



GW Law Faculty Publications & Other Works

Faculty Scholarship

2005

527 Groups and Campaign Finance: The Language, Logic, and Landscape of Campaign Finance Regulation

Miriam Galston

George Washington University Law School, mgalston@law.gwu.edu

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Galston, Miriam, "527 Groups and Campaign Finance: The Language, Logic, and Landscape of Campaign Finance Regulation" (2005). *GW Law Faculty Publications & Other Works*. 596.

https://scholarship.law.gwu.edu/faculty_publications/596

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

TABLE OF CONTENTS

- I. INTRODUCTION
- II. WHAT IS A POLITICAL COMMITTEE?
THE RELEVANT ELECTORAL ACTIVITY

 - A. The Definition of “Contribution” and “Expenditure”

 - 1. The Narrow Construction of the Influencing Language
 - 2. The Ambiguity of the Express Advocacy Standard.....
 - 3. Broader Constructions of the influencing Language
 - 4. Provisional Application to 527 Groups.....

 - B. The Major Purpose Standard.....

 - 1. The Applicability of the Major Purpose Standard
 - 2. What Campaign Activity Must Be Major?

- III. WHAT IS A POLITICAL COMMITTEE?
CONSTITUTIONAL JUSTIFICATIONS

- A. Contributions, Expenditures, and 527 Groups
- B. Nature of the Speaker and 527 Groups
- C. Corruption, Candidate Benefit, and 527 Groups
- D. Conclusion

- IV. SECTION 527 ORGANIZATIONS
UNDER THE INTERNAL REVENUE CODE
- V. CONCLUSION.....

I. INTRODUCTION

The 2004 presidential election season witnessed the usual stream of acerbic epithets: “completely nauseating,”¹ “barrage of harsh attack ads,”² and “negative onslaught.”³ The objects of this opprobrium were the now infamous “527 groups,”⁴ which spent roughly half a billion dollars on federal elections in 2004.⁵ Attack ads, simply negative or completely nauseating, are hardly new. Spending hundreds of millions of dollars of soft money on elections is also not new.⁶ Even designing creative ways to evade campaign finance laws, through “legal loopholes”⁷ or arguably illegal ones, is hardly new.

¹ See Editorial, *Big Campaign Donors on the Run*, Christian Science Monitor, Nov. 2, 2004, at 8 (describing the soft money advertising funded by 527 groups).

² See The Christian Science Monitor, Nov. 2, 2004, p. 8 (editorial describing the soft money advertising funded by section 527 groups).

³ Joan Vennoch, *Campaign Finance Joke*, Boston Globe, Aug. 26, 2004, at A19.

⁴ For the definition and operation of these groups, see *infra* note 21 and pp. 67-69.

⁵ The totals vary by more than \$100,000,000, depending upon the methodology used. According to “PoliticalMoneyLine” website, almost \$470,000,0 was received by these groups during the 2004 election cycle on federal elections, with more than \$400,000,000 attributable to the top fifty groups. See http://www.tray.com/cgi-win/irs_ef_527.exe?DoFn=&sYR=2004. According to the Campaign Finance Institute (CFI), the sum spent by all federal 527 groups was \$424,000,000. See STEVE WEISSMAN AND RUTH HASSAN, *BCRA AND THE 527 GROUPS 2* (2005), available at www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_527Chapter.pdf. Both of these analyses correct for most intergroup transfers between and among 527 groups.

⁶ See Thomas E. Mann, *The Rise of Soft Money*, in *INSIDE THE CAMPAIGN FINANCE BATTLE: COURT TESTIMONY ON THE NEW REFORMS*, 17, 27 (Anthony Corrado, Thomas E.Mann, & Trevor Potter, eds., 2003) (listing the amounts of hard and soft money raised by Democrats and Republicans from 1976-2000). The amount of soft money raised during a presidential election year exploded in 1996 and then doubled to almost \$500,000,000 in 2000. *Id.*

⁷ See 151 Cong. Rec. S973, S973 (Feb. 3, 2005) (statement of Sen. Russell Feingold).

What, then, accounts for the intense publicity accorded 527 groups, to the degree that “527s” became a noun and part of popular political discourse and bills were introduced in the House and Senate to rein in 527 groups even before the 2004 election took place.⁸ Members of Congress also took the unusual step of filing suit to compel the Federal Election Commission (“FEC”) to enforce existing campaign finance laws against many 527 groups believed to be operating outside the strictures of the Federal Election Campaign Act (“FECA” or “the Act”).⁹ By the time the election was held, the controversy over 527 groups had escalated to the point that some lawmakers and campaign finance experts were calling for the abolition of the FEC and its replacement with a new entity with greater independence and enforcement powers.¹⁰

Many factors converged to thrust 527 groups to the forefront of this controversy.¹¹ The most

⁸ *527 Reform Act of 2004*, H.R. 5127, 108th Cong. (2d Sess. 2004), S. 2828, 108th Cong. (2d Sess. 2004). The bill was not passed. A revised version (*527 Reform Act of 2005*) was introduced in 2005. See H.R. 513, 109th Cong. (1st Sess. 2005), S. 271, 109th Cong. (1st Sess. 2005). After S.271 was marked-up in Committee in April, incorporating a large number of amendments, it was re-issued with the same name on May 17, 2005, as an original bill, S. 1053, 109th Cong. (1st Sess. 2005).

⁹ *Shays/Meehan v. FEC*, Civil Action No. 1:04-CV-01597 (D.D.C., filed Sept. 14, 2004). This is not the first time the FEC has been sued to compel enforcement of the political committee provisions of FECA. See *Akins v. FEC*, 146 F.3d 1049 (D.C.Cir. 1998); *Kean for Congress Committee v. FEC*, Civil Action No 1:04CV00007(JDB) (D.D.C., filed May 24, 2004).

¹⁰ See *Federal Election Administration Act*, H.R. 2709, 108th Cong. (1st Sess. 2005); S. 1388, 108th Cong. (1st Sess. 2005). The new agency would have three members, making inaction due to deadlock less likely, and would conduct enforcement actions in conjunction with administrative law judges.

¹¹ Some of the uproar was made possible by the transparency of the groups’ finances, including the identities of their contributors, that resulted from disclosure rules enacted in 2000. See I.R.C. § 527(i), (j), enacted by Pub. L. 106-230 (2000). The notoriety of 527 groups also seems to have stemmed from the suddenness with which they became major campaign players, seemingly eviscerating the soft money reforms enacted barely two years earlier. See *Bipartisan Campaign Reform Act*, Pub. L. No. 107-155, 116 Stat. 81 (codified as part of FECA at 2 U.S.C. § 431 et. seq.). To some extent the shrillness of the reporting on 527 groups was simply a reflection of the shrillness

significant criticism heaped upon 527 groups derives from the belief that many of them, including most of those with the greatest revenues and expenditures during the 2004 election cycle, were operating in flagrant disregard of applicable federal campaign finance laws,¹² including those enacted as part of the 2002 McCain-Feingold campaign finance reform (hereinafter “BCRA”)¹³ to eliminate the pervasiveness of “unregulated” or “soft” money¹⁴ in federal elections. If the 527 groups in question should have been subject to comprehensive FECA regulation, including contribution and expenditure rules, they would not have been permitted to receive contributions in excess of \$5,000 from any person during an election cycle.¹⁵ In fact, however, many contributions to 527 groups during the 2004 election cycle were in excess of \$100,000, and some individuals contributed millions of dollars.¹⁶ In addition, 527 groups subject to those rules cannot accept contributions from

of the presidential campaign in general.

¹² See 150 Cong. Rec. S9527 (Sept. 22, 2004) (remarks of Sen. John McCain) (calling the practices of certain section 527 organizations “illegal” and “already prohibited” and calling the FEC a “rogue agency” for failing to enforce existing law requiring such entities to register as political committees under FECA).

¹³ See *supra* note 10.

¹⁴ These phrases both refer to money raised for federal elections that is not subject to the FECA restrictions on the permissible sources and amounts of campaign contributions. “Hard” or “federal” money refers to contributions that are subject to these rules. For example, neither unions nor corporations are permitted to make hard money contributions from their treasury funds, whereas they can use such funds for soft money contributions. Although soft or unregulated money may be subject to some FECA disclosure regulations, these may not be as rigorous as the disclosure rules for hard or federal money. For a succinct description of the concept of soft money and its potential dangerous for elections, see *McConnell v. FEC*, 540 U.S. 93, 122-26 (2003)

¹⁵ 2 U.S.C. § 441a(a)(1)(C)

¹⁶ See PoliticalMoneyLine, 2004 Cycle Large Donors to PoliticalMoneyLine’s Key 527 Groups, at http://www.fecinfo.com/cgi-win/irs_ef_527.exe?DoFn=&sYR=2004 (listing, based upon I.R.S. filings, large contributors to 527 groups in the 2004 election cycle). Some of the 527 groups

corporate or union general treasury funds (although they can accept money from corporate or union political action committees (“PACs”), subject to FECA’s restrictions on PACs).¹⁷ In short, if the controversial 527 groups should have been governed by these campaign finance rules, their fundraising efforts would have been far more arduous than they were and the groups would probably have been able to raise and spend considerably less money than they in fact did.¹⁸

This Article examines the legal issues that determine whether, or which, 527 groups should be subject to the comprehensive FECA regulatory regime.¹⁹ In brief, the core legal question is whether 527 groups should be classified as “political committees” for FECA purposes. This entails exploring the attributes of both “political committees,” which are creatures of federal campaign finance law,²⁰ and section 527 “political organizations,” which are products of the Internal Revenue Code (the “Code”)²¹ --two distinct statutory regimes, whose purposes and restrictions coincide in some instances but diverge in others.²²

listed were registered as political committees under FEC and maintained both federal and nonfederal accounts.

¹⁷ See 2 U.S.C. § 441b(a), (b).

¹⁸ Note, however, that several of the top fifty 527 groups did register as political committees. See OpenSecrets.org (listing eleven of the top twenty 527 groups as registered under FECA), at <http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2004>.

¹⁹ As will be discussed in what follows, even groups that are not subject to the comprehensive FECA regulatory regime may be subject to specific provisions of FECA, e.g., the requirement that electioneering communications be funded exclusively with “regulated” or “hard” money. See 2 U.S.C. § 441b(b), (c)(1) and *infra* note 89 and accompanying text.

²⁰ 2 U.S.C. § 431(4).

²¹ All references to the Code are to the Internal Revenue Code of 1986, as amended.

²² Section 527 groups are called “political organizations” in the Code, while the relevant entities under FECA are called “political committees.” Both are defined in terms of influencing, or

The proper classification of 527 groups from the perspective of campaign finance law depends upon resolving issues of constitutional law first elaborated in *Buckley v. Valeo*²³ and recently developed in *McConnell v. FEC*.²⁴ In *Buckley*, the Supreme Court invalidated certain provisions of FECA and narrowly construed the reach of others based upon the distinction between the discussion of issues, on the one hand, and express advocacy to elect or defeat one or more candidates for federal office, on the other.²⁵ Although the meaning and application of this distinction has been the subject of intense controversy among courts and commentators for more than twenty-five years, it nonetheless provided the irreducible conceptual framework for constitutional analysis of campaign finance regulation throughout that period. In 2003, the *McConnell* Court, for reasons discussed below, concluded that the distinction between issue discussion and express advocacy had proven unworkable and, in fact, facilitated the evasion of campaign finance laws.²⁶ In

attempting to influence, the nomination or election of individuals to public office. For the differences in the scope of the electoral activities referred to by each body of law, see *infra* Part IV. For difficulties posed by overlapping statutory regimes, see Frances R. Hill, *Probing the Limits of Section 527 To Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387 (Jan. 17, 2000) (2000 TNT 11-78) and *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477 (Apr. 16, 2001) (2001 TNT 74-42).

²³ *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*) (examining the 1974 amendments to FECA, the federal campaign finance statute originally enacted in 1971).

²⁴ *McConnell v. FEC*, 540 U.S. 93 (2003) (considered amendments to FECA enacted as part of the BCRA in 2002).

²⁵ See *Buckley*, 424 U.S. at 14, 41-44, 80. The Court did note that the distinction between the two “may often dissolve.” *Id.* at 42.

²⁶ See *McConnell*, 540 U.S. at 126-28, 124 S. Ct. at 650-51 (2003) (observing that “[w]hile the distinction between “issue” and express advocacy seemed neat in theory, the two categories of advertisements proved functionally identical in important respects. Both were used to advocate the election or defeat of clearly identified federal candidates...”).

upholding almost all of the contested amendments to FECA enacted by BCRA, the Court recharacterized and, arguably, revised the *Buckley* distinction. The net result of the *McConnell* decision was to make clear that express advocacy and issue advocacy represent two points along the continuum of advocacy speech, but that there is terrain between these two points, a considerable portion of which can be regulated by Congress under appropriate circumstances. Determining which 527 groups can be subjected to the comprehensive FECA regulatory regime without violating First Amendment protections thus presupposes ascertaining the nature of that continuum and the level of protection likely to be accorded to speech at different points along it by the post-*McConnell* Court.

To assess how much constitutional terrain is open to regulation, it is necessary to delve into both the language and logic of *Buckley* and *McConnell*. It is possible that *McConnell* simply overruled certain portions of *Buckley* that, as a conceptual matter, depended upon the centrality of the express advocacy doctrine. If so, the Court left the door open for Congress, and to some extent the FEC, to regulate a much wider range of campaign speech than has heretofore been considered possible. It is also possible that *McConnell* left *Buckley*'s conceptual core largely intact and upheld parts of BCRA that were inconsistent with *Buckley*, thereby creating a new jurisprudence in considerable tension with the constitutional principles embodied by the earlier decision. If this is correct, it will be even more difficult now than in the past to predict the likely reception by the Court of regulation of campaign speech, since it will have at least two competing lines of precedent to provide support for its decisions.

