

STOPPING “WINKS AND NODS”: LIMITS ON COORDINATION AS A MEANS OF REGULATING 527 ORGANIZATIONS

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The 2004 federal elections witnessed an unprecedented rise in activity by independent political organizations called “527s.” The current campaign finance regime limits how much individuals and groups may contribute to candidates, parties, and political committees, but leaves 527s virtually unregulated. As a result, wealthy donors were able to circumvent federal contribution limits by giving large amounts to 527 groups. In 2004, these groups raised millions of dollars, which they spent on highly influential advertisements and voter mobilization campaigns. The groups were so successful that they are expected to play a significant role in the 2006 and 2008 elections, and both Congress and the Federal Election Commission (FEC) have considered regulating the groups more closely.

This Note examines the role of 527 organizations in the 2004 election and proposes ways to prevent future circumvention of the campaign finance regime. It argues that Congress should address the 527 problem by passing legislation regulating coordination between outside groups and political campaigns. A statute regulating coordination presents several benefits over current proposals for 527 reform. First, it is more likely to satisfy the constitutional limits on campaign finance regulation. Second, it provides a long-term solution that is not dependent on how a group is classified under tax or campaign finance law. Third, it will encourage donors seeking to buy influence over candidates to give smaller, “hard money” contributions. Finally, congressional legislation will avoid the delay and confusion seen in recent FEC efforts to regulate coordination.

INTRODUCTION

As the Supreme Court famously noted in *McConnell v. FEC*, “Money, like water, will always find an outlet.”¹ In the 2004 election, money found a new outlet in independent political advocacy groups. Dubbed “527s” after the section of the tax code under which they are formed,² these organizations may raise and spend unlimited amounts of money for political activities. After the Bipartisan Campaign Reform Act of 2002 (BCRA) imposed significant financing restric-

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¹ 540 U.S. 93, 224 (2003).

² 26 U.S.C. § 527 (2000).

tions on political parties and political action committees (PACs),³ the 2004 federal elections saw an unprecedented level of activity by 527 organizations.⁴ The groups collected over \$233 million and in many cases used the money to take over or substantially supplement key campaign activities.⁵ Given their impact on federal campaigns in 2004, most commentators expect to see the groups play a significant role in the 2006 and 2008 elections.⁶

Congress and the Federal Election Commission (FEC) are currently debating how to respond to this new force in electoral politics. The Supreme Court has imposed a complicated constitutional framework on campaign finance law, prohibiting any restrictions on independent spending on political activity ("expenditures") but allowing limits on contributions to political campaigns and parties ("contributions").⁷ As a result, campaign finance reforms have

³ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered new and amended sections of 2 U.S.C. and 36 U.S.C. § 510).

⁴ Swift Boat Veterans for Truth derailed Senator Kerry's campaign by putting him on the defensive about his war record. The first advertisement, "Any Questions?," ran just days after the close of the Democratic National Convention on August 4, 2004. See Swift Vets and POWs for Truth, TV Ads and Video, <http://horse.he.net/~swiftpow/index.php?topic=Ads> (last visited Apr. 9, 2006); The Center for Responsive Politics, Swift Boat Veterans for Truth, 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=61> (last visited Apr. 9, 2006). Liberal-leaning 527 organizations, like Voices for Working Families, ran a massive get-out-the-vote effort, sending volunteers armed with Palm Pilots to register voters and get them to the polls. DAVID B. MAGLEBY ET AL., CTR. FOR THE STUDY OF ELECTIONS AND DEMOCRACY, DANCING WITHOUT PARTNERS: HOW CANDIDATES, PARTIES AND INTEREST GROUPS INTERACT IN THE NEW CAMPAIGN FINANCE ENVIRONMENT 10 (2005), available at <http://csed.byu.edu/Index/DancingwithoutPartners.pdf>.

⁵ See *infra* note 100 and accompanying text.

⁶ See, e.g., Chris Cillizza, *527 Aims for Six-Year Drumbeat on Senate GOP*, ROLL CALL, June 23, 2005, at 1 (describing new 527 organization aimed at putting pressure on Republican senators even during non-election years); Alexander Bolton, *527s Outstrip 2004 Cycle's Pace*, HILL, Aug. 17, 2005, at 5, available at <http://www.hillnews.com/thehill/export/TheHill/News/Frontpage/081705/527.html> (noting that high fundraising for 527s in first six months of 2005 "supports predictions that soft-money groups will have a major impact on the midterm congressional elections and may augur races in which the candidates are vastly outspent by outside groups").

⁷ See *Buckley v. Valeo*, 424 U.S. 1, 143 (1976). This decision has been sharply criticized by many commentators. See, e.g., *If Buckley Fell* (E. Joshua Rosenkranz ed., 1999) (volume of essays recommending overrule of *Buckley*); JOHN RAWLS, *POLITICAL LIBERALISM* 359-63 (1993) (disapproving of Supreme Court's rejection in *Buckley* of "the idea that Congress may try to establish the fair value of the political liberties"); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 97-101 (1993) (arguing that *Buckley* "reflect[s] pre-New Deal understandings" that "accept[] existing distributions of resources as prepolitical and just"); Burt Neuborne, *Buckley's Analytical Flaws*, 6 J.L. & POL'Y 111, 111 (1997) ("[T]he *Buckley* rules foster the open sale of special, privileged access for the rich to public officials."); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 666-67 (1997) (criticizing "*Buckley* Court's attempt to solve an analogical crisis by splitting the difference. . . . between two of our most pow-

focused on three constitutionally permissible areas of regulation: mandatory disclosure laws, public financing of campaigns, and contribution limits.⁸ Disclosure laws require political organizations to identify the source of all contributions they receive above a specified amount. Section 527 organizations are already subject to such disclosure requirements.⁹ Public funding is available for presidential candidates who agree to comply with certain campaign finance limitations, but this option has not proved as popular as advocates had hoped. In 2004, neither presidential candidate accepted public funds, preferring to raise substantial campaign war chests from private sources.¹⁰ Accordingly, most proposals for 527 reform have focused on reducing improper influence over candidates by setting limits on how much a donor may contribute to a 527 organization.

Until now, the primary means of regulating campaign spending have been restrictions on contributions to certain types of groups. Yet further regulation of groups could improperly infringe on constitutional rights and merely drive donations to types of organizations that are even harder to regulate. The Supreme Court permits some campaign finance regulation to prevent corruption or the appearance of corruption, or to prevent obvious circumvention of existing regulations, but it has rejected other rationales. Although several 527 organizations in the 2004 election may have posed a threat of corruption, the activities of most 527 organizations do not affect federal elections. Many of these groups advocate almost exclusively on state and local issues and are therefore beyond the reach of federal campaign finance law. Any new regulations regarding 527 organizations must be carefully drafted to capture the problematic groups without infringing on the First Amendment rights of other groups. However, narrow drafting would make it relatively easy for groups to circumvent the restrictions, requiring that Congress and the FEC continually revisit regulations on outside groups after each election cycle.

The problem posed by 527 organizations is not the collection of large donations per se, but that many donors use the groups to circum-

erful traditions: equality in the realm of democratic polity, and liberty in the realm of political speech”).

⁸ BRUCE ACKERMAN & IAN AYRES, *VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE* 3–4 (2002); Richard Briffault, *Reforming Campaign Finance Reform: A Review of Voting With Dollars*, 91 CAL. L. REV. 643, 646–47 (2003) (book review) (identifying these as “[t]hree regulatory techniques that together form the core of campaign finance law”).

⁹ See *infra* Part II.B.2.

¹⁰ Howard Dean also declined federal matching funds. See John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 636–37 (2005) (arguing for significant overhaul of public funding for presidential campaigns).

vent laws prohibiting direct contributions to candidates. In the 2004 election, campaigns engaged in a surprising amount of communication with purportedly independent 527 organizations. The most effective groups spent their money on core campaign activities, such as get-out-the-vote efforts and issue-based advertisements. The combination of permissive coordination rules and large donations raises the potential for 527 organizations to act as conduits for otherwise illegal contributions.

Instead of focusing on contributions to 527 organizations, legislators should target the relationship between the groups and federal campaigns. This Note argues that Congress should enact tougher restrictions on coordination between outside groups and parties or candidates.

New legislation aimed at reducing coordination offers several advantages over existing proposals. First, this approach avoids many of the constitutional concerns raised by contribution limits. The Supreme Court has recognized that coordinated spending poses a significant risk of corruption and has upheld restrictions on coordination between parties and outside groups. Second, restricting coordination provides a longer-term solution than regulations specifically directed at 527 organizations. As several commentators have noted, cracking down on 527 groups will only drive donations to different types of tax-exempt organizations. By contrast, the application of anti-coordination laws would depend not on how a group was classified under tax law, but rather on how the group behaved with respect to a candidate or political party. Third, this new legislation would have the biggest impact on the behavior of donors seeking to curry favor with a candidate, while still allowing other types of donors to support a particular issue or platform. Finally, congressional legislation is necessary because the FEC has failed to define coordination clearly and appropriately.

Part I of this Note explains the current campaign finance framework, including the constitutionally accepted rationales for and permissible methods of regulation. Part II describes the role of 527 organizations in the 2004 election and the implications for future elections. Part III identifies the strengths and weaknesses of proposed responses to the 527 problem. Part IV proposes new congressional legislation that would enhance and expand existing prohibitions on coordination between independent groups and parties or campaigns.

I

CONTEMPORARY CAMPAIGN FINANCE LAW: RATIONALES
AND METHODS

Over the past thirty years, the Supreme Court has recognized two rationales for imposing limits on political fundraising: preventing corruption or the appearance of corruption, and preventing circumvention of campaign finance laws. While these rationales are sufficient to justify limits on “contributions” to political entities, the Court has consistently held that the government may not limit independent “expenditures” on political activities. Importantly, the Court has held that when a group coordinates with a candidate on how it spends its money, this spending can be treated as a “contribution,” even though no money goes directly into the candidate’s coffers.

As a result of this distinction between contributions and expenditures, most campaign finance regulation has focused on regulating contributions. This Note will focus on two methods of contribution regulation. First, the government may set caps on all contributions going to certain kinds of groups, such as political parties and political committees. Second, the government may define “contribution” more or less expansively, depending on how it regulates coordinated spending.

A. Rationales for Regulating Campaign Finance

The 1970s marked the beginning of modern campaign finance regulation. Congress passed the Federal Election Campaign Act of 1971 (FECA)¹¹ and its 1974 amendments,¹² which required all federal candidates, parties, and groups to comply with a variety of disclosure provisions, contribution limitations, and spending caps.¹³ In *Buckley v. Valeo*,¹⁴ the foundational case on campaign finance regulation, the Supreme Court upheld many of these provisions, but it set important limits on when government could regulate campaign finance. Recognizing that FECA affected fundamental First Amendment rights, it held that such regulations could only be justified by a compelling gov-

¹¹ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended in scattered sections of 2 U.S.C.).

¹² Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2 U.S.C.).

¹³ S. REP. NO. 92-96, at 20–21 (1971). FECA also introduced the system of public financing of federal campaigns. Federal Election Campaign Act Amendments §§ 9031–42, 88 Stat. at 1297–1303. For a summary of the history of FECA and its amendments, see Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL’Y REV. 235, 239 (2004).

¹⁴ 424 U.S. 1 (1976).

ernment interest. Although the government offered several rationales for FECA, the Court only accepted the interest in preventing corruption or the appearance of corruption in federal elections.¹⁵

The Court identified two ways in which large political contributions threaten the integrity of the democratic system: Donors might make actual quid pro quo arrangements with elected officials,¹⁶ or "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions" would undermine public confidence in the system.¹⁷ Under this corruption rationale, money as such does not threaten the political system; rather, only when money is used to purchase favors or access, or it appears that politicians are granting these benefits to wealthy special interests, may the government intervene.

In subsequent cases, the Court recognized corruption concerns beyond strict vote-buying. Money could be used to gain access to or achieve undue influence over politicians. Accordingly, the Court permitted regulations that address "the broader threat from politicians too compliant with the wishes of large contributors."¹⁸ In *McConnell v. Federal Election Commission*, the Court upheld BCRA's new restrictions on soft money¹⁹ in light of substantial evidence that "national party committees peddl[ed] access to federal candidates and officeholders in exchange for large soft-money donations."²⁰

As political actors found creative ways around campaign finance limits, the Court upheld restrictions aimed at preventing circumven-

¹⁵ *Id.* at 25–26. Several other reasons have been offered for regulating campaign finance, including halting the spiraling costs of campaigning for public office, S. REP. NO. 92-96, at 20; equalizing the relative ability of citizens to affect the outcome of elections, *Buckley*, 424 U.S. at 25–26; giving elected officials more time to devote to political issues rather than fundraising, *Landell v. Sorrell*, 382 F.3d 91, 119–25 (2d Cir. 2004); and opening up the system to more candidates, *Buckley*, 424 U.S. at 26. However, the Court has consistently rejected these other rationales. *See, e.g., id.* at 48–49 (holding that idea that government may restrict speech of some in order to enhance voice of others is "wholly foreign to the First Amendment").

