Reformation of 527 Organizations: Closing the Soft Money Loophole Created by the Bipartisan Campaign Reform Act of 2002

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TABLE OF CONTENTS

I. Introduction .......................................................................... 810

II. The History of Campaign Finance Law ............................... 815
    A. In the Beginning: Early Campaign Finance Law ............ 815
    B. The Enactment of the Federal Election Campaign Act ......................................................... 817
    C. The 1974 FECA Amendments .................................... 818
    D. Modern Campaign Finance Law ................................. 819
       1. Buckley v. Valeo ...................................................... 819
       2. The Bipartisan Campaign Reform Act of 2002 ........... 825
       4. The Failures of FECA and BCRA: Ushering in A New Era of Soft Money ........................... 828

III. Putting it all Together: Problems Associated with 527s and Congress’ Power to Regulate Them ........................................ 829
    A. The Birth of 527s ........................................................... 829
    B. The Problems Associated with 527s ............................. 830
    C. Congressional Regulation of 527s ................................. 832

IV. Possible Remedies to the Problems Associated with 527s ........................................................................ 836
    A. Inaction by Congress ...................................................... 837
    B. Restricting Expenditures ............................................... 839
    C. Strengthening Disclosure Requirements on 527s .......... 839
    D. Subjecting 527s to FEC Regulation ............................... 841

V. Required Anonymity: The Real Solution to the Problems Associated with Money in Campaigns? ....................... 845

VI. Conclusion ........................................................................... 849
I. INTRODUCTION

"Few men have virtue to withstand the highest bidder."
-George Washington

"I don’t think we ought to have 527s," commented President George W. Bush in an August 2004 press conference.\footnote{Press Release, White House Office of the Press Secretary, President Meets with Defense Team: Remarks by the President in Press Availability (August 23, 2004), http://www.whitehouse.gov/news/releases/2004/08/20040823-4.html.} In speaking of 527s, Bush was referring to tax exempt groups, organized under section 527 of the Internal Revenue Code, that raise money for political activities like issue advocacy.\footnote{Types of Advocacy Groups, http://www.opensecrets.org/527s/types.asp (last visited Oct. 10, 2004); I.R.C. § 527 (2004). In Buckley v. Valeo, the Court distinguished express advocacy from issue advocacy, finding that issue advocacy consisted of "funds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat." 424 U.S. 1, 44, 96 S. Ct. 612, 647 (1976). This is to be contrasted with the Court's view of express advocacy, which was defined by the Court as "express terms advocat[ing] the election or defeat of a clearly identified candidate for federal office, [including ads that use terminology] such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and] 'reject.'" Id. at 44, 96 S. Ct. at 647.} This includes groups such as Swift Boat Veterans for Truth, MoveOn.org, and America Coming Together.\footnote{George J. Terwilliger III & George C. Wells, Corporate Donations: 527 Organizations, The National Law Journal, Sept. 13, 2004, available at http://www.whitcase.com/files/Publication/bbd7ce69-0f9e-4961-b055bd94c43b8167/Presentation/PublicationAttachment/1a470c97-83f9-479b-ac29c45f73e68eb8/527%20Organizations.pdf; see MoveOn.Org: Frequently Asked Questions, http://www.moveon.org/about.html (last visited Oct. 30, 2004) (According to their website, MoveOn.org is composed of three entities: a 501 organization, a 527 organization, and a federal Political Action Committee. The website claims that the Political Action Committee is the only entity responsible for aiding candidates.); see generally Types of Groups, http://www.opensecrets.org (last visited Oct. 10, 2004) (Political Action Committees are organized for the purpose of raising and spending money to elect and defeat candidates and are subject to FEC regulation. 501 groups operate "for religious, charitable, scientific or educational purposes ... [and] are not supposed to engage in any political activities, as long as these activities do not become their primary purpose."). The manipulation of 501 groups, as well as the commingling of the...} 527 groups achieved notoriety during the 2004...
election cycle because of the highly controversial ads produced by some 527 organizations.  

Although the Bipartisan Campaign Reform Act of 2002 (BCRA), which consisted of extensive campaign finance restrictions aimed at limiting contributions of soft money, was expected by many to clean up campaigns, some third party advocacy groups have been able to avoid being subjected to the new finance regulations. Amounts spent on political advertising that are not directed by, or associated with, a candidate or political campaign are known as independent expenditures and are not subjected to the limits passed in 2002. The amounts spent by 527 organizations fall under this exception as long as their efforts are not coordinated with political campaigns. The reason these restrictions do not apply to 527s is because BCRA only applies to political committees. Political committees are defined by BCRA’s predecessor, the Federal Election Campaign Act (FECA), as “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.” The Supreme Court has

three aforementioned types of groups is an issue that is beyond the scope of this comment.

4. For an example of such an ad, see infra note 20.
5. The term “soft money” refers to contributions that are not subject to the disclosure requirements of federal election laws. The Supreme Court, 2003 Term—Leading Cases, 118 Harv. L. Rev. 364, 364 n.2 (2004).
6. The Campaign Finance Law: Independent Expenditures, http://www.opensecrets.org/regulation/fecplus/fecplus9.htm (last visited Oct. 10, 2004). In a footnote, the Buckley Court cited a House Report and defined independent expenditures as costs “incurred without the request or consent of a candidate or his agent.” 424 U.S. 1, 47 n. 53, 96 S. Ct. 612, 648 n. 53 (1976) (citing H.R. Rep. No. 93-1239, at 6 (1974)). The Court also cited an example from a Senate report, stating “a person might purchase billboard advertisements endorsing a candidate. If he does so completely on his own, and not at the request or suggestion of the candidate or his agent’s [sic] that would constitute an ‘independent expenditure’ on behalf of a candidate.” Id. (citing S. Rep. No. 93-689, at 18 (1974)).
8. 2 U.S.C. § 431(4)(A) (2004) (A “political committee” may also be any separate segregated fund established under 2 U.S.C. 441b(b) or any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the
stated that a group does not fall within FECA’s definition of political committee unless its “major purpose” is to influence federal elections.\textsuperscript{9} Even though most 527s seem to fall under this definition, as they have over $1,000 in contributions and influencing federal elections as their main purpose, the Federal Election Commission has chosen not to treat 527s as political committees.\textsuperscript{10} The best explanation for this decision is found in the distinction between “express advocacy” and “issue advocacy” in \textit{Buckley v. Valeo}.\textsuperscript{11}

In \textit{Buckley v. Valeo}, the Court found that express advocacy consisted of communications “that in express terms advocate the election or defeat of a clearly identified candidate for federal office . . . containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’”\textsuperscript{12} As most ads produced by 527s do not use these explicit words of advocacy, the FEC has chosen to treat them as issue ads.\textsuperscript{13} Since the FEC has deemed 527s ads to be issue advocacy, rather than express advocacy of a candidate, these organizations do not qualify as political committees and are not subject to the limits imposed by BCRA. This has allowed 527s to support a particular candidate by simply disguising their express advocacy as issue advocacy.

This ability of 527s to engage in issue advertising is fairly broad, as the Supreme Court has defined express advocacy narrowly. 527s used this distinction to their advantage in the 2004 election cycle. For instance, the Swift Boat Veterans for Truth produced an ad that featured a veteran who claimed that John Kerry was deceitful and was openly lying about being in Cambodia

\begin{itemize}
\item \textsuperscript{9} Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976).
\item \textsuperscript{10} On September 14, 2004, a civil action was instituted by Representative Christopher Shays (R-Conn.) and Representative Marty Meehan (D-Maine) in the United States District Court for the District of Columbia. The complaint alleged that the FEC failed to adequately define the term “political committee.” To view a copy of the complaint, see http://www.brook.edu/ gs/cf/headlines.htm (last visited Feb. 2, 2005).
\item \textsuperscript{11} 424 U.S. at 44, 79, 96 S. Ct. 612, 646–47.
\item \textsuperscript{12} \textit{id}.
\item \textsuperscript{13} See \textit{supra} note 2 for the \textit{Buckley} Court’s definition of issue advocacy.
\end{itemize}
in 1968. Although this ad focused on a particular issue, Kerry’s war record, the real purpose of the ad was clear—Vote for Bush. MoveOn.org ran an ad alleging that Bush used family connections to get him into the Texas National Guard, where he failed to fulfill his obligations. Again, although the form of the ad centered on an issue, Bush’s service in the Texas National Guard, the real message behind the ad was “Vote for Kerry.”

Although 527s are billed as independent political advocacy groups, there have been allegations that both 2004 presidential candidates, President George W. Bush and Senator John Kerry, have ties to certain 527s. Controversy surrounded John Kerry’s campaign when he hired Ken Exley, the director of special projects for MoveOn.org, as director of online communications for his campaign. Allegations of connections to 527s culminated in the resignation of the Bush campaign’s legal counsel, Ben Ginsberg, after it was discovered that Ginsberg had also served as independent legal counsel for the Swift Boat Veterans for Truth. These connections suggest the real threat of 527s—that they are merely a vehicle for doing the dirty work of the official campaigns.