This Article argues instead that *McConnell* correctly identified the limits of *Buckley*'s express advocacy doctrine and elaborated a constitutional doctrine both consistent with and more comprehensive than the campaign finance jurisprudence identified with the earlier decision. The result is thus that campaign finance law has been transformed, but in ways not inconsistent with

Buckley's core teaching about the importance of protecting genuine discussion of issues from most forms of regulation. In effect, the Court has given up all pretense of operating in a universe of safe harbors and bright line rules. Instead, it has announced its willingness to grapple with the complex and sophisticated landscape of fundraising and spending practices that have transformed modern campaigns. For 527 groups, this means that Congress will have to justify its current 527 reform proposal,²⁷ which subjects all but a few 527 groups to comprehensive FECA regulation, by demonstrating that the characteristics of the groups or their activities locate them within the permissible constitutional terrain suggested, although not yet fully articulated, by the Court's campaign finance jurisprudence.

The constitutional issues can be divided into two general categories, those relating to the type of campaign activity that would cause a group to be classified as a political committee and those that relate to the nature of the justification for restricting avenues for funding campaign speech. Part II of this Article discusses the former. Because the Supreme Court has construed the constitutionally acceptable types of campaign activity amenable to FECA regulation narrowly or broadly depending upon the nature of the specific campaign finance provision involved, this Part examines the features of the varying contexts that appear to have motivated the Court to validate or invalidate campaign finance restrictions on particular types of campaign activity. The broader the Court's construction of the electoral activities that can be subjected to campaign finance restrictions, the more latitude Congress has in regulating campaign activity and the more intrusive the outcome from the perspective of participants subject to the restrictions.

I argue that the express advocacy standard, which represents the most narrow construction of the type of campaign activity potentially subject to regulation, is actually somewhat broader than is

²⁷ See *supra* note 7.

often alleged by courts and commentators. As a consequence, the post-*McConnell* Court would likely legitimate a more capacious interpretation of the express advocacy standard, similar to the one adopted by the FEC,²⁸ were the issue ever litigated. At the same time, express advocacy can and should be distinguished from electoral activities less directly focused on the prospects of individual candidates. To that end, this Part develops three paradigms, implicit in the logic of the Supreme Court's decisions, that explain instances in which FECA regulation has been upheld in the face of First Amendment challenges, and it highlights the situations in which the Court has been willing to permit empirical evidence of relationships to overcome constitutional concerns about vagueness or overbreadth. Based upon the analysis of the features common to situations in which the Court has validated FECA regulation of campaign speech other than express advocacy, this Part concludes that the proposal now being considered by Congress to compel all but a few types of 527 groups to register as political committees would exceed the boundaries permissible under current constitutional doctrine.

Part III of the Article examines other constitutional dimensions that bear on the validity of campaign finance regulation. In particular, it examines the most prominent constitutional justifications influencing the Supreme Court's judgments in specific contexts insofar as these issues bear on the question of the appropriate regulation of the controversial 527 groups. This Part first examines the constitutional doctrine privileging the protection afforded "expenditures" over that given to "contributions" and then analyzes how this doctrine is applied in two-tier situations, *i.e.*, when individuals or groups seek to exercise their First Amendment speech rights by contributing to an intermediary, such as a 527 group. The analysis also looks at the manner in which constitutional protection of campaign speech varies according to the status of the speaker, *i.e.*, depending upon

²⁸ See the discussion *infra* notes 67-68 and accompanying text.

whether the speaker is an individual or an entity, and whether the entity is a corporation, labor organization, or an unincorporated group. This section then applies these doctrines to the situation of 527 organizations, some of which are incorporated, and some of which are not. Finally, this Part discusses the evolution of the Court's jurisprudence originating in the state's interest in preventing corruption or the appearance of corruption, which is the sole state interest accepted by the Court to justify restrictions on campaign speech, and then locates the 527 group controversy within this evolving jurisprudence. These inquiries into the treatment of campaign contributions (as contrasted with expenditures) and the levels of protection afforded different types of speakers provide support for the constitutional legitimacy of current efforts by members of Congress to amend the definition of a political committee to include most types of 527 groups. Although the evidence that the proposed 527 legislation is necessary to prevent corruption or the appearance of corruption is less convincing, this Part concludes that, on balance, proponents of the 527 group reform proposals will have numerous, well-developed constitutional precedents for arguing their case successfully.

Part IV explores the origin and purpose of section 527 of the Code, in particular, its function to provide favorable tax treatment to political groups. This was necessary to resolve the confused state of the tax law for political organizations and their contributors and to encourage political activity and political discourse. The focus of this Part is a comparison of the Code's treatment of certain electoral activities with the counterpart treatment of the same activities by campaign finance law. The discussion emphasizes particular campaign activities that are treated differently by the two bodies of law, *i.e.*, activities that are treated as electoral by the Code, but that would not be required to be paid for with hard money under FECA or would not enhance the likelihood that a group engaging in such activities would be considered making expenditures potentially subject to comprehensive FECA regulation.

The analysis reveals that the tax law definition of electoral activity is inclusive: it defines electoral activity as broadly as possible and takes into account all the facts and circumstances surrounding activities that a 527 group seeks to have classified as electoral for Code purposes so that they can be paid for with tax-favored funds. Federal election law, in contrast, tends to construe narrowly which types of electoral activity are subject to particular provisions of FECA because of the constitutional questions necessarily raised whenever political speech is burdened by regulation. The Part concludes that there exists a wide range of activities that contribute toward a 527 group's status as exempt for tax law purposes that would nonetheless not contribute to the group's qualification as a political committee for purposes of federal campaign finance law. In the absence of sufficient empirical findings as to the importance of such activities for 527 groups active in 2004 or likely to be active in the future, however, it is impossible to know whether they are significant enough to reject a presumption that the federal electoral activities of 527 groups that do not register are fundamentally congruent with those that FECA is designed to regulate.

The Article concludes by raising the issue of the desirability of requiring section 527 groups to be subject to federal campaign finance laws from a policy perspective.²⁹ The thrust of Parts II and III is that there are sound constitutional arguments that can be made in support of the 527 reform legislation now under consideration in Congress, although there also exist significant constitutional barriers to treating most 527 groups as having a characteristic electoral mission on a par with that of candidates, parties, their committees, and other political committees. What can be done constitutionally, however, is not necessarily what should be done as a matter of public policy. The conclusion of the Article thus invites inquiry into the distinct types of electoral activities engaged in by 527 groups in light of theories of civic participation and the positive effects on voter mobilization

²⁹ See *infra* Part IV.

attributed largely to these 527 groups during the 2004 election cycle. In other words, assuming that section 527 groups can operate legally outside of FECA, either under current law or as a result of legislation, the Article argues that legislators should consider the potential role of 527 groups in voter mobilization when weighing the civic benefits hoped for from the restrictions proposed against certain countervailing civic harms.

II. WHAT IS A POLITICAL COMMITTEE? THE RELEVANT ELECTORAL ACTIVITY

There is universal agreement that not all 527 groups are required to register as political committees. Registration is mandatory only if a 527 group qualifies as a political committee because it conforms to the definition set forth in FECA. Involvement in a *federal election* is the threshold condition for qualifying as a political committee. As a consequence, certain 527 groups, such as state and local political organizations whose activities focus exclusively on non-federal elections do not need to register, although they may be subject to state election law registration and related requirements. Similarly, 527 organizations devoted exclusively to influencing the nomination or appointment of federal judges do not need to register, since federal judges are not elected.³⁰ The FEC has also, through regulation, exempted additional types of 527 groups from the definition of a political committee.³¹ In addition, only certain types of involvement in federal elections are thought

³⁰ Acknowledging the inapplicability of the political committee definition to such groups, the proposed 527 reform legislation carves out exceptions for the types of groups described in the text. *See* S. 271, 109th Cong. §2(b) (1st Sess. 2005), and H.R. 5127, 109th Cong. (1st Sess. 2005). For additional examples of activities of 527 groups that do not trigger political committee status, see *infra* Part IV.

³¹ For example, a 527 group formed to “test the waters” for a potential candidate for a federal office would not qualify as a political committee because regulations exclude money contributed or spent for such activities from the definition of a contribution or an expenditure--unless and until the potential candidate decides to run for a federal office. *See* 2 CFR § 100.131 (exception from the

to trigger political committee status.³²

At first glance, the definition of a political committee is straightforward. According to the section of FECA containing definitions, three types of entities qualify as a political committee. First, “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year.”³³ Political committees also include “any separate segregated fund established under the provisions of section 441b(b)” of FECA and certain political party committees.³⁴ The last two types of political committee listed in the definition are not relevant to the controversy over 527 groups and, thus, will not be discussed further.³⁵

Several considerations make the application of the statutory definition problematic. First, both of the component terms—“contribution” and “expenditure”—have embedded in them a reference to electoral activity that is indeterminate and requires interpretation. Second, the Supreme Court has explained the meaning of the referenced electoral activity in different ways in different decisions, and it has suggested that “contributions” and “expenditures” will be construed narrowly or broadly depending upon the context, that is, the specific provision of FECA in which the terms occur.³⁶ As a

definition of an expenditure).

³² See the discussion *infra* Part II.A.

³³ 2 U.S.C. § 431(4)(A).

³⁴ 2 U.S.C. § 431(4)(B), (C).

³⁵ The second type of political committee is established and administered by a corporation or a labor union. 2 U.S.C. § 441b(b). The third type is comprised of certain local committees or a political party. 2 U.S.C. § 431(4)(C).

³⁶ See *infra* Part II.A.1.

consequence, it is impossible to take the language of any Supreme Court precedent interpreting the meaning of either term and simply transfer it to the expenditure or contribution definitions when they form part of the definition of a political committee. Rather, because each of the Court's interpretations of the language is dependent upon the purpose of the specific statutory provision at issue and the governmental interests served by the provision, the language must be taken together with the logic of the interpretive framework created by the Court in order to apply the precedents to provisions not yet adjudicated. Since the Court's reasoning inevitably involves multiple competing principles, the logic of each decision, or portion of a decision, is similarly multifaceted.

Third, in *McConnell v. FEC*, its most recent decision bearing upon the meaning of the key terms, the Supreme Court announced that its interpretation in *Buckley* did not reflect the outer limits of a constitutionally acceptable interpretation of these terms, but was instead an exercise of statutory interpretation tailored to the immediate context.³⁷ This development, which was largely unexpected by lawyers versed in campaign finance law,³⁸ has added another layer of uncertainty to an already unsettled area.

In addition to the preceding interpretive difficulties, in the last five years, the Supreme Court has increasingly taken the changing political landscape to which the law and its pronouncements apply as elements of the interpretive context. In effect, the ways campaigns, institutions, and political actors actually behave drive the application of doctrine in much the same way as does the purpose of individual provisions of the Act and the government interests served. Thus, the

³⁷ See *McConnell*, 540 U.S. at 190-92, 202-03, 124 S. Ct. at 687-88, 694.

³⁸ For an analysis that did anticipate the substance of the *McConnell* ruling on this issue, see THE CAMPAIGN FINANCE INSTITUTE TASK FORCE ON DISCLOSURE, ISSUE AD DISCLOSURE: RECOMMENDATIONS FOR A NEW APPROACH 20 (2001), at http://www.cfinst.org/disclosure/pdf/issueads_rpt.pdf.

landscape, or “facts on the ground,” form an increasingly prominent part of the framework within which the Court develops its interpretations of the language and logic of campaign finance law. The Court has made explicit reference to the plastic nature of election law in commenting upon lawmakers’ continuing need to revise campaign finance legislation in the face of the ongoing efforts on the part of some participants in campaigns to evade the law’s reach.³⁹ The Court has been somewhat less candid, however, in noting how its own jurisprudence has been influenced by the need to restate--not merely apply-- its doctrine in response to the evolving nature of campaigns.⁴⁰

Finally, although the statutory definition of a political committee is cast solely in terms of contributions or expenditures in excess of \$1,000, the Supreme Court in *Buckley* appeared to stipulate that, to be a political committee, a group would have to be “under the control of a candidate” or its “major purpose” would have to be “the nomination or election of a candidate.”⁴¹ The Court’s statement suggests that classification of a group as a political committee presupposes that it satisfies both the statutory quantitative contribution or expenditure test and a judicially created candidate control or major purpose test. Although there is some authority questioning whether the Court’s statement should be thus interpreted,⁴² most commentators are of the view that there are in fact two prongs to the definition of a political committee, one statutory and one judicially created.⁴³ This view raises further questions, such as the proper method for ascertaining an organization’s major

³⁹ See *McConnell*, 540 U.S. at 224, 124 S. Ct. at 706.

⁴⁰ See *infra* Part III.B.

⁴¹ *Buckley*, 424 U.S. at 79.

⁴² See *Richey v. Tyson*, 120 F. Supp. 2d 1298 (S.D. Ala. 2000).

⁴³ See Edward B. Foley and Donald Tobin, *Section 527 Groups Not an End-Run around McCain-Feingold*, 72 U.S.L.W. 2403 (Jan. 20, 2004).

purpose, and it invites inquiry into the differences, if any, between the federal election activities that make up the electoral component of the statutory prong of the definition and those relevant to determining a group's major purpose. The issues raised by the judicially created prong of the definition are discussed in Part II.B.

A. The Definition of "Contribution" and "Expenditure"

For election law purposes, a contribution includes "anything of value...for the purpose of influencing any election for Federal office," whether it takes the form of a gift, loan, deposit of money, or anything else.⁴⁴ This definition covers not only value given directly or indirectly to candidates, parties, or other campaign persons or entities; it also applies to spending on behalf of a campaign if made as a result of coordination with the campaign.⁴⁵ The definition of "expenditure"

⁴⁴ 2 U.S.C. § 431(8)(A)(I). The statutory provision also specifies that a contribution also includes one person compensating a different person for rendering personal services to a political committee. 2 U.S.C. § 431(8)(A)(ii) . For the regulations implementing these definitions, see 11 CFR §§ 100.51-.57, 100.110-114. For the exceptions to the contribution and expenditure rules, see 2 U.S.C. § 431(8)(B), (9)(B), 11 CFR §§ 100.71-.92, 100.130-.154.