¹⁶ *Buckley*, 424 U.S. at 26–27.

¹⁷ *Id.* at 27.

¹⁸ *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 389 (1999) (upholding state law imposing contribution limits similar to federal limits).

¹⁹ Traditionally, the term "soft money" referred to unregulated contributions to political parties, purportedly for generic party building activities. *See, e.g.,* Larry Makinson, *The Old Soft Money Ain't What It Used to Be*, CAPITAL EYE, Winter 2001, <http://www.opensecrets.org/newsletter/ce74/softmoney.asp> (distinguishing between various uses of phrase "soft money"). More generally, the term is used to describe "money that affects federal elections" but falls outside the scope of federal regulation. *See* Jeremy Monteiro, *A Profile in Courage: The Bipartisan Campaign Reform Act of 2002 and the First Amendment*, 52 DEPAUL L. REV. 83, 91 (2002).

²⁰ 540 U.S. 93, 150 (2003).

tion of the law.²¹ The Court applied intermediate scrutiny to limits on contributions,²² and circumvention was considered a sufficiently important government interest to justify limits on coordinated expenditures.²³ In *FEC v. Colorado Republican Federal Campaign Committee (Colorado Republican II)*, it stated that “all Members of the Court agree that circumvention is a valid theory of corruption.”²⁴ In upholding the majority of BCRA’s provisions, the Court in *McConnell* was persuaded in part by the substantial evidence of circumvention of contribution limits in prior federal elections.²⁵

Under the corruption rationale, campaign finance law should restrict groups or individuals who use political spending to purchase access and influence, while protecting legitimate expression of political support. Several authors have noted a distinction between “access” groups, which present a clear threat of corruption, and “ideological” groups.²⁶ Access groups seek influence over an office in order to gain specific (often economic) benefits from the political process. These groups are more likely to contribute to both major candidates in a race and are less likely to engage in general political discourse.²⁷ Ideological groups are organized around a policy agenda and seek to elect the politician whose views most closely match theirs. Like access groups, ideological groups seek access to and influence over public officials, but they also work to develop legitimate popular support for their agendas. In formulating a campaign finance policy, Congress may wish to protect ideological groups while restricting the activities of access groups.

²¹ See, e.g., *FEC v. Beaumont*, 539 U.S. 146, 160 (2003) (upholding ban on corporate contributions to nonprofit advocacy corporation, citing *Austin* for danger of circumvention); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 664–65 (1990) (upholding limits on contributions by nonprofit chamber of commerce in part because companies could circumvent corporate contribution limits by using chamber’s treasury as conduit).

²² See *McConnell*, 540 U.S. at 138–39; *Beaumont*, 539 U.S. at 161–62; *Nixon*, 528 U.S. at 386.

²³ *FEC v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431, 465 (2001).

²⁴ *Id.* at 456.

²⁵ *McConnell*, 540 U.S. at 125, 129–30.

²⁶ See Briffault, *supra* note 8, at 665 (drawing this distinction); see also ACKERMAN & AYRES, *supra* note 8, at 173–74 (distinguishing between sociological and ideological groups); Elizabeth Garrett, *Voting with Cues*, 37 U. RICH. L. REV. 1011, 1027–29 (2003) (distinguishing between economic organizations and ideological groups); Note, *The Ass Atop the Castle: Competing Strategies for Using Campaign Donations to Influence Lawmaking*, 116 HARV. L. REV. 2610, 2611 (2003) (distinguishing between donors with “legislative” and “electoral” strategies). These authors use a variety of terms to describe this distinction, but this Note uses “access” and “ideological” as shorthand for these concepts.

²⁷ See generally Garrett, *supra* note 26; Note, *supra* note 26.

Categorical restrictions that target groups by tax or political status will not capture all corrupting activity and may inadvertently restrict some legitimate activity. When faced with groups that may have mixed purposes for their political spending, campaign finance law should introduce deterrents that will promote self-selection among donors. As will be argued below, prohibiting groups from coordinating with candidates will drive access-minded donors away from outside organizations while allowing ideologically-minded donors to make substantial contributions to independent groups.

B. *Methods for Regulating Contributions*

In addition to defining the permissible rationales for campaign finance law, the *Buckley* Court ruled on FECA's methods of achieving its goals. Plaintiffs challenged FECA provisions which prohibit any person or group from making "contributions" or "expenditures" of more than \$1000 a year to a clearly identified candidate for the purpose of influencing a federal election.²⁸ First, the Supreme Court held that all kinds of political spending implicate expression and association protected by the First Amendment.²⁹ However, limits on "expenditures" as opposed to "contributions" imposed a burden on a much greater range of protected activity.³⁰ The Court held that restrictions on independent "expenditures" imposed an unconstitutional burden on free speech and association, whereas limits on "contributions" were permissible.³¹ In order to preserve the constitutionality of the law as written, the Court narrowed the term "expenditures" to apply only to those expenditures that posed the greatest threat of corruption—expenditures that expressly advocated the election or defeat of a candidate.³² As a result, "[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."³³ In general, the Court has upheld contribution limitations while striking down limits on expenditures.³⁴

²⁸ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101, 88 Stat. 1263, 1263 (1974) (amending 18 U.S.C. § 608(b)).

²⁹ *Buckley v. Valeo*, 424 U.S. 1, 16, 19 (1976).

³⁰ *Id.* at 19–21.

³¹ *Id.* at 143.

³² *Id.* at 43–44.

³³ *Id.* at 45 (emphasis added).

³⁴ *See, e.g., FEC v. Beaumont*, 539 U.S. 146 (2003) (upholding limits on contributions to candidates made by nonprofit corporations); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (striking down limitations on independent expenditures by nonprofit corporations).

Although FECA restricted direct contributions to candidates, political actors quickly exploited two significant gaps in the law: issue advocacy and soft money. In 2002, Congress passed BCRA to close these loopholes.³⁵ Yet BCRA left two important issues undecided. First, BCRA did not define what constituted a “political committee” for purposes of contribution limits. Second, it directed the FEC to issue new regulations on “coordinated expenditures,” but did not define “coordinated.”³⁶

1. Defining “Political Committees”: The “Express Advocacy” and “Major Purpose” Tests

Buckley offered two different standards for determining if a group fell under FECA’s restrictions. In upholding regulation of political committees, the Court stated that the state could regulate groups “that are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.”³⁷ However, the Court also held that FECA could only restrict money spent on “express advocacy.”³⁸ In a footnote, the Court listed several examples of express advocacy, including the use of phrases such as “vote for” or “defeat” a particular federal candidate.³⁹ Known as the “magic words” test, many interpreted *Buckley* to permit groups to escape FECA’s restrictions as long as their advertisements and other materials did not explicitly state “vote for” or “vote against” a clearly identified candidate. This interpretation led to the memorable “issue ads” of previous elections.⁴⁰

In 2003, the Court explained in *McConnell* that the narrower “express advocacy” test was only one way of limiting the scope of the law and did not operate as a constitutional restraint on the definition of “political committee.”⁴¹ The opinion prompted many interested parties to advocate for inclusion of the “major purpose” test in the legal definition of political committee. At the end of 2003 and the

³⁵ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered new and amended sections of 2 U.S.C. and 36 U.S.C. § 510).

³⁶ Bipartisan Campaign Reform Act of 2002 § 214(b)–(c).

³⁷ The Court explained that “[e]xpenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.” *Buckley*, 424 U.S. at 79.

³⁸ *Id.* at 44–45.

³⁹ *Id.* at 44 n.52.

⁴⁰ For a good overview of the problems posed by the “express advocacy” test and the resulting proliferation of issue advertisements, see *McConnell v. FEC*, 540 U.S. 93, 126–29 (2003).

⁴¹ *Id.* at 190–91; see also Edward B. Foley & Robert M. Duncan, *Comments to FEC: April 5, 2004*, 31 N. KY. L. REV. 361, 366 (2004) (discussing repudiation of “express advocacy” test).

beginning of 2004, the FEC considered new regulations that would have applied the major purpose test.⁴² However, in May 2004, the FEC announced that it would take no regulatory action before the November federal elections.⁴³ As a result, there was significant uncertainty at the beginning of the election cycle as to which groups would be considered political committees, and ultimately the express advocacy test remained in place.⁴⁴ This uncertainty remains, as the FEC has refused to revise the definition of "political committee," preferring instead to rule on a case-by-case basis.⁴⁵ However, the District Court for the District of Columbia has recently ordered the FEC either to provide a better explanation for its decision or to issue new rules, finding that "judging from FEC's track record in the 2004 election, case-by-case adjudication appears to have been a total failure."⁴⁶

2. Defining Coordination

The Supreme Court introduced the concept of coordinated expenditures in *Buckley*. In distinguishing between contributions and expenditures, the Court held that "all expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate"⁴⁷ should be treated as contributions and subject to FECA's limits.⁴⁸ As a result, Congress amended FECA's definition of "contribution" to include any money spent by a group "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or party.⁴⁹ The conference committee for the 1976 amendments noted that the purpose of this provision was to distinguish between "independent expressions of an individual's views and the use of an individual's resources to aid a candidate in a manner indistinguishable in substance from the direct payment of cash

⁴² See Political Committee Status, 69 Fed. Reg. 11,736 (proposed Mar. 11, 2004).

⁴³ See Brian DeBose & Ralph Z. Hallow, *FEC Delays 527 Nonprofit Restrictions, GOP Now Seeks Own Soft-Money Machines*, WASH. TIMES, May 14, 2004, at A3 (reporting vote by FEC rejecting proposal for reform and delaying decision on groups).

⁴⁴ The FEC did adopt a regulation which would require 527 organizations to use some hard money to fund communications directed at influencing federal elections, but this regulation did not take effect until after the November 2004 election. Amy Fagan, *FEC Reigns in 527s, Starting Next Cycle*, WASH. TIMES, Aug. 20, 2004, at A5.

⁴⁵ Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004) (indicating decision not to adopt revised definition and defending "major purpose" test).

⁴⁶ *Shays v. FEC*, No. Civ. 04-1597(EGS), Civ. 04-1612(EGS), 2006 WL 825981, at *12 (D.D.C. Mar. 29, 2006).

⁴⁷ *Buckley*, 424 U.S. at 47 n.53.

⁴⁸ *Id.* at 46-47.

⁴⁹ 2 U.S.C. § 441a(a)(7)(B) (1976) (later amended by BCRA § 214(a)(2)).

to a candidate.”⁵⁰ Thus, from its inception, the regulation of coordinated expenditures was a means to separate personal expression from attempts to purchase political favors.

The FEC made several unsuccessful attempts to elaborate on the definition of coordinated expenditures. In *Colorado Republican Federal Campaign Committee v. FEC (Colorado Republican I)*, the Supreme Court rejected an FEC presumption that all expenditures by a political party were coordinated with a candidate.⁵¹ In *FEC v. Christian Coalition*, the agency argued that “any consultation between a potential spender and a federal candidate’s campaign” would render any subsequent expenditures “coordinated” for the purposes of contribution limits.⁵² The district court found the FEC’s proposed standard too broad, and instead required either some candidate control over the details of the resulting expenditures or substantial negotiation or discussion between the group and the candidate about those details.⁵³ Although these cases placed limits on the definition of coordination, the Supreme Court has upheld the general principle that the government may treat coordinated expenditures as contributions.⁵⁴ In *Colorado Republican II*, the Court clearly held that coordinated expenditures are contributions,⁵⁵ that limits on coordinated expenditures are subject to intermediate scrutiny,⁵⁶ and that the government’s interest in preventing circumvention of contribution limits is sufficiently important to justify limits on coordinated expenditures.⁵⁷

Recognizing the need for a better definition of coordination, Congress, through BCRA, directed the FEC to issue new regulations on what constituted “coordinated communications.”⁵⁸ Under the old

⁵⁰ H.R. REP. NO. 94-1057, at 59 (1976) (Conf. Rep.), reprinted in 1976 U.S.C.C.A.N. 946, 974.

⁵¹ *Colorado Republican I*, 518 U.S. 604 (1996) (holding that political parties may make unlimited independent expenditures on political activities).