527 organizations have become a strong force in the American electoral system. These groups are able to accumulate large sums

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17. A statement from MoveOn.org asserted that Exley and MoveOn.org will not have any contact throughout the election in order to avoid any appearance of impropriety. See Mecurio, supra note 16.

18. In an August 2004 interview, White House Senior Advisor Karl Rove admitted that Ginsberg served as legal counsel to the Swift Boat Veterans for Truth, but denied any wrong doing, stating:

That’s normal . . . . [Ginsberg is] fulfilling a legal function, not a political [one] . . . . But Ben Ginsberg, who’s a great friend of this president and has been with him since he began to run for president in 1999, did—was—resigned from the Bush campaign in order to remove any possibility of being a distraction to his friend.

of money from donors, including multi-million dollar donations from single donors. For example, George Soros contributed over twenty-three million dollars amongst nine 527s during the 2004 election cycle.\(^\text{19}\) This money allows the groups to communicate their message to massive numbers of people via large media outlets, such as national television advertisements. These ads are quite controversial because many of them are negative attack ads. Some have argued that many of these advertisements contain blatant misrepresentations and falsities, designed to lure the American people into voting against a particular candidate.\(^\text{20}\)


20. See generally Press Release, White House Office of the Press Secretary, President Meets with Defense Team: Remarks by the President in Press Availability (Aug. 23, 2004), http://www.whitehouse.gov/news/releases/2004/08/20040823-4.html. Examples of such television ads include an ad produced by the Swift Boat Veterans for Truth, which consists of the following: an American flag, the Jefferson Monument, and the Washington Monument flash across the screen as a voice comments on the importance of symbols, freedom, valor, and sacrifice. At first glance, this ad appears to be nothing more than an attempt to stir up patriotic feelings that will raise the American morale. These patriotic symbols quickly disappear and are replaced with dismal images of anti-war protests. Footage of John Kerry, stating that he has renounced his war medals, is used to lead the narrator to conclude that a man who has renounced symbols of his country cannot be trusted. Another ad features a veteran who claims that Kerry is deceitful and is openly lying about being in Cambodia in 1968. On his website, Kerry includes a petition for visitors to sign, urging President Bush to stop the Swift Boat Veterans for Truth from spreading statements that have been “contradicted by official Navy Records, the New York Times, the Washington Post, the Chicago Tribune and every man who served under John Kerry.” See Tell George Bush: Stop the Smear—Get Back to the Issues, http://www.johnkerry.com/petition/oldtricks.php (last visited Oct. 29, 2004). Swift Boat Veterans for Truth is not the only group guilty of promoting these attack ads. An example of an anti-Bush ad promulgated by MoveOn.org is an ad that alleges that Bush used family connections to get him into the Texas National Guard, where he failed to fulfill his obligations. See Memmott, supra note 15. In response to the ad, White House Press Secretary Scott McClellan stated:

We have been on the receiving end of more than $62 million in negative political attacks from these shadowy groups that are funded by unregulated soft money . . . . [T]he President has condemned all of the
As a result of the prominence of these attack ads run by 527 groups during the 2004 election cycle, many have called for reform of 527 groups. This comment examines the battle between those who argue that restrictions on 527 groups are needed in order to maintain integrity in the election system, and those who argue that such restrictions would violate the right of 527 groups to exercise their First Amendment right of free speech. Part II details the history of campaign finance laws, with particular emphasis on the type of restrictions on campaign finances that have been allowed by the courts. Part III explores whether Congress has the power to place any type of restrictions on Section 527 groups without violating the First Amendment and concludes that Congress does in fact have that power. Part IV analyzes several possible limitations that Congress could implement and determines that subjecting 527s to FEC regulation is the optimal starting point for Congress. Although this will solve some of the problems with 527 organizations, the flood of money into politics will continue to cause problems until more drastic steps are taken to reform campaign finance law. One possible method for achieving this reform is by eliminating caps on individual contributions and implementing a system where donors’ identities would not be revealed to the candidate.

II. THE HISTORY OF CAMPAIGN FINANCE LAW

A. In the Beginning: Early Campaign Finance Law

Campaign finance law is an area that has troubled our nation since the early twentieth century. President Theodore Roosevelt's first item of Congressional business in 1906 dealt with enacting a law prohibiting political contributions by corporations. Roosevelt commented, "It is necessary that laws should be passed to prohibit the use of corporate funds directly or indirectly for political purposes; it is still more necessary that such laws be
thoroughly enforced." 22 This was one of the first manifestations of what would prove to be an ongoing congressional concern with keeping elections free from the influence of money. From 1906 to 1947, the legislation was amended several times, with each amendment putting further restrictions on campaign finances. 23 In 1925, a comprehensive revision of the existing legislation was accomplished with the Federal Corrupt Practices Act of 1925. The legislative history of the Act suggests it was intended to remedy "the evils" associated with individuals and associations making large contributions to political candidates in return for future political favors. 24

Political advertising via the media has been a cause for public concern for years. In 1940, the Hatch Act, which was designed to eliminate the abuses in the political process that accompany the operation of a vast civil administration, was reformed. 25 The 1940 amendments to the Act put limitations on both the expenditures of political committees and contributions by individuals or groups. 26 According to a statement by Senator John H. Bankhead II, the goal of the Act was not only to deter politicians from rewarding large contributors with political favors, but also to limit the sums of money available for campaigning through the media. 27 Senator Bankhead was concerned that large contributions enabled politicians to spread their "propaganda, both true and untrue" through use of the media. 28

22. Id.
24. United States v. International Union United Automobile, Aircraft, and Agricultural, Implement Workers of America, 352 U.S. at 575, 77 S. Ct. at 533. This case involved an alleged violation of the federal Corrupt Practices Act. The Act prohibited corporations and labor organizations from making a "'contribution or expenditure in connection with' any election for federal office." Id. at 568, 77 S. Ct. at 530. A labor union was charged with violating the Act by using union dues to fund television broadcasts that endorsed certain Congressional candidates. Id. at 584-85, 77 S. Ct. at 537-38. The Court found that the alleged offense was within the scope of the Act and remanded the case to the district court so that it could continue prosecution. Id. at 591, 77 S. Ct. at 541.
25. Id. at 577, 77 S. Ct. at 534.
26. Id.
27. Id. at 577-78, 77 S. Ct. at 534.
28. Id. at 578, 77 S. Ct. at 534.
B. The Enactment of the Federal Election Campaign Act

The presidential election of 1960 also prompted calls for reform of the election system. Some were concerned that presidential candidate John F. Kennedy’s affluence gave him an unfair advantage, as he had more resources available for use in his campaign. In 1971, Congress passed the Federal Election Campaign Act (FECA). FECA limited the amount of money that candidates could personally contribute to their campaigns, limited what could be spent on media advertising, and required disclosure of campaign contributions and expenditures.

Shortly after FECA took effect, news of the Watergate scandal surfaced. During the investigation, it was discovered that between the time that FECA was enacted and the time it took effect on April 17, 1972, President Richard Nixon had raised almost twenty million dollars in unreported campaign funds. Much of this money was raised just forty-eight hours before FECA took effect.

This was not the end of President Nixon’s campaign finance related troubles. Two Washington Post reporters soon discovered a secret bank account that had been set up by President Nixon’s Committee to Re-elect the President. This account, which was used for campaign contributions, contained illegal contributions laundered through a Mexican bank. This discovery led to an audit of the Committee, which revealed even more violations of campaign finance laws.

29. Whittaker, supra note 23, at 1068 (citing Suzanne M. Coil, Campaign Financing 10 (Millbrook Press 1994)).
33. Whittaker, supra note 23, at 1069 (citing Suzanne M. Coil, Campaign Financing 12 (Millbrook Press 1994)).
34. Whittaker, supra note 23, at 1069 (citing Bradley A. Smith, Unfree Speech 31–32 (Princeton Univ. Press 2001)).
35. Id. at 1070 (citing Robert E. Mutch, Campaigns, Congress, and Courts: The Making of Federal Campaign Finance Law 47 (Praeger Publishers 1988)).
36. Id.
37. Id.
C. The 1974 FECA Amendments

Although President Nixon's violations of campaign finance law, along with his ties to Watergate, ultimately led to his resignation, his violations also prompted Senators Edward Kennedy and Hugh Scott to put forth bills geared toward closing holes in FECA. This resulted in the 1974 amendments to FECA. These amendments placed limits on the amounts that individuals could contribute to candidates and political committees and limited spending by candidates in federal elections. The contribution limitations included: a $1,000 limit on individuals donating to a candidate for federal office, limiting the donation of Political Action Committees (PACs) to $5,000 per election, limiting donations to national committees of political parties to $20,000 a year for individuals and $15,000 a year for PACs, and an aggregate cap of $25,000 a year on the amount an individual could contribute to all federal candidates, national parties, and PACs. The limitations on expenditures by presidential and Congressional candidates varied. These limits included a $10 million cap on spending in the presidential primaries and a $20 million cap covering the general presidential election. Presidential candidates were only able to spend $50,000 of their own money. One of the most widely criticized limitations was a $1,000 limit per election on the amount that could be spent to independently support a federal candidate. The 1974 amendments also created