⁴⁵ See 2 U.S.C. § 441a((7)(B), (8). Thus, a coordinated expenditure is treated as a contribution, subject to FECA's contribution limits. Section 441a(8) also provides that any contribution "earmarked or otherwise directed through an intermediary or conduit to a candidate will be considered a contribution to the candidate. What constitutes coordination has long been debated. In 2002, as part of BCRA Congress repealed the FEC regulation defining coordination on the ground that it failed to cover any but the most explicit forms of coordination and it directed the FEC to write a regulation covering a wider range of understandings between a candidate or campaign and persons making expenditures on their behalf. Portions of the FEC's post-BCRA regulation were successfully challenged in court as too lenient by sponsors of the 2002 campaign finance reform legislation. See *Shays v. FEC*, 337 F. Supp. 2d 39 (D.D.C. 2004). The FEC is appealing this part of the District Court's ruling. See FEC Press Release, Oct. 29, 2004, at <http://www.fwc.gov/press/press2004/1029shays.html>. The plaintiffs originally appealed the portions of the court's decision upholding four of the regulations, but later withdrew its objection. See *Shays v. FEC*, 2004 U.S.App. LEXIS 24896 (Dec. 2, 2004) (dismissing the plaintiffs' cross-appeal pursuant to their motion).

similarly references “anything of value...for the purpose of influencing any election for Federal office” or a written agreement to make an expenditure.⁴⁶

The meaning of the expression “for the purpose of influencing any election for Federal office” is thus indispensable for understanding what constitutes a contribution or an expenditure and, by the same token, what constitutes the statutory prong of the definition of a political committee. At the same time, as was noted earlier, Supreme Court decisions, starting with *Buckley* and as recently as *McConnell*, have interpreted the range of electoral activities encompassed by that language more or less narrowly depending upon the context, in particular, depending upon whether a narrow construction is necessary to prevent regulation of campaign speech that is so vague or broad that it unconstitutionally burdens the affected parties.⁴⁷ Thus, the meaning of the language varies with the context. The 527 group problem cannot, then, be resolved without deciding the proper scope of the language for purposes of classifying political committees.

1. The narrow construction of the influencing language. Organizations that fail to register as political committees take the view that, for purposes of determining political committee status, the influencing language in contribution and expenditure definitions encompasses only what is commonly called “express advocacy,” e.g., exhortations such as “Vote for Voinovich and make Ohio

⁴⁶ 2 U.S.C. § 431(9)(A).

⁴⁷ See *infra* Parts II.A.1, 3. According to the Court, there is no legislative history of the influencing language. See *Buckley*, 424 U.S. at 77 (noting that the language “appears to have been adopted without comment from earlier disclosure Acts”). Some members of the House in fact expressed concern about the ambiguity of the influencing language and sought clarification, but the responses were less than satisfactory. See 120 Cong. Rec. (Part 31) H41816 (discussing voting records prepared after a legislative session by the League of Women Voters), H41818-41819 (discussing a post-election fund raiser to pay off election debts and the period when a person is not an announced candidate) (Dec. 20, 1974).

strong” or “defeat the Governor and restore fiscal responsibility.”⁴⁸ Since their electoral activities do not constitute express advocacy thus defined, the groups argue, the funds given to them do not qualify as contributions, the funds they spend do not qualify as expenditures, and, thus, they do not qualify as political committees.

This interpretation of the type of electoral activities that trigger political committee status is based upon statements made by the *Buckley* Court in the course of its discussion of the constitutionality of dollar limits on independent expenditures and certain reporting and disclosure rules enacted as part of the 1974 Amendments to FECA. These rules would have applied to individuals other than candidates and to groups other than candidate, party, and other political committees, and if violated, would have subjected the violators to criminal sanctions.⁴⁹

The *Buckley* Court expressed concern about the ambiguity of the influencing language in the definition of an expenditure in both the dollar limit and disclosure provisions on the ground that it could be construed to reach “both issue discussion and advocacy of a political result.”⁵⁰ Any burden on the discussion of issues during a campaign was to be subject to strict scrutiny, both by virtue of “so closely touching our most precious freedoms” and because the speech in question would be

⁴⁸ This type of express advocacy has become known as the “magic words” standard. It derives from comments made by the Supreme Court in *Buckley*, 424 U.S. at 44, n.52, and several subsequent cases.

⁴⁹ See *Buckley*, 424 U.S. at 39-44 (expenditure limits), *id.*, at 78-81 (reporting requirements). 2 U.S.C. § 441 (1974), the text of which is reprinted in *Buckley*, 424 U.S. at 181.

⁵⁰ See *Buckley*, 424 U.S. at 39-44, 63-64, 77; 2 U.S.C. § 434(e) (1974). The Court proceeded to invalidate the expenditure limits despite (or because of) its narrowing construction. *Id.*, at 44-48. In contrast, it upheld the reporting requirements once the scope of their application was circumscribed. *Id.*, at 79.

engaged in by independent political actors.⁵¹ To prevent the provisions from being “impermissibly broad” or so vague as to inhibit the core protected speech of individuals and groups other than candidates and political committees, the Court held that expenditures for purposes of the dollar caps or for the disclosure rules should be construed “to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”⁵²

The concept of express advocacy is also an integral part of FECA’s prohibition against certain corporations and labor unions making “a contribution or expenditure in connection with any [federal] election,” including primaries, conventions, or caucuses for selecting such candidates, if the money comes from the entity’s general treasury funds (as contrasted with PAC funds).⁵³ Relying on

⁵¹ *Buckley*, 424 U.S. at 39 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

⁵² *Buckley*, 424 U.S. at 39-44, 79-80.

⁵³ *See* 2 U.S.C. § 441b(a). Although the influencing language is not used in this provision, courts and commentators generally equate the reach of the influencing language and the electoral activity referenced in this prohibition, and the Supreme Court has raised the same vagueness and overbreadth concerns in connection with this provision as it had with the influencing language in *Buckley*. Corporations and unions are permitted to use their treasury funds to establish and pay the administrative costs of affiliated political committees, popularly known as PACs, and corporations can solicit contributions for their associated PACs from shareholders and certain high-level employees, while unions can solicit contributions from their members (collectively the “restricted classes”). *See* 2 U.S.C. § 441b(b)(2). However, they are not allowed to contribute their general funds to the PACs for the latter to spend. 2 U.S.C. § 441b(b)(2)(C). This is true regardless of whether the PACs engage in express advocacy or not.

The earliest version of the federal prohibition against corporate spending on federal campaigns was enacted in 1907 and the restriction was expanded and strengthened in the following decades. For a detailed account of the history of these laws, see *United States v. Automobile Workers*, 352 U.S. 567, 570-84 (1957); *FEC v. Beaumont*, 539 U.S. 146, 152-55 (2003). Certain corporations are exempted from the prohibition. *See also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”) (exempting from the prohibition a nonprofit advocacy organization described in section 501(c)(4) of the Code that accepted no contributions from corporations and did not itself engage in any business activities). Certain other entities incorporated only for liability purposes are also exempt.

the vagueness rationale advanced in *Buckley*,⁵⁴ the Supreme Court held in 1986 that the prohibition would pass constitutional muster only if it was construed to apply exclusively to expenditures for express advocacy, and not a wider range of campaign related activities.⁵⁵ The consequence of this ruling was to enable unions and corporations to use their general treasury funds, rather than PAC money, to fund election related advertising and voter mobilization as long as they avoid express advocacy.⁵⁶

In short, in connection with three separate provisions of FECA, the Supreme Court has found that the potential expansive reach of the influencing language made the regulation of expenditures constitutionally unacceptable because of the protected nature of the speech to be regulated. To support the position that, as a matter of law, express advocacy should constitute the standard for determining political committee status, these precedents must be seen as accomplishing two things. First, they impose a narrow construction on the meaning of the ambiguous influencing language in the three operative provisions under scrutiny in the Court's decisions. In addition, one would have to argue that these precedents create a presumption that the influencing language will be construed narrowly to refer to express advocacy in other contexts unless there is an affirmative reason based

⁵⁴ See *supra* note 51 and accompanying text.

⁵⁵ *MCFL*, 479 U.S. at 248-49. See also *Beaumont v. FEC*, 539 U.S. 146 (2003); *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) (upholding a state law that prohibited independent expenditures made by corporations using general treasury funds); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788, n. 26 (1978) (affirming, in dictum, the legitimacy of a state law prohibiting corporate expenditures using general treasury funds).

⁵⁶ As a result of a provision enacted in BCRA, however, unions and corporations are now also prohibited from using their treasury funds to pay for electioneering communications in the 30 days preceding a primary and the 60 days preceding an election. For the range of electoral activities considered "electioneering activities," see 2 U.S.C. § 441b(b), (c)(1) and *infra* note 89 and accompanying text.

upon the character of a specific context to interpret it more broadly.

The belief that these precedents create such a presumption is shared by numerous state and federal public officials. Several times in the last decade, for example, Senator Hollings introduced a resolution in the Senate to amend the Constitution in order to permit greater regulation of contributions and expenditures that are “made by, in support of, or in opposition to” a candidate for federal office.⁵⁷ It was the perception of those who backed the resolution that without such an amendment, the constitutional jurisprudence developed by *Buckley* and its progeny would stymie any effort to regulate expenditures on a basis broader than express advocacy. Most federal and state courts that have reviewed portions of state campaign finance laws with definitions similar or identical to those in FECA have also concluded that the electoral activities that trigger application of the expenditure definition or political committee status are limited to express advocacy.⁵⁸

Finally, as part of BCRA Congress expanded several provisions of FECA that involved restrictions on “expenditures” to include in their reach disbursements made for “electioneering communications,” which do not necessarily involve express advocacy.⁵⁹ For example, prior to BCRA, FECA stated that expenditures made by anyone “in cooperation, consultation, or concert, with, or at the request of a candidate” or his or her committees or agents would be treated as a contribution for FECA purposes rather than an independent expenditure.⁶⁰ BCRA added a new

⁵⁷ See 147 Cong. Rec. S2853 (March 26, 2001) (introducing and explaining S.J. Res 4).

⁵⁸ See *Florida Right to Life, Inc. v. Mortham*, CASE NO. 98-770-CIV-ORL-19A (M.D. Fla. 1998), at 1998 U.S. Dist. LEXIS 16694; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135 (Ind. 1999); *North Carolina Right to Life v. Beake*, 108 F. Supp. 2d 498, 504 (E.D.N.C. 2000).

⁵⁹ See 2 U.S.C. §§ 441a(a)(7)(B)(I), (ii), 441b(a), (b). For the meaning of the term “electioneering communications,” see *infra* note 89 and accompanying text.

⁶⁰ 2 U.S.C. § 441a(a)(7)(B)(i). BCRA added a parallel provision that treats expenditures

subsection to this coordination provision stating that disbursements for electioneering communications⁶¹ will be treated as contributions, rather than as independent expenditures, if they are coordinated with a federal candidate or a federal or non-federal political party.⁶² A reasonable interpretation of this BCRA addition is that the term “expenditure” in the original version was understood by Congress to refer only to express advocacy and, as a result, it was necessary to amend the provision to specify electioneering communications in order to broaden the range of election related expenditures that would be treated as contributions if made pursuant to coordination with a candidate or party. This reading would strengthen the argument for presuming that express advocacy is in general the object of the influencing test in the definition of expenditure and, by analogy, in the definition of contribution, unless the language or context makes clear that a broader range of influencing activities is intended.⁶³

2. The ambiguity of the express advocacy standard. Even if political committee status is properly determined based upon the view that expenditures and contributions presuppose express advocacy, there will still be considerable uncertainty as to which organizations need to register. Initially, the express advocacy standard seemed straightforward. In *Buckley*, the Supreme Court illustrated the types of communications that qualify as “express words of advocacy of election

made in coordination with a party as contributions to the party. 2 U.S.C. § 441a(a)(7)(B)(ii). *See also* *Buckley v. Valeo*, 424 U.S. at 46-49 (applying independent expenditure rules to individuals and unincorporated groups other than political committees); *Colorado Republican Federal Campaign Comm. V. FEC*, 518 U.S. 604 (1996) (*Colorado I*) (applying independent expenditure rules to parties). Such expenditures do, however, have to be reported to the FEC if they exceed a certain threshold. 2 U.S.C. § 434(c)(1).

⁶¹ *See* 2 U.S.C. § 434(f)(3)(A).

⁶² 2 U.S.C. § 441a(a)(7)(C).

⁶³ For a contrary interpretation, see *infra* Part II. A.3..

or defeat” in a footnote, according to which “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” and “reject” would all satisfy the constitutional concerns underlying the express advocacy standard.⁶⁴ These illustrations have usually been taken quite literally, *i.e.*, as implying that electoral activity will not be considered express unless communications include one of the “magic words” contained in the *Buckley* footnote or a close synonym. As a consequence, organizations seeking to avoid express advocacy typically design their electoral communications to deviate in some respect from the magic words paradigm. The organization under review in *MCFL*, for example, argued that its newsletter had not engaged in express advocacy when it urged readers to “Vote Pro-Life” and then listed which candidates endorsed pro-life positions because it had never closed the “gap” between the exhortation to vote and specific candidates.⁶⁵ That this position was argued before the Supreme Court captures the extremes to which the literal interpretation of the *Buckley* footnote has been taken.⁶⁶ The Court, however, rejected the organization’s claim and concluded that the newsletter’s content did constitute express advocacy, even though the words of exhortation to voters never directly preceded the names of specific candidates.

The year after *MCFL*, the Ninth Circuit Court of Appeals elaborated on the range of communications that would count as express advocacy in holding that the concept extended to communications that “when read as a whole, and with limited reference to external events, [must] be

⁶⁴ *Buckley*, 424 U.S. at 44, n. 52.