⁵² 52 F. Supp. 2d 45, 89 (D.D.C. 1999).

⁵³ *Id.* at 91–92 (describing candidate and group as “joint venturers in the expressive expenditure”).

⁵⁴ See *Colorado Republican II*, 533 U.S. 431 (2001) (upholding restrictions on coordinated expenditures by parties); *Colorado Republican I*, 518 U.S. at 608 (allowing parties to make unlimited independent expenditures on political activities); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990) (allowing limitations on independent expenditures of for-profit corporations); *FEC v. Mass. Citizens for Life*, 479 U.S. 238 (1986) (allowing non-profit organizations receiving no business corporation funds to make unlimited independent expenditures); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480 (1985) (same).

⁵⁵ 533 U.S. at 447.

⁵⁶ *Id.* at 456.

⁵⁷ *Id.* at 457.

⁵⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).

regulations, communications were only considered coordinated if the candidate engaged in "substantial discussion or negotiation" with an outside group.⁵⁹ Congress explicitly repealed these regulations and stated that new FEC regulations "shall not require agreement or formal collaboration to establish coordination."⁶⁰ The Supreme Court upheld this provision in *McConnell*, noting that expenditures made "after a wink or nod" are just as useful to a candidate as expenditures made after a formal agreement and may be treated as contributions.⁶¹ In addition, BCRA directed the FEC to address several specific areas where improper coordination was likely.⁶²

The post-BCRA regulations not only failed to address these concerns,⁶³ but also allowed for a significant amount of coordination. The FEC applied a two-pronged analysis, considering both the content of the communication and the conduct of the organization with respect to a candidate or a party. The content prong in particular was drawn rather narrowly, resulting in several holes in the regulation. Communications were not "coordinated" if they did not refer to a political party or "clearly identified" federal candidate.⁶⁴ Communications made more than 120 days before the election could refer to a federal candidate as long as they did not recycle campaign materials or engage in express advocacy.⁶⁵ Most surprisingly, candidates could actually direct the content of messages under certain circumstances without meeting the definition of "coordinated."⁶⁶

Congressmen Shays and Meehan, BCRA's House sponsors, challenged the regulations, and in May 2005, the Court of Appeals for the District of Columbia affirmed the district court decision to invalidate

⁵⁹ See *Shays v. FEC*, 337 F. Supp. 2d 28, 55 & n.25, 56 (D.D.C. 2004) (quoting 11 C.F.R. § 100.23(c)(2)(iii) (2001)), *superseded by* Bipartisan Campaign Reform Act of 2002), *aff'd*, *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005).

⁶⁰ Bipartisan Campaign Reform Act of 2002 § 214(c).

⁶¹ See *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (quoting *Colorado Republican II*, 533 U.S. at 442, 446).

⁶² These areas included redistribution of campaign materials, use of common vendors, participation of former candidate or party employees, and substantial discussion between groups and campaigns. Bipartisan Campaign Reform Act of 2002 § 214(c).

⁶³ The FEC regulations do not address the role of former employees. See 11 C.F.R. § 109.21 (2006).

⁶⁴ See *id.* § 109.21(c)(1), (3)–(4).

⁶⁵ See *id.* § 109.21(c)(2)–(3), (4)(ii).

⁶⁶ The FEC regulations only apply to certain types of communications. Thus, a candidate or political party can work with an outside group on preparing communications that are not recycled campaign materials, run more than 120 days before the election, and avoid express advocacy. See *id.* § 109.21; Trevor Potter & Glen Shor, *Lessons on Enforcement from McConnell v. FEC*, 3 ELECTION L.J. 325, 332–33, 333 n.75 (2004).

the regulations.⁶⁷ Judge Tatel strongly criticized the regulation for allowing “a coordinated communication free-for-all for much of each election cycle.”⁶⁸ Yet he held that the FEC rule did not violate the “unambiguously expressed intent of Congress,”⁶⁹ because BCRA provided too little guidance as to the appropriate standard.⁷⁰ Following the court’s ruling, the FEC issued new proposed regulations on “coordinated communications,”⁷¹ but several of the proposals repeat the same mistakes of the present regulations.⁷² The circuit court decision and inadequate FEC response indicate that Congress needs to take a firmer hand with respect to defining coordination.

The Court of Appeals also struck down FEC regulations defining solicitation and direction of contributions.⁷³ Under BCRA, parties and candidates may not “solicit” or “direct” funds to outside groups.⁷⁴ The FEC defined these terms very narrowly, so that only direct requests for funds were prohibited. The court found that these definitions left a wide array of activity unregulated, permitting indirect requests for money in the form of “winks and nods.”⁷⁵ It held that these definitions allowed candidates and parties to circumvent BCRA’s provisions, thereby violating “Congress’s intent to shut down the soft-money system.”⁷⁶

Any new campaign finance law must address the remaining gaps in campaign finance regulation while satisfying the constitutional constraints of *Buckley*. Regulation of coordinated spending is constitutionally permissible for three reasons: Coordinated expenditures are “contributions,” they create the appearance of corruption, and they allow donors to circumvent contribution limits. Enhanced coordination prohibitions will also resolve the ambiguities in BCRA, as well as

⁶⁷ *Shays v. FEC*, 414 F.3d 76, 79 (D.C. Cir. 2005), *aff'g* *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004).

⁶⁸ *Id.* at 100.

⁶⁹ *Id.* at 96 (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

⁷⁰ *Id.* at 97–99 (finding delegation of authority to FEC at first step of *Chevron* test because “Congress has not spoken directly to the issue at hand”).

⁷¹ Coordinated Communications, 70 Fed. Reg. 73,946 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

⁷² For example, in response to the circuit court’s criticism that the FEC failed to provide reasons for its 120 day restriction, one proposed alternative simply offers more facts to support this distinction. *Id.* at 73,949.

⁷³ *Shays*, 414 F.3d at 107. Although these regulations do not directly relate to coordinated expenditures, they are relevant to the question of how much contact parties or candidates may have with outside groups in the context of fundraising. *See infra* Part IV.B.

⁷⁴ 2 U.S.C. § 441i (Supp. 2004).

⁷⁵ *Shays*, 414 F.3d at 104.

⁷⁶ *Id.* at 105–06.

constrain the problematic behavior of all groups, regardless of whether they satisfy the definition of a political committee.

II

A NEW PROBLEM FOR CAMPAIGN FINANCE LAW: 527 ORGANIZATIONS

Following Congress's crackdown on soft money in 2002, political operatives looked for new methods of collecting large donations, and many turned to 527 organizations. The role of 527 organizations in the 2004 election highlights two interesting issues. First, political operatives used 527 organizations to circumvent BCRA's ban on soft money, but the groups were not a perfect substitute. Because the organizations were not directly tied to a campaign, some access-minded donors preferred to give smaller, hard money contributions to campaigns and PACs. Second, to the extent that groups used their money to further a candidate's campaign strategy, they conferred significant political benefits. Without stricter regulations, political operatives can be expected to exploit the 527 loophole more efficiently in future elections and attract more access-minded donors. However, if 527 organizations are pushed further away from campaigns, access-minded donors will continue to prefer hard money contributions.

A. 527 Organizations and the 2004 Election

Section 527 organizations played a role in previous elections,⁷⁷ but they took on a new significance in the post-BCRA environment. Section 527 organizations fall under an intersection of tax and campaign finance law. Under section 527 of the tax code, a group can register as a 527 organization if its primary purpose is to influence elections.⁷⁸ These groups are distinguished from other types of nonprofits, such as section 501(c)(4) organizations, which can only engage in limited types of political activity.⁷⁹ Section 527 groups receive cer-

⁷⁷ See Michael Trister, *The Rise and Reform of Stealth PACs*, AM. PROSPECT, Sept. 25–Oct. 9, 2000, at 32.

⁷⁸ A 527 group is 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). An exempt function is defined as the "function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors . . ." *Id.* § 527(e)(2).

⁷⁹ Section 501(c)(4) groups are social welfare organizations. 26 U.S.C. § 501(c)(4) (2000). Their primary activities must benefit the public, but they may engage in some political activity. Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt*

tain tax benefits in exchange for registering with the government and disclosing information about their contributors. Although many political committees are 527s, not all 527 organizations are subject to fundraising restrictions: There is a gap between what makes a group a 527 organization under the tax code and what makes it a political committee for the purposes of campaign finance law. For example, a group whose primary purpose was influencing federal elections could register as a 527 organization, but it would not be a political committee unless it engaged in “express advocacy” related to a federal candidate. Until recently, this regulatory gap seemed relatively unimportant because there were other ways of raising soft money. However, in the post-BCRA environment, 527 organizations presented the best option for collecting unregulated funds.

1. *Identity and Motivation of 527 Contributors*

In 2004, 527 organizations received the bulk of their funds from large contributions by individuals. Given the highly polarized political environment of the 2004 election, many wealthy individuals wished to spend significant amounts of money to influence the election, particularly the presidential race.⁸⁰ As a result, the total amount of donations from individuals to 527 organizations jumped from \$37 million in 2002 to \$256 million in 2004.⁸¹ There was a significant increase in new donors to 527 organizations, with twenty-two first-time 527 donors giving at least \$200,000 each, for a total of over \$26 million.⁸² Inter-

Organizations, 31 WM. MITCHELL L. REV. 55, 60, 73–74 (2004). Section 501(c)(3) organizations are public charities which may engage in some lobbying but are strictly prohibited from seeking to influence campaigns for elected public office. 26 U.S.C. § 501(c)(3) (2000).

⁸⁰ See Lisa Getter, *The Race for the White House: With 527s, New Power Players Take Position*, L.A. TIMES, Nov. 1, 2004, at A16 (profiling major 527 donors). Forty-five individuals or couples contributed one million dollars or more to a 527 organization, for a total of roughly \$167 million. *Id.* at A16. George Soros spent over \$23 million on the 2004 election, see The Center for Responsive Politics, *Top Individual Contributors to 527 Committees, 2004 Election Cycle*, <http://www.opensecrets.org/527s/527indivs.asp?cycle=2004> (last visited Apr. 9, 2006), and was particularly vocal about his reasons for opposing President Bush. See George Soros, *Why I Gave*, WASH. POST, Dec. 5, 2003, at A31; see also Marcus Mabry, *Rich Man's Crusade*, NEWSWEEK, Oct. 18, 2004, at 26 (describing Soros's efforts to defeat Bush, including running two-page ads in thirty-six swing state newspapers and engaging in multi-city speaking tour). Texan T. Boone Pickens gave over \$4 million to Swift Boat Veterans and other groups. See The Center for Responsive Politics, *T. Boone Pickens, Contributions to 527 Committees, 2004 Election Cycle*, <http://www.opensecrets.org/527s/527indivsdetail.asp?ID=h1001162782&Cycle=2004> (last visited Apr. 9, 2006).

⁸¹ Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT (Michael J. Malbin ed.) (forthcoming) (manuscript at 12), available at <http://cfinst.org/studies/ElectionAfterReform/chapters.html> (last visited Apr. 9, 2006).

⁸² ALEX KNOTT & AUGUSTIN ARMENDARIZ, CTR. FOR PUB. INTEGRITY, *527s ATTRACT NEW DONORS AS OTHERS ABANDON SYSTEM IN WAKE OF BCRA* (2004), <http://>

estingly, most of the top individual donors gave *more* money to 527 organizations than they had given to the national parties in previous years.⁸³ Thus, unregulated contributions from these individuals actually increased in 2004.⁸⁴

By contrast, corporations generally avoided 527 organizations, and BCRA appears to have made a significant impact on corporate giving. There are indications that corporations gave less soft money in the 2004 election cycle than in 2000.⁸⁵ Some companies, including such government-dependent businesses as Lockheed Martin and Fannie Mae, chose not to give to federal 527 organizations at all.⁸⁶ BCRA prohibits corporations from giving large sums to political committees, and uncertainty as to whether 527 organizations would be considered political committees caused corporations to shy away.⁸⁷ Additionally, companies prefer to give where there is a proven benefit,⁸⁸ and many viewed the connection between 527s and candidates as too tenuous to warrant the cost.⁸⁹

This pattern of giving has important implications for future campaign finance reforms. The behavior of wealthy individuals compared to corporations may reflect a distinction between ideologically-driven and access-minded donors. In order to reduce unregulated contributions by access donors, legislators should consider what prompted corporations to turn to hard money. The key factors in reduced corporate giving to 527s were the apparent isolation of 527s from candidates and fear of legal sanctions if the groups did constitute political

www.publicintegrity.org/527/report.aspx?aid=365. The Center for Public Integrity pointed out that many of the largest contributors to 527s became inactive after the imposition of disclosure requirements for 527s. *See id.*

⁸³ Weissman & Hassan, *supra* note 81 (manuscript at 13).

