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# COMMENTS

## 527s: The New Frontier for Election Law and Associational Rights

The media widely reported the 2004 Election as the most divisive in recent history.<sup>1</sup> Just as acrimonious partisan campaigning has long been a hallmark of American politics, so has the struggle over campaign financing, especially with regard to corporations, unions, and, most recently, wealthy individuals.<sup>2</sup> Congress's first attempt to address concerns related to campaign contributions by corporations was the Tillman Act of 1907.<sup>3</sup> After many subsequent statutes that sought to tweak the original act and to include regulation of other influential contributors, such as labor organizations,<sup>4</sup> Congress enacted the Federal Election Campaign Act of 1971 (FECA).<sup>5</sup> The Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>6</sup> Congress's most recent attempt to limit what it sees as the corrupting effect of campaign contributions from various parties, was recently examined and largely upheld by the U.S. Supreme Court.<sup>7</sup> BCRA sought to curtail perceived soft-money<sup>8</sup> loopholes that had been

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1. See, e.g., *CNN Wolf Blitzer Reports* (CNN television broadcast Oct. 8, 2004) (describing the 2004 campaign as "one of the most bitterly divisive campaigns in recent memory") (transcript on file with the University of Miami Law Review); *CBS Morning News* (CBS television broadcast Nov. 2, 2004) (describing the 2004 campaign as "one of the most divisive and expensive presidential campaigns in recent memory") (transcript on file with the University of Miami Law Review).

2. See *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 208-10 (1982) (reviewing history of regulation of financial contributions to federal candidates by corporations and labor unions); The Center for Responsive Politics, *Top Individual Contributors to 527 Committees 2004 Election Cycle*, <http://www.opensecrets.org/527s/527indivs.asp?cycle=2004> (last visited Nov. 13, 2005) (showing that approximately \$146 million was spent by the top 25 contributors to 527s based on the Center's compilation of Internal Revenue Service records released January 11, 2005); The Center for Public Integrity, *527s in 2004 Shatter Previous Records for Political Fundraising* (Dec. 16, 2004), <http://www.publicintegrity.org/527/report.aspx?aid=435> (showing that approximately \$126 million was spent by the top 15 individual donors to 527s in the 2004 election cycle based on the Center's analysis of Internal Revenue Service reports).

3. Pub. L. No. 59-36, 34 Stat. 864 (codified as amended at 2 U.S.C. § 441b (2000)).

4. See *McConnell v. FEC*, 540 U.S. 93, 114-22 (2003) and its predecessors for a more detailed discussion of the historical campaign finance laws that led up to the enactment of BCRA.

5. Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2, 18, and 47 U.S.C.).

6. Pub. L. No. 107-155, 116 Stat. 81.

7. See *McConnell*, 540 U.S. at 93.

8. *Id.* at 123 ("[P]rior to the enactment of BCRA, federal law permitted corporations and unions, as well as individuals who had already made the maximum permissible contributions to

left open by FECA, or, as some critics claim, the Federal Election Commission's (FEC) interpretation of FECA.<sup>9</sup> Nevertheless, BCRA still did not directly or conclusively address the increasingly significant impact of 527 organizations.

527s exist at the "intersection" of tax law and campaign finance law.<sup>10</sup> For this reason, the actions undertaken by 527s are difficult to categorize and do not attract the attention they deserve from the average voter. The importance of these organizations, and the common and statutory law that attempt to circumscribe their impact on federal elections, cannot be underestimated. The restrictions imposed during federal campaigns on constitutional principles embodied in the First Amendment, as well as the Supreme Court's and Congress's justifications for these restrictions, are quite controversial.

With a focus on First Amendment associational rights, section I of this article will introduce the "new" 527s (section 527 of the Internal Revenue Code has existed since 1974, but has undergone several important changes since the mid-1990's),<sup>11</sup> and describe why they have received so much media attention,<sup>12</sup> despite the public's general ignorance of their characteristics. The next section will briefly discuss *McConnell v. FEC*<sup>13</sup> and predecessor cases in connection with testimony regarding proposed rulemaking by the FEC to regulate 527s. A further discussion of *McConnell* and related cases will comprise the following section, which will analyze the scarce, yet convoluted, history of the associational rights of political organizations such as 527s. The final section, which contains the primary analytical portion of this article, will examine predictions on the future role of 527s, and what proposed and recent changes to the laws and regulations in this area might mean for

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federal candidates, to contribute 'nonfederal money'—also known as 'soft money'—to political parties for activities intended to influence state or local elections.").

9. See *527 Reform Act of 2005: Hearing to Examine and Discuss S. 271 Before the S. Comm. on Rules and Administration*, 109th Cong. (2005) [hereinafter *527 Hearing*] (statement of Sen. John McCain), available at [http://rules.senate.gov/hearings/2005/030805\\_hearing.htm](http://rules.senate.gov/hearings/2005/030805_hearing.htm) ("S. 271 . . . is straightforward legislation to overcome the FEC's failure to properly interpret the original Federal Election Campaign Act.").

10. *Id.* (statement of Professor Frances R. Hill) ("Section 527 organizations exist at the point where the Internal Revenue Code . . . intersects FECA.").

11. See Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387 (2000).

12. See, e.g., John McCormick, *With a 527, Little Guys Can Behave Just Like Big Spenders; Fed-up Neighbors Make Anti-Bush Ad*, CHI. TRIB., Oct. 18, 2004, at 15; Thomas B. Edsall, *After Late Start, Republican Groups Jump Into the Lead; Since August, 527s Raised Six Times as Much as Democrats*, WASH. POST, Oct. 17, 2004, at A15; Glen Justice & Kate Zernike, *'527' Groups Still at Work Raising Millions for Ads*, N.Y. TIMES, Oct. 16, 2004, at A5.

13. 540 U.S. 93 (2003).

alternative forms of campaign financing, the pursuit of campaign finance reform goals, and their impact on associational rights.

### I. THE NEW 527S

Under section 527, the Internal Revenue Code provides income tax exemption for political organizations that engage in certain “exempt functions.”<sup>14</sup> These exempt functions are defined as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual” to any public office or office in a political organization.<sup>15</sup>

Various campaign finance analysts, including former FEC insiders, have argued that because 527s are self-defined political organizations whose goal is to influence elections, those that specifically target federal elections should be required to adhere to the registration, reporting, and contribution limits that restrain the use of soft money under FECA.<sup>16</sup> Proponents of this argument use FECA’s definition of a political committee,<sup>17</sup> and its related definitions for contributions<sup>18</sup> and expenditures,<sup>19</sup> to bolster their position. On the other side of the controversy are those who do not see any reason to automatically treat 527 organizations differently than other nonprofits based on the definition of their activities under the Internal Revenue Code.<sup>20</sup> The two sides have thus framed the debate around the proper relationship between the two statutes. In

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14. See I.R.C. § 527 (2000 & Supp. II 2002).