⁶⁵ *MCFL*, 479 U.S. at 249-50. Although the newsletter contained a disclaimer stating that it was not “an endorsement of any particular candidate,” the Court found the disclaimer ineffective to negate the express advocacy. *Id.*

⁶⁶ For other examples. See *Kean for Congress Committee v. FEC*, Civil Action No 1:04CV00007(JDB) (D.D.C., filed May 24, 2004).

susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate.”⁶⁷ The FEC responded by promulgating a definition of express advocacy that reflected the Ninth Circuit’s decision.⁶⁸ The regulation describes alternative types of communications that qualify as express advocacy: the magic words route set forth in *Buckley*, the compound paradigm adjudicated in *MCFL*, and a narrow facts and circumstances approach. According to the last alternative, express advocacy occurs:

when taken as a whole and with limited reference to external events, such as the proximity to the election, [a communication] could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because --1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and 2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or

⁶⁷ *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987). For criticism of this decision, see *infra* note 69 and accompanying text. The communication in question contained criticism of a particular candidate and included the words “Don’t let him do it.”

⁶⁸ The FEC referenced the *Furgatch* decision in its *Explanation and Justification* that was issued with the final regulation. Notice 1995-23, 60 FR 64260, 64260 (Dec. 14, 1995). See also Notice 1995-10, 60 FR 35292, 35294 (July 6, 1995). However, several courts have noted that the regulation does not expressly make a call to action an element of express advocacy, whereas the *Furgatch* court stated that advocacy must contain “a clear plea for action.” *Furgatch*, 807 F. 2d at 864. See *FEC v. Christian Action Network*, 8894 F. Supp. 946, 952 n.6 (W.D. Va. 1995), *affirmed*, 92 F.3d 1178 (4th Cir. 1996) (*per curiam*). See also *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (awarding the plaintiffs in *Christian Action Network* fees and costs, under the Equal Access to Justice Act, on the grounds that the FEC’s position in enforcing the regulation was not “substantially justified”); *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) (arguing that regulation of speech based upon “the understanding of the audience” rather than “the actual message of the advocate” ‘violated the teaching of *Buckley* because it created too much uncertainty).

encourages some other kind of action.⁶⁹

The Supreme Court has never reviewed the reasonable person/unmistakable advocacy standard, and there are few cases applying the standard to concrete situations because most appellate courts, other than the Ninth Circuit, have declared that portion of the regulation an unconstitutional departure from the *Buckley* paradigm.⁷⁰ According to these courts, the *Buckley* express advocacy doctrine requires more than an implication that a communication is encouraging people to vote for or against a particular candidate.⁷¹ Describing a specific candidate's political view "does not *per se* translate into an exhortation to vote," even if the audience "is addressed as a member of the voting public."⁷²

Despite the near-consensus among lower courts, the reasoning of the *McConnell* decision suggests that the Supreme Court is likely to uphold the FEC's reasonable person/unmistakable advocacy standard. Recall that the Court's fundamental concern in the campaign finance cases has

⁶⁹ 11 C.F.R § 100.22(b).

⁷⁰ *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379, 391-92 (4th Cir. 2001); *Faucher v. FEC*, 928 F.2d 468 (1st Cir.), *cert. denied sub nom* *FEC v. Keefer et al.*, 502 U.S. 820, 116 L. Ed. 2d 52 (1991); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963 (8th Cir. 1999); *Right to Life of Duchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998), *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8 (D. Me.), *affirmed per curiam*, 98 F.3d 1 (1st Cir. 1996), *cert. denied sub nom* *Moore v. Chamber of Commerce of the United States*, 537 U.S. 1018. *See also* *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1052-55, 1061 (4th Cir. 1997). In contrast, in dictum, the Seventh Circuit indicated that the teachings of *Buckley* and *MCFL* do "not dictate one outcome rather than another" in the types of cases that generated the disagreement between the *Furgatch* and *Christian Action Network* courts. *See Wisconsin Right to Life v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998), *cert. denied*, 525 U.S. 873 (1998).

⁷¹ *FEC v. Christian Action Network*, 894 F. Supp. at 953-54. *Contrast* *Furgatch*, 807 F.2d at 865 (asserting that express advocacy occurs even though the advertisement "failed to state the precise action called for, but rather left the reader with an 'obvious blank' to fill in").

⁷² *FEC v. Christian Action Network*, 894 F. Supp. at 954.

been to protect pure issue discussion, and not to protect all political speech other than express advocacy, from intrusive rules that could inhibit or unduly restrict a speaker.⁷³ The obstacle to achieving this goal is “line-drawing problems” posed by the influencing language.⁷⁴ The express advocacy doctrine was elaborated as a means of preventing the line from being drawn in a way that could subject issue discussion to campaign finance law (avoiding overbreadth) as well as insurance that speakers would be on notice regarding which of their activities required disclosure (avoiding vagueness) in situations where the context did not preclude such defects. Given the instrumental status of the express advocacy standard, the *McConnell* Court’s acknowledgment that the magic words version of the standard is now an “anachronism” because of the ease with which it is evaded,⁷⁵ and the same Court’s acceptance of regulation of electioneering communications and those simply “supporting” or “attacking” a candidate in certain contexts,⁷⁶ the Court might find the reasonable person/unmistakable advocacy test a reasonable expression of the type of campaign activity appropriately regulated in the current political environment.

3. Broader constructions of the influencing language. One difficulty, then, in relying on the express advocacy standard when interpreting the influencing language in the definition of a political committee is that the standard may include a facts and circumstances test of the kind endorsed by the Ninth Circuit in *Furgatch* and embodied in the FEC’s express advocacy regulation. A more daunting obstacle is the fact that the Supreme Court has not in fact limited the influencing

⁷³ See *Buckley*, 424 U.S. at 79.

⁷⁴ *Buckley*, 424 U.S. at 79.

⁷⁵ *McConnell*, 540 U.S. at 194, n.77, 124 S. Ct. at 689, n.77.

⁷⁶ See *infra* Part II.A.3 (*infra* pp. 36-37).

language to express advocacy in every provision of FECA. In examining the contribution limits to candidates, parties, and political committees added in 1974, for example, the Court did not perceive a need to resolve the ambiguity in the meaning of the influencing language in the definition of a contribution much less to limit the language to express advocacy.⁷⁷ While acknowledging that the ambiguity inherent in the language could be troublesome in other contexts, the Court argued that the language “presents fewer problems” for someone desiring to avoid exceeding the statutory contribution ceilings because of “the limiting connotation created by the general understanding of what constitutes a contribution.”⁷⁸ In the same decision, the Court observed “vagueness problems” could arise in determining which disbursements of a candidate or political committee count as expenditures for reporting purposes because of the ambiguity of the influencing language. The Court concluded, however, that “[e]xpenditures of candidates and of ‘political committees’ so construed⁷⁹ can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.”⁸⁰ In short, in two⁸¹ instances in *Buckley*, the ambiguity inherent in the influencing language did not create constitutional burdens on the speech rights of donors to or

⁷⁷ *Buckley*, 424 U.S. at 24 n. 24.

⁷⁸ *Buckley*, 424 U.S. at 24 n. 24.

⁷⁹ The Court had just noted that lower courts had construed the definition of a political committee narrowly to encompass “only...organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Buckley*, 424 U.S. at 79.

⁸⁰ *Buckley*, 424 U.S. at 79.

⁸¹ Each of the two instances involved multiple situations. The “first” instance related to contribution limits for transfers of value to candidates and their committees, to parties and their committees, and to political committees that were not candidate or party committees. The “second” instance related to disbursements made by candidates and their committees, on the one hand, and political committees, on the other.

participants in a campaign.

At first glance, these outcomes seem anomalous, given the reasoning in *Buckley* discussed earlier.⁸² Presumably the influencing language can be overbroad in the two contexts at issue. A group controlled by a candidate, not to mention nonconnected political committees not controlled by candidates, would not necessarily be engaged in express advocacy all the time, yet transfers of value to such entities would uniformly be treated as contributions, *i.e.*, as made for the purpose of influencing the outcome of a federal election, and the groups' disbursements would uniformly be deemed expenditures, *i.e.*, as made for the purpose of influencing. Recent empirical analysis has in fact revealed that ads funded by candidates and their committees involve express advocacy only five percent of the time, largely because more subtle ads are considered by marketing experts to be more effective.⁸³ For the same reasons, a group that has the nomination or election of a candidate as its major purpose would not necessary have express advocacy as its major purpose or the major part of its activities. Express advocacy on the part of candidates or of political committees, in other words, cannot be assumed to be the dominant, much less the exclusive type of action or mode of communication. Yet the *Buckley* Court saw no need to narrow the construction of a contribution or an expenditure to express advocacy in these instances to keep the influencing language from constitutional infirmity, even though its application would surely capture a broad spectrum of activities related to federal campaigns.

The Court's logic in those instances in which it did not impose an express advocacy requirement is instructive. In the case of contribution limits, overbreadth and vagueness were cured

⁸² See *supra* Part II.A.1.

⁸³ See *McConnell*, 540 U.S. at 127-28, 206, 124 S. Ct. at 651, 696.

by what the Court called “the limiting connotation created by the general understanding of what constitutes a contribution.”⁸⁴ This invites the question, why was the general understanding not successful in limiting the connotation of the influencing language in connection with independent expenditures? The contributions in question in *Buckley* were those given to candidates or political committees, recipients whose characteristic mission is to influence the outcome of elections for candidates for federal office in whatever manner possible. In this context, the indeterminacy of the influencing language in the abstract was apparently made determinate by the *nature of the recipient*. Contributors and recipients alike are on notice that the contributions are subject to FECA restrictions because they will be used by the recipients for the campaign. There is thus no uncertainty or chilling of the donor’s speech. Notably, it is the characteristic mission of the recipients, not the express advocacy standard, that eliminates constitutional vagueness or uncertainty.

Similarly, the general understanding of candidates’ and political committees’ characteristic missions served as a predicate for the Court’s willingness to dismiss threats of vagueness or overbreadth when all disbursements by candidates and political committees are treated categorically as expenditures, *i.e.*, as made for the purpose of influencing the outcome of a campaign for federal office. As a result of the Court’s interpretation, the influencing language will apply as properly to the dry charts and off-putting graphs used by Ross Perot to make his case to voters as it will to the most polished, negative Madison Avenue type ads approved by a campaign director pushing the envelope. The *nature of the spender* in these instances dispels the ambiguity of the abstract influencing language. The border police, in the form of express advocacy, need not stand guard when the characteristic mission of the recipient or the spender carries with it a limiting connotation.

In contrast, individuals and entities that are not themselves candidates or political committees

⁸⁴ *Buckley*, 424 U.S. at 637, n.24.

and that are not contributing to candidates or political committees in general lack a recipient or spender whose characteristic mission is commonly understood to resolve the influencing language's potential ambiguity. As a consequence, the Supreme Court has reviewed restrictions on spending by such individuals and groups for purposes related to a campaign with strict scrutiny, and it has limited the risk of vagueness and overbreadth through the express advocacy constraint.⁸⁵ Of course, such persons can become subject to a "general understanding" accompanied by a "limiting connotation" that will override considerations of vagueness or overbreadth if they coordinate their spending with a candidate or party. In that event, because of the characteristic mission of the other party to the arrangement, their spending will be treated as a campaign contribution by FECA regardless of whether they intend to or do in fact fund express advocacy or something else.⁸⁶

The *McConnell* decision validated three additional provisions involving the regulation of electoral activities broader than express advocacy in addition to those upheld in *Buckley*. The first was occasioned by Congress's attempt to address what it and many commentators labeled "so-called issue ads." These communications, which are clearly intended to create support or opposition to particular candidates while at the same time avoiding express advocacy, occur throughout campaign cycles, but are especially pronounced in the final months of a campaign and in battleground districts and states. Because the ads avoid express advocacy, those who fund them have traditionally paid with soft money, *i.e.*, money not subject to FECA regulations. Thus, corporations and unions have

⁸⁵ *Supra* Part II.A.1. The most notable exception to this generalization is the provision prohibiting corporations and labor organizations from making independent expenditures using treasury funds. 2 U.S.C. § 441b(a). For the justifications for this provision, see *infra* note 52.

⁸⁶ *See supra* notes 115-117 and accompanying text. Given the lack of precise standards defining relationships that are considered coordinated and those considered truly independent, this aspect of campaign finance law imposes its own line drawing problems that could give rise to constitutional infirmities.

used their treasury funds rather than their PAC money to pay for such ads and FECA disclosure of the expenditures was not required, even though more than ninety percent of those who viewed the ads saw them as advocating for or against a particular candidate.⁸⁷ There was thus a general understanding by the viewing public that the ads were express advocacy, and it was the intent of those who designed the ads that they should be thus interpreted by viewers.⁸⁸ Under the legal precedents outlined earlier, however, it was possible to argue that express advocacy was not involved because exhortations to support or defeat were not immediately followed by the names or likenesses of specific candidates, *i.e.*, because there was a “gap” between the exhortation to act and the specific candidate who was the object of the action.

To curb the most troublesome instances of this practice, Congress introduced the concept of an “electioneering communication,” defined as a radio or television communication that names or otherwise clearly identifies a candidate for a federal office, occurs in the 30 days prior to a primary or 60 days prior to an election, and can be received by at least 50,000 people in the area in which the election for that office will be held.⁸⁹ BCRA also added electioneering communications to the types of campaign activity subject to the prohibition imposed on the use by corporations and unions of their treasury funds as well as to the campaign activity subject to the disclosure provisions on individuals and groups other than candidates and political committees.⁹⁰ As a consequence, since the passage of BCRA, corporations and unions can only fund such ads with FECA regulated (*i.e.*,

⁸⁷ See *supra* note 82.

⁸⁸ See *McConnell*, 540 U.S. at 193, 124 S. Ct. at 689, 694.

⁸⁹ See 2 U.S.C. §§ 434(f)(3), 441b(c)(1).

⁹⁰ BCRA §§ 201(a), 203(a), 214(d) (codified at 2 U.S.C. §§ 434(f), 441b(b)).

PAC) money, and persons (other than candidates and political committees⁹¹) who make expenditures for such ads must now disclose them to the FEC within twenty-four hours after a certain dollar amount has been disbursed for communications of this kind in a year.