40. A Political Action Committee can be defined as "a segregated fund that a corporation, labor union, or political organization can create to collect voluntary contributions from individuals—but not corporate funds—and pass them onto candidates." The Twentieth Century Fund Working Group on Campaign Finance Litigation, Buckley Stops Here: Loosening the Judicial Stranglehold on Campaign Finance Reform 24–25 (The Century Foundation Press 1998).
41. Id.
42. Id. at 25.
43. Id.
44. Id.
45. Id.
the Federal Election Commission (FEC), an organization designed to ensure that candidates complied with the new FECA rules.46

The 1974 FECA amendments were met with some resistance.47 A report from the Twentieth Century Fund Working Group on Campaign Finance Litigation, which describes itself as a non-profit, non-partisan fund that sponsors analyses of economic policy, foreign affairs, and domestic political issues, argued that Congress did not spend a sufficient amount of time ensuring that the amendments would withstand a constitutional challenge.48 The group insisted that such a challenge was sure to occur soon after the amendments were enacted, as Congress was taking a scarcely legislated area "involving critically important issues—like the very health of our democracy . . . [and] impos[ing] upon it a complex tangle of regulations infused with ambiguity."49 A group of federal candidates, political parties, and organizations that shared this same view challenged the 1974 FECA amendments in Buckley v. Valeo.50

D. Modern Campaign Finance Law

1. Buckley v. Valeo

Buckley v. Valeo,51 decided by the Supreme Court in 1976, is the most significant decision thus far in the lineage of campaign finance reform cases.52 Buckley involved a challenge to the 1974 FECA Amendments, which were designed "to purify and equalize federal elections, [by] plac[ing] stringent limitations upon the amounts of money that individuals were permitted to contribute and spend upon campaigns for federal office."53 The major issues in Buckley that are relevant to this comment are the constitutionality of limits on both contributions and expenditures.

47. This resistance is exhibited by the challenge to the 1974 FECA amendments in Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976). See also Part II.D.1 for further discussion.
48. The Twentieth Century, supra note 40, at 25.
49. Id.
50. 424 U.S. 1, 96 S. Ct. 612.
51. Id.
52. Whittaker, supra note 23, at 1071.
When examining the limits placed on contributions and expenditures by the 1974 FECA amendments, the Court addressed whether these limitations violated the First Amendment’s guarantee of free speech. The Court made a distinction between campaign contributions and campaign expenditures.\(^5\) Although the Court found that both contribution and expenditure limitations were a type of infringement on the First Amendment, it found “expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association...”\(^5\)

The Buckley Court recognized that campaign contributions and expenditures fall within “an area of the most fundamental First Amendment activities.”\(^5\) It found that expenditure limitations required the most exacting scrutiny, forcing the government to show a substantial governmental interest.\(^5\) The interests asserted by the government, avoiding corruption and equalizing the playing field in order to compensate for the fact that some candidates have mass amounts of personal wealth, did not meet the Court’s standard.\(^5\) The Court found that the limits on campaign

\(^{54}\) Buckle, 424 U.S. at 23, 96 S. Ct. 636. The Buckley Court found that “by contrast with a limitation upon expenditures for political expression, a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication.” Id. at 20, 96 S. Ct. at 635.

\(^{55}\) Id. at 23, 96 S. Ct. at 636.

\(^{56}\) Id. at 14, 96 S. Ct. at 632.

\(^{57}\) In implementing this heightened scrutiny, the Buckley Court stated that “a restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.” Id. at 19, 96 S. Ct. at 634. The Court found the expenditure limit represented “substantial rather than merely theoretical restraints on the quantity and diversity of political speech.” Id. at 19, 96 S. Ct. at 635.

\(^{58}\) For the Court, preventing corruption was not enough to justify the expenditure limits because the legislation prevented only some large expenditures. Id. at 45, 96 S. Ct. at 647. Equalizing the financial resources of the candidates was not a sufficient interest as the restriction may fail to promote financial equality among candidates. A candidate who spends less of his personal resources on his campaign may nonetheless outspend his rival as a result of more successful fundraising efforts. Indeed, a candidate’s personal wealth may impede his efforts to persuade others that he needs their financial contributions or volunteer efforts to conduct an effective campaign.
expenditures imposed "substantial and direct restrictions on the ability of the candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate." Thus, the limits on individual expenditures made by candidates were struck down.

The Court went on to address FECA's limits on individual contributions to political campaigns. Although the Court found that the freedom of association was a "basic constitutional freedom," it noted that even protected constitutional rights can be violated if the government can demonstrate a "sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of associational freedoms." The government's stated interests were protecting against corruption, reducing the influence of the wealthy to equalize the political process for all candidates, and reducing the increasing cost of campaigns in order to allow greater access to the political system. The Court did not discuss the latter two interests, as it found that reducing corruption and the appearance of corruption was a sufficient reason for abridging some First Amendment rights. The limitations that the 1974 FECA amendments placed on individual contributions to political campaigns were upheld by the Supreme Court.

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*Id.* at 54, 96 S. Ct. at 651. The Court also found that the First Amendment "simply cannot tolerate § 608(a)'s restriction upon the freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Id.*

59. *Id.* at 58–59, 96 S. Ct. at 654.

60. *Id.* at 58–59, 96 S. Ct. at 653–54.

61. *Id.* at 25, 96 S. Ct. at 638.

62. *Id.* at 25–26, 96 S. Ct. at 638.

63. In making this finding, the *Buckley* Court stated:

[C]ontribution limitation focuses precisely on the problem of large campaign contributions the narrow aspect of political association where the actuality and potential for corruption have been identified while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources. Significantly, the Act's contribution limitations in themselves do not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.

*Id.* at 28–29, 96 S. Ct. at 639–40.

64. *Id.* at 58, 96 S. Ct. at 653.
Buckley was a divisive case for the Court, as demonstrated by the fact that Chief Justice Burger, along with Justices White, Marshall, Blackmun, and Rehnquist, dissented in part. Not all of the members of the Court agreed with the contribution limits. In his dissent, Chief Justice Burger argued that limits on expenditures and limits on contributions were "two sides of the same First Amendment coin." He argued that the two limits were interrelated, as limits on contributions resulted in limits on expenditures. The idea behind this argument is that the less money candidates receive because of contribution caps, the less they have available to spend. In a separate dissent, Justice Blackmun also dissented to the portion of the majority opinion that upheld the contribution limits, finding that the Court had not made a real distinction between contribution and expenditure limits.

More recent criticism of Buckley is set forth in Justice Kennedy's dissent in Nixon v. Shrink Missouri Government PAC. The Nixon Court rejected a challenge to a Missouri law that limited contributions to candidates for state office. As this case occurred before there were limits on soft money, Justice Kennedy's dissent argued that Buckley's contribution limits were an ineffective means to reform campaign finance laws, as they only encouraged "covert speech funded by unlimited soft money." Justice Kennedy advocated overruling Buckley in order to allow Congress and the states to attempt to devise a new, more effective type of reform.

Another significant point concerning Buckley is that the Court drew a distinction between express and issue advocacy, finding that issue advocacy consisted of "[f]unds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat . . .". This is to be contrasted with the Court's view of express advocacy, which was defined by the Court as "express terms advocating the election or defeat of a clearly identified candidate for federal office . . . [including ads that use terminology] such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' [and]..."
This test, referred to by some as the "magic words" test, is significant as it defines express advocacy narrowly.

The policy reason for forming such a narrow definition of express advocacy appears to be the fear of a potential chilling effect on individual speakers and small groups. If speakers must comply with an abundance of regulations, they will suppress their speech because they do not have the resources to comply with the rules. However, this broad definition has allowed groups like 527s to run express ads that they would normally be unable to run by disguising them as issue ads.

Recognizing this problem, the Ninth Circuit has held that express advocacy actually encompasses more than only those communications that contain the "magic words." Indeed, the Ninth Circuit realized the exact advantage that a narrow interpretation of express advocacy would give to groups like 527s. It found that a strict application of the "magic words" test would leave "'independent campaign spenders'... just beyond the reach of the Act [FECA] by avoiding certain key words while conveying a message that is unmistakably directed to the election or defeat of a named candidate." Other circuits, including the most recent federal courts of appeal's application of the test, have strictly adhered to the Buckley "magic words" test, finding that a communication is not express advocacy unless it contains the "magic words" set out in Buckley.