15. *Id.* § 527(e)(2) (2000).

16. See, e.g., *Political Comm. Status Notice of Proposed Rulemaking: Public Hearing on 11 CFR Parts 100, 102, 104, 106, and 114 Before the FEC* (Apr. 15, 2004) [hereinafter *Public Hearing*] (statements of Lawrence Noble, Executive Director, Center for Responsive Politics, former FEC General Counsel, and Trevor Potter, Chair and General Counsel, Campaign Legal Center, former FEC Comm’r), available at [http://www.fec.gov/pdf/nprm/political\\_comm\\_status/trans\\_04\\_15\\_04.pdf](http://www.fec.gov/pdf/nprm/political_comm_status/trans_04_15_04.pdf).

17. 2 U.S.C. § 431(4)(A) (2000) (“The term ‘political committee’ means . . . any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”).

18. *Id.* § 431(8)(A)(i) (“The term ‘contribution’ includes . . . any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” (emphasis added)).

19. *Id.* § 431(9)(A)(i) (“The term ‘expenditure’ includes . . . any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.” (emphasis added)).

20. See, e.g., *Public Hearing*, *supra* note 16 (statement of Jim Bopp of Bopp, Coleson & Bostrom, on behalf of Focus on the Family, the National Right to Life Committee, and other groups). In fact, in the final regulations issued by the FEC on November 23, 2004 and effective January 1, 2005, it adopted rules that apply “without regard to tax status, so they reach all FECA ‘persons,’ including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code.” Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees,

other words, should the FEC look to their tax-exempt status in categorizing 527s, thereby treating them in the same manner as other 501(c) organizations<sup>21</sup> that are not currently regulated? Or, should the FEC look to the activities that provide the basis for 527's tax-exempt status, thereby perhaps requiring the regulation of these organizations? Congress delegated this difficult analytical choice to the FEC;<sup>22</sup> however, some legislators are quite unhappy with the FEC's recent decisions and therefore have introduced legislation to mandate regulation of 527s as political committees.<sup>23</sup>

It is also important to point out those changes to section 527 that require disclosures regarding contributions to these organizations.<sup>24</sup> 527s must file with the Internal Revenue Service (IRS) several reports detailing the amount, date, and purpose of all large expenditures as well as the name, address, occupation, and employer of all large contributors.<sup>25</sup> In fact, it is this very information that allows advocates of stricter regulation to monitor, track, and report on the contributions and expenditures of 527s.

While these disclosures provide important information, many proponents of stricter regulation believe that IRS regulation is insufficient because it fails to restrict the large impact of soft money on the federal campaign landscape.<sup>26</sup> According to two organizations that advocate changes to the current regulations, over \$500 million was raised and spent by 527s during the 2004 election cycles (of which almost half represented spending by committees involved with presidential election races), resulting in almost double the amount raised and expended in

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Funds Received in Response to Solicitations, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (codified at 11 C.F.R. pts. 100, 102, 104, and 106).

21. 501(c) organizations are named for their section in the Internal Revenue Code and are organizations that are exempt from taxation. See 26 U.S.C. § 501(c) (2005).

22. As noted by FEC Commissioner Thomas during the oversight hearing, the FEC has been authorized by Congress "to make, amend, and repeal such rules" as are necessary to carry out the campaign finance laws enacted by Congress. See *Public Hearing*, *supra* note 16 (statement of Scott Thomas, FEC Comm'r). Because Congress did not specifically include 527s in their definition of political committees, it is up to the FEC to regulate 527s as political committees through its rule making powers, which was the subject of the public hearing.

23. See 527 Reform Act of 2005, S. 271, 109th Cong. (2005).

24. For an interesting discussion on the legislative history of amendments to section 527 as well as the forecasted and intended effects of the amendments, see David D. Storey, Note, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167 (2002).

25. I.R.C. § 527(j) (2000).

26. See, e.g., 527 Hearing, *supra* note 9 (statement of Scott Thomas, FEC Comm'r) (addressing the argument against a proposal by Commissioners Thomas and Toner for the FEC to regulate 527s that Congress already enacted disclosure requirements for and stating that the enactment of additional regulation would be "to reject a clear congressional judgment").

2002.<sup>27</sup>

Furthermore, these same reform advocates espouse the view that the FEC has failed in its obligation to reign in 527 organizations that have clearly violated the campaign finance laws, and has cleared the way for yet more circumvention.<sup>28</sup> In fact, one reform advocate has characterized this kind of circumvention as “statutory arbitrage,” in that these organizations planned their way into tax-exempt status by claiming their organizations were political in nature, and then opposed classification as political committees to avoid regulation under FECA.<sup>29</sup> There is even evidence that the Supreme Court agrees with the argument that some 527s have already become, and will increasingly be, used as soft-money loopholes.<sup>30</sup>

## II. *McCONNELL* AND FEC RULEMAKING

Both sides of the 527-classification debate have focused on the strong rhetoric the majority in *McConnell* employed to uphold the challenged provisions of BCRA. Those who support classification of 527s as political committees view the Court’s language as authoritative on the issue, while those who oppose such treatment regard this language as dicta.

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27. The Center for Responsive Politics, *527 Committee Activity: Expenditure Breakdown – Federally Focused Organizations*, <http://www.opensecrets.org/527s/527cmtes.asp?level=E&cycle=2004> (last visited Nov. 13, 2005); The Center for Public Integrity, *supra* note 2. Although there seems to be some inconsistency between the dollar amounts reported by each organization, this may be explained by the different dates at which each performed its analysis (December 16, 2004 versus January 11, 2005).

28. *Public Hearing*, *supra* note 16 (statement of Larry Noble) (“Do not let the soft money history repeat itself. It is in danger of repeating itself on a much quicker time frame than we’ve ever seen before. I think there was the general feeling the FEC was not doing what it needed to do . . . .”); *Id.* (statement of Trevor Potter) (“So I think it’s important that the Commission deal with this matter at this time, not wait and prove itself unable to deal with it, run the risk that the other side of the political equation will use that as a justification to go forward itself, and then be faced yet again with a circumstance where the political reality has moved past you and it will be difficult to deal with any of this after the election. So for all those reasons, I do urge the Commission to proceed with the 527 side of this in an expeditious manner.”).

29. *527 Hearing*, *supra* note 9 (statement of Professor Frances R. Hill).

30. *See McConnell v. FEC*, 540 U.S. 93, 176-77 (2003). In upholding the BCRA changes to FECA that prohibit party committees from donating to 527s and other nonprofits, the majority observed:

Parties and candidates have also begun to take advantage of so-called “politician 527s,” which are little more than soft-money fronts for the promotion of particular federal officeholders and their interests . . . . These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves. Given BCRA’s tighter restrictions on the raising and spending of soft money, the incentives for parties to exploit such organizations will only increase.

