th Cong. (2004) (statement of Sen. Russell Feingold) [hereinafter Feingold Testimony], available at http://www.rules.senate.gov/hearings/2004/031004_feingold.htm (“Our bill was concerned with the raising and spending of soft money by the political parties ....”); Holman & Claybrook, supra note 43, at 251 (“[T]he primary objectives of BCRA [were] ... to end large contributions ... to national parties and federal officeholders ... and ... to capture the bulk of electioneering issue ads by parties and independent groups under federal campaign finance law.”).
developed a record of empirical evidence demonstrating the government’s compelling interest in amending FECA. This record contained evidence of corruption and the appearance of corruption in the election system as a result of soft money loopholes and sham issue advocacy. Finding that the government had a compelling interest and the means were sufficiently narrow, the Supreme Court upheld the major provisions of BCRA.

BCRA closed the soft money loophole by limiting the use of soft money by political parties. BCRA bans national parties from soliciting, raising, transferring, or distributing soft money. Under BCRA, state and local parties are prohibited from using soft money to pay for federal election activities, which include public communications that promote, support, attack, or oppose a clearly identified federal candidate (the “PASO” standard).

To increase awareness of sham issue advocacy, BCRA created a new statutory test called “electioneering communication.”

65. See Whittaker, supra note 24, at 1099-100 (stating that Congress developed a "voluminous record of evidence").
66. “[O]ver 60,000 pages of documents [were] submitted in defense of [BCRA].” Id. at 1100.
67. Id. (“This collective evidence proved Congress’s belief that corruption or the appearance of corruption existed in the political system.”).
68. After Buckley, national, state, and local parties developed soft money conduits for circumventing federal election law. Briffault, supra note 7, at 150.
69. See Pratt, supra note 57, at 1681-82 (arguing that expenditures of large amounts of soft money on sham issue advocacy raise the appearance of corruption because organizations making these expenditures “could benefit after that candidate comes to power”).
72. Id. § 441i(b). Federal election activities are defined as:
1) voter registration activity during the 120 days before a federal election; 2) voter identification, get-out-the-vote and generic campaign activity in connection with elections where federal offices are at stake; 3) any “public communication” promoting, supporting, attacking, or opposing a “clearly identified [federal] candidate”; and 4) the services of any state-party employee dedicating a portion of his paid time to “activities in connection with a federal election.

74. Id. § 434(f)(3).
Electioneering communication is defined as: "[A]ny broadcast, cable, or satellite communication which refers to a clearly identified candidate for [f]ederal office," which is broadcast within sixty days before a general election or thirty days before a primary election, and can potentially be received by at least 50,000 persons in the district or state the federal candidate seeks to represent.\textsuperscript{75} Any group that engages in electioneering communications is subject to only disclosure requirements and source limitations.\textsuperscript{76} This new test was added because Congress recognized that the express advocacy test was "functionally meaningless" and that most issue advocacy was "functional[ly] equivalent to express advocacy."\textsuperscript{77}

As the political parties prepared for the first post-BCRA election, they recognized that a soft money loophole remained.\textsuperscript{78} Although BCRA closed the political party soft money loophole, the electioneering communication definition did not curtail the ability of independent groups to collect unlimited soft money donations. Independent groups were still free to raise and spend soft money as long as their activities did not constitute express advocacy.\textsuperscript{79} A new soft money loophole was born.

II. HISTORY OF 527 POLITICAL ORGANIZATIONS

A. Section 527 of the Internal Revenue Code

Section 527 political organizations (527s) are named after the section of the Internal Revenue Code under which they are

\textsuperscript{75} Id. § 434(f)(3)(A), (C).
\textsuperscript{76} Id. § 434(f)(1)-(2). For a discussion of the McConnell Court's reasoning in upholding the electioneering communication test, see Briffault, supra note 7, at 155-59. \textit{See also infra} Part IV.A-B.
\textsuperscript{77} \textit{See} McConnell v. Fed. Election Comm'n, 540 U.S. 93, 193-94, 206 (2003) (stating that the Court found from the litigation record that the magic words requirement was "functionally meaningless" and that most issue advocacy advertisements "are the functional equivalent of express advocacy"). "In 2000, for example, only 2\% of ads run by political parties and other groups used \textit{Buckley}'s magic words." Pratt, \textit{supra} note 57, at 1677 (citing Holman & McLoughlin, \textit{supra} note 62).
\textsuperscript{78} \textit{See} Grimaldi & Edsall, \textit{supra} note 8.
\textsuperscript{79} Independent groups could easily avoid such a limitation by not using magic words in their political communications. \textit{See supra} notes 77-78 and accompanying text.
organized.\footnote{80} Political organizations formed under § 527 are granted tax-exempt, nonprofit status.\footnote{81} To qualify for § 527 status, the organization must be “organized for the express purpose of engaging in partisan political activity.”\footnote{82} If these organizations maintain their status as independent groups, then they are free to raise and spend unlimited soft money because they exist beyond the reach of FECA. The only requirement placed on 527s is that they must disclose their contributions and expenditures to the Internal Revenue Service (IRS), which in turn makes them available to the public.\footnote{83}

The ability of 527s to influence elections differs from the ability of other tax-exempt, nonprofit organizations formed under the Internal Revenue Code to influence elections.\footnote{84} The most frequently occurring tax-exempt organization is a 501(c)(3) organization, which is also named after an Internal Revenue Code section.\footnote{85} The 501(c)(3) organizations are permitted to lobby elected officials to a limited extent, but are disallowed from expressly engaging in partisan or electioneering activities.\footnote{86} Another form of tax-exempt

\footnote{80. See I.R.C. § 527 (2000).}
\footnote{81. I.R.C. § 527(a), (e)(1) (2000) (“The term ‘political organization’ means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”). An exempt function is defined 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.” I.R.C. § 527(e)(2). 527s are exempt from federal income and gift tax, but must pay a tax on investment income.}
\footnote{82. McConnell, 540 U.S. at 174 n.67. See also id. at 177 (stating that 527 organizations “by definition engage in partisan political activity”).}
\footnote{83. Kingsley & Pomeranz, supra note 81, at 61-62. In 2000, campaign finance reform advocates amended § 527 to require disclosure of donations of more than $200 and disclosure of expenditures of more than $500. Donald B. Tobin, Anonymous Speech and Section 527 of the Internal Revenue Code, 37 Ga. L. Rev. 611, 625 (2003). This legislation was enacted in response to the television advertisements run by Republicans for a Clean Air, a § 527 organization, against Senator John McCain in the 2000 Republican presidential primary. See discussion supra note 60. Campaign finance reformers were upset that a § 527 organization funded by two Texas billionaires could influence the outcome of the primary election without complying with FECA. See Holman, supra note 11, at 247-48; Tobin, supra, at 625.}
\footnote{84. Kingsley & Pomeranz, supra note 81, at 60-61.}
\footnote{85. Id. at 60.}
\footnote{86. See id. For the definition of federal election activities, see supra note 72.}
organization is a 501(c)(4) organization, which is also named after a section of the Internal Revenue Code.\textsuperscript{87} Section 501(c)(4) organizations are generally considered social welfare organizations and are permitted to pursue political and other activities.\textsuperscript{88} The expenses for political activities, however, cannot be one-half or more of the organization's total budget.\textsuperscript{89} Both 501(c)(3) and 501(c)(4) organizations maintain their tax-exempt status only if they limit their efforts to influence elections.\textsuperscript{90}