Why did the Supreme Court uphold the electioneering provisions as constitutional? None of the electioneering communication provisions necessarily involved a speaker or a recipient whose characteristic mission was campaign related. Instead, they suggest the existence of a third paradigm for the type of situation in which the Court is willing to find a general understanding with a limiting connotation that cures overbreadth,⁹² namely, when empirical evidence demonstrates that a particular activity or communication is both intended and generally, if not universally, understood as advocacy of one or more specific candidates for federal office. In the third paradigm, empirical data derived from the landscape of contemporary campaigns rather than statutory language and logic justifies finding a characteristic meaning of communications that both mention a candidate and occur in proximity to a primary or an election. The *McConnell* court conceded that some pure issue discussion or grass roots lobbying for legislation would be captured by the electioneering communication provisions, and thus become subject to funding by hard money exclusively, yet it determined that the overbreadth would be small and vagueness problems inconsequential, presumably because of the powerful statistical evidence of the likely purpose of such communications when they are broadcast during the most intense electoral time frame.

⁹¹ Candidates and political activities were already subject to disclosure rules for all their expenditures.

⁹² Vagueness was not an issue in the case, probably because of the specific elements Congress included in the definition. *See McConnell*, 540 U.S. at 202-07, 124 S. Ct. at 694-97 (noting that plaintiffs' challenge charged that section 203 of BCRA was overbroad, underinclusive, and discriminatory in favor of media companies).

On this view, the *McConnell* Court's reasoning can also be seen as validating the FEC's controversial reasonable person/unmistakable advocacy regulation,⁹³ given that the record was replete with statistics and expert testimony confirming that the selected class of communications was unlikely to be mistaken for anything but an attempt to influence the election or defeat of a candidate for federal office.⁹⁴ Alternatively, the decision can be seen as upholding the restrictions on electioneering communications primarily in order to prevent circumvention of the express advocacy rules during the time frame when the incentive to circumvent is the strongest.⁹⁵

The second provision regulating more than express advocacy approved in *McConnell* involved restrictions on the type of funding required of state and local parties engaged in campaign activities when a federal candidate is on the ballot. BCRA prohibited national political parties from raising or spending soft money.⁹⁶ To prevent the national parties from evading the prohibition by shifting the soft money regime to other party committees, Congress prescribed that state and local parties use regulated federal ("hard") money or a mix of hard and soft money to fund a range of campaign activities, including voter registration in the 120 days preceding an election, voter identification, get-out-the-vote ("GOTV") activities, generic party mobilization, and making a public communication that "promotes or support" or "attacks or opposes" a clearly identified federal candidate (often referred to as the "PASO" standard).⁹⁷ The concept of an expenditure in this

⁹³ See *supra* note 68.

⁹⁴ 11 CFR § 100.22(b). See *supra* Part II. A.2.

⁹⁵ See *McConnell*, 540 U.S. at 206, 124 S.Ct. at 696. See *infra* note 165 and accompanying text (discussing circumvention).

⁹⁶ See section 309 of BCRA (codified as 2 U.S.C. § 441i(a)).

⁹⁷ See 2 U.S.C. §§ 431(20), 441i(a). The monies in the "mix" referred to in the text are known as "Levin funds."

provision thus applies far beyond express advocacy, and it was challenged in *McConnell* as being unconstitutionally vague based upon the reasoning in *Buckley*. Although the PASO language is considerably less precise than the definition of an electioneering communication and only a few notches less general than the influencing language deemed constitutionally infirm in *Buckley*, the *McConnell* Court rejected the plaintiffs' vagueness allegation. According to the Court, the words set forth "explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."⁹⁸

Viewed in the abstract, it is difficult to reconcile the *McConnell* Court's deference to the PASO standard with the *Buckley* Court's concern for the chilling effects of the ambiguous influencing language on core political speech; and the *McConnell* Court's justification for its deference went beyond the *Buckley* doctrine in other respects.⁹⁹ The *McConnell* Court was, however, true to the logic of *Buckley* in linking its analysis to the close connection between the national and state parties and recalling the special characteristics of political committees that made vagueness concerns less pressing than would be the case for independent expenditures, *i.e.*, that a political committee's expenditures "are, by definition, campaign related."¹⁰⁰

Although the characteristic mission of the national parties is not the characteristic mission of the state parties, the historic proximity between the two enabled the Court to dismiss vagueness concerns. One explanation is that the historic relationship served as a proxy for coordination,

⁹⁸ *McConnell*, 540 U.S. at 170, n.64, 124 S. Ct. at 675, n.64. The Court added that, should any ambiguity in the standard remain, the parties could seek an FEC advisory opinion for clarification. *Id.*

⁹⁹ See *infra* notes ____ and accompanying text.

¹⁰⁰ See *McConnell*, 540 U.S. at 170, n.64, 124 S. Ct. at 675, n.64, citing *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

broadly construed to include consultation and suggestion as well as outright requests.¹⁰¹ In that event, raising or spending soft money to fund the activities specified by Congress would be deemed a contribution of soft money to the national parties, which would violate BCRA's ban on the national parties receiving or spending as well as soliciting or directing soft money. The statutory language does not require this interpretation, however. FECA's coordination provision is triggered by "expenditures" made for any purpose, assuming coordination, whereas the soft money restrictions on state and local parties is triggered by a specific, albeit broad, list of activities that could impact the election of a federal candidate.¹⁰² This suggests that the soft money restrictions may have overcome potential vagueness concerns, not by presuming coordination, but due to the *combination* of the parties' historically close connection *and* the specificity of the influencing activities enumerated in the statute. If this is correct, this list of activities may be indicative of the latitude that the Court is now prepared to give Congress in regulating a very wide range of electoral activities in those contexts where empirical evidence has dispelled theoretical concerns about the chilling effects of uncertainty.

A third provision of BCRA upheld in *McConnell* regulates electoral activities much broader than express advocacy. This provision prohibits a party committee, regardless of whether it is connected to one of the national parties, from soliciting non-federal (or soft) money for, or making or

¹⁰¹ This is the meaning of FECA's provision treating coordinated expenditures by "any person" as a contribution to a candidate or party. *See* 2 U.S.C. § 441a(a)(7)(B)(i), (ii).

¹⁰² *See* 2 U.S.C. §§ 431(20), 441i(b). In addition to the argument, section 441a(d), which permits nation and state party committees to make expenditures in connection with a federal election in amounts that exceed contribution limits, is predicated upon the view that the committees of national and state political parties can act independently of the candidate. *See also* *FEC v. National Conservative Political Action Committee (NCPAC)*, 470 U.S. 480 (1985) (observing that political committee spending can be independent and even counterproductive for a candidate's campaign).

directing donations of non-federal money to, an organization described in section 501(c) of the Code if the organization “makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity).”¹⁰³ The purpose of the provision is to prevent the parties from evading the soft money ban of BCRA by raising soft money for exempt organizations, unregulated by FECA, that could use the money for certain electoral purposes.¹⁰⁴ The statutory language clearly implies that party committees can raise non-federal money without limit for exempt organizations that do not make expenditures in connection with a federal election. To make crystal clear that “expenditure” in this context refers to more than express advocacy, Congress added “including expenditures or disbursements for express advocacy.”

The language of the provision thus explicitly defines an expenditure as covering, although not limited to, federal election activities, *i.e.*, voter registration in the 120 days before an election, voter identification, get out the vote activities, generic (party) campaign activity, and PASO communications that support or attack a clearly identified candidate for federal office. The logic of the provision appears to be similar to the logic of the provision restricting state and local party

¹⁰³ 2 U.S.C. § 441i(d)(1). The statute refers to “any funds.” However, the *McConnell* Court construed the language to refer to non-federal funds because the ban, if applied to money raised in accordance with FECA restrictions, would be unconstitutional. *See McConnell*, 540 U.S. at 174-78, 124 S. Ct. at 678-80. The subsection also contains a parallel prohibition with for 527 groups. 2 U.S.C. § 441i(d)(2). The latter provision is discussed *infra* notes 106, 109 and accompanying text.

¹⁰⁴ Some exempt organizations described in section 501(c) of the Code can engage in electoral activities without losing their exempt status. *See, e.g.*, Steven H. Sholk, *A Guide to Election Year Activities of Section 501(c)(3) Organizations*, in 6 TAX STRATEGIES FOR CORPORATE ACQUISITIONS, DISPOSITIONS, SPIN-OFFS, JOINT VENTURES, FINANCINGS, REORGANIZATIONS & RESTRUCTURINGS 1299 (2004); Elizabeth Kingsley and John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55 (2004).

committees to using federal money or Levin funds to pay for federal election activities.¹⁰⁵

Regulation is justified when it applies to the *confluence* of electoral activities of a certain kind and party committees raising money for entities engaged in such activities. In the case of national parties, which are subject to an absolute prohibition against raising, etc., non-federal money,¹⁰⁶ the provision appears to be redundant. State and local party committees, in contrast, are prevented from spending non-federal funds on federal election activities by the provision discussed earlier, but could raise money for entities engaged in such activities as long as the money raised was not earmarked to pay for the activities in question. The provision does not, however, limit *individuals*, *groups*, and *political committees* (other than party committees) from fund raising for, or making contributions to, exempt organizations engaged in federal election activities. This suggests that, Congress did not intend to subject to comprehensive FECA regulation organizations described in 501(c) and involved in the campaign activities that comprise federal election activities. In any event, it is unclear whether the Supreme Court would have countenanced such regulation based upon the three paradigms elaborated in this section of the article.¹⁰⁷

4. Provisional application to 527 groups. Section 441(d)(2), added by BCRA, suggests that Congress recognizes that not all 527 groups qualify as political committees. The provisions prohibits a political party committee, national or otherwise, from soliciting nonfederal money for or directing such money to 527 groups. The purpose of section 441(d)(2) was to prevent

¹⁰⁵ See 2 U.S.C. §§ 431(20), 441i(a), and *supra* notes - and accompanying text.

¹⁰⁶ See 2 U.S.C. § 441i(a).

¹⁰⁷ As noted earlier, the extent of the electoral activity being regulated is only one of the considerations influencing the Court's constitutional analysis. For a discussion of other factors, see Part III.

parties from circumventing their inability, post-BCRA, to raise soft money for themselves by raising it for “like-minded” exempt organizations that would then spend the money to benefit the parties’ candidates.¹⁰⁸ The prohibition applies to solicitations for all 527 organizations other than those that have registered as political committees under FECA or are regulated by state campaign finance laws.¹⁰⁹ Although the prohibition does not spell out the characteristics of the 527 groups subject to the regulation, the provision makes no sense unless there are 527 groups to which it could actually apply, *i.e.*, one or more types of 527 organization that are not political committees under FECA or regulated under state campaign finance laws and that could be the recipients of parties’ soft money fund raising were it not for this prohibition. If this inference is correct, the implication of section 441(d)(2) is that some of the controversial 527 groups can raise and spend soft money as long as they raise it independently of party fund raisers and as long as they abide by any relevant FECA reporting and disclosure rules that may be triggered by the nature of the activities they engage in, *e.g.*, independent expenditures or electioneering communications.¹¹⁰

This interpretation of section 441(d)(2) is at odds with the statements made by some

¹⁰⁸ See *McConnell*, 540 U.S. at 175, 124 S. Ct. at 678-80.

¹⁰⁹ See 2 U.S.C. § 431(4)(C), (5), (6) (calling “political committees” all candidate committees and any local party committee that receives more than \$5,000 in contributions in a year or itself makes more than \$1,000 of contributions or expenditures in a year).

¹¹⁰ For these requirements, see 2 U.S.C. § 434(e), (f). It is also possible to interpret section 441(d)(2) as referring to 527 groups that engage exclusively in non-federal or non-electoral activities, *i.e.*, the groups expressly excepted from the registration requirements of the 527 Tax Reform Act of 2005. See *supra* note 7. According to one commentator, the prohibition may be a congressional response to the fact that the FEC routinely refuses to enforce FECA rather than a reflection of Congress’s interpretation of the scope of FECA restrictions accurately understood and enforced. Comments of Steve Weissman, Associate Director of the Campaign Finance Institute, in correspondence with the author, June 1, 2005.

members of Congress who, when introducing 527 group reform legislation, asserted that the controversial 527 groups are required by existing law to register under FECA as political committees.¹¹¹ Needless to say, members' assertions do not necessarily express the current state of the law accurately. In addition, the question of the meaning of the definition of a political committee may go beyond the language used in specific provisions of FECA to legitimate interpretations of the language articulated by the Supreme Court. In particular, if the FEC promulgates regulations predicated upon such interpretations, it is possible that the Court would uphold them as valid exercises of the agency's authority, even in the absence of specific statutory directives by Congress to the agency.

Take, for example, the coordination provision added by BCRA to include disbursements for electioneering communications among the types of expenditure that will be reclassified from independent expenditures to contributions subject to contribution limits if the person funding the communications is acting at the suggestion of a candidate or political party.¹¹² As was noted earlier, this addition could be construed as an acknowledgment by Congress that "expenditure" in the original version referred only to express advocacy.¹¹³ In upholding the new provision, however, the Court referred to the new provision as one that "*clarifies* the scope of the preceding subsection..., which states more generally" that coordinated expenditures will be treated as contributions.¹¹⁴

The Court's language suggests that it viewed the original provision, which spoke only of

¹¹¹ See *supra* note 11.

¹¹² 2 U.S.C. § 441a(a)(7)(C).

¹¹³ See *supra* note 67 and accompanying text.