*Id.* (citations omitted).

Specifically, supporters of the proposed FEC rulemaking assert a connection between the line of cases from *Buckley v. Valeo*<sup>31</sup> and *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*<sup>32</sup> to *McConnell*. In noting the *McConnell* Court's statement that "actions taken by political parties are presumed to be in connection with election campaigns,"<sup>33</sup> FEC Commissioner Michael E. Toner stated: "We believe—Commissioner Thomas and I do—that political parties and other campaign organizations and 527 groups have many of the same characteristics [as political parties]."<sup>34</sup> On the other hand, opponents of the change narrowly construe the Court's language as only applying to political parties and candidates.<sup>35</sup> This argument could also be supported by the line of cases from *Buckley*<sup>36</sup> and *FEC v. National Right to Work Committee*<sup>37</sup> to *McConnell*.<sup>38</sup> Specifically, Bradley A. Smith, the Chairman of the FEC, has said that "[t]he Supreme Court in *McConnell v. FEC* [ ] explicitly recognized that Congress could treat some groups differently from others without running afoul of constitutional equal protection guaran-

31. 424 U.S. 1, 79 (1976) (The term "political committee . . . 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.").

32. 479 U.S. 238, 262 (1986) ("[S]hould 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. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns." (citation omitted)).

33. *McConnell*, 540 U.S. at 170 n.6.

34. *The Fed. Election Commission: Oversight Hearing Before the H. Commission on H. Administration*, 108th Cong. (2004) [hereinafter *Oversight Hearing*] (statement of Michael E. Toner, FEC Comm'r), available at [http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=94496.pdf&directory=/disk2/wais/data/108\\_house\\_hearings](http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.52&filename=94496.pdf&directory=/disk2/wais/data/108_house_hearings).

35. See, e.g., *id.* (statement of Bradley A. Smith, FEC Chairman) (quoting the *McConnell* Court's presumption, and stating: "[D]espite the apparent breadth of this pronouncement, its scope is limited. The Court did not address the phrase ['promote, support, attack or oppose'] as applied to non-party committees with complex policy agendas—that issue wasn't before the Court, since BCRA itself does not apply the standard to non-party committees.").

36. See 424 U.S. at 80 ("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'—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach . . . is not impermissibly broad, we construe 'expenditure' . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.").

37. See 459 U.S. 197, 210 (1982) ("[T]he 'differing structures and purposes' of different entities 'may require different forms of regulation in order to protect the integrity of the electoral process.'" (quoting *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 201 (1981))).

38. See 540 U.S. at 188 ("More importantly, however, Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. 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.").

tees. In so doing, it recognized that independent groups would remain free from restrictions placed upon parties.”<sup>39</sup>

The rules eventually adopted by the FEC represent a compromise between these divergent arguments and interpretations of relevant case law. For one, there was compromise in the effective date of the new rules—it was too late for the rules to affect the 2004 elections, but the rules will affect the 2006 elections, as they came into effect January 1, 2005.<sup>40</sup> Also, the rules will subject certain 527s to FECA regulations if they receive contributions in response to a communication that “plainly seeks funds ‘for the purpose of influencing Federal elections.’”<sup>41</sup> Nevertheless, these new rules will apply “without regard to tax status, so they reach all FECA ‘persons,’ including, for example, entities described in or operating under section 501(c)(3), 501(c)(4), and 527 of the Internal Revenue Code.”<sup>42</sup> Finally, the Commission rejected proposals to define the term “expenditure” to include communications that promote, attack, support, or oppose any candidate for federal candidate or that promote or oppose any political party, specifically when made by 527 organizations or organizations that meet *Buckley’s* “major purpose” test.<sup>43</sup>

Given FEC Chairman Smith’s testimony regarding his view that the FEC must defer to Congress on the issue of defining expenditures,<sup>44</sup> and Senator McCain’s view that the FEC is so ineffective that it must be replaced, as well as his introduction of legislation to require 527s to register as political committees,<sup>45</sup> it is no surprise that the current status of 527s is being challenged yet again by the 527 Reform Act of 2005.<sup>46</sup>

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39. *Oversight Hearing*, *supra* note 34 (statement of Bradley A. Smith, FEC Chairman). However, this language from *McConnell* could also be used to support the view that 527s should be treated differently from 501(c) organizations, and that in fact, 527s should be classified as political committees. *Public Hearing*, *supra* note 16 (statement of Larry Noble) (“[T]he FEC must recognize that using different standards under FECA for determining when 527 and 501(c) organizations become political committees is mandated by the Supreme Court’s resolution of the tension between the congressional intent evidenced by the plain words of FECA and constitutional concerns.”).

40. Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, Funds Received in Response to Solicitations, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, and 106).

41. *Id.* at 68,057.

42. *Id.* at 68,056.

43. *Id.* at 68,065.

44. *Oversight Hearing*, *supra* note 34 (statement of Bradley A. Smith, FEC Chairman).

45. John McCain, *Paying for Campaigns: McCain Eyes Next Target*, USA TODAY, Nov. 4, 2004, at 27A.

46. S. 271, 109th Cong. (2005).



### III. THE HISTORY OF ASSOCIATIONAL RIGHTS OF POLITICAL ORGANIZATIONS

The Court in *McConnell* reiterated that although First Amendment associational rights are important and deserving of protection, they are not absolute.<sup>47</sup> Associational rights may be infringed upon if the restriction is “closely drawn” to the government’s objective.<sup>48</sup> Moreover, the level of scrutiny that a court must apply in considering the validity of the restriction may vary depending on whether contributions or expenditures are restricted.<sup>49</sup>

A complicating factor in evaluating the associational rights of political organizations is the question of where a group’s rights originate. Are the protected associational rights only those of the individuals who contribute to the organization? Or does the organization itself possess associational rights independent of its individual members’ rights?

One of the earliest cases to address the interaction between individual and organizational associational rights is *Sweezy v. New Hampshire*,<sup>50</sup> in which the Court announced that “[a]ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.”<sup>51</sup> This statement implies that organizations do have rights separate and distinct from the rights of their members and that the organization’s rights are worthy of First Amendment protection.

In *NAACP v. Alabama ex rel. Patterson*,<sup>52</sup> the Supreme Court struck down a law compelling disclosure of a group’s members as violating the right of association, and enunciated a clear standard of review for government regulation of the right: “Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.”<sup>53</sup> The Court noted that its decision was protective of both the individual rights of those associated with the NAACP<sup>54</sup> and of

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47. See *McConnell v. FEC*, 540 U.S. 93, 171 (2003) (“We recognize, as we have in the past, the importance of preserving the associational freedom of parties. But not every minor restriction on parties’ otherwise unrestrained ability to associate is of constitutional dimension.”).