Congress did not originally intend for 527 organizations to influence elections without limitation.\textsuperscript{91} Congress enacted § 527 in response to IRS uncertainty about how to treat political organizations for income tax purposes.\textsuperscript{92} Congress resolved this uncertainty by deciding to treat all political organizations in the same manner as it treats 501(c) organizations—they would be exempt from income taxation.\textsuperscript{93} Congress granted this exemption on the belief that political organizations “properly regulated” by FECA positively contribute to democratic societies.\textsuperscript{94} This belief is evidenced by the nearly identical language Congress used to describe organizations allowed to organize under § 527—having the primary purpose of influencing elections—and the language used in FECA's political committee definition—having the major purpose of influencing elections.\textsuperscript{95} At the time of § 527's enactment, such political organizations were within the scope of FECA's regulations. Thus, Congress

\textsuperscript{87} Kingsley & Pomeranz, supra note 81, at 60-61.
\textsuperscript{88} Id.
\textsuperscript{90} Other tax-exempt organizations include 501(c)(5) and 501(c)(6) organizations, which are limited in their political activities, similar to 501(c)(4) organizations. Kingsley & Pomeranz, supra note 81, at 61.
\textsuperscript{91} Francis R. Hill, Probing the Limits of Section 527 to Design a New Campaign Vehicle, 86 TAX NOTES 387, 390 (2000); Holman, supra note 11, at 266; Tobin, supra note 83, at 622-25.
\textsuperscript{92} Tobin, supra note 83, at 621-22. The IRS's uncertainty arose from its inability to characterize political organizations as 501(c)s, and thus tax-exempt, or as for-profit entities, and thus subject to income tax. See id. at 627-28.
\textsuperscript{93} Holman, supra note 11, at 266; Tobin, supra note 83, at 621-24 (discussing the motivation for congressional action in adding § 527).
\textsuperscript{94} Tobin, supra note 83, at 624.
granted the tax exemption with the intention that FECA would limit the ability of 527s to influence elections.

Congress's intention was undermined when the Supreme Court concluded in *Buckley* that FECA's political committee definition was unconstitutional. As discussed above, the Court interpreted the language of FECA's political committee definition to apply only to organizations with the major purpose of influencing elections through expenditures that expressly advocate the election or defeat of a federal candidate. Thus, after *Buckley*, only 527s engaged in express advocacy—communications that used the magic words—would be governed by FECA.

The IRS further undermined Congress's original intent when it chose not to use *Buckley*'s express advocacy test to determine whether an organization qualified for tax exemption under § 527. Such a test would have limited § 527 eligibility to only those organizations that engaged in express advocacy and thus, would have been governed by FECA. Instead, the IRS adopted a broader test for determining § 527 eligibility. The broader test grants § 527 eligibility to any organization that cannot qualify for § 501(c) status because they seek to influence an election beyond the permitted level. Any group formed for the express purpose of engaging in partisan political activity could now organize under § 527 and avoid complying with FECA's requirements.

As a result, organizations which admittedly sought to influence elections could escape FECA by carefully wording their political communications. These carefully worded sham issue ads leave no doubt as to the influence they seek to exert on the election.

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96. *See Tobin, supra* note 83, at 624; *supra* notes 43-47 and accompanying text.
97. *See Tobin, supra* note 83, at 624; *supra* notes 48-51 and accompanying text.
98. *Id.*
99. *Id.* The IRS's adoption of the broader test resulted from political operatives recognizing the tax advantages of § 527. These political operatives argued persuasively to the IRS that their activities were political and partisan in nature, qualifying them for § 527 tax protection. At the same time, these organizations persuasively argued to the FEC that these same activities were nonpartisan issue advocacy, and thus did not fall within the definition of political committee. *527 Hearing, supra* note 22 (statement of Sen. Feingold); *see also 527 Hearing, supra* note 22 (statement of Professor Frances R. Hill, Univ. of Miami Sch. of Law).
101. For examples from the 2004 election, see *infra* note 131-32 and accompanying text.
Section 527 enables soft money donors to influence the outcome of an election while avoiding hard money limits.

**B. The 527 Soft Money Loophole**

Initially, Congress did not reassert its original intent due to First Amendment concerns. Section 527 was mainly used by independent organizations engaged in issue advocacy. Section 527 enabled these organizations to raise soft money to fund political communications that focused on issue discussion. For example, a 527 organization could have spent soft money to rate the qualifications of all candidates for Congress on nonpartisan criteria and "publish[] the results prior to an election." Another organization could have spent soft money to publish a voter guide for its members and others concerned with a public policy issue. Engaging in these types of activities meant that 527s operated mainly on the sidelines of our election system.

During this time, the Supreme Court weighed in again. In *Federal Election Commission v. Massachusetts Citizens for Life (MCFL)*, the Court indicated in dicta that subjecting an independent political group not engaged in express advocacy to contributions limits similar to those designed for political committees likely

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102. See supra note 60; infra note 170.
103. For example, George Soros gave more than $23 million to various 527s for the specific purpose of defeating President George Bush; Bob Perry gave more than $8 million to various 527s for the specific purpose of defeating John Kerry. Center for Responsive Politics, *Individuals*, supra note 9. Wealthy donors from Texas earned the state the nickname "ATM state" as a result of the $36 million contributed to 527s. John Frank, *City, State Give Big to Maverick 527 Groups: Houston Leans Left in Its Support of Independent, Partisan Advocates*, HOUS. CHRON., Oct. 10, 2004, at 1.
104. See generally Kingsley & Pomeranz, *supra* note 81, at 114 (stating that "[m]any organizations that qualify for tax exemption under I.R.C. § 527 are not primarily engaged in influencing federal elections").
105. Such communications were a part of the vital discussion and debate the Supreme Court sought to protect from FECA. See supra text accompanying notes 45-47.
106. See Kingsley & Pomeranz, supra note 81, at 116.
107. See *id.* at 117.
108. See generally Nelson, *supra* note 2 (reporting that 527s were minor players prior to 2004). Previously, political parties dominated the election system through soft money contributions. See supra Part I.C.
infringed on First Amendment rights. The Court noted that this would hold true only if the independent political group's expenditures did not become so significant as to indicate the group's major purpose was to influence elections. If the group's expenditures reached such a level, however, it could be appropriate to classify the group as a political committee.