⁸⁴ Seventy-three of the top 113 donors to 527 organizations contributed soft money to national party committees in 2000 and 2002, for a total of \$50 million. In 2004, these seventy-three individuals gave \$157 million to § 527 organizations—three times what they had given in the previous two election cycles combined. *Id.* (manuscript at 13).

⁸⁵ *See, e.g.,* Jeanne Cummings, *Closing the Spigot: In New Law's Wake, Companies Slash Their Political Donations*, WALL ST. J., Sept. 3, 2004, at A1 ("Of the top 10 corporate political donors in 2000, which contributed more than \$21 million to both parties, not one is giving to the 527s."); Christopher H. Schmitt, *A Shift in the Balance of Power*, U.S. NEWS & WORLD REP., Sept. 20, 2004, at 34 (reporting that corporate donations fell off, particularly in relation to union giving, because corporations gave less to 527 organizations); Annys Shin, *Cutting Into the Checks: New Campaign Finance Rules Prompt Businesses to Sharply Curtail Donations*, WASH. POST, Sept. 13, 2004, at E1 (citing nonpartisan survey of Washington area corporations).

⁸⁶ Shin, *supra* note 85.

⁸⁷ *See* Schmitt, *supra* note 85.

⁸⁸ Profit-driven firms can be assumed not to spend money unless there is some return. As such, they may be considered the archetypal "access" group. *See supra* notes 26–27 and accompanying text.

⁸⁹ *See* Schmitt, *supra* note 85; Shin, *supra* note 85.

committees. Accordingly, new campaign finance laws should increase the independence of 527 groups and establish clear and substantial penalties for violating the new provisions.

2. *Relationship Between 527s and the National Parties*

Throughout the course of the 2004 elections, parties developed sophisticated and substantial relationships with outside groups. Section 527 organizations proved most effective when their efforts complemented campaign and party strategy. Democrats benefited most from 527 groups' voter mobilization efforts, but found themselves hamstrung by their inability to coordinate with liberal 527s on advertisements. For the Republican Party, 527 groups provided substantial support on the airwaves, creating two of the most successful advertisements of the presidential campaign.⁹⁰ In addition, contacts between officials of both parties and 527 leaders helped fuel fundraising for 527 groups.

Initially, the national parties adopted very different approaches to 527 organizations. Democrats quickly embraced the groups as a means of raising the soft money on which they relied, whereas Republicans initially tried to force the FEC to restrict 527 fundraising. Democratic party leaders realized that BCRA's limits on soft money would greatly advantage Republicans, who historically have been better at raising hard money than Democrats,⁹¹ and they developed a system of connected 527 organizations, independent of the national party, that would target battleground states.⁹² They presented the idea to several wealthy philanthropists, including George Soros, who each contributed millions of dollars to support the groups.⁹³

⁹⁰ In addition to the Swift Boat Veterans ad, *see supra* note 4, Progress for America created the popular "Ashley's Story," which featured a girl who had lost her mother on September 11 describing her meeting with President Bush. *See* Jeffrey H. Birnbaum & Thomas B. Edsall, *At the End, Pro-GOP '527s' Outspent Their Counterparts*, WASH. POST, Nov. 6, 2004, at A6; Thomas B. Edsall & James V. Grimaldi, *On Nov. 2, GOP Got More Bang for Its Billion, Analysis Shows*, WASH. POST, Dec. 30, 2004, at A1. It should be noted that most voters learned about the Swift Boat Veterans from media coverage. *Id.*

⁹¹ In March 2001, over a year and a half before BCRA was enacted, Democratic Party leader Harold Ickes warned Democrats in a letter that they could be significantly out-funded by Republicans in the next election. The solution, he suggested, lay in using independent, nonprofit 527 and 501(c) groups to collect soft money donations. James V. Grimaldi & Thomas B. Edsall, *Super Rich Step into Political Vacuum: McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 17, 2004, at A1.

⁹² *See id.* These groups included Americans Coming Together (ACT), which focused on voter registration and get-out-the-vote efforts, and the Media Fund, which developed issue advertisements to run over the summer of 2004. Getter, *supra* note 80.

⁹³ Soros gave \$10 million to ACT, which was matched by insurance magnate and marijuana legalization advocate Peter Lewis. Grimaldi & Edsall, *supra* note 91.

Meanwhile, Republicans held off on creating 527s because they believed the organizations would violate campaign finance law.⁹⁴ The divergent strategies of the parties were partly a result of ambiguities in FEC regulations. The situation made for strange bedfellows, with both campaign finance reform activists and Republicans lobbying the FEC to adopt standards that would allow the Commission to regulate many of these 527 groups.⁹⁵ When it became clear that the FEC would not make any decisions bearing on the 2004 elections, several top Republicans formed their own 527 organizations.⁹⁶

By the summer, both parties were relying on 527s to support key political activities. The participation of 527s in voter mobilization and issue advocacy allowed the national parties to spend less on these activities. Overall, 527s that engaged in federal electoral activities raised more than \$233 million; of that, \$175 million went to groups devoted specifically to electing or defeating President Bush.⁹⁷ By comparison, the Republican and Democratic national committees raised \$684 million and \$627 million, respectively, for all elections.⁹⁸ However, the efficacy of 527 organizations' efforts appears to have depended on how well their messages aligned with those of the campaigns.

On the Democrats' side, 527 organizations were particularly successful at contacting voters. ACT spent \$135 million on the largest get-out-the-vote program in the nation's history.⁹⁹ Unfortunately for the Democrats, they were dependent on 527 organizations to fund

⁹⁴ Thomas B. Edsall, *After Late Start, Republican Groups Jump Into the Lead: Since August, 527s Raised Six Times as Much as Democrats*, WASH. POST, Oct. 17, 2004, at A15. A notable exception to this general approach is the creation of the Leadership Forum, which was formed in late 2002. However, an early complaint about the group to the FEC may have had a chilling effect on the creation of other Republican 527s. See *id.*

⁹⁵ Thomas B. Edsall, *Proposed Rules for '527' Groups Lead to Some Unusual Alliances*, WASH. POST, Apr. 14, 2004, at A23 (noting that Republican Party and campaign watchdog groups allied against "a coalition of conservative family advocates and liberal abortion rights groups").

⁹⁶ Progress for America, a 501(c)(4) organization with close ties to the Bush campaign, reorganized as a 527 so it could devote more of its resources to federal electoral activities. Weissman & Hassan, *supra* note 81 (manuscript at 8–9). Additionally, 527s that had already formed greatly increased their fundraising activities. Lisa Getter, *The Race to the White House: GOP Can't Beat '3rd Party' Groups, So It Forms Them*, L.A. TIMES, June 6, 2004, at A20 (reporting that Leadership Forum accelerated its fundraising drives and Club for Growth received \$2 million within one month after FEC choice to make no decision).

⁹⁷ DEREK WILLIS, CTR. FOR PUB. INTEGRITY, 527 FUNDRAISING NETS A RECORD HAUL: INDEPENDENT POLITICAL GROUPS HAVE RAISED \$391 MILLION FOR THE 2004 ELECTION (2004), <http://www.publicintegrity.org/527/report.aspx?aid=403>.

⁹⁸ Birnbaum & Edsall, *supra* note 90.

⁹⁹ Edsall & Grimaldi, *supra* note 90.

issue advertisements.¹⁰⁰ At times, liberal 527s' agendas diverged from that of the Kerry campaign, and legal restrictions prevented the campaign from overtly coordinating with the 527s on messages.¹⁰¹ Thus, when Kerry strategists wanted advertisements showing a positive image of the candidate to counter Republican attack ads, 527 organizations acted on their donors' strong anti-Bush sentiments and sponsored commercials attacking Bush.¹⁰² Similarly, the Democratic 527s failed to respond to the Swift Boat Veterans' advertisements with pro-Kerry messages.¹⁰³

The formal separation of 527 organizations from presidential candidates proved a boon to the Republicans. President Bush could simultaneously chastise 527 groups and benefit from the Swift Boat Veterans attacks on Kerry.¹⁰⁴ Overall, Republicans had greater control over the messages that reached voters, and “[b]oth Swift Boat Veterans for Truth and Progress for America helped reinforce key Bush messages and effectively raised serious doubts about a centerpiece of the Kerry message, his war record.”¹⁰⁵

Finally, although the parties were legally prohibited from coordinating with 527s, there was a significant amount of informal communication. Bill Clinton appeared at several 527 fundraisers. Although he was not an official member of the Kerry campaign or the Democratic Party administration, his presence was used to convey party approval of the groups and to reassure donors.¹⁰⁶ At one Progress for America conference, the chair of the Republican National Committee, the director of the Bush campaign, and then-presidential counsel

¹⁰⁰ The Kerry campaign controlled just sixty-two percent of the money spent on pro-Kerry television advertising. *Id.*

¹⁰¹ As one top Democratic strategist noted, “We would try to tell the [527] groups working with us what we wanted them to do, and sometimes they paid attention—and when they disagreed, they did whatever they wanted to do. It’s very different on the Republican side of the aisle.” Thomas B. Edsall, “527’ Legislation Would Affect Democrats More: Proposals Seek to Limit Groups That Provide Millions,” *WASH. POST*, Mar. 28, 2006, at A3. This quote also indicates that at least some liberal 527 organizations were ideological rather than access-minded; even with the opportunity to communicate with the presidential campaign, they chose to deliver their own message.

¹⁰² Edsall & Grimaldi, *supra* note 90.

¹⁰³ Harold Ickes, head of the Media Fund, later said that it was too difficult for an outside group to respond adequately to the attacks because it was “a matter so personal to Senator Kerry, so much within his own knowledge. Who knew what the facts were?” *Id.*

¹⁰⁴ Press Release, Ctr. for the Study of Elections and Democracy, 527s Had a Substantial Impact on the Ground and Air Wars in 2004, Will Return (Dec. 16, 2004), available at <http://csed.byu.edu/pressreleases.html> (follow link to title).

¹⁰⁵ *Id.*

¹⁰⁶ One 527 group leader said, “[Clinton] gave the donors confidence, both ideological ones and the access ones.” Weissman & Hassan, *supra* note 81 (manuscript at 7).

Benjamin Ginsberg spoke to donors, although the three men excused themselves during the discussion of contributions.¹⁰⁷

The parties' relationships with 527 organizations in the 2004 election have two important implications for future elections. First, uncertainty as to the value and legitimacy of 527 organizations in 2004 limited their impact to some degree. Now that they have proven to be a valuable political force, parties will likely take greater advantage of them.¹⁰⁸ Second, parties were able to create close relationships with supposedly independent 527 organizations in a variety of ways. Absent new restrictions, political operatives can be expected to develop more sophisticated means of coordinating efforts with 527 organizations. In 2006 and 2008, 527 organizations are likely to play a greater role and be more effective at circumventing the purpose of the soft money ban than in 2004.

B. Why Reform Is Necessary

With BCRA, Congress sought to reduce the amount of soft money in federal elections,¹⁰⁹ and judging from the 2004 election, it appears to have been largely successful. The total amount of soft money in the campaign system dropped by about \$318 million.¹¹⁰ Yet 527 organizations collected \$424 million in unregulated funds,¹¹¹ and most commentators expect 527 organizations to play a major role in the 2006 and 2008 federal elections.¹¹² For the 2006 election, federal 527 groups have already raised \$125 million, including nearly \$4.7 million collected by Progress for America and \$4.5 million by ACT.¹¹³ In the last federal election, many businesses avoided 527 organizations because their legality and influence were uncertain, but for the 2006 election, 527 groups are more established and may be more successful at attracting corporate donations.¹¹⁴ The movement in Congress to

¹⁰⁷ *Id.* (manuscript at 8).

¹⁰⁸ The Democrats appear particularly reliant on 527 organizations for the upcoming electoral campaigns. As Jim Jordan, who was involved with both the Media Fund and ACT in 2004, said, "For better or worse, our [the Democrats'] side is now much more reliant on extra-party institutions to do our core political business." Edsall, *supra* note 101.

¹⁰⁹ See *supra* note 35 and accompanying text.

¹¹⁰ Weissman & Hassan, *supra* note 81 (manuscript at 3).

¹¹¹ *Id.* (manuscript at 2).

¹¹² See, e.g., Bolton, *supra* note 6 (noting "predictions that soft-money groups will have a major impact on the midterm congressional elections").