48. See *id.* at 136 (“Thus, a contribution limit involving even ‘significant interference’ with associational rights is nevertheless valid if it satisfies the ‘lesser demand’ of being ‘closely drawn’ to match a ‘sufficiently important interest.’”) (citations omitted).

49. See *id.* at 134.

50. 354 U.S. 234 (1957).

51. *Id.* at 250.

52. 357 U.S. 449 (1958).

53. *Id.* at 460-61.

54. *Id.* at 459 (“If petitioner’s rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association.”).

the association itself. The association has rights because it is “in every practical sense identical” to its members and because it would likely be adversely affected by any violation of its members’ associational rights.<sup>55</sup> Because of these factors, the Court found that the NAACP had standing to protest the violation on behalf of its members.<sup>56</sup>

*Buckley* reiterated the original basis for the protection of a group’s associational rights: the ability to “effectively amplify[ ] the voice of their adherents.”<sup>57</sup> The Court concluded that this associational right was infringed by FECA’s independent expenditure limitations.<sup>58</sup> However, the Court also went on to distinguish this associational right from the organization’s right to aggregate large sums of money to promote effective advocacy and, importantly, an individual member’s right to associate with a candidate or committee, both rights which were infringed upon by FECA’s contribution limits.<sup>59</sup> In this way, *Buckley* not only introduced the concept that groups may have an additional layer of associational rights above individual rights, but it also established a dichotomy with respect to associational rights: the distinction between contribution limits and independent expenditure limits, which continued in subsequent cases right through *McConnell* (with the possible exception of *Austin v. Michigan Chamber of Commerce*,<sup>60</sup> discussed below).<sup>61</sup>

A further refinement on the theory of group associational rights came with *MCFL*, when a plurality of the Supreme Court sought to justify why certain organizations deserved greater protection of their associational rights than others.<sup>62</sup> By reasoning that certain nonprofit corporations do not pose the same threat as for-profit corporations, the plurality reached the conclusion that the use of the corporate form by

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55. *Id.*

56. *Id.* at 460.

57. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (citing *Patterson*, 357 U.S. at 460).

58. *Id.* Independent expenditures are defined as expenditures “by a person (A) expressly advocating the election or defeat of a clearly identified candidate; and (B) that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 2 U.S.C. § 431(17) (2000).

59. *Buckley*, 424 U.S. at 22.

60. 494 U.S. 652 (1990).

61. *See, e.g., Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 387 (2000) (“We flagged a similar difference between expenditure and contribution limitations in their impacts on the association right.”); *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (“We repeatedly have struck down limitations on expenditures . . . on the ground that such limitations ‘impose far greater restraints on the freedom of speech and association’ than do limits on contributions and coordinated expenditures.”). *Buckley* arguably created a tripartite standard perpetuated in *McConnell* by further distinguishing between coordinated expenditures (treated as indirect contributions) and expenditures “made totally independently of the candidate and his campaign.” *See id.*

62. *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 254-55 (1986) (plurality opinion).

itself should not trigger the deferential standard enunciated in *National Right to Work*.<sup>63</sup> Instead, the legislature should consider the underlying purpose of the organization when evaluating the potential for corruption in expending money during political campaigns.<sup>64</sup>

Just a few years later, the Court adopted an even more nuanced approach to corporate associational rights in *Austin*. The majority characterized its opinion in *MCFL* by limiting it to the following phrase: "In *MCFL*, we held that the nonprofit organization there had 'features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status.'"<sup>65</sup> The Court went on to both reiterate and broaden the three distinct characteristics of an *MCFL*-type entity: its formation for a political purpose and a narrow political focus that precludes engaging in business activities; the absence of shareholders, who are replaced by members who have "no economic disincentive for disassociating . . . if they disagree with [the organization's] political activity"; and the organization's "independence from the influence of business corporations."<sup>66</sup> By distinguishing the Chamber of Commerce from an *MCFL*-type entity, the majority found a state campaign finance law, which prohibited the use of general treasury funds for independent expenditures, to be constitutional as applied to a nonprofit organization.<sup>67</sup>

The primary significance of *Austin* is the Court's distinction of the two entities by looking through the organization to the associational rights of the individual members in considering whether the members have an economic disincentive for disassociating from the organization: "Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community."<sup>68</sup> This rationale would

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63. See *id.* at 259; *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982) (accepting Congress's reasoning for regulating all corporations and labor unions, without regard to their financial resources, and not wanting to "second-guess" the legislature's response to the perceived threat of corruption).

64. *MCFL*, 479 U.S. at 259 ("Regulation of corporate political activity thus has reflected concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes. Groups such as *MCFL* do not pose that danger of corruption. *MCFL* was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace." (footnote omitted)).

65. *Austin*, 494 U.S. at 661 (quoting *MCFL*, 479 U.S. at 263).

66. *Id.* at 662-64.

67. See *id.*

68. *Id.* at 663.

seem to support the premise that the individual members' associational rights are superior to those of the organization.

The dissenting opinions in the case, however, are worthy of discussion. Three Justices argued strenuously that the majority departed from the expenditure/contribution distinction first enunciated in *Buckley*.<sup>69</sup> This is significant because the basis of the distinction was grounded in the greater infringement on associational rights resulting from restrictions on independent expenditures.<sup>70</sup> The dissenting Justices also rejected the majority's rationale that state-conferred advantages of incorporation make it unfair for these organizations to benefit from these advantages and at the same time attempt to influence the political process.<sup>71</sup> In a separate dissenting opinion, Justice Scalia further explained that acceptance of "special advantages," including tax breaks, does not come at the expense of First Amendment Rights.<sup>72</sup>

For the most part, the cases discussed cite the prevention of corruption or the appearance of corruption of political candidates by large contributors as the rationale for restricting contributions and independent expenditures. Beginning with *Nixon v. Shrink Missouri Government PAC*,<sup>73</sup> the Court acknowledged a separate, albeit related, aim of "democratiz[ing] the influence" of money on elections.<sup>74</sup> This trend continues through *McConnell*, which has perhaps been the Court's most successful attempt at articulating a theory of American democracy and electoral politics.

In the same year that *Nixon* was handed down, the Court endeavored again to protect the associational rights of organizations. In *California Democratic Party v. Jones*,<sup>75</sup> Justice Scalia announced that the "forced association" under California's Proposition 198<sup>76</sup> would likely have the intended outcome of changing a political party's message, and that the majority could "think of no heavier burden on a political party's associational freedom."<sup>77</sup>

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69. *See id.*

70. *Id.* at 702-03 (Kennedy, J., dissenting).