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74. Id. at 44, 96 S. Ct. at 646–47.
76. In Federal Election Commission v. Furgatch, the Ninth Circuit found that "express advocacy" is not strictly limited to communications using certain key phrases. It found that a "magic words" test "would preserve the First Amendment right of unfettered expression only at the expense of eviscerating the Federal Election Campaign Act." Federal Election Commission v. Furgatch, 807 F.2d 857, 862–63 (9th Cir. 1987).
77. Id. at 863.
78. Both the First Circuit and the Fourth Circuit have strictly applied the Buckley "magic words" test. See Faucher v. Federal Election Commission, 928 F.2d 468, 470 (1st Cir. 1991) (finding that "trying to discern when issue advocacy in a voter guide crosses the threshold and becomes express advocacy invites just the sort of constitutional questions the Court sought to avoid in adopting the bright-line express advocacy test in Buckley."); Federal Election Commission v. Central Long Island Tax Reform Immediately Committee, 616 F.2d 45, 53 (2d Cir. 1980) (finding that "the words 'expressly advocating' means exactly what they say.").
The Supreme Court itself was faced with making a distinction between express advocacy and issue advocacy in *Federal Election Commission v. Massachusetts Citizens for Life*.\(^7\) This case involved a non-profit group's distribution of a newsletter that urged voters to vote "pro-life" in an upcoming election.\(^8\) The publication contained the pictures of "pro-life" candidates. The Court found that this was express advocacy.\(^9\) After quoting the *Buckley* "magic words" test, the Court held that the publication fell within express advocacy as defined by that test, as it provided "in effect an explicit directive: vote for these (named) candidates."\(^10\) The Court found the fact that the message was "marginally less direct than 'Vote for Smith' . . . [did not] change its essential nature."\(^11\)

Although *Massachusetts Citizens for Life* may give the impression the Supreme Court is willing to move away from a strict reading of the *Buckley* Court's "magic words" test, more recent federal decisions contradict this impression. *Maine Right to Life Center v. Federal Election Commission*\(^12\) involved a challenge to 11 CFR 100.22, a regulation in which the FEC defined express advocacy as not only ads containing the *Buckley* "magic words," but also any communication that "when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) . . . ."\(^13\) The court interpreted *Massachusetts Citizens for Life* as having adopted *Buckley*’s definition of express advocacy.\(^14\) Although the court recognized that an ad does not have to expressly use the words "vote for" to indicate the desire that the candidate be elected and found this regulation to be "a very reasonable attempt to deal with . . . [the] vagaries of language," it ultimately held that the Supreme Court drew a bright line in *Buckley*.\(^15\) As a result, the regulation was

\(^8\) *Id.*
\(^9\) *Id.* at 249, 107 S. Ct. at 623.
\(^10\) *Id.*
\(^11\) *Id.*
\(^13\) *Id.* at 10.
\(^14\) *Id.*
\(^15\) *Id.* at 11-12.
stuck down. Although this opinion came from a federal district court, it was affirmed by the First Circuit. The Supreme Court denied certiorari.

As a result of the conflict between the federal circuits, it is not entirely clear if the Supreme Court intends for the Buckley Court’s “magic words” test to still be strictly applied, thus narrowly defining express advocacy. While Massachusetts Citizens for Life seems to indicate that the Supreme Court may be willing to adopt a broader definition of express advocacy, it never held that the Buckley Court’s “magic words” test should be abandoned. Nor has the Court acted to overturn circuit court decisions like Maine Citizens for Life, which narrowly defined the express advocacy.

2. The Bipartisan Campaign Reform Act of 2002

Although there is jurisprudence interpreting Buckley, the next major step in campaign finance law was the Bipartisan Campaign Reform Act of 2002 (BCRA). This reform, which took effect on November 6, 2002, was sponsored by Senators Russ Feingold and John McCain. This legislation amended FECA. Although BCRA did raise the contribution limits set out in the 1974 FECA amendments, the most important and well known part of BCRA is

88. Id.
92. See Whittaker, supra note 23, at 1084.
its ban on soft money. Soft money consists of contributions that are not regulated by federal election laws. BCRA prohibits national, local, and state party committees from receiving or spending soft money. BCRA also prohibits "electioneering communications" within sixty days before a general election. This includes advertisements that refer to a clearly identified candidate running for federal office.

Political committees are defined by BCRA's predecessor, FECA, as "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." In Buckley, the Supreme Court stated that a group does not fall within this definition of political committee unless its "major purpose" is to influence federal elections. Even though most 527s seem to fall under this definition, as they have over $1,000 in contributions and have influencing federal elections as their main purpose, the FEC has chosen not to treat 527s as political committees.

A concrete example of the significance of this follows. Group A receives $200,000 of contributions in a year, which it uses to do some advertising supporting presidential candidate Bush. These ads include a thirty second commercial that points out Kerry's weaknesses. At the end of the commercial the phrase "Vote for Bush" flashes across the screen for one second. Group B also receives $200,000 a year of contributions, which it uses for advertising for presidential candidate Kerry. It also produces a thirty second commercial. This commercial points out Bush's weaknesses just as effectively as group A pointed out Kerry's weaknesses.

93. Id.
94. Soft money was originally excluded from campaign finance law as an attempt to encourage "party building" activities. Though the money was intended to be used for generic party building activities, such as "Get Out the Vote" campaigns and generic advertisements that support party platforms but do not endorse a specific candidate, it soon became a primary means for parties to receive millions of dollars of contributions from affluent supporters. Cecil C. Kuhne, III, Restricting Political Campaign Speech: The Uneasy Legacy of McConnell v. Fed. Election Comm'n, 32 Cap. U. L. Rev. 839, 842-46 (2004).
96. Id.
97. Id.
100. See discussion supra Part I.
weaknesses, but does not explicitly say "Vote for Kerry" at the end of the commercial. What is the distinction between these two almost identical groups? Group A has engaged in express advocacy. Although Group B's ad was similar, it is not express advocacy under the Buckley "magic words" test. The FEC will not treat Group B as a political committee, as it technically has not engaged in express advocacy. Group A will be treated as a political committee that must comply with all of the provisions of BCRA.101

3. McConnell v. Federal Election Commission

BCRA had only been enacted for twenty minutes when Senator Mitch McConnell filed a lawsuit challenging the constitutionality of the law.102 The Supreme Court ultimately upheld most of BCRA, including its ban on soft money, in McConnell v. Federal Election Commission.103 The Court found that the government had a substantial interest in preventing corruption that was proven by an overwhelming amount of evidence.104 The Court also upheld the limitations imposed on electioneering communications, recognizing that the government had an interest in eliminating ads that were designed to look like issue ads but were actually designed to favor a particular candidate.105

Although the Court upheld the ban on soft money, Justice Scalia issued a strong dissenting opinion. He found that limiting the amount of money that could be contributed by third party groups was actually a limit on the candidate's right to speech.106 Justice Scalia found that in order to make an effective communication, it is necessary to make use of the services of others.107 He stated that although "[a]n author may write a novel, . . .

101. See infra part II.D.4 for an example of how BCRA limits the soft money for groups that are determined to be political committees.
102. Whittaker, supra note 23, at 1086.
104. Id. at 118–20, 124 S. Ct. at 645–46.
105. Id. at 126–29, 124 S. Ct. at 650–52.
106. Id. at 251, 124 S. Ct. at 722.
107. Id. Justice Scalia found that for a: [G]overnment bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited
he will seldom publish it himself.” If candidates are not allowed to seek the financial assistance of others, or are limited in the amount of assistance they can receive, this is actually a limit on the candidate’s fundamental right to free speech.109

4. The Failures of FECA and BCRA: Ushering in a New Era of Soft Money

Although both FECA and BCRA placed limits on campaign finances, none of this legislation has affected 527s. Anthony Corrado and Thomas Mann of the Brookings Institute argue that BCRA has generally been effective, as it has accomplished its principle goal of “prohibit[ing] elected officials and party leaders from extracting unregulated gifts from corporations, unions[,] and individual donors in exchange for access to[,] and influence with[,] policymakers.”110 Nevertheless, even Corrado and Mann recognize that the absence of regulation over 527s is a cause for concern. In effect, the failure of regulations on 527s, along with the limits on soft money imposed by BCRA, has led to 527s becoming a way to circumvent the contribution caps of BCRA. Although a person can only contribute $2,000 to a political candidate, that same person can contribute an unlimited amount of money to 527s. The 527 that receives the donation then uses the contribution to support the very same political candidate to whom the individual donor was only able to donate $2,000. Many wealthy contributors have taken advantage of this loophole in BCRA. The top three individual contributors to 527s donated over fifty-five million dollars in the 2004 election cycle.111
III. PUTTING IT ALL TOGETHER: PROBLEMS ASSOCIATED WITH 527S AND CONGRESS’ POWER TO REGULATE THEM

A. The Birth of 527s

Section 527 of the Internal Revenue Code was enacted in 1975. The intent of this provision was to clarify that contributions to political organizations and committees are not taxable income. In 1996, the IRS announced that groups, including those unregulated by FECA, that engage in federal issue advocacy can register under section 527. This led to a proliferation of 527s. In addition, this proliferation was fueled by the fact that the complex administrative process required to gain tax exempt status under many provisions of the tax code was not required of a group attempting to gain the exempt status under section 527.