After MCFL, § 527 was used increasingly by individuals or groups wanting anonymity while seeking to influence elections. Political organizers recognized that § 527 enabled them to use soft money to fund sham issue advocacy to influence the outcome of elections. The proliferation of this use of 527 organizations in the 2000 election prompted efforts to institute reform. After the airing of the Republicans for Clean Air ad during the 2000 primaries, Congress passed legislation amending § 527 to require disclosure of contributions and expenditures. This legislation ensured that wealthy, self-interested individuals could not hide behind an anonymous entity, but it did not extend the hard money limits to 527s.

In 2004, 527s emerged as a dominating and defining influential force in the American election system. As political parties readied for the first post-BCRA elections, political operatives launched "a secret effort to continue the flow of soft money" into the election system. These operatives devised a plan to use § 527 political organizations to do what BCRA barred the political parties from

110. *Id.* at 254-55. Only if an independent political group engaged in express advocacy would it be classified as a political committee and subject to FECA's contribution limits. *See id.* at 262.

111. *Id.* at 262.

112. *Id.*

113. *See Tobin, supra* note 83, at 613-14 (stating that 527 organizations were often used to influence elections without revealing the identity of the contributors). Tobin cites, as an example, the Republicans for Clean Air ad discussed in note 60. *See id.* at 614-15. After some pressure, the sponsors revealed their identities: Republicans for Clean Air consisted of two members, both Texas billionaires and major contributors to the Bush campaign. *Id.*

114. *See Pratt, supra* note 57, at 1676-77 (stating that sham issue advocacy has become prevalent in current campaigns).


116. *Id.* For a discussion of the disclosure requirements, see *supra* note 83 and accompanying text.

117. *See supra* note 2.

doing: "[R]aise and spend unlimited contributions of 'soft money' ... to influence federal elections." The 527s were set up to collect soft money to finance the same voter-influencing activities that political parties previously conducted using soft money contributions.

C. FEC Declines to Close the 527 Soft Money Loophole

Outraged by these efforts to circumvent and violate the spirit of the campaign finance laws, campaign finance reformers called upon the FEC to plug the 527 soft money loophole. Responding to pressure to close the loophole, the FEC made two attempts to adopt campaign finance regulations which would have barred 527s from raising and spending soft money to influence federal campaigns. Reformers argued that the FEC had the power to close the loophole under current law and that congressional action was not necessary. Opponents argued that only Congress could close
the loophole, that the proposals under consideration were unconstitutional infringements on the First Amendment rights of issue advocates, and that the proposals were politically motivated.\(^\text{125}\) After considering the issue, the FEC decided not to adopt the regulations necessary to close the loophole.\(^\text{126}\) Dismayed by the FEC's decision, campaign reform advocates introduced legislation in an attempt to close the loophole.\(^\text{127}\) The reformers acknowledged, however, that the proposed legislation could not have been passed before the November 2004 elections.\(^\text{128}\)

As a result, the 527 soft money loophole was exploited in the 2004 election year. Political operatives formed new 527s with the announced purpose of raising soft money and express purpose of advocating the election or defeat of the candidates.\(^\text{129}\) Their efforts

\(^{125}\) See Sidwell, supra note 49, at 950-54 (summarizing public reaction to the proposals to close the 527 soft money loophole); see also Edsall, Unusual Alliances, supra note 122 ("Democratic and Republican leaders believe that the outcome of the FEC deliberations could dramatically affect the race between President Bush and Sen. John F. Kerry, the presumptive Democratic nominee.").


\(^{128}\) Dewar, supra note 20. As predicted, the legislation did not pass prior to the November 2004 elections. S. 2828; H.R. 5127. As a result, the reformers initiated a new effort to pass legislation closing the loophole in the next congressional session. See supra note 22 and accompanying text.

\(^{129}\) See E.J. Dionne, Jr., Editorial, Playing with Fire on 'Soft Money,' WASH. POST, Mar. 16, 2004, at A21 (commenting on Harold Ickes' travels across the country to raise soft money for his 527 to run ads directed against George Bush; Ickes was a top lieutenant to Bill Clinton); Thomas B. Edsall, GOP Creating Own '527' Groups: Unregulated Funds Can Be
included base-mobilizing voter registration, get-out-the-vote efforts, and sham issue advocacy aimed at promoting a favored candidate or attacking a disfavored candidate.\textsuperscript{130} For example, one 527 advertisement criticized President Bush for making a joke about the failure to find weapons of mass destruction in Iraq when military members died doing just that.\textsuperscript{131} Another 527 advertisement criticized Senator John Kerry for "supposed flip-flopping by showing a groom dumping his bride to passionately embrace her best friend."\textsuperscript{132} The end result was a federal election "defined, and dominated, by three numbers: 527."\textsuperscript{133}

III. LEGISLATION'S BASIC FRAMEWORK AND CONSTITUTIONAL CONCERNS

The 2004 election experience shows that new legislation is needed to bring 527s within the letter and spirit of federal campaign finance law. Campaign finance reformers have proposed legislation that creates a new definition specifically for 527s for the term "political committee."\textsuperscript{134} Generally, this legislation defines a

\textit{Raised,} WASH. POST, May 25, 2004, at A15 [hereinafter Edsall, GOP] (reporting that Republican operatives launched an effort to raise soft money through a 527 with close ties to the Bush administration to purchase television ads praising administration policies).

130. \textit{See} Balz & Edsall, supra note 10, at A1 ("The Democratic groups have created five organizations to oversee facets of the campaign: paid advertising; voter identification and turnout; communications, polling research and rapid response; fundraising; and the coordination of the operations of more than two dozen liberal organizations."); Edsall, GOP, supra note 129; Thomas B. Edsall, Pro-GOP Groups Outpaced in Funds: Pro-Democratic '527s' Far Ahead, WASH. POST, July 16, 2004, at A9 (reporting that 527s were virtual "shadow" parties performing basic party functions such as get-out-the-vote drives and running anti-Bush ads).

131. \textit{See} Kurtz, supra note 5.

132. \textit{See} id.

133. Hosenball, Isikoff & Bailey, supra note 2, at 23.

political committee as an organization formed under § 527 of the Internal Revenue Code that promotes, attacks, supports, or opposes a federal candidate. Exempted from the proposed legislation's reach are 527s organized for the following purposes: influencing elections of nonfederal candidates, influencing nonfederal elections, influencing elections without federal candidates on the ballot, influencing state ballot initiatives or referenda, and influencing the selection of individuals to nonelected offices or leadership positions within political parties. The proposed legislation would therefore amend FECA to create a second definition for the term political committee, but it still would not capture all activities by 527s. The legislation captures only those activities by 527s that do not meet the carveouts and only those activities by 527s that promote, attack, support, or oppose a federal candidate. Only 527s meeting the new definition for the term political committee would fall within the federal hard money limits. Exempted 527s and 527s that did not engage in electioneering activities that promote, attack, support, or oppose a federal candidate, on the other hand, would not be subject to the hard money limits. For example, 527s could still

within federal campaign finance law were suggested. See, e.g., Edward B. Foley, Comments to FEC: April 5, 2004, 31 N. KY. L. REV. 361, 362 (2004) (proposing that the FEC reject a major purpose test based solely on § 527 and adopt a broader major purpose test that asks whether one-half of an organization's expenditures are used for federal electioneering activities). One method in particular received the support of the FEC's Office of General Counsel and would require "an organization to have 'as its major purpose the nomination or election of one or more candidates for federal office.'" Draft Final Rules for Political Committee Status (Agenda Document No. 04-75 for FEC Open Meeting Agenda for Aug. 19, 2004), http://www.fec.gov/agenda/mtgdoc04-75.pdf (last visited Mar. 16, 2005) (basing the major purpose definition on one-half expenditures for federal electioneering activities). The General Counsel's proposal continued to use the PASO standard to define the expenditure prong of the political committee definition. Id. For a detailed discussion of the one-half expenditure test, see Edward B. Foley, The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups, 31 N. KY. L. REV. 341, 351-59 (2004).