71. *Id.* at 711-12.

72. *Id.* at 680 (Scalia, J., dissenting) ("It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.").

73. 528 U.S. 377 (2000).

74. *Id.* at 401 ("Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. . . . [The statute] permits all supporters to contribute the same amount of money, in an attempt to make the process fairer and more democratic." (citations omitted)).

75. 530 U.S. 567 (2000).

76. Proposition 198 sought to allow all registered voters, including those not registered for a specific political party, to vote for any candidate in a political party's primary regardless of that candidate's political affiliation. *See id.* at 570.

77. *Id.* at 581-82.

Another case preceding *McConnell*, *FEC v. Colorado Republican Federal Campaign Committee (Colorado II)*<sup>78</sup> is also of importance to this brief historical review. In a footnote in *Colorado II*, the Court used a long string cite to try to describe the relationship between individual and organizational associational rights, but ultimately concluded that the issue is unsettled, and refused to consider the issue in the case at bar.<sup>79</sup>

Just as the Court in *Jones* ostensibly established some protection for a group's associational rights, the *McConnell* Court sought to introduce limits on those rights. The Court sought to achieve this objective by downplaying the importance of such rights,<sup>80</sup> and by applying the narrowest possible reading of *Buckley* with respect to those rights.<sup>81</sup>

#### IV. WHERE DO 527S FIT IN?

Applying the "closest scrutiny" standard enunciated in *Patterson* to proposed regulation of 527s entails an examination of the evidence that is available to support the theory that large contributions to these organizations cause corruption of federal political candidates. On the one hand, expenditures by 527s can be seen as totally independent from the candidates and their political parties, thereby triggering protection under the *Buckley* independent expenditure standard.<sup>82</sup> On the other hand, except for the argument that huge contributions to 527s, like those seen in the 2004 election cycle, do in fact raise the specter of corruption, there may be some evidence that 527s do indeed coordinate with federal candidates. Nonetheless, there is other data to support *Buckley* protec-

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78. 533 U.S. 431 (2001).

79. *See id.* at 448 n.10 ("We have repeatedly held that political parties and other associations derive rights from their members. While some commentators have assumed that associations' rights are also limited to the rights of the individuals who belong to them, that view has been subject to debate. There is some language in our cases supporting the position that parties' rights are more than the sum of their members' rights, but we have never settled upon the nature of any such difference and have no reason to do so here." (citations omitted)).

80. *McConnell v. FEC*, 540 U.S. 93, 171-72 (2003) ("We recognize . . . the importance of preserving the associational freedom of parties. But not every minor restriction on parties' otherwise unrestrained ability to associate is of constitutional dimension." (citations omitted)).

81. *See id.* at 182 ("Even on the narrowest reading of *Buckley*, a regulation restricting donations to a federal candidate . . . qualifies as a contribution limit subject to less rigorous scrutiny. Such donations have only marginal speech and associational value, but at the same time pose a substantial threat of corruption.").

82. *See* Richard L. Hasen, Op-Ed., *A GOP Flip-Flop on Political Ads*, L.A. TIMES, Mar. 14, 2004, at M5 ("The 527s do not coordinate with candidates or parties. Unlike the political parties, 527s are not selling access to elected officials in exchange for large donations. Under the Supreme Court cases that say one cannot limit spending on campaigns independent of candidates, it is hard to see how contributions to these groups could constitutionally be regulated. . . . The court has refused to acknowledge that independent spending can lead to corruption or its appearance, and it has explicitly rejected the idea of leveling the playing field as a strong enough interest to justify restrictions on 1st Amendment freedoms.").

tion under the Court's rationale that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."<sup>83</sup> It therefore remains to be seen whether the expenditures by 527s are truly independent and uncoordinated.

Also, 527s may meet the requirements for protection of the associational rights of *MCFL*-type entities.<sup>84</sup> As to the first characteristic, 527s are clearly political organizations that do not otherwise engage in business activities and whose contributors "are fully aware of [their] political purposes, and in fact contribute precisely because they support those purposes."<sup>85</sup> The second characteristic is also easily met because 527s do not have shareholders with a claim on assets or earnings or members that would suffer a disadvantage for disassociating.<sup>86</sup> The final factor is less clear—while 527s are not established as business corporations or labor unions, they do not always have a policy of refusing contributions from those organizations.<sup>87</sup> While the negative attention 527s have garnered results mostly from large individual donations that dwarf the corporate donations, it is unclear whether corporate contributions, which many analysts expect will increase in the future, will turn 527s into the "conduits for the type of direct spending that creates a threat to the political marketplace."<sup>88</sup> The key to deciding this factor therefore lies in whether a court would find that 527s circumvent existing election laws designed to prevent the corrupting influence of these types of donations.

The Court in *MCFL* held that classifying the nonprofit groups that met its three requirements as political committees under FECA (the same action proposed by proponents of 527 reform) was overly burdensome and was not sufficiently narrowly tailored to meet the stated compelling government interest of preventing "massive undisclosed political spending by similar entities, and [ ] their use as conduits for undisclosed spending by business corporations and unions."<sup>89</sup> Given the disclosure

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83. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976); see also *Fox Special Report with Brit Hume: The All Star Panel* (Fox News television broadcast Aug. 5, 2004) (discussing impact of Swift Boat Veterans for Truth ads, Mort Kondracke commented: "I mean it's ironic that among these 527s, finally a 527 pops up that's helping, supposedly, helping Bush. And it's doing him more harm than good.").

84. See *supra* text accompanying notes 65-67.

85. See *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 260-61 (1986).

86. See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 662-64 (1990).

87. See *id.*

88. *MCFL*, 479 U.S. at 264; see also The Center for Public Integrity, *supra* note 2 (showing that the top 527 corporate donor gave approximately \$4 million, while the top individual donor gave \$23.7 million. The top fifteen 527 corporate donors gave a total of approximately \$21 million in comparison with approximately \$126 million (6 times the corporate amount) for the top 15 individual donors).

89. *MCFL*, 479 U.S. at 262.

requirements that are now in place for 527s,<sup>90</sup> however, there is a strong argument that the “state interest in disclosure” has already been met “in a manner less restrictive than imposing the full panoply of regulations that accompany status as a political committee under [FECA].”<sup>91</sup> Nevertheless, opponents argue that these disclosure requirements still may not adequately address the government’s interest in preventing circumvention of campaign finance laws.<sup>92</sup>

The greatest obstacle to the application of the *MCFL* standard to 527s comes from the Court’s somewhat careless reference to *Buckley*’s major purpose test:

Furthermore, 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. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat *MCFL* any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.<sup>93</sup>

As many have persuasively argued, the major purpose of 527s, by definition, is campaign activity, and they engage far more than occasionally in spending on behalf of candidates. The argument still remains, however, that 527s have features “more akin to voluntary political associations than business firms,”<sup>94</sup> even though there may be reasons to impose “burdens on independent spending”<sup>95</sup> aside from their incorporated status.