Some suggest that section 527 was intended by Congress “to give their own campaign committees automatic tax-exempt status.” Indeed, 527s originally appeared to be quite favorable to Congress, as it allowed them to solicit funds from corporations and labor unions that FECA prohibited the campaigns themselves from receiving. As 527s were not subjected to disclosure requirements, they also provided a method for Congressmen to
allow their supporters to funnel large sums of money toward the Congressman while remaining anonymous.119

Congress did not anticipate 527s evolving into the creatures that they are today. 527s were not used as much prior to 2002, as soft money contributions to political parties and candidates were unlimited. As a result of their status as recipients of the soft money that can no longer be given directly to the candidates or the political parties, 527s have gained tremendous political power. With this new power in the form of capital, as well as their allegedly detached position from the candidates, 527s have been given the freedom to produce national advertisements that some say border on the extreme. While Congress may have expected 527s to directly help their campaigns, they did not envision the type of entity that 527s would become. Congress must now take steps toward correcting this situation that they created.

B. The Problems Associated with 527s

Although soft money was originally intended for get-out-the-vote and party building purposes, only eight and one half cents of every dollar of soft money was spent on one of these purposes.120 The greatest portion of the soft money dollar went toward “issue” advertising that indirectly supported the defeat or election of a candidate.121 Although BCRA addressed this problem with regard to most entities when it imposed limits on soft money contributions, the limits imposed by BCRA do not affect 527s.122 In addition, 527s may spend as much soft money as they would like, as amounts spent on political advertising that are not directed by or associated with a candidate or political party are known as independent expenditures and are not subjected to BCRA limits.123 This caused a great amount of controversy during the 2004 election cycle because of the ways that some 527s spent the contributions they received. There were allegations that national advertisements

119. Current law requires that 527s report all contributions over $200 and all expenditures over $500 to the IRS. See infra Part IV.C. See also David D. Storey, The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform, 77 Ind. L.J. 167 (2002).
121. Id.
122. The Campaign Finance Law, supra note 6.
123. Id.
produced by some 527s contained misrepresentations intended to deceive the American people.\footnote{124} A deeper problem arises from the possibility of connections between the purportedly independent 527s and federal electoral candidates.\footnote{125} This suggests that the soft money contributions that cannot be given directly to the candidate because of BCRA limits are still being given to the candidate indirectly through a 527 that supports the candidate.

In enacting BCRA, Congress has already recognized the need to place restrictions on various political actors. The purpose of BCRA was "to end large contributions from corporations, unions, and wealthy individuals to the national parties and federal officeholders, where the potential for corruption is greatest."\footnote{126} This same potential for corruption continues to exist with 527s. Wealthy individuals may contribute millions of dollars to 527s, which use the money in support of a candidate. If the candidate is elected, the potential for political favors for the wealthy donor is high.

Private parties have tried to influence Washington through the use of money for a long time.\footnote{127} This has inevitably led to more corruption than has been discovered, as it is difficult to infer inappropriate influence from the mere fact of contributions, as politicians will claim that they would have taken the same action regardless of the contribution.\footnote{128} Nevertheless, money has been an influence in American politics since at least the 1800s, when Daniel Webster, who was on retainer from the Bank of United States, used his position as Congressman to defend the bank.\footnote{129} In the 1860s, state Senator William Marcy Tweed led a group of New York legislators who "openly sold their votes for cash."\footnote{130} A more recent example involves the 1998 decision to expand NATO, the North Atlantic Treaty Organization, which was founded after World War II to establish stability in Europe.\footnote{131} This decision was allegedly motivated by fifty-one million dollars spent by defense contractors, who would gain from the expansion through the sale

\begin{footnotes}
\footnote{124} See sources cited supra note 20.
\footnote{125} See supra Part I.
\footnote{126} Holman & Claybrook, supra note 120, at 251.
\footnote{128} Ian Ayers, Should Campaign Donors Be Identified?, Regulation, Summer 2001, at 12.
\footnote{129} Drew, supra note 127, at 61.
\footnote{130} Mark Green, Selling Out 35 (ReganBooks 2002).
\footnote{131} Drew, supra note 127, at 66.
\end{footnotes}
of weapons to new NATO members, lobbying Congress. The desire to help defense companies was evidenced by a fifteen billion dollar fund that was set up to guarantee funds to the new members that could not afford to buy the weapons. Although these examples do not directly demonstrate corruption in the form of political favors, they do demonstrate the influence of money in politics.

C. Congressional Regulation of 527s

Quoting Senator Alan Simpson, the McConnell Court recognized that "money is the mother’s milk of politics." As money is a vital part of politics and political campaigns, it will inevitably continue to be a subject of controversy. A constant battle is sure to rage on between Congress, which will enact laws regulating campaign finances, and candidates, who will challenge those laws and try to circumvent them.

How far can Congress go in its regulation? Although the Court has already allowed Congress to regulate party committees, can Congress extend its reach to regulate third party advocacy groups such as 527 organizations? New regulations have the potential to violate the First Amendment privilege of free speech. Congress must remember that its power has limits, which "may not be mistaken or forgotten." Recognizing this warning, it is still possible that Congress has the authority to place some type of regulation on 527s without violating the First Amendment. Testimony given by Glenn Maramaco, a senior attorney at the Brennan Center for Justice at NYU School of Law, before the Committee on Ways and Means supports the idea that even though only express advocacy groups were subjected to the requirements of FECA by the Supreme Court in Buckley, the Court did not intend to exempt groups such as 527s. Rather, the fear of the Buckley Court was of the chilling

132. Id. at 67.
133. Id.
135. Whittaker, supra note 23.
136. Id. at 1089 (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)).
effect that could occur if groups whose main purpose was not to influence federal elections were subjected to FECA. The fear was based on the idea that these groups would not express their views because they were not sophisticated enough to familiarize themselves with all of the FECA requirements, as influencing elections was not their main purpose.

However, the Internal Revenue Code's definition of a 527 states that the main purpose of these organizations is to influence federal elections. 527s are not the type of group that the Buckley Court was interested in protecting. Most 527s are very large groups, with a great amount of capital resulting from the lack of limits on individual contributions. These groups are certainly sophisticated enough to familiarize themselves with campaign finance law requirements. Subjecting 527s to the requirements of campaign finance restrictions will not cause the feared chilling effect, diminished speech by 527s.

FECA's definition of a political committee is very similar to the Internal Revenue Code's definition of a political organization. Under FECA, a political committee is "any committee, club, association, or other group of persons which . . . makes expenditures aggregating in excess of $1,000 during a calendar year." Section 527 of the Internal Revenue Code defines a political organization as "a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function." Although these definitions are very similar, 527 organizations are treated as a political organization capable of receiving tax exempt status under the Internal Revenue Code definition but are not treated as a political committee that is subject to FECA's requirements. The FEC has chosen not to treat 527s as political committees as a result of the distinction made between express and issue advocacy in Buckley. However, 527s are by definition established to influence the election of a candidate. This

138. Id.
141. The Buckley Court defined express advocacy as ads "that in express terms advocate the election or defeat of a clearly identified candidate for federal office . . . containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" Buckley v. Valeo, 424 U.S. 1, 44, 96 S. Ct. 612, 646–47 (1976).
is precisely the type of group that *Buckley* was attempting to regulate.\[^{142}\]

When defining the term "political committees," the *Buckley* Court found that in order "to fulfill the purposes of the Act [FECA] they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."\[^{143}\] The Court then found that when the speaker is not a political candidate or a political committee, FECA limits reached only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.\[^{144}\] Thus, the Court drew a distinction between express and issue advocacy. When dealing with issue advocacy, FECA limits do not apply.

527s have used the *Buckley* Court's narrow definition of express advocacy to their advantage. By producing ads that avoid certain key phrases, such as "vote for" and "vote against," the ad qualifies as issue advocacy under the *Buckley* Court's "magic words" test. This enables 527s to engage in express advocacy by simply disguising their ad as issue advocacy. Although the ads produced by 527s appear to discuss a certain issue, such as Kerry's Vietnam service or Bush's service in the Texas National Guard, and do not expressly tell voters to cast their ballot for or against a certain candidate, their message is clear—do not vote for the candidate that we are portraying badly. Conversely, by casting one of the major presidential candidates in a bad light, the 527s are encouraging voters to vote for the other major candidate. This problem of allowing "independent groups" to subvert FECA "by avoiding certain words while conveying a message that is unmistakably directed to the election or defeat of a named candidate," which results from a strict application of the *Buckley* "magic words" test, was identified by the Ninth Circuit long before 527s become widely used during the 2004 election cycle.\[^{145}\]

Additionally, it can be argued that the *Buckley* Court only precluded some issue advocacy from being subjected to FECA limits. Glenn Maramaco's testimony before the Committee on Ways and Means argued that 527s groups, whose main purpose is the nomination or election of a candidate, should be subjected to FECA. He stated:

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142. Holman & Claybrook, *supra* note 120.
143. *Buckley*, 424 U.S. at 79, 96 S. Ct. at 663.
144. *Id.* at 79–80, 96 S. Ct. 663–64.
The Court in *Buckley* could not have been more clear. When applied to a speaker that is neither a political candidate nor a political committee, the term "expenditure" in section 434(e) must be narrowly construed under the "express advocacy" standard. However, when applied to organizations that have as a major purpose the nomination or election of a candidate, the "express advocacy" limiting construction simply does not apply. The activities of these groups are, by definition, campaign related, and legitimately subject to regulation under FECA.\(^{146}\)

There is a strong argument that the *Buckley* Court intended FECA limits to apply to 527 groups, whose main purpose is advocating the election of a candidate. With the narrow express advocacy provision, the Court only intended to protect unsophisticated groups, whose main purpose was not supporting the election of a candidate.