135. Alternative 2-A, supra note 134; see also S. 271 (using similar exceptions); H.R. 513 (using similar exceptions); S. 2828 (using similar exceptions); H.R. 5127 (using similar exceptions).

136. Alternative 2-A, supra note 134; see also S. 2828 (providing similar carveouts to protect against overbreadth concerns); H.R. 5127 (providing the same carveouts as S. 2828).

137. FECA's original political committee definition, as interpreted by the Supreme Court, would remain in effect. See supra note 136. For a discussion of the original definition interpreted by the Supreme Court, see supra Part I.B.

138. The carveouts are the exceptions discussed supra notes 134-36 and accompanying text.
raise soft money to fund the following activities: publishing voter guides that contain voting records on a particular ideological issue but “contain[] no express statements in support of or in opposition to any candidate”; activities devoted to “improving the quality of elected officials [by] rating the qualifications of all candidates for Congress” on nonpartisan factors; publication of a candidate list whose members pledged to act in accordance with campaign ethics; and activities to promote state ballot initiatives.\(^\text{139}\) The 527s, and all other forms of independent groups, would remain free to raise soft money so long as their activities did not bring them within the scope of either definition of “political committee.”\(^\text{140}\)

The basic framework of the proposed legislation has been denounced as unconstitutional. Opponents argue that the legislation is unconstitutionally vague and overly broad, and, as a result, would subject activities protected by freedom of speech to governmental regulation.\(^\text{141}\) The threat that the basic framework would fail under judicial review was enough to block the proactive efforts of campaign reformers to close the flow of soft money in the 2004 presidential election.\(^\text{142}\) Although these concerns are valid, this Note argues that the proposed 527 legislation is constitutional. The

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139. Kingsley & Pomeranz, *supra* note 81, 115-18. These examples are derived from the article written by Elizabeth Kingsley and John Pomeranz, and based on testimony Pomeranz “prepare[d] for the [FEC] in response to the Commission’s Notice of Proposed Rulemaking on Political Committee Status.” *Id.* at 55 n.* & 115-18.

140. Independent groups would still be subject to any limitations that the tax code may impress upon their entity status. See *supra* notes 84-90 and accompanying text. These independent groups may also be subject to other aspects of federal election law, such as the electioneering communication provision discussed *supra* notes 74-76.

141. See Kingsley & Pomeranz, *supra* note 81, at 113-18 (discussing how the use of § 527 to define major purpose will result in excessive regulation and fail constitutional requirements that federal election law not be vague and overly broad); see also Sidwell, *supra* note 49, at 952-53 (summarizing the vagueness and overbreadth concerns raised in comments to the FEC’s proposed regulations). Kingsley and Pomeranz argue that the legislation based on § 527 is vague, overly broad, and unconstitutional. See Kingsley & Pomeranz, *supra* note 81, at 113-18. Their argument is based on the assumption that this legislation would capture all 527 activities. At least with regard to the proposed legislation discussed in this Note, however, that is not the case. The activities cited by Kingsley and Pomeranz would not be captured by the proposed legislation because 527s engaged in those activities would not be promoting, supporting, attacking, or opposing a clearly identified federal candidate, or otherwise engaging in exempted activities.

142. See Sidwell, *supra* note 49, at 953-54 (suggesting that concerns about how to properly define political committee may have resulted in the FEC taking a precautionary approach).
legislation is sufficiently narrow to achieve the compelling interest of preventing the corrupting influence of soft money funneled through 527 political organizations. Strict scrutiny concerns, therefore, should not be a barrier to efforts to close the 527 soft money loophole.

IV. CONSTITUTIONAL ANALYSIS OF THE BASIC FRAMEWORK

A. Standard of Review

Since Buckley, the Supreme Court has applied strict scrutiny judicial review to election laws encroaching on free speech.\textsuperscript{143} Strict scrutiny is used to protect the important role of free speech in our election system.\textsuperscript{144} The degree to which the Supreme Court applies strict scrutiny, however, has declined since Buckley.\textsuperscript{145} The Court’s use of strict scrutiny review in McConnell illustrates the effect of this decline.

In McConnell, the Court set out different degrees of strict scrutiny based on the type of federal electioneering activity the election law sought to capture. Contribution limits to a political campaign committee were reviewed with “closely drawn” strict scrutiny\textsuperscript{146} because

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\textsuperscript{144} Kingsley & Pomeranz, supra note 81, at 103-04; see supra notes 40-42 and accompanying text.

\textsuperscript{145} Telephone Interview with Michael E. Toner, Commissioner, Federal Election Commission (Nov. 19, 2004). In Nixon v. Shrink, 528 U.S. 377 (2000), the Court deferred to the Missouri legislature’s determination that a $275 contribution limit was necessary to prevent corruption in some circumstances. Justices Breyer, Ginsburg, and Stevens all recognized that “post-Buckley experiences with campaign finance have demonstrated that ... a flexible approach to the constitutional review of campaign finance rules [is needed].” Landell v. Sorrell, 382 F.3d 91, 108 (2d Cir. 2004). The Second Circuit recently applied a weak form of strict scrutiny to uphold expenditure limits within Buckley’s framework, even though Buckley itself invalidated expenditure limits because the limits were not justified by the government’s compelling interest in preventing corruption. See Landell, 382 F.3d at 110-14 (explaining why the court would grant deference to the legislature’s findings).

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.\textsuperscript{147}

If, however, the election law borders on issue advocacy, the degree of scrutiny applied is greater than "closely drawn" strict scrutiny.\textsuperscript{148} As the Court stated in \textit{McConnell}, this greater degree of strict scrutiny requires that the federal electioneering activity subjected to an election law be the functional equivalent of express advocacy.\textsuperscript{149}

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Toner, \textit{supra} note 145. Closely drawn scrutiny was used by the Court to uphold the soft money restrictions BCRA placed on the national, state, and local parties. Downie, \textit{supra}, at 931. The Court applied the lower degree of scrutiny because it found that restrictions on soft money contributions were not expenditure limitations that required a higher degree of scrutiny. \textit{Id.} \\

\textsuperscript{147} Foley, \textit{supra} note 134, at 343. 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 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 give[] 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). \textit{Id.} at 343-44.