Furthermore, the Court in *Austin* demonstrated that it was willing to disregard the distinction between contributions and expenditures when applied to nonprofit corporations that did not meet the strict requirements of *MCFL*. In comparing the Michigan Chamber of Commerce to 527s, it is possible that 527s would fail the *MCFL* test on the third characteristic (independence from influence of business corporations) based on the Court’s anti-circumvention rationale:

Business corporations . . . could circumvent the Act’s restriction by funneling money through the Chamber’s general treasury. Because the Chamber accepts money from for-profit corporations, it could, absent application of [Michigan campaign finance law] serve as a

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90. See I.R.C. § 527(j) (2000).

91. *MCFL*, 479 U.S. at 262.

92. See *527 Hearing*, *supra* note 9 (statement of Scott Thomas, FEC Comm’r).

93. *MCFL*, 479 U.S. at 262 (citations omitted).

94. *Id.*

95. *Id.*

conduit for corporate political spending. In sum, the Chamber does not possess the features that would compel the State to exempt it from restriction on independent political expenditures.<sup>96</sup>

Further complicating the discussion over how to properly classify 527s is that the immense attention paid to 527s is largely attributable to the significant sums that poured into negative attack ads, including “sham issue ads”<sup>97</sup> before and during the 2004 presidential race. Advocates for change have emphasized that political parties and candidates—not “unaccountable” 527s—should dictate the issues discussed in federal elections.<sup>98</sup> If one of the main reasons for limiting large individual contributions to 527s is to change, restrict, or even shut down the messages these negative ads convey, then the associational rights of 527s and their members (upheld in cases like *Patterson*,<sup>99</sup> *Buckley*,<sup>100</sup> *First National Bank v. Bellotti*,<sup>101</sup> and *Jones*<sup>102</sup>) are potentially being violated.

*McConnell* recognized that restricting negative attack ads achieves the legitimate government interest in anti-circumvention of campaign finance laws restricting contributions.<sup>103</sup> When applying *McConnell* to

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96. *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 664-65 (1990) (footnote omitted).

97. As one Senate report described them, sham issue ads are “candidate advertisements masquerading as issue ads.” *McConnell v. FEC*, 540 U.S. 93, 132 (2003). One example of an Internet ad run during the 2004 election cycle was by a small 527. The ad shows, among other things, Osama bin Laden “making a fictitious endorsement of President Bush.” See McCormick, *supra* note 12.

98. See *527 Hearing*, *supra* note 9 (statement of Sen. Trent Lott) (“We’ve shifted power from the political parties to shadowy 527s who are now setting the agenda for this country’s electoral process. This is fundamentally wrong. The ones who should be setting the issue agenda are candidates and the political parties they represent.”).

99. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. . . . [A]nd state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” (citations omitted)).

100. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976) (“[FECA’s] \$1,000 limitation on independent expenditures ‘relative to a clearly identified candidate’ precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.”).

101. 435 U.S. 765, 790 (1978) (discussing corporate advertising used to oppose a State referendum, as opposed to candidates for political office, and stating: “[T]he fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’” (quoting *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959))).

102. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 581-82 (2000) (“Such forced association has the likely outcome—indeed, in this case, the *intended* outcome—of changing the parties’ message. We can think of no heavier burden on a political party’s associational freedom.” (emphasis added)).

103. *McConnell v. FEC*, 540 U.S. 93, 185 (2003) (“The . . . argument, that soft-money contributions . . . for ‘public communications’ do not corrupt or appear to corrupt federal



527s, however, it is difficult to argue that the Supreme Court definitively provided a basis for finding an anti-corruption, anti-circumvention, or participatory self-governance rationale for classifying 527s as political committees in an effort to limit individual contributions. The evidence that the complainants in *McConnell* and supporters of classifying 527s as political committees cite does not explicitly implicate a corruption link between 527s and political candidates. Rather, that evidence simply reiterates the point that 527s are effective at utilizing ads to influence the electorate.<sup>104</sup>

It is also remarkable that the plaintiffs in *McConnell* characterized 527s as interest groups; the Supreme Court had no trouble distinguishing interest groups from political parties, effectively justifying the lack of soft-money restrictions on interest groups.<sup>105</sup> Furthermore, if conclusive evidence were provided to show that 527s truly operate independently from candidates and that their advertising campaigns may even have the effect of harming a given political candidate, then the Supreme Court would likely afford *Buckley* protection to such independent expenditures by 527s.<sup>106</sup>

On the other hand, while the issue was not squarely before the Court in *McConnell*, the majority demonstrated its disdain for “politician 527s” in dicta.<sup>107</sup> Reform advocates have also made persuasive arguments as to how circumvention *might be* achieved by 527s.<sup>108</sup> Furthermore, the Court has already sanctioned the anti-circumvention mea-

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candidates, ignores . . . Congress’ strong interest in preventing circumvention of otherwise valid contribution limits. The proliferation of sham issue ads has driven the soft-money explosion.”).

104. See Declaration of Raymond J. La Raja, Republican Nat’l Comm. v. FEC, Civ. No. 02-874 (D.D.C. Sept. 23, 2002), *aff’d in part, rev’d in part sub nom.* *McConnell v. FEC*, 540 U.S. 93 (2003) (citing Professor David Magleby’s study).

105. *McConnell*, 540 U.S. at 188 (“More importantly, however, Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. 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.” (citations omitted)).

106. See *id.* at 221 (“[T]he rationale for affording special protection to wholly independent expenditures has nothing to do with the absence of an agreement and everything to do with the functional consequences of different types of expenditures. Independent expenditures ‘are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view.’”).

107. See, e.g., *id.* at 176-77 (“Parties and candidates have also begun to take advantage of so-called ‘politician 527s,’ which are little more than soft-money fronts for the promotion of particular federal officeholders and their interests. These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves. Given BCRA’s tighter restrictions on the raising and spending of soft money, the incentives for parties to exploit such organizations will only increase.” (citations omitted)).