When addressing the limits on individual contributions, the *Buckley* Court recognized the importance of protecting against corruption in political campaigns.\(^{147}\) The same reasoning applies to the argument that the government has this same type of interest in regulating 527s. The *Buckley* Court recognized the increasing importance in political campaigns of raising money to be used for communication with the public.\(^{148}\) 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 . . . representative democracy is undermined."\(^{149}\) Again, the argument is applicable with regard to 527s. Given the accusations of connections between President Bush and Senator Kerry to the 527s, there is potential for corruption in the form of future political favors. These favors may not only be awarded to 527 groups that promoted the candidate, but also to the multimillion dollar individual donors to 527s. This interest in combating corruption is very similar to the interest in preventing corruption upon which the *Buckley* Court based its decision regarding upholding contribution limits. This interest in preventing corruption with 527s should be strong enough to overcome any infringement of the First Amendment. There is also

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146. *Hearing Before the Ways and Means Committee on Disclosure of Political Activities of Tax Exempt Organizations*, 106th Cong. (June 20, 2000) available at WL 897057 (Statement of Glenn Maramaco, Senior attorney of the Brennan Center for Justice at NYU School of Law).
148. *Id.* at 26, 96 S. Ct. at 638.
149. *Id.* at 26–27, 96 S. Ct. at 638.
room for the government to argue that it has an interest in equalizing the political process and reducing the increasing cost of campaigns in order to allow more people to have access to the political system, two arguments that the Buckley Court did not reach.

Additionally, there is an argument that the Court itself has recognized Congress' power to regulate 527s. In a footnote in McConnell v. Federal Election Commission, the Court argued:

Justice Kennedy's contention that Buckley limits Congress to regulating contributions to a candidate ignores Buckley itself. There, we upheld FECA's $25,000 limit on aggregate yearly contributions to candidates, political committees, and party committees out of recognition that FECA's $1,000 limit on candidate contributions would be meaningless if individuals could instead make "huge contributions to the candidate's political party." 150

The Court found that placing limits on outside groups was justified, not only as a means of preventing "pass-throughs" that attempt to avoid contribution limits, but also as a means of limiting contributions funding "express advocacy and numerous other non-coordinated expenditures." 151 This footnote is important because the Court recognized the benefits of placing limits on outside groups and limiting non-coordinated expenditures.

As a result of the similarity between FECA's definition of a political committee and the Internal Revenue Code's definition of a political organization, viewed in light of the type of group that the Buckley Court was trying to protect, Congress has the power to regulate 527s. In addition, the Supreme Court itself has recognized the merit of regulating outside groups in McConnell v. Federal Election Commission.

IV. POSSIBLE REMEDIES TO THE PROBLEMS ASSOCIATED WITH 527S

While Buckley has left room for the regulation of 527s by Congress, more questions have surfaced. How much regulation can Congress impose? What type of regulation is appropriate? This section will consider possible regulations that Congress may try to adopt, and address the constitutionality of each.

151. Id.
A. Inaction by Congress

The first “solution” that Congress could undertake is no solution at all. Columbia Law Professor Michael Doff advocates this approach.\(^\text{152}\) Doff advocates letting the supporters work it out between themselves by countering each other’s attacks.\(^\text{153}\) Although he recognizes that there will still be misleading ads, he advocates this approach over subjecting 527s to the FEC.\(^\text{154}\) Doff states:

> as the speakers have to be more and more distant from the candidates, in order to escape campaign finance regulation, the candidates become less and less accountable for that speech. [Thus,] the effect of closing the 527 “loophole” could be to spur the creation of even less responsible speakers next time around.\(^\text{155}\)

This approach is lacking because it ultimately fails to resolve the problem of reducing the potential for corruption. 527s and their donors may look for favors from the political candidate they supported. The candidate may not only feel a sense of obligation to the group, but also may award political favors to them in order to ensure their support in the future.

This approach should not be entirely dismissed, however, as it does have merit with regard to addressing the attack ads that have been produced by some 527s. While there are means that could be implemented in order to regulate the content of these ads,\(^\text{156}\) this

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153. Id.

154. Id.

155. Id.

156. One possible remedy for monitoring the allegedly false advertisements produced by some 527s is allowing the FEC to monitor advertisements produced by 527s. The FEC already monitors compliance with FECA. About the FEC, http://www.fec.gov/about.shtml (last visited Nov. 2, 2004). An individual who believes that a provision of FECA has been violated can send a written, notarized complaint to the FEC’s Office of General Counsel (OGC). Filing a Complaint, http://www.fec.gov/pages/brochures/complain.shtml (last visited Nov. 2, 2004). Within five days after receiving the complaint, OGC sends a copy of the complaint to the alleged violator, who has fifteen days to respond. Id. A respondent who wants to be represented by counsel may do so by sending the FEC a Statement of Designation of Counsel. Id. The OGC then examines the case in order to determine whether it warrants further action. Id. Then, the OGC recommends whether there is “reason to believe” that a violation occurred.
approach is much less of an infringement on First Amendment rights. If one group does not like the commercial of another group, it is free to produce its own commercial. If a group does not have the assets to fund the production of a "counter-attack" commercial, which is not true of most 527s, it can use the media to get its message out. Additionally, the ads that caused such controversy may not have had a very big impact on the outcome of the 2004 presidential election, as exit polls reveal that most people voted the way they did because of moral values.\footnote{This indicates that Americans are more likely to vote for the candidate they identify with, regardless of whether an ad criticizes a technical aspect of the candidate's service in Vietnam or the Texas National Guard. If these ads are not having an impact on how voters vote, there is no justification for abridging the right to speech. Although the "fighting speech with speech" approach does not do much to combat potential corruption, it serves as a solution for allegedly false ads.}

or is going to occur. \textit{Id.} The decision to proceed is ultimately left to the Commissioners, who are to consider "the respondent's reply, relevant committee reports on the public record and the General Counsel's analyses and recommendations." \textit{Id.} If the Commission decides there is "reason to believe," the OGC performs an investigation. \textit{Id.} The results of this investigation are put in a brief, a copy of which is given to the respondent and the Commission. \textit{Id.} Before a copy of the brief is sent to the respondent, the respondent can request that the matter be resolved through negotiation. \textit{Id.} If the negotiations do not resolve the matter, the respondent has fifteen days to submit a response brief. \textit{Id.} If the Commission believes that there is "probable cause to believe" that a violation has occurred, the OGC will attempt to enter into a conciliation agreement with the violator. \textit{Id.} If an agreement is not reached within nineteen days, the FEC can file a suit in federal district court. \textit{Id.} This procedure, or a similar one, could be used by the FEC to monitor ads produced by 527s.

\footnote{Twenty-two percent of Americans surveyed responded that they based their vote on "moral values," followed by the economy (twenty percent), terrorism (nineteen percent) and Iraq (fifteen percent). Will Lester, \textit{Top Concern for Voters May Depend on Question}, Chi. Trib., Nov. 12, 2004, at 20. It should be noted that the Pew Research Center, an independent research group that studies opinions on politics, found that the survey may have been eschewed by the manner that the question was asked. \textit{Id.} The Pew Research Center polled 1,209 voters who said they voted in the 2004 presidential election. \textit{Id.} "When those voters were given a list, 'moral values' was the most popular choice at 27 percent." \textit{Id.} However, when they were asked an open-ended question about the top issue, Iraq was picked by twenty-seven percent and moral values tied with terrorism at nine percent. \textit{Id.}}
B. Restricting Expenditures

What if Congress was to impose a limit on the expenditures of 527s? This would be very similar to the limit on independent expenditures that was addressed in Buckley. In Buckley, the Court found that because this was a sizable burden, this type of limitation was subject to the "closest scrutiny." The Court found expenditure limits placed "substantial and direct restrictions on the ability of the candidates, citizens, and associations to engage in protected political expression." The government's interest in preventing corruption in the election system, the same interest the government could argue with regard to 527s, was found insufficient to support an infringement of the First Amendment right to free speech. This type of limitation would most likely be found unconstitutional for the same reasons.

Furthermore, having fewer ads would not necessarily produce more accurate advertising, as the groups would still be able to spend money on any type of advertising, leaving room for ads with misrepresentations.