¹¹³ Political Money Line, Money in Politics Databases, http://politicalmoneyline.com/cgi-win/lirs_ef_527.exe?DoFn=&sYR=2006 (last visited Apr. 9, 2006) (reporting receipts, minus transfers, based on IRS filings).

¹¹⁴ See Weissman & Hassan, *supra* note 81 (manuscript at 18).

pass new campaign finance legislation reflects a concern by many members that they will face powerful 527s in their upcoming races.¹¹⁵

The question for campaign finance law is whether 527 organizations, and the soft money on which they rely, represent a serious problem. Do 527s promote corruption, or are they too removed from candidates for their soft money to pose a threat? Some commentators believe that limiting independent expenditures made primarily by small groups of individuals would be unconstitutional.¹¹⁶ Even if new limits proved to be constitutional, they suggest that further regulation of 527 organizations is unnecessary because not all soft money poses a threat of corruption. They argue that current laws requiring disclosure of contributions to 527s are sufficient to prevent corruption. But as discussed below, regulation is not only possible, it is necessary to fulfill the stated purpose of current campaign finance law.

1. Preventing Corruption or the Appearance of Corruption

Opponents of new regulation maintain that extending BCRA's contribution limits to nonprofits would be inconsistent with the law's purpose. As Anthony Corrado and Thomas Mann argue, "McCain-Feingold was not written to bring every source of unregulated federal campaign funding within the scope of the law. Rather, it was designed to end the corrupting nexus of soft money that ties together officeholders, party officials and large donors."¹¹⁷ BCRA only banned soft

¹¹⁵ The recently formed Senate Majority Project and its offshoot organization, the Fresh Start for America Project, both target Republican senators up for reelection in the 2006 midterm elections. Paul Kane, *527 Eyes Senate GOPers*, ROLL CALL, Mar. 16, 2006, at 1. Several commentators have noted the partisan divide in support for 527 regulation, with Republican congressional leaders pushing hardest for reform because they are less reliant on 527s than are their opponents. See, e.g., Bob Bauer, *The Arrival of 527 Reform in the House: Will the Reform Community Join Forces with Hastert and Boehner?*, Mar. 30, 2006, http://moresoftmoneyhardlaw.com/updates/outside_groups.html?AID=670 (web update to ROBERT F. BAUER, *MORE SOFT MONEY HARD LAW* (2d ed. 2003)); Edsall, *supra* note 101. This push has drawn criticism from conservatives, who have traditionally opposed campaign finance regulations. See, e.g., Editorial, *Campaign Finance Cynics*, WALL ST. J., Apr. 3, 2006, at A16 (chastising Republican leaders for supporting more campaign finance restrictions); Editorial, *86 the Anti-527 Action*, NAT'L REV. ONLINE, Apr. 4, 2006, <http://www.nationalreview.com/editorial/editors200604040842.asp> (opposing 527 reform on free speech grounds).

¹¹⁶ See, e.g., Gregg D. Polsky & Guy-Uriel E. Charles, *Regulating 527 Organizations*, 73 GEO. WASH. L. REV. 1000, 1027 (2005) (arguing that regulating 527 organizations is unconstitutional); see also Edward B. Foley & Donald Tobin, *The New Loophole?: 527s, Political Committees, and McCain-Feingold*, BNA MONEY & POL. REP., Jan. 7, 2004, <http://www.bna.com/moneyandpolitics/loophole.htm> (suggesting that constitutionality of further 527 regulation depends on ability of government to present evidence of threat of corruption).

¹¹⁷ Anthony Corrado & Thomas E. Mann, *Flap over 527s Aside, McCain-Feingold Is Working as Planned*, ROLL CALL, May 20, 2004, at 8, available at <http://www.brookings.edu/views/op-ed/mann/20040520corradowann.htm> (last visited Apr. 9, 2006).

money going to national parties and federal officeholders and candidates and does not apply directly to nonprofits.¹¹⁸

BCRA also limits certain potentially corrupting activities of 527 organizations. For example, although 527 organizations can receive contributions from corporations and unions, they cannot use those funds to pay for advertisements that will air within sixty days of the general election.¹¹⁹ Some people note that 527 groups cannot guarantee access to candidates.¹²⁰ In order to avoid FEC regulation, 527 organizations may not coordinate their efforts with parties or campaigns, and federal candidates and party officials may not engage in fundraising for unregulated 527 organizations.¹²¹ These critics argue that Congress recognized that nonprofits do not pose the same threat to the integrity of elections and chose not to impose soft money limitations on them.¹²²

There are several problems with the argument that regulating 527s contradicts the intent of BCRA. Although BCRA does not explicitly ban soft money fundraising by nonprofits, it does limit contributions by individuals to parties and candidates. Arguably, using nonprofits to circumvent this restriction violates the intent of the law. More notably, the sponsors of BCRA, Senators John McCain and Russ Feingold, have been very vocal in their support of expanded regulation of 527 organizations and have sponsored a bill to this effect.¹²³ As Senator McCain wrote,

[BCRA] was not designed to lower spending in elections because the reality is that it costs money to communicate political views. It was, however, designed to ensure that the money political groups spend in federal elections is limited to reasonable, small contribu-

¹¹⁸ Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 285–87 (2004).

¹¹⁹ Corporate and union treasury funds may not be used to pay for electioneering communications. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91 (2003) (codified at 2 U.S.C.A. § 441b (West 2005)).

¹²⁰ See, e.g., Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 24, 2004, at A1 (noting that groups “provide [donors with] little access to those who set policy”).

¹²¹ See, e.g., Richard Hasen, *Has Campaign Finance Reform Failed?*, LEGAL AFFAIRS, Oct. 11, 2004, http://www.legalaffairs.org/webexclusive/debateclub_527s1004.msp (statement made in online debate). A group organized under section 527 of the Internal Revenue Code could make expenditures coordinated with a campaign, as many party committees do, but then the group would be classified as a political committee and subject to campaign finance regulation. See 2 U.S.C. § 431(4) (2000) (defining political committee). BCRA prohibits candidates for federal office from soliciting soft money, *id.* § 441i(e) (Supp. 2004), and expressly prohibits national party officials from fundraising for section 527 organizations, *id.* § 441i(d)(2).

¹²² Holman, *supra* note 118, at 284–87.

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

tions from individuals to prevent corruption and the appearance of corruption.¹²⁴

Thus new regulation of 527 organizations supports the aims of BCRA if the groups pose a threat of corruption or the appearance of corruption.

Section 527 organizations' close ties with party officials create the appearance of corruption. FEC regulations include a "grandfather" clause that allows parties and candidates to establish 527 organizations before November 6, 2002.¹²⁵ The FEC allows for a high degree of coordination before any resulting expenditures will be treated as contributions.¹²⁶ Campaign officials may meet with 527 organization leaders, as long as they are not acting as agents of the campaign.¹²⁷ Benjamin Ginsberg provided legal advice to the Swift Boat Veterans while he was serving as outside counsel to President Bush's campaign.¹²⁸ Although Ginsberg resigned his position with the Bush campaign, he maintained, most likely correctly, that he did not violate the law.¹²⁹ Harold Ickes simultaneously ran the Media Fund and consulted for the Democratic National Committee, although only on general party and political matters.¹³⁰ A glance at the directors of many major 527 organizations reveals a veritable "who's who" of former senior campaign and party officials.¹³¹ Although current regulations prevented overt coordination on most political messages, the parties

¹²⁴ John McCain, *Paying for Campaigns: McCain Eyes Next Target*, U.S.A. TODAY, Nov. 4, 2004, at A27.

¹²⁵ 11 C.F.R. § 300.2(c)(3) (2006); see also Holman, *supra* note 118, at 270 (explaining "grandfather clause"). Grandfathered groups include the Leadership Forum, created by the National Republican Congressional Committee, and the Media Fund, created on November 5, 2002, by Harold Ickes. *Id.*

¹²⁶ See 11 C.F.R. § 109.23 (2006); Holman, *supra* note 118, at 270; Richard Kornylak, Note, *Disclosing the Election-Related Activities of Interest Groups Through § 527 of the Tax Code*, 87 CORNELL L. REV. 230, 245–46 (2001).

¹²⁷ 11 C.F.R. § 109.20 (defining coordination as "cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents" (emphases added)).

¹²⁸ See, e.g., Dan Balz & Thomas B. Edsall, *Lawyer Quits Bush-Cheney Organization: Campaigns Spar Over Ties to Outside Funding Groups*, WASH. POST, Aug. 26, 2004, at A1 (reporting Ginsberg's resignation after revelation that he advised Swift Boat Veterans); Tim Jones & John McCormick, *Attack Ads by 527s Spark Bitter Debate*, CHI. TRIB., Aug. 27, 2004, at 1 (describing accusations by both parties of improper coordination between 527 organizations and party or campaign officials).

¹²⁹ See *supra* note 128.

¹³⁰ Weissman & Hassan, *supra* note 81 (manuscript at 7).

¹³¹ As a political riposte after his resignation, Benjamin Ginsberg published an op-ed in the *Washington Post*, listing all of the top Democrats with ties to 527 organizations, including Kerry lawyer Robert Bauer, Harold Ickes (head of the Media Fund), and Democratic National Convention chair Bill Richardson. Benjamin L. Ginsberg, Op-Ed., *Swift Boats and Double Standards: Why Aren't the Media Scrutinizing Lawyers and Advisors to Kerry?*, WASH. POST, Sept. 1, 2004, at A19.

clearly supported 527 fundraising efforts and in turn benefited from their expenditures.

2. *Creating Clear and Effective Sanctions*

Some opponents to reform argue that existing disclosure requirements adequately regulate 527 organizations.¹³² Pursuant to the Brady-Lieberman disclosure law of 2002, 527 groups must file regular reports with the IRS.¹³³ These reports list the name, address, and employer (in the case of an individual) of all those who contribute \$200 or more in a year, as well as the amount of the contribution.¹³⁴ The information is made publicly available on a searchable IRS website.¹³⁵ These disclosure requirements have allowed the media to report on who supports particular organizations. Theoretically, this information would allow voters to decide how much weight to give information coming from a 527 group.

Yet unlike violations of campaign finance law, there are no criminal penalties attached to failure to comply with the disclosure requirements.¹³⁶ An interest group could choose to sacrifice its tax-exempt status or pay a fine in order to protect the identity of its contributors.¹³⁷ With such limited penalties, the disclosure requirements may not have as strong a deterrent effect as opponents of reform expect. Additionally, the effectiveness of disclosure depends on the media and special interest groups seeking out and widely disseminating the contribution information. Although the media and others did use the disclosure reports to identify who backed the major 527 organizations,¹³⁸ it is questionable whether this information informed

¹³² FEC Commissioner David M. Mason has made this point and argued that the proposed 527 Reform Act will actually reduce transparency by driving contributions to 501(c) organizations for which currently there are no disclosure requirements. *Hearing on S. 271, 527 Reform Act of 2005, Before the S. Comm. on Rules and Administration*, 109th Cong. (2005) (statement of David M. Mason, Commissioner, Federal Election Commission), available at <http://rules.senate.gov/hearings/2005/MasonTestimony.pdf>.

¹³³ Pub. L. No. 107-276 (2002) (codified at 26 U.S.C.A. § 527(j) (West 2005)).

¹³⁴ 26 U.S.C.A. § 527(j)(3)(B) (West 2005).

¹³⁵ Holman, *supra* note 118, at 266. This IRS website is accessible at <http://forms.irs.gov/politicalOrgsSearch/search/basicSearch.jsp> (last visited Apr. 9, 2006).

¹³⁶ See 26 U.S.C.A. §§ 11(b)(1)(D), 527(b)(1), 527(j)(1) (West 2005) (imposing penalty of thirty-five percent of value of expenditures or contributions not disclosed); Kingsley & Pomeranz, *supra* note 79, at 113.

¹³⁷ Kornylak, *supra* note 126, at 258. For the formula used to calculate the penalty for failure to comply with disclosure requirements, see § 527(j)(1), which multiplies the tax rate based on an organization's annual income by the amount to which the failure to disclose relates.

¹³⁸ See, e.g., John Frank, *Chronicle Study Included Data on Contributions Since 2000*, HOUSTON CHRON., Oct. 10, 2004, at A20 (describing study conducted by *Houston Chronicle* of contributions to and expenditures by 527 organizations).

voter opinions about the advertisements and candidates.¹³⁹ The FEC and Congress clearly believe disclosure requirements are inadequate, as both institutions have put forth proposals addressing the 527 problem.