108. See *527 Hearing*, *supra* note 9 (statement of Michael J. Malbin, Exec. Director, Campaign Finance Institute).

sure of limits on soft-money contributions to 527s and other tax-exempt organizations from political party committees.<sup>109</sup> Finally, as some campaign finance reform analysts have observed, both the amount of evidence needed to meet the burden of proof for showing corruption or its appearance, as well as the level of scrutiny applied to campaign finance regulations, has steadily decreased over the years, resulting in an almost completely deferential approach to congressional judgments.<sup>110</sup>

## V. THE 527 REFORM ACT OF 2005<sup>111</sup>

Legislation recently introduced by Senator McCain and others proposes to treat all 527 organizations as political committees under FECA, with a few exceptions. The exceptions are 501(c) nonprofits that expend funds for “exempt functions” under section 527 (the so-called “embedded 527s” that are also exempt from reporting requirements under 527(f)(1) and 527(i)(5)); 527s that have gross receipts of less than \$25,000 or more for any taxable year; state and local political party committees and political party committees of state and local candidates;<sup>112</sup> 527s organized solely to pay for deductible business expenses under section 162(a) of the Internal Revenue Code;<sup>113</sup> 527s organized solely for newsletter funds;<sup>114</sup> and 527s organized solely to influence non-federal elections, unless they spend more than \$1,000 on “[a] public communication that promotes, supports, attacks, or opposes [the so-called “PASO Standard”] a clearly identified candidate for Federal office during the 1-year period ending on the date of the general election for the office sought by the clearly identified candidate occurs [sic]” or for voter drive activity described in section 325(d)(1) of FECA.<sup>115</sup>

With this legislation, pro-reform advocates are trying to target the shadowy 527s that they find objectionable, while at the same time assuaging concerns about infringing on state and local committees, and fending off claims that this legislation is simply one step closer to pushing campaign finance reform deeper down into the Internal Revenue

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109. See *McConnell*, 540 U.S. at 180 (“Though there is little legislative history regarding BCRA generally, and almost nothing on § 323(d) specifically, the abuses identified in the 1998 Senate report regarding campaign finance practices involve the use of nonprofit organizations as conduits for large soft-money donations.”).

110. For a detailed discussion on the evolving standard and specific examples in *McConnell*, see Richard L. Hasen, *Campaign Finance After McCain-Feingold: Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31 (2004).

111. S. 271, 109th Cong. (2005).

112. See I.R.C. § 527(i)(5) (2000).

113. See *id.* § 527(e)(2) (2000).

114. See *id.* § 527(g) (2000).

115. S. 271 § 2.

Code towards regulation of 501(c) organizations.<sup>116</sup> This most recent round of proposed legislation on campaign finance reform raises some important questions and concerns that go to the heart of First Amendment associational rights.

For example, to what extent are Americans willing to allow Congress, whose members, some have credibly argued, have a conflict of interest when it comes to campaign finance and a vested interest in entrenching themselves and their parties, to continue to impose restrictions on associational rights?<sup>117</sup> Why is it that 501(c) groups may engage in some issue advocacy that ultimately influences federal elections, but once such activity is deemed a “major purpose,” it becomes subject to strict source and contribution limitations? Are the disclosure requirements added in the amendment to section 527 enough to allow the average American voter to decide which ads are genuine and which ones are shams? Why are reform advocates so convinced that further regulation of political associations like 527s will put an end to “cynicism and apathy” on the part of “average” voters?<sup>118</sup> After all, what if the “average” voter just does not care enough about certain issues or candidates to contribute money in any quantity? Why is it wrong for billionaires like George Soros to express their disdain for policies and candidates when there is no good evidence that they are trying to put politicians in their pockets?

Several legal scholars have attempted to answer these questions. Proponents of reform point to the “major purpose” test first enunciated in *Buckley* and reiterated in *McConnell* as a rationale for distinguishing 527s, whose self-proclaimed major purpose is to influence elections.<sup>119</sup>

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116. Compare *527 Hearing*, *supra* note 9 (statement of Robert F. Bauer) (“By empowering the FEC to determine whether an organization is an IRC § 527 ‘political organization,’ the bill would surely encourage complaints to the FEC that various organizations, particularly 501(c)s, were operating as 527s, not as 501(c)s. In light of the reform community’s distrust of 501(c) advocacy and voter mobilization programs, this is not by any means a remote possibility. For organizations now operating under exemption recognized by the IRS, this is, in fact, a likely and costly effect of the structure of this proposal.” (footnote omitted)), with *527 Hearing*, *supra* note 9 (statement of Prof. Frances R. Hill) (“The 527 Reform Act of 2005 does not apply to section 501(c) organizations, as it states explicitly in Section 4(3). This approach reflects the very different tax predicate of section 527 and section 501(c). . . . [T]he IRS will not simply treat [an organization that does not qualify as a 501(c) because of activities that push the envelope] as an involuntary section 527 organization.”).

117. See, e.g., *id.* (statement of Robert F. Bauer) (“Also true is the traditional and profound effect of partisan interest on the choice of which reforms are promoted, and which are not. Examples range from early Congressional investigations into violations of the Federal Corrupt Practices Act, through the enactments of the Hatch and Smith-Connolly Acts, and the Federal Election Campaign Act of 1971. The pressure for 527 reform, in the wake of the 2004 Presidential and Congressional elections, is the latest chapter in this partisan history.”).

118. See *id.* (statement of Sen. Russell D. Feingold).

119. See, e.g., *id.* (statement of Scott E. Thomas, FEC Comm’r).

Others argue that starting with this test is a misinterpretation of *Buckley*, and that the correct standard to apply in attempting to define political committees is the contribution/expenditure test.<sup>120</sup> Still others involved in influencing the debate have responded by raising another potential constitutional challenge to 527 regulation, which emanates from the distinction in the standards applied to independent expenditures versus contributions (that is, independent expenditures enjoy a higher degree of associational protection than contributions). The Court has reiterated on numerous occasions that individuals are free to engage in limitless expenditures “made totally independently of the candidate and his campaign.”<sup>121</sup> These statements by the Court would seem to preclude a constitutional contribution limit on contributions to “independent expenditure committees.”<sup>122</sup>

Senator McCain and other Republican reform advocates respond to this potential constitutional challenge by pointing to a memorandum prepared by Professor Daniel Ortiz, a Professor of Law at the University of Virginia School of Law.<sup>123</sup> In the memorandum, Professor Ortiz relies on the interplay between the majority judgment and the concurring opinion in *California Medical Ass’n v. FEC*,<sup>124</sup> as well as on footnote 48 in

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120. See *id.* (statement of David M. Mason, FEC Comm’r) (“The claim by some that the law requires the Commission to begin its inquiry with a major purpose analysis and then work backwards to consider whether an organization whose major purpose is political has made expenditures or contributions turns the judicial test inside out. It attempts to use a doctrine enunciated as necessary to limit the reach of the statute into a tool to expand the statute’s reach. In addition, since the Court has held that all spending by political committees is campaign-related, this approach attempts to short circuit the statutory approach though [sic] expenditures and contributions by begging those questions: beginning with a ‘major purpose’ inquiry which is not mentioned or defined in the statute [sic], and then simply declaring that all or virtually all spending by a ‘major purpose’ group is an ‘expenditure.’ This would make the statute’s expenditure definition, and the statute’s use of that term to define political committee, superfluous.”).