C. Strengthening Disclosure Requirements on 527s

Originally, 527s were not required to report their contributions and expenditures. This allowed large, but controversial, contributors to hide their identities behind a 527. In 2000, Public Law 106-230 amended section 527 of the Internal Revenue Code to require that 527s publish their expenditures and contributions. Although 527s are not currently required to

159. Id. at 58–59, 96 S. Ct. at 654.
160. The Buckley Court found that preventing corruption was not enough to justify the expenditure limits because the legislation prevented only some large expenditures. "[S]o long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." Id. at 45, 96 S. Ct. at 647.
162. Act of July 1, 2000, Pub. L. No. 106-230, § 2, 114 Stat. 447, 479–82 (to be codified at I.R.C §§ 527(j), 6104(d), 6652(c)(1)(C)). Urging the passage of the Bill in the House, Congressman Lloyd Doggett of Texas said, "we have called on the House to come together to support in a bipartisan fashion a cleanup of some of the worst excesses in our campaign finance system, what one expert referred to as the most dangerous loophole that has ever come along, period, what Senator McCain has
LOUISIANA LAW REVIEW

report their contributors and expenditures to the FEC, 527s are required to report this information to the IRS in the form of periodic reports.\textsuperscript{163} The IRS requires 527s to report all contributions of $200 or more, as well as all expenditures of $500 or more.\textsuperscript{164} This is the same information that political committees must report to the FEC.\textsuperscript{165} The only exemption to the IRS requirement is for groups that reasonably anticipate that they will have less than $25,000 of contributions and expenditures for the taxable year.\textsuperscript{166} This information, which includes the names and addresses of 527 contributors, as well as the amount of the contribution, is available to the public through the IRS website.\textsuperscript{167} This allows the public to find the identities of those behind 527s.

As information on the contributors to 527s is already available to the public, strengthening disclosure requirements will not have a great impact on the problems associated with 527s. Current disclosure requirements are fairly stringent. 527s may elect to submit either monthly or quarterly reports during the election year, with a special report due twelve days prior to elections.\textsuperscript{168} Forcing 527s to submit more of these disclosure reports will not aid the American public, as most of them will not take the initiative to investigate the donors behind 527s. Additionally, even those who investigate may not be any more informed, for they may not know the platforms of the contributors. As a result, even those who do investigate 527s and their donors may not be able to judge the reliability of the 527 advertisements. Strengthening current

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\textsuperscript{164} Id.


\textsuperscript{166} Id.

\textsuperscript{167} Id.

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disclosure requirements is not an ideal solution for solving the problems associated with 527s.

Additionally, although Buckley upheld required disclosure provisions of the 1974 FECA amendments, questions involving the constitutionality of required disclosure still linger as this was not a unanimous decision by the Court. In his dissent, Chief Justice Burger found that although preventing the appearance of corruption was a legitimate government interest, disclosure requirements could deter an individual from making a campaign contribution. He found that the public’s right to information was not absolute when the information would reveal an individual’s private political convictions. He found that the public’s right to information was not absolute when the information would reveal an individual’s private political convictions. Justice Burger’s dissent argued, “Secrecy, like privacy, is not per se criminal [rather] . . . secrecy and privacy as to political preferences and convictions are fundamental in a free society.” The debate over the constitutionality of current disclosure requirements coupled with the fact that more stringent requirements would be unlikely to improve the system, leads to the conclusion that strengthening disclosure requirements is not an optimal route of reform for 527s.

D. Subjecting 527s to FEC Regulation

A strong argument can be made that 527s should be regulated by the FEC. FECA’s definition of a political committee is very similar to the Internal Revenue Code’s definition of a political organization. 527 organizations are treated as political organizations capable of receiving tax exempt status under the Internal Revenue Code but are not treated as political committees subject to FECA’s requirements. The FEC has chosen not to treat 527s as political committees as a result of the distinction between

170. Id.
171. Id.
172. Under FECA, a political committee is “any committee, club, association, or other group of persons which . . . makes expenditures aggregating in excess of $1,000 during a calendar year.” 2 U.S.C. § 431(4)(A) (2000). Section 527 of the Internal Revenue Code defines a political organization as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (2000).
express and issue advocacy in *Buckley*. However, 527s are, by definition, established to influence the election of a candidate. This is precisely the type of candidate that *Buckley* was attempting to regulate.

The 527 Reform Act of 2004 introduced by Sen. Joseph Lieberman (D-Conn.) and the principal sponsors of BCRA, Sen. Russell Feingold (D-Wisc.), Sen. John McCain (R-Ariz.), Rep. Martin Meehan (D-Mass.), and Rep. Christopher Shays (R-Conn.), would accomplish this by requiring 527s to register as political committees, and thus be subject to regulation by the FEC. The bill, which would take effect in 2005, defines a “political committee” as any association that receives contributions or makes expenditures in excess of $1,000 per year and “has as its major purpose the nomination or election of one or more candidates” for federal office. The bill also clarifies that 527 organizations have as their major purpose “the nomination or election of one or more candidates.” As a result, 527s would be subject to FEC regulations. The bill contains an exemption for 527s with annual receipts of less than $25,000.

In introducing the bill, Senator McCain stated:

Under the new rules, at least half of the funds spent on these voter mobilization activities by Federal political committees would have to be hard money from their Federal account. More importantly, the funds raised for

173. In *Buckley v. Valeo*, the Court distinguished express advocacy from issue advocacy, finding that issue advocacy consisted of “funds spent to propagate one's views on issues without expressly calling for a candidate's election or defeat.” 424 U.S. 1, 44, 96 S. Ct. 612, 646 (1976). This is to be contrasted with the Court's view of express advocacy, which was defined as “express terms advocat[ing] the election of defeat of a clearly identified candidate for federal office . . . [including ads that use terminology] such as 'vote for,' 'elect,' 'support,' ‘cast your ballot for,' ‘Smith for Congress,' ‘vote against,' ‘defeat,’ [and] ‘reject.” *Id.*, 96 S. Ct. at 646-47. See *supra* Part I for further explanation of this topic.

174. See argument *supra* Part III.

175. 527 Reform Act of 2004, S. 2828, 108th Cong. (2004). While this Comment was pending publication, the 527 Reform Act of 2004, which was introduced near the end of the 108th Congress, was reintroduced as the 527 Reform Act of 2005 to the 109th Congress. See 527 Reform Act of 2005, S. 1053, 109th Congress (2005); 527 Reform Act of 2005, H.R. 513, 109th Congress (2005).


177. *Id.*

178. *Id.*
their non-federal account would have to come from individuals and would be limited to no more than $25,000 per year per donor. Corporations and labor unions could not contribute to these non-federal accounts. To put it in simple terms, a George Soros could give $25,000 per year as opposed to $10 million to finance these activities.\footnote{179}

Senator McCain indicated that he was not attempting to eliminate 527s, only to subject them to FEC regulation.\footnote{180} Senator McCain placed the blame for the problem associated with 527s on a failure by the FEC, before calling for an eventual complete change in the FEC.\footnote{181} For evidence of the FEC’s failure, McCain turned to the Supreme Court’s decision in \textit{McConnell} to argue that “the U.S. Supreme Court stated that the FEC had ‘subverted’ the law, issued regulations that ‘permitted more than Congress had ever intended,’ and ‘invited widespread circumvention’ of FECA’s limit on contributions.”\footnote{182}

Although the FEC recently approved new regulations that will require some 527s to use hard money to cover at least half of their expenses, it also rejected two sets of proposed regulations, one offered by the FEC General Counsel’s Office and one offered by commissioners Michael Toner and Scott Thomas, that would subject 527s to register as political committees.\footnote{183} These proposals would have subjected 527s to the limits imposed on all other political committees, including contribution caps.\footnote{184}

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180. Senator McCain stated “our proposal will not shut down 527s, it will simply require them to abide by the same Federal regulations every other Federal political committee must abide by in spending money to influence Federal elections.” 150 Cong. Rec. S. 9526 (daily ed. Sept. 22, 2004) (statement of Sen. McCain).

181. Senator McCain found that the blame for “this continuing illegal activity lies squarely with the FEC. This agency has a duty to issue regulations to properly implement and enforce the nation’s campaign laws and the FEC has failed, and it has failed miserably to carry out that responsibility.” 150 Cong. Rec. S. 9526 (daily ed. Sept. 22, 2004) (statement of Sen. McCain).


184. Id.
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The 527 Reform Act of 2004 should be implemented and held constitutional.

FECA’s definition of a political committee is very similar to the Internal Revenue Code’s definition of a political organization, yet 527 organizations are treated as political organizations capable of receiving tax exempt status under the Internal Revenue Code definition but not treated as political committees subject to FECA’s requirements. The only reason that could be found for the FEC’s refusal to treat 527s as political committees is the distinction made between express and issue advocacy in Buckley. But, by definition, 527s are established to influence the election of a candidate.\(^{185}\) The Buckley Court’s fear of a chilling effect does not apply to 527s. By definition, the main purpose of 527s is advocacy of a candidate.\(^{186}\) In addition, the majority of 527s are not small groups with limited resources. Most 527s have an abundance of resources, some of which could be used toward investigating compliance with FECA regulations. The 527 Reform Act accounts for small 527s that do not have vast resources at their disposal by including an exemption for 527s that do not have annual receipts over $25,000.\(^{187}\) 527s are precisely the type of organization that Buckley was attempting to regulate.