¹¹⁴ *McConnell*, 540 U.S. at 202, 124 S. Ct. at 694 (emphasis added).

expenditures, as comprising a more general category of campaign speech than express advocacy. In that event, “expenditure” in this coordination provision already included electioneering communications in principle and possibly other types of campaign speech not specified, or not yet specified by Congress. The BCRA provision merely “clarifies” what existing law, properly understood, already covered-- possibly due to Congress’s desire to put to rest the controversies surrounding the reach of the influencing language in the definition of expenditure for coordination purposes. The Court reinforced the suggestion that the BCRA amendment was not needed to enable the definition of an expenditure to reach electioneering communications by explaining further that the BCRA addition “pre-empts a possible claim that [the original provision] is ...limited, such that coordinated expenditures for communications that avoid express advocacy cannot be treated as contributions.”¹¹⁵ The Court concluded that “there is no reason why Congress may not treat coordinated disbursements for electioneering communications in the same way it treats all other coordinated expenditures.”¹¹⁶

The clear implication of the Court’s comments is that, in the context of coordination, any disbursements in connection with the campaign will be treated as regulated by FECA regardless of the precise nature of the specific electoral activities actually involved in a particular case. Presumably, then, had the FEC promulgated a regulation to this effect, the *McConnell* Court would have upheld the regulation against claims that the regulation exceeded the agency’s authority. We can thus speculate with confidence that, were the FEC to write regulations specifying that funding for any activities comprehended by the term “Federal election activities” will be considered a

¹¹⁵ *McConnell*, 540 U.S. at 202, 124 S. Ct. at 694.

¹¹⁶ *McConnell*, 540 U.S. at 203, 124 S. Ct. at 694.

contribution to a candidate or party if coordinated with them, it is likely that the Court would uphold the regulation based upon its reasoning in the *McConnell* decision.¹¹⁷ The Court's expansive approach to the nature of an expenditure in this context is not, however, repeated anywhere else in the *McConnell* opinion, *i.e.*, outside the context of the coordination provision. This fact suggests that the Court was influenced in reaching its judgment by one of the paradigms discussed in this Part. The participant in a campaign that coordinates with a candidate or party acquires, for practical purposes, the characteristic mission of the candidate or party in the relationship and thus there is no constitutional bar to subjecting that participant to restrictions that assume the presence of the other party's characteristic mission.

In sum, based upon the Supreme Court's decisions concerning the extent of electoral activity properly subject to FECA regulation, it seems likely that the Court's willingness to uphold legislation, such as the 527 Reform Act of 2005, which would establish a broad construction of the type of electoral activities triggering political committee status, will depend upon showing that the characteristic mission of 527 groups under Internal Revenue Code precedents is to influence the nomination, election, or defeat of one or more federal candidates in the sense that we associate with

¹¹⁷ Nonetheless, because the Court did not state what are the boundaries of the meaning of expenditure in the context of coordination, in particular, whether it extends to any and all disbursements made at the suggestion of or in coordination with a candidate or party, there is some uncertainty as to the scope of the FEC's authority. The situation is less clear in connection with other provisions of FECA that refer to expenditures without elaboration since the Court's comments in the provision discussed in the text are explicitly linked to the coordination provision. Nothing in the passage suggests, must less requires, a broad interpretation of the influencing standard in any other campaign finance provision. In fact, the logic of the analysis may be that, when an expenditure is made as a result of some arrangement with a person or entity whose characteristic mission is the election of one or more specific candidates for federal office, the expenditure is no longer truly independent and its character should be determined based upon the character of the other party to the arrangement.

candidates and national parties. Alternatively, the Court could permit such legislation if there is a historic or empirically demonstrable close relationship between the controversial 527 groups and the candidates or parties and Congress enumerates specific types of campaign activities (in addition to express advocacy) that will be considered evidence of an intent to influence one or more federal candidates for purposes of the definition of a political committee.¹¹⁸

In short, based upon the logic of the Supreme Court's decisions discussed in this Part, it is questionable whether the Court would validate the type of reform legislation currently proposed,¹¹⁹ as applied to 527 groups that can demonstrate their complete independence of parties and candidates, simply because of the range of electoral activities they engage in, assuming that the larger part of those activities does not constitute express advocacy.

B. The Major Purpose Test

1. The applicability of the major purpose standard. As noted earlier, the Supreme Court in *Buckley* noted that FECA's rules requiring disclosure by political committees of all expenditures could be considered overbroad, but stated that this possibility would not rise to the level of constitutional significance based, in part, on the circumstance that [t]o fulfill the purposes of the Act [the words "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed

¹¹⁸ This follows the model of BCRA's soft money regulations applicable to state parties discussed above. *See supra* notes ___ and accompanying text.

¹¹⁹ *See supra* note 7.

by Congress. They are, by definition, campaign related.¹²⁰

Most commentators have interpreted the Court's words to mean that, because of the burdensome nature of the disclosure restrictions imposed upon a political committee, no organization can be required to register as a political committee unless it is controlled by a candidate or its major purpose is nominating or electing (or attempting to defeat the nomination or election of) one or more federal candidates.¹²¹ As a result of this interpretation, it is frequently assumed that both the statutory expenditure test and the judicially created major purpose test must be satisfied to compel an organization to register as a political committee.

The FEC did not accept the existence of a major purpose test immediately after the *Buckley* decision was rendered.¹²² In the last decade, however, the agency has usually taken the position that political committee status presupposes satisfying both tests.¹²³ In some instances, the FEC has

¹²⁰ *Buckley*, 424 U.S. at 79.

¹²¹ See Foley and Tobin, *Section 527 Groups Not an End-Run around McCain-Feingold*, *supra* note 42.

¹²² See, e.g., FEC Advisory Opinion ("AO") 1978-51 (stating that an unincorporated Native American tribe would become a political committee if it contributed more than \$1,000 to federal candidates or political committees in a single year), FEC AO 1979-41 (stating that the National Committee for a Democratic Alternative would become a political committee if it ran ads opposing Jimmy Carter's nomination as the Democratic candidate for President), FEC AO 1988-22 (stating that a group seeking to have more Republicans elected in a certain area would become a political committee if its distributions or expenditures exceeded \$1,000 per year), *at* <http://www.fec.gov/law/advisoryopinions.shtml>. In Notice 2001-3 ("Definition of Political Committee"), 66 FR 13681, 13682 (Mar. 7, 2001), the FEC proposed a new regulation that would elaborate the definition of "contribution" and stated that the receipt of contributions and expenditures in excess of \$1,000 would qualify the recipient as a political committee. This rulemaking is considered to be "in abeyance." See FEC, First General Counsel's Report, MUR ___, at 6, n. 7 (Sept. 3, 2003), written in connection with *Kean for Congress Committee v. FEC*.

¹²³ In the wake of *Akins*, *supra* note 9, and *MCFL*, *supra* note 53, the FEC expressly abandoned the view that the statutory prong alone could trigger political committee status. See FEC

dismissed complaints submitted to the agency asking it to compel a specific group to register as a political committee, advancing as the justification the fact that the group does not have the requisite major purpose.¹²⁴ On one occasion, in contrast, the FEC argued that the major purpose test, strictly construed to refer to the nomination or election of one or more specific candidates, is properly required only in the case of groups that are not primarily “electoral.” According to the agency, groups “clearly engaged in partisan politics” because they are dedicated to electing or defeating a class of candidates (Democratic or Republican, liberal or conservative, for example) do trigger political committee status even though the major purpose test, based upon a strict construction of “expenditure,” is not satisfied.¹²⁵

The *Buckley* Court’s language is more ambiguous than is commonly thought. The passage quoted above seems to say that, if either of two conditions is met (candidate control or major purpose), constitutional concerns are satisfied without further inquiry. The passage does not, however, preclude the possibility that other organizations, which are not by definition campaign

AO 1995-11, at 3 and n. 10, at <http://www.fec.gov/law/advisoryopinions.shtml>.

¹²⁴ See *Akins v. FEC*, 146 F.3d 1049 (D.C.Cir. 1998) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998); *Kean for Congress Committee v. FEC*, Civil Action No.: 1:04CV00007 (D.D.C. 2004), at <http://www.fec.gov/law/litigation.shtml>. Interestingly, the FEC’s General Counsel advised the FEC in the latter case that the group in question (the Council for Responsible Government, a group organized to oppose the election of Kean in the 2000 New Jersey Congressional primary) should have registered as a political committee, but the vote of the FEC Commissioners, which was 3-3, failed to endorse that advice.

¹²⁵ See *FEC v. GOPAC, Inc.*, 917 F. Supp. 851 (D.D.C. 1996). The FEC lost the case and did not appeal, although five of the six Commissioners voting on the appeal had voted to bring the lawsuit against GOPAC in the first place. On this inconsistency, see Statement for the Record in *FEC v. GOPAC*, statement by Vice Chairman John Warren McGarry, Commissioner Danny Lee McDonald, and Commissioner Scott E. Thomas, at <http://www.fec.gov/members/thomas/thomasstatement22.htm>.

related and cannot be assumed to be campaign related, could nonetheless be shown to be campaign related and operating in what the Court called “the core area sought to be addressed by Congress.”

For example, organizations with multiple major purposes might be shown, through a combination of argument and empirical data, to be sufficiently campaign related that, using strict or exacting scrutiny, the Court might nonetheless find regulating them as political committees is not invalid despite potential constitutional concerns.¹²⁶ This is because in the *Buckley* passage in question, the Court was concerned that the FECA provision requiring a committee to disclose all expenditures might be applied inappropriately “to reach groups engaged purely in issue discussion.”¹²⁷ The narrow construction of the definition of a political committee solved the “line-drawing problem” noted by the Court.¹²⁸ Line-drawing was also the problem that led the *Buckley* court to limit the reach of certain disclosure provisions applying to the independent expenditures of individuals or groups independent of campaigns to disbursements made for express advocacy. However, as a result of the *McConnell* decision, it is now clear that the narrowing construction of the influencing language through the doctrine of express advocacy does not represent the outer boundary

¹²⁶ Foley and Tobin consider and reject this alternative. See Foley and Tobin, *Section 527 Groups Not an End-Run around McCain-Feingold*, *supra* note 42, at 2404-2405. Some courts, in contrast, have asserted that the practical impact of “the” major purpose is not different from that of “a” major purpose. See *North Carolina Right to Life v. Becke*, 108 F. Supp. 2d 498, 508 (E.D.N.C. 2000) (arguing that the point of the major purpose standard “must be whether a group may fairly be called “campaign-related”).

¹²⁷ *Buckley*, 424 U.S. at 79.

¹²⁸ *Buckley*, 424 U.S. at 78. The Court of Appeals for the District of Columbia Circuit has also offered a narrowing construction of the *Buckley* statement quoted in the text, namely, that it refers only to situations involving independent expenditures rather than those involving contributions since the former are afforded a greater degree of constitutional protection than the latter. See *Akins v. FEC*, 101 F.3d 731, 741-42 (D.C. Cir. 1996) (*en banc*), *vacated on other grounds*, 524 U.S. 11 (1998).

of constitutionally permissible solutions to the line drawing problems for which it was proposed.¹²⁹ By the same token, in the wake of *McConnell* it is pertinent to re-examine the Court's narrowing construction of the definition of a political committee to determine if other approaches fall safely within the outer limits of constitutional interpretation. In other words, after *McConnell*, the burdensome regulation of political committees may be considered justified when a group engages in significant amounts of campaign activities even though the related expenditures constitute less than fifty percent of the group's total disbursements. Alternatively, the *McConnell* clarification of the constitutional status of *Buckley*'s line drawing construction of the statute suggests the possibility that imposing the burdens of political committee regulation on groups might pass constitutional muster as long as the groups were not primarily devoted to issue discussion, which is entitled to the highest form of protection accorded political speech.¹³⁰ Finally, the *McConnell* clarification may refocus attention on the counterintuitive implication of the major purpose test as typically construed, namely, that it shelters from FECA political committee regulation a group spending \$5,000,000 on campaign activities, if the sum represents a small fraction of its annual expenditures, while it would subject to the FECA regime a group with an annual budget of \$1,000,000 if more than \$500,000 of that amount were spent on campaign activities. Such a result would be a triumph of form over substance and would protect from the political committee regime the organizations most likely to pose a threat to the integrity of the election process and best equipped to comply with the campaign finance rules created to diminish that threat.

¹²⁹ See *supra* Parts II.A.3-4.

¹³⁰ It is possible to distinguish between issue discussion and issue advocacy, moreover. Until the *McConnell* decision, the Supreme Court always used the phrase "issue discussion" rather than "issue advocacy." In *McConnell*, the Court often refers to "so-called issue advocacy." 540 U.S. at 126, 127, 129, 190, 193, 194, 124 S. Ct. at 650, 651, 652, 687, 688, 689.

2. What campaign activity must be major? Assuming that an organization should not, as a matter of constitutional law, be required to register as a political committee unless its major purpose is campaign activity, the question arises as to the nature of the campaign activity that is relevant. As was discussed in Part II.A, the relevant activity depends, among other things, on the context, *i.e.*, whether constitutional considerations of vagueness or overbreadth dictate a narrow construction of the influencing language. Because the Supreme Court upheld BCRA's electioneering communication provisions against both vagueness and overbreadth challenges in several instances, it is tempting to assume that electioneering communications should be counted along with express advocacy in determining whether an organization's activities reveal that its major purpose is campaign activity.¹³¹ If enacted by Congress, a provision to this effect is likely to be valid given that the *McConnell* Court upheld adding the disclosure of electioneering communications to the provision requiring disclosure of independent expenditures, a category that the Court has repeatedly characterized as the form of campaign speech that is most protected because it most resembles the discussion of issues.¹³² The practical consequences of thus construing the influencing language for purposes of the major purpose standard may not, however, be very significant because most groups that sought to avoid becoming subject to hard money restrictions in any context chose in the 2004 election to avoid engaging in electioneering communications altogether rather than set up a hard money account to fund them.

A much harder question is posed by the possibility that PASO communications, or even all

¹³¹ See Foley and Tobin, *Tax Code Section 527 Not an End-Run around McCain-Feingold*, *supra* note 43, at 2404.

¹³² The *McConnell* Court also upheld adding electioneering communications to the types of campaign communications that corporations and labor organizations cannot fund from their general treasuries. See *supra* notes 88-91 and accompanying text.

activities subsumed under the heading of “Federal election activities,” should be counted in determining whether a group’s major purpose qualifies as the nomination or election of one or more candidates, *i.e.*, as campaign related.¹³³ The danger is that, in so doing, activities that would clearly be subject to FECA regulations once a group is a political committee would be used to determine whether a group is a political committee in the first place. The danger, in other words, is the possibility of bootstrapping or circularity and, thus, of being overinclusive in defining the activities that trigger political committee status.