\textsuperscript{148} See Bopp \& Coleson, \textit{supra} note 143, at 301 (citing \textit{McConnell}, 540 U.S. at 206) ("\textit{McConnell} requires that statutes bordering on issue advocacy must be analyzed under the \textit{Buckley} [and] \textit{McConnell} line of precedents so as to employ the express advocacy test or its functional equivalent.").

\textsuperscript{149} \textit{Id.} Recall that the Supreme Court in \textit{Buckley} created the express advocacy test to address concerns that FECA was overly broad. See \textit{supra} notes 44-50 and accompanying text. In \textit{McConnell}, the Court held that \textit{Buckley}'s express advocacy line was merely one possible solution to constitutional problems in the language of FECA, "and that other definitions of speech to be regulated could satisfy the First Amendment." Jaffe, \textit{supra} note 72, at 259 (citing \textit{McConnell}, 540 U.S. at 190-92). The \textit{McConnell} majority then went on to consider whether electioneering communication was a definition of regulated speech that could satisfy the First Amendment. The majority found that express advocacy had become "functionally meaningless." \textit{McConnell}, 540 U.S. at 192-94. The majority then asked whether electioneering communication was the functional equivalent of express advocacy. The
The new 527 legislation is intended as a contribution limit to close the soft money loophole. Attempts to capture 527s within campaign finance laws, however, will also border on issue advocacy. If the legislation survives the functional equivalent strict scrutiny review applied to election laws that border on issue advocacy, then it will survive closely drawn scrutiny, a lesser standard.

To survive functional equivalent strict scrutiny review, the basic framework of the proposed 527 legislation must survive a two-part test similar to true strict scrutiny review. First, the government must have a compelling interest in restricting election-related activity. Second, the government's means of achieving these interests must be sufficiently tailored to meet the interests. This Note will show that the basic framework of the proposed 527 legislation survives both tests, and is therefore constitutional.

B. Compelling Government Interests

The Supreme Court has found two compelling government interests for restricting certain federal electioneering activities: corruption and circumvention. The corruption interest is broadly defined as the prevention of corruption and the appearance of corruption. The circumvention interest is defined as preventing circumvention of federal election law. Both of these compelling

majority found the two were functionally equivalent and thus held that the new statutory definition of regulated speech was not unconstitutionally vague or overbroad. *McConnell*, 540 U.S. at 194; Jaffe, *supra* note 72, at 259.

Although the proposed legislation is intended to be a soft money restriction, there is no guarantee that a court would view it that way because it also encroaches on groups interested in issue advocacy. For this reason, this Note uses the higher degree of strict scrutiny to determine constitutionality.

Bopp & Coleson, *supra* note 143, at 300-01. "*McConnell* requires generally that laws restricting free ... speech that border on issue advocacy ... must be narrowly tailored to a compelling state interest. Within strict scrutiny[,] ... *McConnell* requires that statutes bordering on issue advocacy must be analyzed ... so as to employ the express advocacy test or its functional equivalent." *Id.* (citing *McConnell*, 540 U.S. at 205-06).

*Id.*

*Id.*


government interests are sufficient to overcome concerns that an election law encroaches on First Amendment rights.156

1. Preventing Corruption and the Appearance of Corruption

In *Buckley*, the Court defined corruption as a quid pro quo.157 The Court found that "[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined."158 In *McConnell*, the Court reaffirmed the government's interest in preventing corruption or the appearance of corruption by limiting "immense aggregations of wealth that are accumulated with the help of the corporate form."159

In *McConnell*, the Court expanded the definition of corruption by recognizing two new forms of corruption. First, the definition of corruption was expanded to include special access.160 The peddling of special access to federal officeholders in exchange for soft money donations to political parties was well documented in the legislative record.161 Special access was distinguished from the access given based on "friendship, family ties, ideological affinity, or prior support."162 The Court found that "special access procured by money ... is uniquely corrupt"163 and held that "Congress could take steps

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156. See Whittaker, *supra* note 24, at 1075 (stating that *McConnell* reaffirmed *Buckley*'s holding that actual corruption or the appearance of corruption was sufficient to overcome First Amendment scrutiny).


158. *Id.* The Court did not define quid pro quo. The Court indicated only that the term was more inclusive than outright bribery. Briffault, *supra* note 7, at 162. In the thirty years since *Buckley*, the Court has been "maddeningly imprecise" in its definition of corruption. *Id.* Quid pro quo has been described as "dollars for political favors," Fed. Election Comm'n v. Nat'l Conservative Political Action Comm., 470 U.S. 480, 497 (1985), and as the compliance of politicians with the "wishes of large contributors," Nixon v. Shrink Missouri Gov't Political Action Comm., 528 U.S. 377, 389 (2000). For a detailed discussion of the Court's attempts to define corruption, see Whittaker, *supra* note 24, at 1075-84.


160. *Id.* at 149-51; Briffault, *supra* note 7, at 162-63. Special access was viewed by the court as preferential treatment by federal officeholders given to soft money contributors. *Id.* Justice Kennedy's dissenting opinion argued that special access only shows favoritism or influence but not corrupt favoritism or influence. *Id.* at 163 (citing *McConnell*, 540 U.S. at 295-96).


162. *Id.* at 164.

163. *Id.* (citing *McConnell*, 540 U.S. at 186).
to eliminate a campaign finance device that created special incentives to officeholders to give special access to donors. This campaign finance device was soft money.

Second, the definition was expanded to recognize the "special relationship and unity of interest" that exists between federal officeholders and political parties. The Court noted the many ways in which candidates do, in fact, benefit from soft money-funded activities. Moreover, the Court found that "the danger of corrupt exchanges through the parties was reflected and reinforced by campaign finance practices." These practices included:

[T]he candidates' awareness of the identities of soft money donors and of the use of the soft funds and of the candidates' consequent gratitude for the soft money donations; the role of federal candidates and officeholders in running party campaign committees and soliciting soft funds; and the parties' use of access to federal officeholders as an incentive to and a reward for soft money donations....

This special relationship and unity of interest present the "possibility that donations to party committees raise the same corruption dangers as donations to the candidates."

The 527s present Congress with the same corruption concerns that justified election law limiting donations to candidates and political parties. Operated as virtual political parties, 527s that are engaged in activities that promote, attack, support, or oppose

164. *Id.* at 163. Briffault discusses the benefit of shifting the focus of corruption from undue influence to access. The shift allows for a more measurable analysis. *Id.* at 163-64.

165. *Id.* at 165 (quoting *McConnell*, 540 U.S. at 145). Justice Kennedy's dissenting opinion argued against this broad definition of corruption on the basis that contributions are only corrupt when there is "a direct connection between the donor and the candidate. Contributions to the parties not earmarked for specific candidates and not involving solicitation by candidates or officeholders could not be corrupt because they do not involve a relationship between a donor and a candidate or officeholder." *Id.* at 165 (citing *McConnell*, 540 U.S. at 295-96 (Kennedy, J., dissenting in part)).

166. *Id.* at 165.