In the last election, uncertainty over the status of 527s caused a great deal of confusion for national parties and donors.¹⁴⁰ New regulation is needed to clarify when an organization falls under the campaign finance limits for political committees. More importantly, such regulation must impose sufficiently substantial penalties to actually deter attempts at circumvention.

III

RESPONSES TO THE 527 PROBLEM: PROPOSED CHANGES TO CAMPAIGN FINANCE LAW

With such large sums of soft money at play, and the appearance of significant influence on the 2004 election, 527 organizations have been criticized as another dangerous loophole in campaign finance regulation. The FEC solicited comments on proposed regulations in early 2004,¹⁴¹ and a number of interested parties weighed in on the costs and benefits of expanded regulation of these groups. Although the FEC initially decided not to adopt the proposed regulations, a recent decision in the District Court for the District of Columbia requires the FEC either to explain its decision or to adopt new rules.¹⁴² In addition, members of the Senate and the House have proposed legislation that would amend campaign finance law. A bill proposed by Senator McCain and others would expand the definition of “political committee” to include more 527 organizations.¹⁴³ A competing bill in the House does very little to regulate 527s, but instead, would strengthen other types of organizations by removing several obstacles to their fundraising.¹⁴⁴ A third bill combines aspects of both, expanding the definition of “political committee” and removing

¹³⁹ See Andrew Countryman, *Investors Turn Focus to Political Contributions: Issue Sparks Growing Number of Resolutions*, CHI. TRIB., Mar. 6, 2005, at 1 (noting that information on contributions is “problematic to compile, even for political watchdog groups” and quoting one expert as stating “the whole disclosure process is really haphazard”).

¹⁴⁰ See *supra* Part II.A.

¹⁴¹ Political Committee Status, 69 Fed. Reg. 11,736, 11,736 (proposed Mar. 11, 2004).

¹⁴² *Shays v. FEC*, No. Civ. 04-1597(EGS), Civ. 04-1612(EGS), 2006 WL 825981 at *5, *13 (D.D.C. Mar. 29, 2006).

¹⁴³ 527 Reform Act of 2005, S. 271, 109th Cong. (2005) (adding 527 organizations to definition of political committee). See also 527 Reform Act of 2005, H.R. 513, 109th Cong. (2005) (same).

¹⁴⁴ 527 Fairness Act of 2005, H.R. 1316, 109th Cong. (2005).

limits on party expenditures on behalf of candidates.¹⁴⁵ All of these proposals focus on contributions and expenditures, and most could face constitutional challenges if enacted. In contrast, legislation that focused on restricting coordination between independent political groups and campaigns and parties would avoid improper infringement on protected political speech and provide a longer-term solution that would prevent future “loopholes.”

A. Redefining “Political Committee” to Include More 527s

Most proposals for reform seek to bring more 527 organizations under existing campaign finance restrictions.¹⁴⁶ These proposals apply the term “political committee” to any group with “a major purpose” of influencing federal elections.¹⁴⁷ Thus many of the major 527 organizations from the 2004 election would be considered political committees and prevented from using soft money. Although this approach has the advantage of requiring minimal changes to the existing campaign finance framework, it poses two significant problems. First, many of the proposals could improperly infringe on First Amendment rights. Second, even if a proposal were sufficiently narrowly tailored to survive constitutional challenge, it could be circumvented relatively easily.

Both the FEC and Congress proposed changes to the law that would apply the “major purpose” test to the definition of political committee. The proposals contemplate several methods for determining a group’s major purpose, but they tend to take one of two approaches, which this Note terms the “exemption method” and the “expenditure method.” The “exemption method” declares all 527 organizations to meet the major purpose test, then exempts certain types of 527s—for example, state 527 organizations and groups promoting candidates for nonfederal offices or non-elected positions.¹⁴⁸ However, a group can easily lose its exemption. The proposed FEC regulations only exempt groups that are organized “solely” for the purpose of influencing nonfederal elections.¹⁴⁹ Potentially, a group could lose its exemption if it engaged in any federal electoral activity, even if this activity represented a small portion of the group’s expenditures or agenda. The Senate and House bills revoke the exemption if

¹⁴⁵ 527 Reform Act of 2006, H.R. 4975, 109th Cong. (2006).

¹⁴⁶ See, e.g., S. 271; H.R. 513; Political Committee Status, 69 Fed. Reg. 11,736 (describing various alternative regulations under consideration).

¹⁴⁷ See *supra* note 146.

¹⁴⁸ See S. 271 § 2(b); H.R. 513 § 2(b); Political Committee Status, 69 Fed. Reg. at 11,748.

¹⁴⁹ Political Committee Status, 69 Fed. Reg. at 11,748 (to be codified at 11 C.F.R. pt. 100.5(a)(2)(iii)).

a group spends more than \$1000 a year on communications or voter drives that mention federal candidates, even if the group spends all its other resources on nonfederal election activities.¹⁵⁰

The exemption method poses two constitutional problems. First, the term “527 organization” may be unconstitutionally vague and overbroad. Kingsley and Pomeranz severely criticize the vagueness of the language of section 527, arguing that the distinction between 527 organizations and other tax-exempt groups is insufficiently clear.¹⁵¹ They note that in practice, the IRS employs a “facts and circumstances” test to distinguish between 501(c)(4) and 527 organizations.¹⁵² Often, the difference depends on the stated intent of the organization.¹⁵³ While this standard would allow a group to easily declare itself a 527 organization, it would pose problems for 501(c)(4) organizations trying to predict how much political activity they could engage in without inviting criminal investigation. The determination that a group is a political committee imposes significant legal obligations, as well as the possibility of criminal sanctions should an organization fail to meet those obligations.¹⁵⁴ The Supreme Court stated in *Buckley* that “Due Process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal Where First Amendment rights are involved, an even greater degree of specificity is required.”¹⁵⁵ As such, the term “any applicable 527 organization” would likely not survive strict scrutiny. Kingsley and Pomeranz conclude that “no court could possibly find that the IRS definition of political exempt-function activities for 527 organizations would provide the necessary ‘adequate notice’ to survive a constitutional challenge for vagueness.”¹⁵⁶

Second, the exemption method may improperly infringe on First Amendment rights. Section 527 offers tax exemption for groups engaged in a broad range of political activity; it is not narrowly tailored for the purpose of preventing corruption or the appearance of corruption in federal elections. Consequently, many groups which do

¹⁵⁰ S. 271 § 2(b)(D); H.R. 513 § 2(b)(D).

¹⁵¹ Kingsley & Pomeranz, *supra* note 79, at 113. The language in the House and Senate bills is even more vague, applying to “an organization described in section 527.” S. 271 § 2(b)(A)(i); H.R. 513 § 2(b)(A)(i) (emphasis added). Thus, they could cover groups that are organized under different sections of the tax code but fit the description in section 527. Donald Tobin & Edward B. Foley, *527 Reform Act of 2004*, in E-BOOK ON ELECTION LAW (2004), http://moritzlaw.osu.edu/electionlaw/ebook/part3/campaign_tax03.html.

¹⁵² Kingsley & Pomeranz, *supra* note 79, at 64.

¹⁵³ *Id.* at 106.

¹⁵⁴ *Id.* at 113.

¹⁵⁵ *Buckley v. Valeo*, 424 U.S. 1, 77 (1976) (internal quotation omitted).

¹⁵⁶ Kingsley & Pomeranz, *supra* note 79, at 114.

not pose a threat of corruption qualify as 527 organizations. The proposals exempt organizations that are clearly non-threatening, such as those devoted to state or local issue advocacy. However, the exemptions may not go far enough, as under the 527 Reform Act of 2005, a state 527 that spends even \$1000 on federal election activities becomes subject to federal campaign finance restrictions.¹⁵⁷ A court applying *Buckley's* balancing test may decide that the Act's restriction of protected speech is not justified by the threat of corruption.

The "expenditure method," put forth in proposed FEC regulations, examines how much a group spends on "electioneering communications"¹⁵⁸ and certain types of "federal election activity."¹⁵⁹ The FEC suggested two ways that spending on these activities could trigger the major purpose test. Under a threshold inquiry, any group that spent more than \$50,000 on these activities would be considered a political committee.¹⁶⁰ Although this test offers a bright line rule that would be relatively easy to apply, it defines "major" in terms of absolute spending rather than a proportion of a group's activities. It would adversely impact large nonprofits that are not primarily focused on promoting a federal candidate. Like the overly broad "exemption method," this regulation could face constitutional challenge from such groups. Alternatively, the FEC may consider federal electoral spending as a percentage of total expenditures. This proportional test looks at disbursements as a percentage of total expenditures rather than a minimum threshold. Therefore, it is less likely to include a large 501(c)(4) organization that has a political agenda and spends

¹⁵⁷ See 527 Reform Act of 2005, S. 271, 109th Cong. § 2(b) (2005); 527 Reform Act of 2005, H.R. 513, 109th Cong. § 2(b) (2005).

¹⁵⁸ An electioneering communication is any broadcast, cable, or satellite communication that refers to a clearly identified federal candidate, airs within sixty days of a general election or thirty days of a primary, and is targeted at the candidate's electorate. 2 U.S.C. § 434(f)(3)(A)(i) (2004).

¹⁵⁹ Political Committee Status, 69 Fed. Reg. 11,736, 11,745–48 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pt. 100.5(a)(2)). Relevant federal election activities include: (1) voter registration activity in the 120 days before a federal election; (2) voter identification, get-out-the-vote, and generic campaign activity conducted in connection with an election where a federal candidate appears on the ballot; and (3) a public communication that refers to a clearly identified federal candidate and promotes, supports, attacks, or opposes a candidate for that office. 2 U.S.C. §§ 431(20)(i)–(iii) (Supp. 2004). BCRA includes a fourth category of federal election activity, services provided by certain political party committees, but the proposed regulations only consider the first three categories. See *id.* § 431(20)(iv).

¹⁶⁰ Political Committee Status, 69 Fed. Reg. at 11,747 (to be codified at 11 C.F.R. pt. 100.5(a)(2)(iii)). The \$50,000 threshold derives from current regulations, requiring political committees spending \$50,000 a year or more to file financial disclosure statements. See 11 C.F.R. § 104.18(a) (2006).

several thousand dollars on electoral activity but is not primarily focused on influencing federal elections.¹⁶¹

This proportional test is more narrowly tailored, but it may yet allow outside groups to circumvent the law. As Edward Foley and Donald Tobin point out, the percentage inquiry only looks at the majority of expenditures, not the plurality.¹⁶² An independent group could spend fifty percent of its expenditures on state electoral activities, becoming a "state 527," or it could use the majority of its expenditures for social welfare functions, as a 501(c)(4) organization.¹⁶³ The first option, becoming a state 527, is unlikely, as most large donors are not interested in influencing state politics.¹⁶⁴ Donors would probably prefer to fund "public policy discourse," which would count as a social welfare function for a 501(c)(4).¹⁶⁵

Foley and Tobin suggest that political operatives will respond to a proportional major purpose test by creating mixed federal and state 527 groups.¹⁶⁶ For example, a group might spend ten percent on state political activity, forty-five percent on federal activities, and forty-five percent on public policy discourse. Because it spends less than fifty percent on federal electoral activities, the group would not be a "political committee" under campaign finance law. Yet it spends the majority of its funds on political activity, both state and local, so it would qualify as a 527 organization.¹⁶⁷ The proportional test would not cover these kinds of groups, absent an express act of Congress to consider both state and federal electoral activity in determining "major purpose."¹⁶⁸ If the FEC adopts a proportional definition of major purpose, then these groups are likely to appear in the next election cycle. Capping federal electoral expenditures at fifty percent, however, may at least diminish their influence.

¹⁶¹ Edward B. Foley has written extensively on the issue of political committees and suggests a modified version of the percentage inquiry. His major purpose test would apply to any group that spends more than fifty percent of its disbursements on certain activities or "forthrightly declare[s]" that its primary mission is to influence federal elections. Foley & Duncan, *supra* note 41, at 362.