Even the FEC itself has recognized the need for reform of 527s. The FEC has taken a small step toward this reform by imposing a requirement that will cause some 527s to use hard money to cover at least half of their expenses. However, the FEC made a mistake in refusing to treat 527s as political committees. The FEC has recognized that transforming the definition of a political committee will not limit 527s much, as some 527s are already registered as political committees.\(^{188}\) Additionally, the Commission found that the disclosure requirements that would be imposed on 527s by the FEC are not burdensome.\(^{189}\) The Commission also noted that there would not be expenditure limits imposed on 527s, so the groups would still be able to spend as much money as they choose on advertising.\(^{190}\)

Additionally, regulation of 527s by the FEC is in line with the Buckley Court’s recognition of the importance of protecting against

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185. Holman & Claybrook, supra note 120, at 247; see also argument supra Part III.B.
189. Id.
190. Id.
corruption in political campaigns. The government has this same type of interest in regulating 527s. The Buckley Court recognized the increasing importance of money in political campaigns, as it can be used for communication with the public.

The Court found that "to the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, . . . representative democracy is undermined." The same type of argument can be made with regard to 527s. Given the accusations of connection between both President Bush and Senator Kerry to 527s, there is potential for corruption in the form of future political favors. These favors may not only be awarded to 527 groups who promoted the candidate, but also to the multimillion dollar individual donors to 527s. This interest in combating corruption is very similar to the interest in preventing corruption upon which the Buckley Court based its decision regarding upholding contribution limits.

This interest in preventing corruption with 527s should be strong enough to overcome any infringement of the First Amendment.

Subjecting 527s to FEC regulation is an optimal starting point for Congress to remedy the problems associated with 527s. The 527 Reform Act of 2004 would limit the contributions by individuals to $25,000 per election, thus decreasing the possibility of corruption in the form of political favors, as there would be no single individual investing millions of dollars in support of a candidate. The winning candidate would be free of the pressures of awarding favors to a person like George Soros, who contributed over twenty-three million dollars to 527s. The potential for corruption in the form of a winning candidate awarding political favors to corporations and labor unions that contributed money to a 527 that was favorable to the candidate would be eliminated, as the 527 Reform Act of 2004 bars any contributions to 527s by corporations and labor unions.

V. REQUIRED ANONYMITY: THE REAL SOLUTION TO THE PROBLEMS ASSOCIATED WITH MONEY IN CAMPAIGNS?

Although the 527 Reform Act of 2004 would limit some of the possibility for corruption through the use of 527s by limiting the

192. *Id.*
193. *Id.*
194. *Id.*
amount of donations an individual could make to a candidate, the overall problems that money causes in politics will continue. The history of our country has shown that despite attempts for reform, the problems associated with money in politics have persisted over time. As the tax code is amended, new sections will inevitably leave new loopholes to be exploited. While the 527 Reform Act of 2004 may prevent individuals from using 527s to subvert campaign finance law during the next election, lawyers will inevitably find a new loophole to use. This is demonstrated by the fact that the use of 527s to circumvent current campaign finance laws grew out of BCRA, a reform measure that was supposed to solve campaign finance problems. In order to solve the overarching problem, more drastic reform of campaign finance law is necessary. One method through which this can be achieved is by adopting a system that lifts current contribution caps imposed on individual donors, while requiring that the identities of the donors be hidden from the candidate.

One of the only campaign finance related issues that is generally agreed upon is the belief that the identities of donors...
should be disclosed.\textsuperscript{198} But has disclosure actually helped solve any campaign finance problems? What if we were to not only stop requiring disclosure of contributors, but prohibit it? Bruce Ackerman and Ian Ayers, professors at Yale Law School, advocate this approach.\textsuperscript{199} Although Ackerman and Ayers have worked out this approach in intricate detail,\textsuperscript{200} the premise is that if candidates do not know who made donations to their campaign, the possibility for corruption is reduced because the candidate does not know to whom to award political favors.\textsuperscript{201} This idea is based on the secrecy associated with the voting booth.\textsuperscript{202} Ballot secrecy was adopted in order to deter corruption by making it difficult for candidates to buy votes.\textsuperscript{203} When the ballots were kept secret, candidates could not be sure for whom the individual voted.

This new system would require candidates, political parties and PACs to establish blind trust accounts at private trust companies with substantial preexisting assets.\textsuperscript{204} All donations would be made by mail to the blind trust.\textsuperscript{205} Campaigns would no longer be allowed to accept cash or checks.\textsuperscript{206} The blind trusts would report to candidates on a weekly basis the total amount that had been donated to the trust, but not the identity of the donors.\textsuperscript{207} Under this system, candidates would still be able to hold large fundraising dinners for the rich, but all the campaign could do to collect

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\item \textsuperscript{198} Ian Ayers, \textit{Should Campaign Donors Be Identified?}, Regulation, Summer 2001, at 12.
\item \textsuperscript{199} See generally Ackerman & Ayers, supra note 197. For more information on anonymous communications, see Saul Levmore, \textit{The Anonymity Tool}, 144 U. Pa. L. Rev. 2191, 2192 (1996) (arguing that anonymity is a useful tool that has been ignored by Americans); Ian Ayers, \textit{Disclosure Versus Anonymity in Campaign Finance}, in Designing Democratic Institutions 19 (Ian Shapiro & Stephen Macedo eds., 2000) (arguing the advantages of anonymity over required disclosure).
\item \textsuperscript{200} For more detailed information on hiding the identities of contributors, see Ackerman & Ayers, supra note 197.
\item \textsuperscript{201} \textit{Id.} at 6.
\item \textsuperscript{202} Ayers, supra note 198, at 12.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.} at 15.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.} Although it is not entirely clear what type of currency would be appropriate, checks would be inappropriate, as a contributor would have access to his cancelled check, which he could use to prove his donation to the candidate.
\item \textsuperscript{207} \textit{Id.}
\end{itemize}
contributions is to send contribution envelopes addressed to the trust to the invited guests. 208

Although such a system looks good on its face, what is to stop an individual donor from telling the candidate about his multimillion dollar campaign contribution? Nothing. But as Ayers points out, "talk is cheap." 209 Anyone can claim to have contributed to the candidate, but the candidate will have no way of verifying this information.

As seen with 527s, required disclosure has not yielded much benefit to the American public. 210 The idea behind disclosure is that public knowledge of political contributions will lead to the punishment of candidates who are inappropriately influenced by donors. 211 It has proven very difficult to infer inappropriate influence from the mere fact of contributions, as politicians will assert that they would have taken the same action had it not been for the contribution. 212 Disclosure tends to prevent only the "most egregious and express types of influence peddling." 213

Anonymity gives contributors more liberty, making it less of a First Amendment infringement. Anonymity allows contributors the freedom to donate as much as they would like and even to tell candidates about their donation, although the candidate has no means of verification. Conversely, required disclosure and contribution caps not only restrict the amount of money a donor can contribute, but also force contributors to speak by revealing their identity. For these same reasons, mandatory anonymity is constitutional, as it imposes less restrictions on individuals than disclosure. As Ackerman states, the anonymity system reflects the idea that "it's my property and I have the right to use it to support any candidate I want." 214

208. Id.
209. Id.
210. For the shortfalls of disclosure, see Part IV.C. As an example of why disclosure is not needed for campaign contributions, Ackerman and Ayers give the following example:

When we are dealing with widgets, this kind of knowledge [of disclosure] is a self-evidently good thing—if the widget producer doesn't know who is paying for his goods, and how much money is on the table, he won't be able to figure out whether to accept deals or reject them. This point doesn't apply here [to campaign contributions].

A victorious politician is guilty of corruption if he delivers the goods to his campaign contributors in too obvious a fashion.

Ackerman & Ayers, supra note 197, at 5.
211. Ayers, supra note 198, at 12.
212. Id.
213. Id.
214. Id. at 16.
To ensure the integrity of this system, Ackerman and Ayers advocate letting the FEC overlook the system with some qualifications. Before this is done, they advocate turning the FEC, a body they criticize for its ineffectiveness, into a five-member panel made up entirely of retirees of the judiciary. These officials would not be entirely free of the political process, as they would be appointed by the current president and confirmed by the Senate. This system could be setup where one member's term ended every two years, allowing a one term president only two appointees. During their ten year term, they would have the “responsibility for making the appointments, and approving the regulations, required for the effective operation of the new paradigm.”

VI. CONCLUSION

As a result of the failure by Congress and the FEC to subject 527s to some type of regulation, these groups have become the new outlet for soft money that can no longer be given directly to the parties or candidates due to the restrictions in BCRA. This has increased the power of 527s, transforming them into groups with vast amounts of resources at their disposal. This phenomena is accompanied by a host of problems, including allegedly false ads and an increase in the potential for corruption. Although Congress may not have anticipated this result when it enacted section 527 of the Internal Revenue Code in the 1970s, it must now take steps to alleviate this problem.

Although the adoption of the 527 Reform Act of 2004 is an ideal route for beginning reformation, it will not alleviate the problem of campaign contributions bringing about the potential for corruption. In order to remedy this problem, reform of the campaign finance system, not just 527s, is necessary. One possible means through which this could be achieved is through adoption of a system that keeps donors of campaign contributions anonymous.

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