167. *Id.*

168. *Id.*

169. See supra text accompanying notes 119-20. Based on their activities and organizers, 527s have been described as shadow political parties. See Holman & Claybrook, *supra* note 43, at 251 (describing 527s as emerging shadow political parties created by political party operatives for the purpose of raising soft money to fund a second campaign).
a clearly identified federal candidate have a special relationship and unity of interest with the federal candidates they support, as seen in the 2004 election. These 527s announced their intent to secure the election or defeat of their favored federal candidate. They then proceeded to engage in federal electioneering activities aimed at achieving this goal. These 527s were so effective that even if a voter could distinguish a 527 advertisement from a candidate's advertisement, the voter probably thought the 527 colluded with the candidate. Furthermore, these 527s were run by political party operatives or former—sometimes even current—members of federal campaign staffs.

It is probable that soft money donations to 527s will raise the same corruption dangers as soft money donations to federal candidates and political parties if the 527s operate analogously to political parties. Federal candidates know the identities of the soft money contributors. The soft money contributions are either announced by the contributor, reported by the press, tracked by campaign finance reform proponents, or listed in disclosure

170. See Balz & Edsall, supra note 10 (reporting the reasons why Democrats formed a parallel campaign using § 527); see also Paul Farhi, Veterans Group Criticizes Kerry's War Record, WASH. POST, May 5, 2004, at A6 (reporting on Democrats' allegations that the formation of Swift Boat Veterans for Truth was to attack John Kerry's military record).

171. See Kurtz, supra note 5 ("A lot of people don't pay attention to the disclosure at the end about who authorized it,' said William Benoit, a University of Missouri communications professor. 'Even if they do notice it's not a candidate ad, a lot of people probably think they're colluding with the candidates."); Carol D. Leonnig, Bush Sues to Stop '527' Groups Backing Kerry, WASH. POST, Sept. 2, 2004, at A6 (reporting that one of the claims in President Bush's suit was that the Kerry campaign and Democratic-leaning 527 organizations were coordinating their efforts). For examples, see references to the ads described supra in text accompanying notes 132-33.

172. Board members, consultants, lawyers, and staff members of 527 organizations are, in fact, often active party partisans. See, e.g., Dan Balz & Thomas B. Edsall, Lawyer Quits Bush-Cheney Organization: Campaigns Spar Over Ties to Outside Funding Groups, WASH. POST, Aug. 26, 2004, at A1 (reporting on the connections between the Bush and Kerry campaigns and 527s); Hosenball, Isikoff & Bailey, supra note 2, at 26 (providing a "flow chart," entitled "A Small, Partisan Universe," detailing the interconnectedness of the staffs of pro-Democrat and pro-Republican 527s and their respective national party apparatuses).

173. See Grimaldi & Edsall, supra note 8 (discussing a recent interview with billionaire George Soros regarding his continued donations to political groups).

174. See id. (reporting on the largest soft money contributors to 527s during the 2004 election).

175. Center for Responsive Politics, Contributors, supra note 9; Center for Responsive Politics, Individuals, supra note 9; The Center for Public Integrity, Major Individual Donors to 527 Committees, http://www.publicintegrity.org/527/search.aspx?act=con&sec=indiv&
reports submitted to the IRS.\textsuperscript{176} In fact, during the 2004 election, federal campaigns called upon 527s to raise and spend soft money for their benefit.\textsuperscript{177}

Recognizing the benefit 527s provided during the 2004 campaign, large soft money contributors may be promised or even given special access to the federal candidates, a promise one 527 organization touted in its soft money fundraising efforts.\textsuperscript{178} Even more worrisome, elected officials could become complacent regarding the wishes of the large 527 soft money contributors.\textsuperscript{179} The result would be the appearance of a quid pro quo between elected officials and 527 soft money donors. The threat of actual or perceived corruption provides the government with a compelling interest in closing a campaign finance device that creates any incentive for officeholders to provide special favors for soft money donors.

\section{2. Preventing Circumvention of Federal Election Law}

In \textit{McConnell}, the Court determined that preventing circumvention of existing federal election law was a legitimate, compelling

\begin{footnotesize}
\textsuperscript{176} The IRS enables the public to search 527 disclosure reports online at http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp (last visited Sept. 13, 2005), or the public may download the entire database of 527 disclosure reports at http://forms.irs.gov/politicalOrgsSearch/search/datadownload.jsp (last visited Sept. 13, 2005).

\textsuperscript{177} See Thomas B. Edsall & Dan Balz, \textit{GOP Backers Urged to Raise, Spend: FEC Ruling Clears Way for Groups' 'Soft Money' Efforts}, WASH. POST, May 15, 2004, at A11 ("[A] top Texas official of the Bush campaign called on pro-Republican groups to aggressively raise and spend as much as possible."). Although there was no direct request from Senator Kerry's campaign, it was widely reported in the press that Democrats were going to rely on 527s funded by soft money to help Senator Kerry equalize President Bush's campaign's financial prowess. See Balz & Edsall, supra note 10, at A1 (reporting that the Democrats were organizing 527s to "supplement the activities of Sen. John Kerry's campaign in the effort to defeat President Bush").

\textsuperscript{178} See Thomas B. Edsall, \textit{Soft-Money Group Promotes Ties to GOP Leaders Despite Warnings}, WASH. POST, May 30, 2004, at A8. In a hurry to catch up with the millions in soft money raised by pro-Democratic 527 organizations, Republican-leaning 527s began touting their ties to prominent party leaders. One group sent out invitations highlighting the appearance of House Speaker Dennis Hastert and Senator Rick Santorum at two different events. \textit{Id.}

\textsuperscript{179} For example, the wife of one of the two Texas developers who funded Republicans for Clean Air in 2002 was appointed by President Bush to the John F. Kennedy Center Advisory Committee on the Arts. Tobin, supra note 83, at 615 n.19 (citing 38 WEEKLY COMP. PRES. DOC. 615 (Apr. 15, 2002)).
\end{footnotesize}
government interest. This new legitimate government interest was used to uphold provisions of BCRA banning national, state, and local parties from raising soft money to influence federal elections. Specifically, this interest justified Congress's restriction of federal electioneering activities by state and local parties that promote, attack, support, or oppose a federal candidate. Congress was concerned "that donors and candidates, stymied by the other soft money restrictions, would, unless prohibited, channel unrestricted donations to state and local candidates and officeholders to be used for federal electioneering" activities. The Court agreed that the PASO standard, applied to state and local parties, was "designed to preclude 'wholesale evasion' of [the national party ban] by preventing state and local parties from becoming conduits for soft money used to influence federal elections." Stymied by the soft money ban on political parties, political operatives turned to 527s to channel unrestricted donations toward electioneering activities. As the 2004 soft money contribution levels show, § 527 was used to achieve wholesale evasion of the federal hard money limits. Organized as shadow political parties, these 527s raised soft money for the purpose of waging a full-scale second campaign to influence the election outcome. By the same reasoning applied in McConnell, the government has a compelling