¹⁶² See Foley & Tobin, *supra* note 116.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* The group would receive the tax benefits of a 527 organization, including exemption from the gift tax. *Id.*

¹⁶⁸ *Id.*

B. *Strengthening Parties to Counterbalance Independent Groups*

Congressmen Mike Pence and Albert Wynn think that the best way to combat improper influence by 527 organizations is to strengthen other groups. Their proposed bill in the House does little to increase regulation of 527s,¹⁶⁹ and instead liberalizes many of the restrictions imposed by BCRA on how money can be raised and transferred from one type of organization to another. For example, the bill increases the amount a PAC can give a candidate or national party.¹⁷⁰ In addition, it makes clear that limitations on contributions do not apply to transfers of funds between party committees and campaigns.¹⁷¹ As a result, groups would be permitted to give more money to candidates than before, either through larger direct contributions or contributions funneled through party committees. Individuals could contribute to a larger number of hard money organizations under the bill.¹⁷² Current law prohibits individuals from giving more than \$101,400 per election cycle in hard money, and the Pence-Wynn bill would remove this aggregate contribution cap.¹⁷³ Under the bill, an individual could give a total of \$2 million to various federal candidates, and another \$1 million to a party through contributions to multiple party committees.¹⁷⁴ Finally, this bill would liberalize many rules relating to issue advertisements. For example, it would allow unions and trade associations to spend unlimited amounts on electioneering communications¹⁷⁵ and would permit groups to coordinate with candidates on certain types of communications.¹⁷⁶ Another bill in the House proposed by Representative Dreier would remove limits on party expenditures made on behalf of candidates in general elections.¹⁷⁷ Although parties would still be prohibited from collecting

¹⁶⁹ 527 organizations must follow the same FEC reporting requirements as political committees. 527 Fairness Act of 2005, H.R. 1316, 109th Cong. § 9 (2005).

¹⁷⁰ *Id.* § 4.

¹⁷¹ *Id.* § 6.

¹⁷² *Id.* § 2(a) (repealing aggregate contribution limits for individuals).

¹⁷³ *Id.* § 2.

¹⁷⁴ Eliza Newlin Carney, *Payback Time for '527' Groups?*, NAT'L J., July 9, 2005, at 2207, 2208. Again, party committees can then transfer these funds to a particular candidate's campaign.

¹⁷⁵ These communications must be funded by accounts containing only individual contributions. Bob Bauer, *The House Marks Up: And Expresses a New Vision of "Reform,"* June 9, 2005, http://www.moresoftmoneyhardlaw.com/updates/outside_groups.html?Archive=1&AID=34 (web update to ROBERT F. BAUER, *MORE SOFT MONEY HARD LAW* (2d ed. 2003)).

¹⁷⁶ Under the bill, groups could coordinate with candidates on electioneering communications that: (1) endorse a state candidate, or (2) state a federal candidate's position on a state or local ballot initiative or referendum. *Id.*

¹⁷⁷ 527 Reform Act of 2006, H.R. 4975, 109th Cong. § 604 (2006).

soft money, they could spend unlimited amounts of hard money in coordination with a candidate's campaign.¹⁷⁸

According to Congressman Pence, the choice between his bill and the 527 Reform Act of 2005 "is really a choice between freedom and regulation."¹⁷⁹ Rather than restricting 527 organizations, Congressman Wynn says their bill protects the rights of both 527s and political parties to "participate in the political process . . . [on] a fair and level playing field in terms of raising money."¹⁸⁰ Most commentators and politicians agree that the bill is really about who controls elections, and the bill shifts the balance in favor of candidates and political parties.¹⁸¹ Congressman Tom Cole said that BCRA had "eviscerated" the parties, and that party fundraising was more transparent than efforts by numerous 527 organizations.¹⁸²

Increased party control could improve the quality of issue advocacy, as parties might become more accountable for the tone and accuracy of advertisements. Yet the bill also includes liberal provisions for independent groups, such as unions and trade associations, to run their own advertisements.¹⁸³ Overall, the bill offers few advantages at significant cost. It actually increases the influence of wealthy individuals who played such a controversial role in the 2004 election by allowing them to give more money. Increasing hard money limits is unlikely to reduce funding to nonprofit organizations; instead, individuals and groups will continue to give large, soft money donations to these outside groups as well as larger hard money contributions. The bill may actually increase donations to outside groups by removing the coordination restrictions for certain types of advertisements. As in the 2004 election, parties could direct interested donors to independent organizations, and these donors would be assured that the adver-

¹⁷⁸ Bob Bauer has pointed out that such a plan would benefit Republicans, as the RNC raised twice as much as the DNC in 2005, and five times as much by March 2006. Bauer, *supra* note 115.

¹⁷⁹ Carney, *supra* note 174, at 2207.

¹⁸⁰ Representative Albert Wynn, Remarks at the Campaign Finance Institute Forum: The "527" Fairness Act of 2005: Pros and Cons (June 23, 2005) (transcript available at http://cfinst.org/transcripts/pdf/CFI_Transcript_Shays-Wynn_6-23-05.pdf).

¹⁸¹ See, e.g., Gretchen Helfrich, *Sand, Vaseline, Politics: 'Reforming' 527s*, CHI. TRIB., Mar. 6, 2005, at C3 (noting that in 2004, "[m]oney . . . went from control by the parties to control by anyone with a donor base and an ax to grind," but restricting 527s would "strengthen the hand of candidates and the parties that support them"); Bauer, *supra* note 175 (arguing that bill has "the broad and entirely conscious purpose of restoring to elected officials and candidates control of their campaigns and more direct access to resources for them").

¹⁸² Patrick O'Connor, *House Republicans Take Up Issue of 527 Finance Reform*, HILL, July 14, 2005, at 3.

¹⁸³ 527 Fairness Act of 2005, H.R. 1316, 109th Cong. § 5 (2005).

tisements produced by the groups would be on message with the campaign.

New campaign finance legislation should seek to reduce the appearance of corruption by targeting those groups that seek to improperly influence candidates. Proposals that would expand existing contribution limits sweep too broadly, harming groups that are not seeking influence, and leave open loopholes for further circumvention of contribution limits. Allowing parties to collect larger contributions does nothing to prevent donors from also giving to independent groups. The best way to make outside groups truly independent is to restrict their ability to communicate with parties and campaigns.

IV

FOCUSING ON COORDINATION

Instead of focusing on what kinds of groups can raise soft money, new legislation should address the relationship between soft money groups and candidates. BCRA included important limitations on "coordinated communications," but Congress left the definition of coordination up to the FEC.¹⁸⁴ The Court of Appeals for the District of Columbia decided that the FEC failed to live up to its obligations in this area, and criticized the FEC for adopting a "functionally meaningless" standard for coordinated communications.¹⁸⁵ In addition, regulations relating to the solicitation and direction of contributions govern the amount of contact between officials and outside groups. In order to establish a clear and effective definition of prohibited coordination, Congress should pass new legislation in these areas.

A. *Why Congress Should Regulate Coordination*

Focusing reform efforts on defining and restricting coordination provides several benefits. First, such limitations are more likely to survive constitutional scrutiny. Second, coordination limits are more likely to be effective in the long run. Third, limiting coordination reduces the value of contributions for access-minded donors. Finally, congressional action in this area will prevent further confusion and delay caused by ineffective FEC regulation.

¹⁸⁴ See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2003) (codified as amended in scattered sections of 2 U.S.C. and 36 U.S.C. § 510).

¹⁸⁵ *Shays v. FEC*, 414 F.3d 76, 100 (D.C. Cir. 2005).

1. *Constitutionality of Coordination Restrictions*

The Supreme Court has consistently recognized that coordinated expenditures pose a real threat of corruption or the appearance of corruption,¹⁸⁶ and Congress may constitutionally regulate coordinated spending.¹⁸⁷ The question is how much coordination justifies governmental intervention.

Although the Supreme Court has not directly ruled on the permissible scope of “coordination,”¹⁸⁸ several opinions indicate that the Court views coordination broadly and does not require actual agreement to justify restricting this type of spending. The rule protecting independent expenditures only applies to expenditures made “totally independently of the candidate and his campaign,”¹⁸⁹ and not to those made with “any general or particular understanding with a candidate.”¹⁹⁰ In *McConnell*, the Court upheld coordination rules that did not require agreement or formal collaboration, stating that Congress could limit expenditures that failed the test of “total independence” of the candidate.¹⁹¹ The Court has noted that the distinction between contributions, which include coordinated expenditures, and independent expenditures is “functional” rather than “formal.”¹⁹² These statements reflect an understanding that there may be a great deal of implicit coordination between outside groups and parties. They may reach informal understandings that fall short of formal agreements. The Court’s language indicates that expenditures resulting from such unofficial communication are not treated as expenditures because they are not truly independent. These standards provide sufficient room for Congress to constitutionally regulate coordination more closely than it has so far.

The Court has also recognized an important government interest in preventing circumvention of campaign finance restrictions through coordinated expenditures.¹⁹³ Preventing circumvention of campaign finance law is a necessary corollary to preventing corruption and its

¹⁸⁶ See *Buckley v. Valeo*, 424 U.S. 1, 26–27, 45–47 (1976) (equating coordinated expenditures with contributions, resulting in “actuality and appearance of corruption”).

¹⁸⁷ See, e.g., *McConnell v. FEC*, 540 U.S. 93, 202–03 (2003) (holding that Congress may constitutionally regulate coordinated expenditures on electioneering communications).

¹⁸⁸ Parties have made categorical challenges to prohibitions on coordinated expenditures, see, e.g., *Colorado Republican II*, 533 U.S. 431 (2001); *Colorado Republican I*, 518 U.S. 604 (1996), and coordinated issue advocacy, *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999).

¹⁸⁹ *Buckley*, 424 U.S. at 47.

¹⁹⁰ *Colorado Republican I*, 518 U.S. at 614.

¹⁹¹ 540 U.S. at 221–22.

¹⁹² *Colorado Republican II*, 533 U.S. at 438.

¹⁹³ *Id.* at 456 & n.18, 457.

appearance through direct contributions. In *Colorado Republican II* the Court noted that there is a "long-recognized rationale of combating circumvention of contribution limits designed to combat the corrupting influence of large contributions."¹⁹⁴ It added that "all Members of the Court agree that circumvention is a valid theory of corruption."¹⁹⁵ In *McConnell*, the Court justified applying a "total independence" test for expenditures because allowing subtle understandings between candidates and spenders posed a threat of circumvention.¹⁹⁶

Based on its interest in preventing corruption and circumvention of campaign finance law, Congress may adopt stricter limits on how much campaigns and outside groups may cooperate. The role of 527 organizations in the 2004 election provides evidence to support the need for further regulation. For example, the Bush campaign received a direct benefit from advertisements paid for by the Swift Boat Veterans,¹⁹⁷ most of which ran after the group met with Benjamin Ginsberg.¹⁹⁸ Even if Ginsberg and the Swift Boat Veterans did not reach an understanding, informal or otherwise, the private meeting created the appearance of corruption. On the Democratic side, Harold Ickes sent a letter to Democrats advocating the creation of 527s, implying that the party deliberately used these groups to circumvent BCRA's soft money limitations.¹⁹⁹

2. Long-Term Efficacy

The improved rules would apply to all groups and therefore could not be circumvented simply by organizing under a different section of the tax code. Several commentators have expressed concern that any new regulation of 527s would just drive money through other loopholes.²⁰⁰ Specifically, political operatives might form 501(c)(4) organizations.²⁰¹ None of the current proposals would reach these kinds of groups, and Congress or the FEC would be forced to reconsider the definition of political committee after the next election cycle. Instead

¹⁹⁴ *Id.* at 456 & n.18.

¹⁹⁵ *Id.* at 456.

¹⁹⁶ *McConnell*, 540 U.S. at 221.

¹⁹⁷ See *supra* notes 104–05 and accompanying text.

¹⁹⁸ The Swift Boat Veterans first sought Ginsberg's advice in July 2004, see Balz & Edsall, *supra* note 128, at A1, and the television commercials ran in August 2004. See *supra* note 4.

¹⁹⁹ See *supra* note 91.

²⁰⁰ See *supra* Part III.A.

²⁰¹ Besides 501(c)(4) organizations, at least one 501(c)(6) organization has already paid for television advertisements supporting Senator Rick Santorum. Edsall, *supra* note 101. The group declined to disclose the names of its donors. *Id.*

of focusing on how a group is organized, the coordination rules govern a group's conduct. Even if 501(c)(4) organizations may still raise and spend unlimited amounts, they cannot use these funds to gain influence over a candidate through coordinated spending.

3. *Deterrent to Access Groups*

Unlike categorical contribution limits, stricter coordination prohibitions specifically deter access-seeking contributors and encourage self-sorting. Access-minded donors will not want to contribute to groups that are isolated from candidates and parties. Giving patterns in the 2004 election demonstrated that donors will only contribute to groups they believe will be effective. Some businesses chose not to give to 527 organizations because they believed the groups were too removed from the parties to be influential.²⁰² By isolating 527 organizations from parties and campaigns, new legislation could drive access-minded donors to focus on better-connected hard money groups. Ideologically-driven contributors may still give large sums of money to nonprofits, but these groups will be more independent.