An important implication of the *McConnell* Court’s reasoning can provide a conceptual framework within which to reach judgments as to the appropriate activities to count in determining whether a group’s activities qualify it as a political committee. A predicate of *McConnell* is that, from the vantage point of constitutional doctrine, there are more than two points, express advocacy and issue discussion, on the political speech axis. The Court’s reasoning suggests that there is rather a continuum, with issue discussion and express advocacy located at the two opposite poles. The *Buckley* Court did not necessarily disagree with the idea of a continuum. Rather it directed its attention only to these two points in order to prevent constitutionally salient line drawing problems from arising if the influencing language was taken at face value. The phenomenon of electioneering communications, introduced as part of BCRA, represents a form of political speech on the express advocacy side of the continuum, but somewhat closer to the center of the continuum than is express advocacy. The concept of “Federal election activities,” as defined in FECA, includes distinct types of

¹³³ This is the position endorsed by Foley and Tobin, *Section 527 Groups Not an End-Run around McCain-Feingold*, *supra* note 42. The authors argue that 527 groups (other than 527 groups focused on state or local elections), by virtue of the terms of their qualification for exemption under section 527 of the Code, will necessarily qualify as political committees. *See also* Edward B. Foley, *The “Major Purpose” Test: Distinguishing between Election-Focused and Issue-Focused Groups*, 31 No. Ky. L. Rev. 341 (2004).

campaign related activities arguably at different degrees of remove from express advocacy and electioneering communications. Employing this notion of degrees of proximity to the two poles on the political speech axis, and recalling that to the *Buckley* Court's ultimate goal was to avoid requiring burdensome FECA regulation of groups "engaged purely in issue discussion," it may be possible to analyze the specific types of campaign activities subsumed under the heading of "Federal election activities" individually to determine the risk that each poses of vagueness or overbreadth if applied to groups that have not yet been assumed to be campaign related by definition.¹³⁴

Based solely upon the analysis in Part II.A of the contexts in which the relevant electoral speech is narrowly or broadly construed, it would seem that to include the entire range of Federal election activities in the scope of the influencing language for purposes of triggering political committee status would go beyond any Supreme Court precedents, including *McConnell*. Almost every time that the Court has validated a broad construction of the relevant electoral activities, there has been some party to the "transaction" whose characteristic mission was the nomination or election of one or more clearly identified candidates. At the same time, it is possible to argue that the characteristic mission of parties, as contrasted with that of candidates, can be seen as party building some of the time and the nomination or election of a class of candidates rather than as specific candidates some of the time.¹³⁵ To that extent, the Court validated expanding the scope of the influencing language in contexts that did not presuppose a participant with a characteristic mission that dispelled constitutional concerns.

¹³⁴ In other words, one would have to assess voter registration within 120 days of an election, voter identification, voter mobilization, and PASO communications separately.

¹³⁵ See *Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604 (1996) (*Colorado I*).

III. WHAT IS A POLITICAL COMMITTEE? CONSTITUTIONAL JUSTIFICATIONS

The breadth of the range of campaign activities being regulated is a central consideration when those affected by the regulation bring a constitutional challenge, but it is not the sole consideration that influences the Court's ultimate determination. Several additional considerations are pivotal in the Supreme Court's analysis of the limits on regulation of campaign speech. Among other things, constitutional doctrine privileges some types of campaign speech over others. In particular, expenditures are generally accorded greater First Amendment protection than contributions.¹³⁶ Constitutional doctrine also privileges some speakers over others, according more deference to individuals (other than candidates) and non-corporate entities than to corporations and labor organizations.¹³⁷ Further, the state interest advanced is a key component of the Court's analysis: certain interests, such as eliminating corruption or the appearance of corruption, are presumptively valid, whereas others, such as equalizing the playing field among campaign speakers, are presumptively unconstitutional.¹³⁸ As would be expected, the type of regulation involved—reporting and disclosure requirements as compared with limitations of the amount or source of contributions—also affects the degree of protection afforded campaign speech. Finally, the type and amount of empirical evidence necessary to support the state's claims vary in accordance with some of the preceding considerations.¹³⁹

A. Contributions, Expenditures, and 527 Groups

¹³⁶ See *infra* Part III.A..

¹³⁷ See *infra* Part III.B.

¹³⁸ See *infra* Part III.C.

¹³⁹ *Nixon v. Shrink Missouri*, 528 U.S. 377 (2000).

The Court has the fewest concerns about the constitutionality of regulating campaign speech when the speech in question takes the form of a contribution to a candidate or political committee, rather than an expenditure, especially an independent expenditure. Expenditures represent expressive speech, according to the Court, because of the significant financial cost of “virtually every means of communicating ideas in today’s mass society.”¹⁴⁰ To restrict expenditures for campaign speech will necessarily limit “the number of issues discussed, the depth of their exploration, and the size of the audience reached.”¹⁴¹

In contrast, the Court has concluded that contributions are a “symbolic expression of support,” in part because they fail to convey the basis of the support and in part because the size of the contribution does not necessarily reflect the intensity of the contributor’s support.¹⁴² In addition, people whose symbolic speech is constrained by contribution caps are still free to engage in political expression above and beyond the caps by spending as much as they wish on independent expenditures or by becoming “a member of any political association and to assist personally in the association’s efforts on behalf of candidates.”¹⁴³ Thus, FECA’s contribution limits constitute only a “marginal restriction” upon a person’s freedom of speech during a campaign.¹⁴⁴ One of the most important consequences of the contribution/expenditure distinction is that the Court’s review of

¹⁴⁰ *Buckley*, 424 U.S. at 19.

¹⁴¹ *Buckley*, 424 U.S. at 19.

¹⁴² *Buckley*, 424 U.S. at 21. Noting that a person’s financial circumstances and “past contribution history” may also explain how much is contributed, the Court concludes that “the size of the contribution provides a very rough index of the intensity of the contributor’s support.” *Id.* Contrast CITE (how much a candidate can raise is a rough index of his popularity).

¹⁴³ *Buckley*, 424 U.S. at 22.

¹⁴⁴ *Buckley*, 424 U.S. at 20-21.

the former is significantly less strict than its review of the latter, which enhances the likelihood that a campaign finance restriction will survive constitutional scrutiny.¹⁴⁵

At the same time, *Buckley* circumscribed the power of the contribution/expenditure distinction by making clear that contribution limits could be unconstitutional if they were so low as to prevent campaigns from being adequately financed or individuals from exercising their right of association in a meaningful way, *i.e.*, from “effectively amplifying” their voices by joining forces with like-minded people.¹⁴⁶ The Court found that this was not the case with FECA’s contribution limits because the “overall effect...is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression.”¹⁴⁷

These teachings of the *Buckley* decision do not bear directly on whether the definition of a political committee should be broadly or narrowly construed,¹⁴⁸ since the definition of a contribution and that of an expenditure were not discussed by the Court with reference to the definition of a political committee. The logic of the Court’s reasoning, however, is useful for assessing claims that opponents of interpreting those definitions broadly can be expected to advance, namely, that only express advocacy, from among the possible types of electoral activity, should be counted in assessing

¹⁴⁵ See *California Medical Ass’n v. Federal Election Comm’n*, 453 U.S. 182, 196 (1981) (plurality opinion) (characterizing contributions as “not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection”).

¹⁴⁶ *Buckley*, 424 U.S. at 21-22.

¹⁴⁷ *Buckley*, 424 U.S. at 21-22.

¹⁴⁸ By “broadly construed,” I mean that the influencing standard built into the definition refers to a wide range of campaign speech other than express advocacy. “Narrowly construing” the definition would limit its triggering mechanism primarily or exclusively to express advocacy.

whether an organization has surpassed either the statutory or the judicially created components of the political committee definition.

As was noted earlier, once an organization registers as a political committee it can not receive more than \$5,000 from any contributor for its hard money account, nor will it be able to accept contributions from the general treasury funds of corporations or labor organizations.¹⁴⁹ One argument for limiting the type of electoral activity that triggers political committee status to express advocacy is thus that political committee status greatly impairs an entity's ability to "speak" through the expenditure of money,¹⁵⁰ and it similarly reduces the power of contributors to such groups to magnify their voices and thus engage in effective collective action. It follows, according to this view, that the Court should minimize the vagueness and overbreadth potential of the triggering conditions because of the intrusive nature of the consequences for protected political speech. In addition, because it will be harder to raise funds if a group is limited to soliciting, receiving, and spending hard money, a 527 group's own ability to exercise its First Amendment right to speak will be compromised in addition to that of its contributors. In short, according to opponents of broadly construing the definition of a political committee, a *Buckley* analysis would consider 527 groups that are independent of candidates and parties as analogous to individuals making independent expenditures. The *Buckley* Court invalidated FECA provisions that placed limits on independent expenditures of individuals; similarly, the independent expenditures of entities should not be limited in amount because of a broad construction of the political committee definition.¹⁵¹

¹⁴⁹ See *supra* note 14.

¹⁵⁰ For the doctrine that money is speech, see *Buckley*, 424 U.S. at 19.

¹⁵¹ *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1997) (*Colorado I*), which invalidated independent expenditure limits on political parties, is not support for the general proposition in the text because the measure under review imposed a dollar cap on the

Other aspects of the logic of *Buckley*, however, favor a broad construction of the definition of a political committee. For example, in *Buckley*, the analysis of the rights of the contributors emphasized the symbolic nature of the speech component of contributions. Although the Court clearly did not contemplate contemporary multimillion dollar contributions when it said that the size of a contribution was only a modest reflection of the expressive speech of the donor, it did note that individuals prevented by contribution limits from further giving to a candidate were free to engage in independent political expression, presumably using independent expenditures on a candidate's behalf.¹⁵² Not only is this alternative still available; it is eminently feasible for potential contributors of amounts in excess of \$100,000, not to mention those in excess of \$1,000,000. Thus, it is unlikely that the Court today would find the indirect burden imposed by the proposed 527 group reform legislation on potential large contributors to 527 groups, which would result from including the groups within the definition of a political committee, to be an unconstitutional interference with the contributors' rights.

In addition, the possible infringement on the right of contributors who associate to amplify their views resulting from a broad construction is also unlikely to have constitutional purchase. First, an entity retains the ability to raise aggregate sums of any size whatever by increasing the number of its contributors. Moreover, in the wake of the 2004 election cycle, the proportion of enormous contributions to 527 groups suggests that the individuals likely to be constrained were those least in need of joining a group to have their voices heard. The provision of the proposed 527 group reform

amount political parties could spend independently of a candidate, whereas the impact, if any, on the amount of funds available to a 527 group for independent expenditures if it became a political committee would be an indirect result of being forced to rely on contributions subject to dollar limits.

¹⁵² See *Buckley*, 424 U.S. at 28.

legislation permitting a 527 group required to register as a political committee to accept up to \$25,000 from any individual each year for its nonfederal (soft money) account¹⁵³ would further lighten both the burden on the free speech and associational rights of the affected contributors and the ability of the entity to raise sufficient funds to be adequately financed. Finally, the Court made clear in one decision involving a contributor barred by campaign finance limits from giving more than \$5,000 to an entity sharing the contributor's interests that a contributor to a group does not have a constitutionally recognizable complaint when it exercises its free speech rights through an intermediary. According to the Court, the First Amendment rights of the association cannot be claimed by the contributor. Speaking through an intermediary thus changes not only the dynamic of the contributor's speech, but also the nature of its constitutional protection.¹⁵⁴

In sum, neither the claims of the 527 group nor those of its contributors are likely to constitute constitutionally sufficient reasons for invalidating proposals to broaden the definition of a political committee to encompass most if not all of the controversial 527 groups.

B. The Nature of the Speaker and 527 Groups

Several positions taken by the Court in later cases also militate against the argument opposing a broad interpretation of the definition of a political committee. First, the Court has upheld FECA's ban on independent expenditures by unions and corporations using general treasury funds because of the strong state interest in preventing corruption and the appearance of corruption in connection with entities capable of amassing large amounts of money.¹⁵⁵ Not all 527 groups raise

¹⁵³ See S. 271, *supra* note 8, § 3(a) (page 8, lines 15-19), S. 1053, *supra* note 8, § 3(a) (page 12, lines 17-21).

¹⁵⁴ See *California Medical Association*, *supra* note 144.

¹⁵⁵ For the special restrictions on corporations and unions, see *supra* notes -. For the discussion of corruption, see *infra* Part III.C.

huge sums of money, of course, and those that do not as well as those that raise all their money from a small number of contributors would be affected adversely by a broad construction of the definition of a political committee. In the past, however, the Court has acknowledged the disproportionate impact of certain campaign finance regulations on corporations or labor groups possessing only modest resources, but has nonetheless validated the restrictions in question if Congress's actions were otherwise constitutionally permissible.¹⁵⁶

In upholding restrictions on independent expenditures, the Court has also emphasized that, as part of its evaluation of the constitutional validity of campaign finance regulations, it will consider whether persons regulated acquired their capacity to amass large amounts of wealth through “special advantages” made possible by the state.¹⁵⁷ Most of these cases involve organizations that are able to accumulate large sums of money by virtue of their corporate form, which is conferred on them by the business law provisions of state law. Not all 527 groups benefit from the corporate form. In fact, most eschew the corporate form so as to avoid the special campaign finance restrictions on corporations. The Court’s “special advantages” argument in the corporation cases is, however, germane to assessing the constitutionality of a political committee definition likely to sweep large

¹⁵⁶ See *Beaumont v. FEC*, 539 U.S. 146, 157 (2003) (noting that the Court has repeatedly upheld the prohibition on corporations spending monies from their treasuries on campaign activities regardless of “the affluence of particular corporations” and even as applied to “nonprofit corporations ‘without great financial resources’”). Contrast *MCFL*, *supra* note 52, in which the Court did invalidate the section 441b prohibition as applied to an advocacy organization exempt under section 501(c)(4) of the Code. In reaching its conclusion, the Court noted three salient features of the organization that distinguished it from corporations properly subject to this restriction. First, the corporation engaged in no commercial activities, and it accepted no contributions from business entities. As a consequence of the fact that all its money came from individuals, it had not accumulated a “large war chest” and was unlikely to do so.