181. See id. at 161-66. Circumvention was also used by the court to uphold the electioneering communication definition. Id. at 185.
182. Id. at 165-66.
183. Briffault, supra note 7, at 167.
184. Downie, supra note 146, at 932 (quoting McConnell, 540 U.S. at 161 n.53).
185. See Balz & Edsall, supra note 10; Dionne, supra note 129 (commenting on Harold Ickes's idea to create a special 527 organization to raise money for ads directed at Bush, and George Soros's and others' willingness to fund the new idea with soft money contributions); Edsall, supra note 8 (reporting on the successful fundraising efforts of Republican-leaning 527s).
186. See supra notes 8-9 and accompanying text.
187. See Holman & Claybrook, supra note 43, at 251 ("The emergence of shadow parties as electioneering non-profit groups waging a full-scale second campaign with non-profits independent of the candidates, flies in the face of the principle of keeping campaign spending down to reasonable levels."). The activities of 527s in the 2004 election were identical to the activities the national parties funded with soft money prior to BCRA. Compare supra notes 52 and 130 with accompanying text.
interest in stopping conduct that flies in the face of a principle of election law.\textsuperscript{188}

Federal campaign finance law protects the health of the American election system from unlimited campaign contributions originating from a single source.\textsuperscript{189} As evidenced by the 2004 elections, 527s are being used to circumvent the hard money limits in federal campaign finance law.\textsuperscript{190} This circumvention raises a specter of corruption that undermines the integrity of the American election system. Faced with the threat of circumvention and corruption, the federal government has legitimate and compelling interests to close the new 527 soft money loophole.

\textit{C. Functional Equivalents Prove Sufficiently Narrow}

In \textit{McConnell}, the Supreme Court held that if the election activity the government seeks to regulate is the functional equivalent of express advocacy, then the regulation is sufficiently tailored to the compelling government interests and is not vague or overly broad.\textsuperscript{191} This functional equivalent test was used by the Court to uphold BCRA's electioneering communication definition.\textsuperscript{192} The Court's test has been summarized as follows: "[S]tatutes 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 ...."\textsuperscript{193}

\textsuperscript{188} This is not to say that the 527 legislation discussed in this Note will block all soft money contributions entering the election system. But it will provide the strongest limit on the amount that enters the system. Soft money contributions will still be allowed in through 501(c)(4) organizations, but the amount will be capped by the organization's budget. \textit{See supra} note 89 and accompanying text.

\textsuperscript{189} \textit{See supra} note 12.

\textsuperscript{190} For example, twenty-five individual donors provided almost forty percent of the $380 million raised by 527 organizations. \textit{See} Center for Responsive Politics, \textit{Contributors, supra} note 9 (listing twenty-five contributors of $2 million or greater that when totaled equal $147,954,009).

\textsuperscript{191} \textit{See supra} notes 149-53.

\textsuperscript{192} \textit{See supra} notes 149-53 and accompanying text. Due to the categorical approach taken in defining electioneering communication, the new law encroached on issue advocacy and a higher degree of review was used to uphold it.

\textsuperscript{193} Bopp & Coleson, \textit{supra} note 143, at 301 (citing \textit{McConnell}, 540 U.S. at 191-94, 205-07).
Applying this test to the definition, the Court held that electioneering communication was the functional equivalent of express advocacy.\textsuperscript{194} The Court made this determination on the basis of a legislative record that proved electioneering communication was the functional equivalent of express advocacy.\textsuperscript{195} Evidence from the 2004 election proves that 527 activities that promote, attack, support, or oppose a federal candidate are the functional equivalent of express advocacy.

1. Vagueness Avoided

Conduct that violates federal election law can result in criminal liability for the actor.\textsuperscript{196} Due process requires that no individual be "held criminally responsible for conduct which he could not reasonably understand to be proscribed."\textsuperscript{197} Thus, due process requires that federal election law avoid vagueness. Federal election law is not vague when it "provide[s] adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal."\textsuperscript{198} In \textit{Buckley}, the Court held that express advocacy provided a person of ordinary intelligence with adequate notice required by the Due Process Clause to conform his conduct in accordance with election law.\textsuperscript{199} In \textit{McConnell}, the majority held that electioneering communication was not vague because it was the functional equivalent of express advocacy.\textsuperscript{200} By being functionally equivalent, the statutory language defining electioneering communication provided adequate notice for a person of ordinary intelligence to conform his conduct with the new election law.\textsuperscript{201}

The \textit{McConnell} majority reached its decision on the basis that both terms contained a bright-line test for capturing certain

\textsuperscript{195} Id. at 207; Bopp & Coleson, \textit{supra} note 143, at 305-07.
\textsuperscript{196} See Kingsley & Pomeranz, \textit{supra} note 81, at 113 ("FECA ... imposes criminal penalties for violations.").
\textsuperscript{197} Buckley v. Valeo, 424 U.S. 1, 77 (1976) (citing United States v. Harriss, 347 U.S. 612, 617 (1954)).
\textsuperscript{198} Id. at 77.
\textsuperscript{199} See \textit{id.} at 44 (holding that express advocacy corrected FECA's vagueness problems).
\textsuperscript{200} McConnell, 540 U.S. at 206.
\textsuperscript{201} See \textit{id.} at 194.
electioneering activities. The bright-line test for express advocacy is the use of magic words. The bright-line test for electioneering communication is its definition of political speech. Political speech is defined as a broadcast that clearly identifies a candidate for federal office, airs within a specific time period, and targets an identified audience of at least 50,000 viewers or listeners. The court concluded that, like the express advocacy test, the electioneering communication test was “both easily understood and objectively determinable.”

The McConnell Court also upheld the PASO standard as not vague when applied to state and local parties. The Court found that the PASO “terms provide[d] explicit standards for those who apply them’ and ‘give the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” The Court continued by noting “[t]his is particularly the case ... [when] actions taken by [state and local] political parties are presumed to be in connection with election campaigns.” The basis behind the Court’s finding was “the political, and politically sophisticated, nature” of the people involved—members and employees of the state and local party.

By this reasoning, the PASO standard could not be used to regulate federal electioneering activities of non-527 organizations, such as 501(c)(3) organizations. The vast majority of these organizations are not run by political sophisticates. Their very nature, even existence, is predicated upon not influencing elections. If applied to 501(c)(3) organizations, the PASO standard would fail constitutionally because these organizations lack the political

202. See Bopp & Coleson, supra note 143, at 302 (“[T]he electioneering communication definition is very clear, providing a bright-line test as required of any statute bordering on issue advocacy.”).
203. See supra note 75 and accompanying text.
204. Bopp & Coleson, supra note 143, at 301-02 (citing McConnell, 540 U.S. at 194).
205. McConnell, 540 U.S. at 170 n.64.
206. Id. (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)).
207. Id. (citing Buckley v. Valeo, 424 U.S. 1, 79 (1976)). A similar presumption can be made about 527 organizations. See supra note 81 and accompanying text.
208. Bopp & Coleson, supra note 143, at 302 n.73.
209. See generally Kingsley & Pomeranz, supra note 81, at 60 (stating that the activities of 501(c)(3) organizations “must be almost entirely educational, charitable, religious, or scientific”).
sophistication required for the PASO terms to “provide explicit standards for those who apply them.”