Stricter regulation of coordination cannot totally eliminate the potential for large expenditures on political activities to make candidates feel beholden to donors. Yet independent expenditures are constitutionally protected, and will remain so as long as the Supreme Court believes that even the potential for corruption cannot outweigh such a direct restriction on free speech.²⁰³

4. *Congress as the Best Institutional Actor*

Until now, Congress has allowed the FEC a fair amount of discretion in developing and implementing regulations related to coordinated expenditures and communications. Yet the FEC has repeatedly failed to adequately enforce the law,²⁰⁴ and its most recent regulations regarding coordinated communications have been struck down as arbitrary and capricious.²⁰⁵ In fact, the FEC's failure to enforce existing coordination rules amidst allegations of massive coordinated expenditures in the 1996 election prompted BCRA's sponsors to

²⁰² See Schmitt, *supra* note 85.

²⁰³ This term, the Supreme Court will consider the constitutionality of expenditure limits for candidates. See *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004), *cert. granted sub nom. Vt. Republican State Comm. v. Sorrell*, 126 S. Ct. 35 (2005).

²⁰⁴ See generally Potter & Shor, *supra* note 66 (discussing problems in FEC enforcement and rulemaking).

²⁰⁵ *Shays v. FEC*, 414 F.3d 76, 79, 115 (D.C. Cir. 2005).

include stronger new coordination requirements in the Act.²⁰⁶ Moreover, administrative action is often too slow to be effective; as the D.C. District Court noted, "The FEC can take years to complete an administrative action, and penalties, if they come at all, come long after the money has been spent and the election decided."²⁰⁷

Some people have questioned whether Congress should issue specific rules governing coordination. During congressional debates over BCRA, some parties expressed concern that the original proposals addressing coordination could improperly infringe on free speech and association.²⁰⁸ BCRA's sponsors responded with a compromise, whereby Congress would "give[] some guidance to the FEC" on what coordination rules should address "without actually dictating the result."²⁰⁹ However, this legislative history does not indicate that Congress is incapable of developing strong yet constitutionally sound legislation. Most likely, BCRA's sponsors delegated the coordination regulations to a neutral agency in the interests of moving legislative debate forward. The coordination rules were only one part of a much larger legislative package. This Note proposes specific legislation on coordination. Under these circumstances, members of Congress may be more willing to compromise on statutory language. More importantly, this history makes clear that Congress has tried allowing other institutions to handle the coordination problem, and these experiments have failed.

B. How Congress Should Regulate Coordination

New legislation should expand on the coordination restrictions in BCRA and current FEC regulations. Specifically, the law should further restrict contact between the agents of a campaign or party and outside groups.

Under current law, campaign and party officials may not engage in active fundraising for outside groups.²¹⁰ Yet these officials may appear at fundraisers if they do not directly solicit funds.²¹¹ As a

²⁰⁶ See Robert F. Bauer, *The McCain-Feingold Coordination Rules: The Ongoing Program to Keep Politics Under Control*, 32 *FORDHAM URB. L.J.* 507, 512 (2005); Potter & Shor, *supra* note 66, at 328–30.

²⁰⁷ *Shays v. FEC*, No. Civ. 04-1597(EGS), Civ. 04-1612(EGS), 2006 WL 825981, at *12 (D.D.C. Mar. 29, 2006) (commenting on FEC's case-by-case approach to defining "political committee").

²⁰⁸ See 147 *CONG. REC.* S3183, 3184–85 (daily ed. Mar. 30, 2001) (statement of Sen. Feingold, incorporating letters from various interest groups expressing such concerns).

²⁰⁹ *Id.* at 3185.

²¹⁰ 2 U.S.C. § 441i(d)–(e) (Supp. 2004).

²¹¹ In 2004, Republican party and campaign officials appeared at a 527 organization fundraiser, but left before the group's organizer made overt solicitations for contributions.

result, officials can convey the message that their candidate or party supports a 527 group, as long as they carefully time their appearances. The new legislation should prevent party and campaign officials from appearing at group events where fundraising will occur, even if the official is not present at the time donations are solicited. Officials would be allowed to speak at general “issues conferences” and other events, but their presence should not be used to give the imprimatur of party approval or imply that the group has influence over a candidate. In *Shays v. FEC*, the Court of Appeals for the District of Columbia struck down current FEC regulations on the solicitation and direction of contributions as contrary to congressional intent.²¹² Congress should take the opportunity to pass new legislation defining “solicit” and “direct” to prohibit implicit appeals for contributions to outside groups.

Outside groups might challenge such provisions as violating their First Amendment rights, because the proposal limits their ability to solicit funds. However, the rule imposes a rather modest restriction on freedom of association. Independent groups may still raise funds in a variety of ways, such as direct mail, telephone solicitation, and fundraisers that do not feature party officials. Additionally, the government has a compelling interest in preventing the appearance of corruption. The presence of a candidate’s campaign manager at a fundraiser certainly creates the appearance of influence and a potential quid pro quo arrangement for contributions to the outside group.

The proposal may present several practical problems. First, it would not prevent non-officials, like Bill Clinton, from fundraising for outside groups. Yet there are very few people like Clinton who can claim to have significant influence with a party or a candidate but who are not actually agents of either. A loophole for such non-officials presents a minimal risk of the appearance of corruption and allows major political figures to participate in public debate. Monitoring compliance with the rule poses the most substantial practical problem, as someone who had attended the meeting would have to report the presence of both a campaign official and a solicitation for contributions. However, parties often act as watchdogs against the improper actions of one another, and the public nature of most fundraisers makes them relatively easy to monitor.

See supra note 107 and accompanying text. Presumably, their appearance implied a connection between the organization and the candidate, while technically circumventing existing regulations.

²¹² 414 F.3d 76, 105–06 (D.C. Cir. 2005). The FEC proposed new definitions of the terms “to solicit” and “to direct.” Definitions of “Solicit” and “Direct,” 70 Fed. Reg. 56,599, 56,600, 56,604 (proposed Sept. 28, 2005) (to be codified at 11 C.F.R. pt. 300).

The new legislation should also limit consulting relationships between outside groups and party or campaign officials. In 2004, Harold Ickes consulted for the Democratic Party while heading a 527 group, and Benjamin Ginsburg consulted for the Swift Boat Veterans while working for the Bush campaign. Consulting relationships increase the likelihood that the independent groups are coordinating their efforts with candidates or parties. The law should prevent officials for either an outside group or a national party or federal campaign from acting as a consultant to the other side, even if the person purports only to discuss non-campaign issues. This regulation may be the easiest to enforce, as consultants could be required to report the sources of their income to the IRS and the FEC. The new regulations would impose significant penalties for violations.

Congress should provide the FEC with clear standards for evaluating future regulations on coordinated communications. The Court of Appeals for the District of Columbia invalidated the current regulations as arbitrary and capricious, in part because the FEC failed to explain why it chose not to regulate communications made more than 120 days before an election.²¹³ As appellees Shays and Meehan pointed out, the FEC did not consider that many important advertisements may run well before an election, particularly in presidential races.²¹⁴ Although the FEC has proposed new regulations in response to the decision,²¹⁵ many of the proposals would do nothing to correct the problems of the 2004 election. One proposal would simply provide more evidence for the 120 day limit.²¹⁶ Another would eliminate the time restrictions for political committees only, thereby perpetuating the same problems with regulations tied to a type of group. While bright line rules based on dates and group status appear to make enforcement easier, they invite circumvention by political groups. Instead, new legislation should focus on a group's conduct, and whether that conduct is more consistent with seeking access or expressing political beliefs.

Adopting more robust restrictions on coordination raises three potential problems. First, the new legislation could go too far and restrict legitimate communications between grass-roots organizations

²¹³ *Shays*, 414 F.3d at 100–03.

²¹⁴ *Id.* at 102.

²¹⁵ Coordinated Communications, 70 Fed. Reg. 73,946 (proposed Dec. 14, 2005) (to be codified at 11 C.F.R. pt. 109).

²¹⁶ *Id.* at 73,949. In response to proposed rule making, the Campaign Legal Center provided the FEC with scripts from over 100 political advertisements that ran more than 120 days prior to federal elections from 1999 to 2006. *Legal Center Testifies at FEC on "Coordination" Rules*, LEGAL CTR. WKLY. REP. (Campaign Legal Ctr., Washington, D.C.), Jan. 27, 2006, <http://www.campaignlegalcenter.org/press-1907.html>.

and their elected representatives. Second, the legislation might not go far enough, permitting outside groups to make large expenditures that benefit federal candidates. Third, pushing money away from parties and candidates, who can be held accountable, to outside groups may have perverse effects on the political process.

In arguing for a narrow definition of coordinated expenditures, James Bopp and Heidi Abegg note that citizens' groups regularly work with public officials to develop lobbying and public education campaigns related to proposed legislation.²¹⁷ If these discussions result in the labeling of any expenditures on such lobbying and education campaigns as coordinated, "[t]he groups would then have a Hobson's choice—either refuse to discuss their public support for legislation with the public officials . . . rendering such efforts much less effective, or discuss such communications with public officials and be prohibited from doing them at all."²¹⁸ However, there is a simple solution to this problem, in the form of content-based limits on the definition of coordinated expenditures. Current FEC regulations defining "coordinated communications" contain a content prong, which requires that the communication be related to a federal election.²¹⁹ Thus legislation defining coordinated expenditures should include a nexus requirement between the expenditure and a federal election. Citizens' groups would remain free to work with officials on legislation-based advocacy, even during election years, as long as the resulting activity did not promote the official as a candidate.²²⁰

Alternatively, even enhanced coordination limits might not deter corrupting behavior by outside groups. The proposals discussed in this Note require some kind of contact between the party or candidate and an outside group. However, such contact is not necessary in order for a group to glean a candidate's campaign strategy. Accordingly, 527 organizations could still use their substantial coffers to fund expenditures on political activities that confer substantial benefits on candidates.²²¹ Candidates may feel beholden to these groups or pro-

²¹⁷ James Bopp, Jr. & Heidi K. Abegg, *The Developing Constitutional Standards for "Coordinated Expenditures": Has the Federal Election Commission Finally Found a Way to Regulate Issue Advocacy?*, 1 ELECTION L.J. 209, 210 (2002).

²¹⁸ *Id.* at 210.

²¹⁹ See 11 C.F.R. §§ 100.29(a), 109.21(c) (2006).

²²⁰ The test for determining whether an expenditure was election-related would require several factors, much like the current FEC content test for "coordinated communications."

²²¹ Ironically, laws requiring 527 organizations to disclose the names of their donors actually make it easier for donors to call on candidates for political favors based on their contributions to these organizations. Ackerman and Ayres have argued for a system that would make all political contributions anonymous in order to avoid this problem. See ACKERMAN & AYRES, *supra* note 8, at 5–6.

vide them special access. However, independent expenditures, even made with the intent of buying influence over a candidate, are constitutionally protected. While coordination limits will not reach these independent expenditures, they go as far as constitutionally permissible and target the quid pro quo arrangements about which the *Buckley* Court was most concerned. More importantly, these independent expenditures may be less effective at promoting a candidate's interests, as was observed in the 2004 presidential election.

A third criticism of enhanced coordination limits draws on a "hydraulic" view of political spending, reflected in the quote from *McConnell* at the beginning of this Note. As Samuel Issacharoff and Pamela Karlan observe, "political money . . . has to go somewhere,"²²² and the authors are particularly suspicious of reform proposals that drive money away from the "mediating influence of candidates and political parties."²²³ They argue that a side effect of increased regulation of contributions to parties and candidates has been a rise in power of special interest groups and an increase in issue advocacy.²²⁴ This concern is reflected in the House bills, which seek to strengthen political parties.²²⁵ However, the goal of coordination limits is to drive more hard money to the parties, by prompting access-minded donors to go where there is a proven benefit. While some critics may object to the effect that single-issue advocates have on elections, they have First Amendment rights to such expression.

CONCLUSION

The role of 527 organizations in the 2004 election demonstrated that unregulated money remains an important part of national politics, despite recent campaign finance reform efforts. The law must find new ways of reducing the corrupting influence such large sums of money can have on federal elections. This Note suggested that current proposals present problems of constitutionality, by unduly restricting free speech, or efficacy, by increasing the influence of wealthy donors and allowing for future circumvention of the law. Instead, Congress should attack corruption by focusing on coordination between donors and candidates. Limiting party and candidate control over outside groups will drive access-minded donors away while preserving the First Amendment rights of ideologically motivated donors to express themselves.

²²² Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1708 (1999).

²²³ *Id.* at 1714–15.

²²⁴ *Id.*

²²⁵ See *supra* Part III.B.