121. *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976)).

122. See *527 Hearing*, *supra* note 9 (statement of David M. Mason, FEC Comm’r) (“Put practically, if it is OK for George Soros and Peter Lewis each to spend \$10 million independently to defeat President Bush, why is it wrong for the two of them to get together and spend \$20 million jointly? Why does combining two rights (those of speech and association) make a wrong? Both the judicial deference to Congressional findings evidenced in *McConnell* and Congress’ own independent obligation to the constitution indicate that Congress should, in considering this legislation, carefully consider whether there is a constitutional impediment to the effective imposition of a \$5,000 contribution limit to [independent expenditure political action committees] and to present its conclusions and constitutional justification for any proposed limit. Even with what might appear to be a favorable breeze from *McConnell*, given the explicit reservation of this issue by the Supreme Court and the active examination of it in two federal circuits, it would be shortsighted to fail to address this constitutional question squarely.”).

123. See *id.* (statement of Sen. John McCain) (submitting Professor Ortiz’s memorandum for the record).

124. 453 U.S. 182 (1981).

*McConnell*,<sup>125</sup> to conclude that it is constitutional to limit contributions to entities that engage solely in independent expenditures.<sup>126</sup>

*CalMed* held that Congress could limit contributions to entities that would use them solely for independent expenditures. *McConnell* then made clear why: *CalMed* necessarily found that such contributions pose a danger of actual or apparent corruption. . . . *CalMed*, then, despite its ambivalent dicta, stands for two propositions: (i) that contributions can corrupt independently of their ultimate use and (ii) that Congress can limit contributions to political committees that the recipients would use to make independent expenditures.<sup>127</sup>

The memorandum, however, does not address how 527 independent expenditures are corrupting candidates or why 527s should be classified as political committees in the first instance, even while acknowledging that “[t]he contribution’s ultimate use did not determine its corruptive potential. Rather, the corruptive potential stemmed from the party’s ability to give donors access to and influence over its candidates,”<sup>128</sup> a charge that has yet to be substantiated with respect to 527s. Furthermore, Professor Ortiz’s memorandum has been criticized on a number of other grounds as well, including the failure to address the associational rights infringement issue of a \$5,000 contribution limit.<sup>129</sup> Still others have argued that the reason why George Soros and other wealthy 527 contributors should be prohibited from making exorbitant contributions is because such donations lead to control of the electoral process in a way that “undermines the democratic value of widespread participation.”<sup>130</sup>

There is mounting evidence that this latter rationale might be accepted by the Supreme Court. The Court’s reasoning in *Buckley* for allowing regulations to infringe upon the associational freedoms implicated in contribution was that, although the contribution ceilings would “merely . . . require candidates and political committees to raise funds from a greater number of persons,” they would still “leave the contributor free to become a member of any political association and to assist

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125. See *McConnell*, 540 U.S. at 152.

126. Memorandum from Daniel R. Ortiz, John Allan Love Professor of Law, University of Virginia School of Law, for Democracy 21 and the Campaign Legal Center 3 (Apr. 9, 2005), available at <http://www.campaignlegalcenter.org/attachments/1114.pdf>.

127. *Id.*

128. *Id.* at 4.

129. See Posting of Rick Hasen to <http://electionlawblog.org/archives/001003.html> (Apr. 13, 2004) (arguing that Dan Ortiz’s point that “[c]ampaign contributions impose only a marginal restriction on free speech . . . misses the associational issue that comes up not for Soros, but for those who have more than \$5,000 to give, but not enough as Soros to be able to engage in effective advocacy”).

130. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 73 (2004).

personally in the association's efforts on behalf of candidates."<sup>131</sup> But while the *Buckley* Court clung to the contribution/expenditure distinction, and to the requirement that there be proven corruption before regulations could be imposed, it seems the *McConnell* Court, and perhaps Justice Breyer in particular,<sup>132</sup> is moving toward a regulatory justification based on a model of "participatory" or "democratic self-government"<sup>133</sup> and "class sensitive" approaches to campaign finance law.<sup>134</sup> As two leading campaign finance reform analysts have pointed out, this growing movement is worrisome to those who value associational freedoms more than any attempt to engage an electorate that may not have any interest in participating in federal elections beyond effectively exercising their right to vote.<sup>135</sup>

While there are merits to arguments on both sides of the 527 Reform Act, perhaps the best solution is to proceed slowly and to adopt an approach that recognizes the significance of associational rights while not being disingenuous or partisan about the potential for corruption. One such possible solution is that proposed by the Brennan Center for Justice, which would classify 527s as political committees for the purposes of disclosure and elimination of contributions from corporations and labor unions, but at the same time would not impose contribution

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131. *Buckley v. Valeo*, 424 U.S. 1, 22 (1976).

132. See Hasen, *supra* note 110, at 31 ("[I]t appears that the Court's jurisprudence is moving in the direction proposed by Justice Breyer, toward upholding campaign finance laws that promote a kind of political equality.").

133. See *527 Hearing*, *supra* note 9 (statement of Robert F. Bauer) ("In the Court's new view, Congress need not confine its efforts to addressing demonstrated corruption, or its appearance: it has constitutional permission to regulate politics in the interest of enriched, more meaningful democratic self-government.").

134. See Overton, *supra* note 130, at 78.

135. See Hasen, *supra* note 110, at 32-33 ("In order to uphold bolder campaign finance laws purportedly under the *Buckley* standard, the Court has: (1) reduced the evidentiary burden that the government must meet to show that a law is necessary to combat corruption or its appearance; (2) relaxed the level of scrutiny applicable to reviewing campaign finance regulation; and (3) especially in the *McConnell* case, engaged in unusually sloppy and incomplete reasoning to justify its holdings. The result is jurisprudential incoherence and a lead opinion in the most important campaign finance case in a generation that appears to pay only cursory attention to the First Amendment interests that must be balanced in evaluating any campaign finance regime."); *527 Hearing*, *supra* note 9 (statement of Robert F. Bauer) ("The now seemingly quaint constitutional concerns expressed by the *Buckley* Court—about the effect of this kind of regulation on rights of speech and association—have been subordinated to this goal of participatory self-government. The goal is grandiose, all the more so because it is undefined; and it is a standing invitation to all manner of regulation, and there are those determined to regulate the politics who are prepared to accept the invitation.").

limitations on individuals when the 527 makes genuinely independent expenditures.<sup>136</sup>

ADRIANA RIVIERE\*

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136. *See* Letter from Burt Neuborne, Legal Director, Brennan Center for Justice, to Mai T. Dinh, Acting Assistant General Counsel, FEC (Apr. 8, 2004) (letter on file with the University of Miami Law Review).

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