Just like political parties, however, 527 organizations, by their definition, are presumed to be connected to election campaigns. They are organized for the primary purpose of influencing elections. In fact, 527s are organized to win elections. For this reason, many 527s are run by political operatives who gained experience through involvement with political parties. By their very nature and operation, 527s are political in nature and politically sophisticated. Thus, the proposed legislation provides 527s with an explicit standard for complying with election law: Does an electioneering activity promote, attack, support, or oppose a federal candidate?

Activities by 527s that promote, attack, support, or oppose a federal candidate are functionally equivalent to express advocacy. Like express advocacy and electioneering communication, the 527 legislation creates a bright-line test: qualifying 527s that engage in electioneering activities that promote, attack, support, or oppose a federal candidate must comply with federal election law. This bright-line test enables ordinary political actors to conform their federal election conduct accordingly. If they wish to engage in tax-

211. See supra note 82 and accompanying text.
212. See Foley, supra note 134, at 345 (arguing that certain types of independent groups “share an essential feature with political parties: they exist to win elections”).
213. See Bals & Edsall, supra note 10; Hosenball, Isikoff & Bailey, supra note 2, at 26-27.
For example, Harold Ickes, the organizer of the major Democratic 527s, sat with the Democratic National Committee’s Executive Committee as of September 20, 2004. Id. at 27.
214. Even campaign finance reform advocates tracking the influence of 527s are able to differentiate PASO and non-PASO activities by 527s. The Center for Public Integrity used the following criteria to determine which of more than 20,000 527s to monitor. Their methodology stated:

The committee is not required to report financial activities to state or federal election authorities; [t]he committee is tied to or formed by a federal lawmaker; and [t]he committee is active in many states and spends most of its money on election-related activities like broadcast advertisements, mailings and political research.

The Center for Public Integrity, Methodology, http://www.publicintegrity.org/527/default.aspx?act=methodology (last visited Mar. 16, 2005). Their methodology, which is similar to the 527 legislation, identified only 471 organizations that required monitoring. Of this number, the Center for Public Integrity only found ninety-eight engaged in federal electioneering activities. Center for Public Integrity, 527 Activity, supra note 8.
215. Qualifying 527s are 527s that do not meet the exceptions discussed supra note 136.
sheltered issue advocacy or federal electioneering activities without
being captured by election law, they can form a 501(c) organiza-
tion.216 If they wish to obtain a tax shelter for activities with the
primary purpose of influencing federal elections, then they can form
a 527 organization and raise only hard money to influence the
outcome of a federal election.

2. Overbreadth Avoided

Federal election laws must not be overly broad. Laws are overly
broad when they restrict activities far in excess of those necessary
to achieve a compelling government interest.217 Election law can
avoid overbreadth concerns when the activity it seeks to capture is
the functional equivalent of express advocacy.218 "[F]unctional
equivalents must be proven by substantial evidence to implement
the same justifications underpinning the express advocacy test;
[]where there are facial determinations, the option of as-applied
challenges must be left open."219

In determining whether electioneering communications were
functionally equivalent to express advocacy in McConnell, the Court
asked whether the purpose of electioneering communication was
the same as express advocacy: electioneering activities intended
to influence the voter's decisions and have that effect.220 In other
words, was electioneering communication used for the same
purpose as express advocacy? The Court turned to the legislative
record to answer that question. The record contained evidence that
electioneering communication was "intended to influence the voters'
decisions and [had] that effect."221 Thus, the Court held that

216. See supra text accompanying notes 86-90.
217. See Kingsley & Pomeranz, supra note 81, at 114 (discussing overbreadth concerns of
election law based on § 527).
218. See Bopp & Coleson, supra note 143, at 304 ("[T]he McConnell analysis, done under
the rubric of Buckley ... still requires either the application of the express advocacy test or
its proven functional equivalent to eliminate overbreadth.").
219. Id. at 301 (citations omitted).
the regulation of express advocacy applied equally to [electioneering communications] ... if
the ads are intended to influence the voters' decisions and have that effect.").
221. See id. at 206 (relying on the record, the majority declared that "the vast majority of
ads clearly had such a purpose"); see also Briffault, supra note 7, at 156 (discussing the ease
with which the majority determined that preelection communication was functionally
electioneering communication was functionally equivalent to express advocacy because they served the same purpose. Whether 527 electioneering activities that promote, attack, support, or oppose a federal candidate are functionally equivalent to express advocacy will depend on whether they have the same purpose as express advocacy—the intention to influence voter decisions and have that effect.

Section 527 was used to funnel soft money into the election system for the specific purpose of influencing voters by promoting, attacking, supporting, or opposing federal candidates. The 527s raised soft money that funded persuasive electioneering activities that aimed "straight for the heart." These public communications produced an effect on voters' perception of the candidates. The 2004 election activities by 527s that promoted, attacked, supported, or opposed a federal candidate were intended to influence voters and had that effect.

Both 527 electioneering activities that promote, attack, support, or oppose a federal candidate and express advocacy serve the same purpose and are functional equivalents. As discussed previously, the framework of the proposed legislation is written such that only 527 activities that are functionally equivalent to express advocacy are governed by the hard money limits. Activities by 527 organizations that are not functionally equivalent are exempted or not within the scope of the legislation. Therefore, facially, the 527 soft money legislation avoids overbreadth concerns because the activity it seeks to capture is the functional equivalent of an activity already captured by election law. As required in McConnell, the option of as-applied challenges remains open.

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222. See Kurtz, supra note 5. The 527s "are saying things that the candidates dare not say, connecting conspiratorial dots, using more disturbing images and indulging in no-holds-barred ridicule.... [527 ads] yield[] a cacophony of themes tailored to different hot-button issues, different constituencies, different states and different kinds of fears." Id.

223. See id.

224. See supra Part III.

225. See supra Part III.
The 2004 election was defined and dominated by 527 political organizations. These organizations operated outside the reach of the federal hard money limits—limits the candidates themselves had to follow. Free of the hard money limits, 527s raised million-dollar contributions from individuals to influence the outcome of the 2004 election. To protect the integrity of the American election system, reform is needed to curtail the corrupting effects of single-source contributions that run into the millions of dollars. This reform can be achieved by congressional legislation based on the basic framework discussed in this Note. The 2004 experience provides Congress with the compelling interest necessary to prevent the corrupting influence of soft money funneled through 527 political organizations. As this Note demonstrated, 527s that promote, attack, support, or oppose a federal candidate are functionally equivalent to express advocacy. By passing legislation that only encompasses the functional equivalent of express advocacy, Congress's means of achieving its compelling interest will be sufficiently narrow to avoid encroachment on freedom of speech. Thus, the basic framework is constitutional and will survive judicial review. First Amendment concerns should not be a barrier to institute the reforms needed to close the 527 soft money loophole for future elections.

Jeffrey P. Geiger*

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