¹⁵⁷ See *National Right to Work v. FEC*, 459 U.S. 197, 207 (1982) (*NRWC*).

numbers of 527 groups into the comprehensive FECA regulatory regime. As will be discussed in Part IV, 527 groups are exempt organizations that owe their favorable tax status to the Internal Revenue Code. Section 527 of the Code declares that the income a 527 group receives from contributions will not be considered income subject to tax.¹⁵⁸ Were contributions to be characterized as income, most of the income would be taxable because section 162(e) denies taxpayers the ability to deduct as expenses the costs of lobbying or engaging in political activity.¹⁵⁹ In addition, contributions to 527 organizations are not subject to gift tax, even if the amounts in question exceed the annual gift tax exclusion amount (currently \$11,000). This affords contributors to 527 groups a far more favorable tax treatment than is available to donors to exempt groups described in section 501(c) of the Code (other than charities, whose donors benefit from the charitable contribution deduction). As a consequence, 527 groups have two state provided advantages enabling them to amass large sums of money. Although the special advantages received by 527 groups are not on all fours with those received by corporations, nonetheless because of the connection between the tax advantages and the entities' ability to accumulate large amounts of wealth, the Court's constitutional campaign finance jurisprudence suggests that it will tend to be sympathetic to lawmakers' efforts to control the excesses of 527 group fund raising.

C. Corruption, Candidate Benefit, and 527 Groups

Since *Buckley*, the Supreme Court has consistently maintained that the only government interest that justifies regulation of campaign speech is the need to prevent corruption or the appearance of corruption. Such public purposes as equalizing the ability of individuals or groups

¹⁵⁸ I.R.C. § 2501(a)(5).

¹⁵⁹ I.R.C. § 162(e).

with disparate resources to make their viewpoints known, reducing the exorbitant costs of campaigns, and enabling candidates without substantial resources to compete are not, according to the Court, legitimate reasons for regulating speech under the Constitution regardless of their desirability from a public policy perspective.¹⁶⁰

The Court's understanding of the meaning of corruption has, however, evolved during the three decades since *Buckley*. *Buckley* was primarily concerned with the dangers posed when people make large expenditures on behalf of a candidate because these would be hidden from public view and were likely to create a sense of obligation on the part of the candidate toward the contributor.¹⁶¹ Preventing corruption or the appearance of corruption of candidates by big spenders seeking to influence their conduct once elected has been seen as an important government interest since the beginning of the twentieth century.¹⁶² In decisions since *Buckley*, the Court has generalized its formulation of the threat posed by large contributions, including coordinated expenditures and bundled contributions, to include corruption through the mere granting of access for large contributors to lawmakers regardless of whether there is any evidence or likelihood that such access will influence a lawmaker's decision making or votes. Access and the possibility of access are thus seen as on a par with the more traditional notion of corruption as involving some manner of quid pro quo.

In addition, the Court has elaborated a doctrine of corruption in connection with corporations that adds to its traditional concerns the belief that corporate officers spending treasury money do not

¹⁶⁰ *Buckley*, 424 U.S. at 25-26. These reasons, in addition to preventing corruption and its appearance, had been alleged by the government to justify the contribution limits. *Id.*

¹⁶¹ *Buckley*, 424 U.S. at 38; *see also McConnell*, 540 U.S. at 144-145.

¹⁶² *See McConnell*, 540 U.S. at 115-19.

necessarily represent the opinions of the shareholders whom they represent as an economic matter. This notion of corruption through distortion of the marketplace appears to diverge significantly from the traditional notion of creating a sense of indebtedness on the part of a lawmaker and a sense of entitlement on the part of the contributor.¹⁶³

Finally, in recent decisions the Court has begun to treat any benefit received by candidates or parties as signaling corruption or the appearance of corruption.¹⁶⁴ Not only does this development go beyond the association of corruption with the idea of reciprocity embodied in the notion of *quid pro quo*. It also appears to ignore differences between purposes and effects, between primary and incidental effects, and between benefits accruing in an undifferentiated way to entire classes of persons, only some of whom are candidates, and benefits targeted to clearly identified candidates in federal races. An example is state voter mobilization efforts in elections involving federal as well as state candidates on the ballot, which are now assumed to benefit the federal candidates simply because of the presence of a federal candidate on the ballot.¹⁶⁵ As an empirical matter, however, sometimes the state efforts are directed exclusively at state races, and there is consistent data to the effect that voters split their votes between parties as least 25 percent of the time.¹⁶⁶

¹⁶³ Justice Scalia has argued that the Court's campaign finance decisions involving the regulation of corporations often amount to a constitutionally illegitimate attempt to equalize the impact of speech of participants in political debate. See *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 692-95 (1990) (*Scalia, dissenting*); Prescott M. Lassman, *Note, Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan State Chamber of Commerce*, 78 VA. L. REV. 759 (1992).

¹⁶⁴ *Beaumont and McConnell* cites.

¹⁶⁵ The *527 Reform Act of 2004*, *supra* note 7, in fact included a provision based upon this assumption. See H.R. 5127, 108th Cong. (2d Sess. 2004), § 3. This provision was eliminated in the 2005 version of the proposed legislation.

¹⁶⁶ See Paul Allen Beck et al., *Pattern and Sources of Ticket Splitting in Subpresidential*

Groups exempt under section 527 of the Code potentially share two of the three attributes of corporations that justify the especially rigorous campaign finance legal environment accorded to them. They have the capacity to amass especially large amounts of wealth, and to a significant extent this advantage is the result of the special tax treatment the government has afforded them. Therefore, by analogy to the unique campaign finance regime to which corporations and unions are subject, the Court may be sympathetic to Congress's desire to circumscribe both the source and the amount of the controversial groups' contributions.

The Supreme Court also has repeatedly recognized that the power to regulate to avoid corruption or the appearance of corruption includes the power to regulate to prevent circumvention of the rules designed to prevent corruption or its appearance. In *Beaumont*¹⁶⁷ and *McConnell* the Court relied on the circumvention justification to afford Congress an unprecedented amount of latitude to implement measures designed to curb, if not eliminate, the worst excesses of the soft money system and the deluge of sham issue ads paid for with soft money and aired in the final months of a campaign. Before this rationale can be successfully applied to the controversial 527 groups, however, the Court should require comparable empirical evidence tending to show that the soft

Voting, 86 Amer. Pol. Sci. Rev. 916 (1992) (finding split ticket voting has stayed at a level of 25-28% since 1972); Richard Forgette & Glenn J. Platt, *Voting for the Person, Not the Party: Party Defection, Issue Voting, and Process Sophistication*, 80 Soc. Sci. Q. 409 (1999).

¹⁶⁷ 539 U.S. 146, 155 (2003) (upholding FECA regulations applied to a nonprofit advocacy group that was incorporated and received only a small amount of funds from business groups). The Court noted that "recent cases have recognized that restricting contributions by various organizations hedges against their use as conduits for "circumvention of [valid] contribution limits." *Id.*, citing *Federal Election Comm'n v. Colorado Republican Federal Campaign Comm.*, 533 U.S. 431, 456, and n 18 (2001). In the context of limiting coordinated expenditures by political parties, the Court observed that "experience 'demonstrates how candidates, donors, and parties test the limits of the current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced.'" *Id.*

money streaming into 527 groups during the 2004 election cycle was likely to be linked to the possibility of corruption, *i.e.*, that the impetus for the contributions was not predominantly ideological (as may have been the case with Swift Boat Veterans for Truth and MoveOn.org), but instead reflected the type of rent seeking that permeated the soft money regime prior to the enactment of BCRA.¹⁶⁸ In addition, and perhaps relatedly, the significance of the fact that very few businesses contributed to 527 groups in 2004 needs to be explored since the potential for corruption may be different or amenable to different preventive strategies in the case of individuals than it is for corporations or other business entities.

D. Conclusion

Several observations can be gleaned from the Court's reasoning in these cases that is helpful for predicting how the Court is likely to approach the inclusion of the controversial 527 groups in the definition of political committee. Despite its belief in the importance of protecting speech at the "core" of the First Amendment, the Court does not begin with a presumption that campaign finance regulation should be limited to the greatest extent possible to activities that expressly advocate the nomination or election of a candidate for federal office. Rather it begins with the presumption that Congress has the right, and indeed the obligation, to prevent corruption or the appearance of corruption in federal campaigns. That presumption, in turn, rests on Congress's responsibility for protecting the integrity of the electoral system. Political speech is a value, but it is a value alongside of, and even intrinsically connected with, the value of preserving the legitimacy of the democratic form of government.

Although it is hopelessly vague about what the latter value means, the Court is crystal clear

¹⁶⁸ The statement in the text does not assume that contributors with ideological motives pose no risk of corruption, but only that there have been well publicized examples of high wealth donors who give to get their candidate elected but without any expectation of creating a debt on the part of the candidate.

that it precludes public policy—in the sense of legislation and other acts of government entities—being for sale or appearing to be for sale. It rejects the proposition, advanced by some, that the popularity of public policy or of candidates can be meaningfully measured by the aggregate amount that can be raised on their behalf. The marketplace of ideas is also a value. However, either it is a lesser value than democratic legitimacy, or else the Court believes that by policing the integrity of the electoral process, all or most or the most representative ideas will find a forum and be heard. Thus, protecting the integrity of the political process may be the ultimate end of constitutionally permissible campaign finance regulation, but it is not an end in itself because the electoral process is itself a means to a democratic government, *i.e.*, one that is both democratically elected and democratically operated.

The Court does not see itself as policing the operation of government except when lawmakers act in ways that contravene the boundaries established by the nation's Constitution. In all other cases, the Court will not presume to substitute its wisdom for the wisdom of the legislature. The Court's mission, given the nature of the Constitution that guides it, is simply to reduce the likelihood that lawmakers' actions will be determined primarily or exclusively because of the influence or prospect of campaign money. Its mission includes, although it is not limited to, insuring that reasonable people will not believe that the laws governing the conduct of elections permit, much less encourage, campaign money to influence the decisions and actions of those who are elected.

In the last analysis, this is the reason the Court does not presume that campaign finance law should regulate only express advocacy rather than a wider range of electoral activities. Campaign finance law can afford to burden political speech to the minimal amount possible when the threat of corruption is the least, namely, when those who spend money on campaign speech are wholly unconnected with the candidates, *i.e.*, when their decisions and activities independent. According to the Court, in such cases the likelihood that a candidate will feel beholden to the person making the

expenditure is the least because the person who presumes to act on a candidate's behalf will not necessarily be advancing the candidate's campaign agenda. But, if such expenditures are so free of the risk of corruption, why regulate them at all? Apparently the Court has validated rules mandating disclosure of independent expenditures for express advocacy (*Buckley*) and electioneering communications (*McConnell*) because in these instances, the *content* of the speech so clearly and directly benefits a candidate that Congress can reasonably assume a candidate may feel beholden to the person making the expenditure. Thus, only express endorsements of candidates (express advocacy) or what a reasonable person would construe as an express endorsement of a candidate (such as electioneering communications in the run-up to a primary or election) have thus far passed constitutional muster when the speaker is independent of the campaign.

To sum up, the constitutional issues discussed in this Part of the Article all suggest justifications that would enable the Court to validate the current effort by Congress to amend the definition of a political committee under FECA so that it would comprehend most, if not all, of the controversial 527 groups that collected and spent huge sums of soft money during the 2004 election cycle. First, the free speech rights of the groups and their contributors are such that the type of regulation being proposed would leave both with the means to participate effectively in federal elections. Second, the 527 groups resemble the types of entities that have, under traditional constitutional doctrine, been less protected than individuals and nonconnected groups making independent expenditures. Finally, because of the massive sums involved and the ability of the groups to serve as conduits for soft money spending that is no longer permitted to the parties, the government can develop a credible showing that, if left unregulated by FECA, the groups pose a serious threat of corruption either directly, by creating obligations among lawmakers, or indirectly, through their role in facilitating circumvention of the soft money reforms enacted in BCRA. By the

same token, to the extent that some 527 groups are genuinely independent of candidates or parties (and their agents) and they raise funds predominantly or exclusively from moderate size donations, the argument from corruption or the appearance of corruption is correspondingly weakened. This is especially the case when the forms of electoral activity the groups engage in are not express advocacy or close to express advocacy on the continuum of political speech.

IV. SECTION 527 ORGANIZATIONS UNDER THE INTERNAL REVENUE CODE

Section 527 of the Code was enacted in 1974 as part of Congress's attempt to clarify the tax status of organizations organized and operated for political purposes.¹⁶⁹ Until that time, the status of contributions given to such organizations was controversial, as was the status of income received or earned by the entities themselves.¹⁷⁰ With the enactment of section 527, it was settled that contributions to political organizations will not be considered income in the hands of the donee organizations, nor will the contributor be subject to gift tax on amounts, if any, above the annual gift tax limit.¹⁷¹ The entities will, however, be required to pay capital gains on gifts of appreciated

¹⁶⁹ See section 10(a) of the Act of January 3, 1975 (Pub. L. 93-625, 88 Stat. 2120 (1975)) (Upholstery Regulators Act). The most complete account of the history of this legislation is William P. Streng, *The Federal Tax Treatment of Political Contributions and Political Organizations*, 29 TAX LAWYER 139 (1976).

¹⁷⁰ The Internal Revenue Service changed its view of the tax status of the organizations and taxability of contributions to them more than once during the period from 1939-1973. See Streng, *Federal Tax Treatment*, *supra* note 169. In addition, during much of this period, there was no provision for political organizations, whether political parties or campaign committees, to file a tax return. See Rev. Rul. 73-84, 1973-2 C.B. 461.

¹⁷¹ For the gift tax as applied to contributors to political organizations prior to the passage of section 527, see Rev. Rul. 59-57, 1959-1 C.B. 626; Rev. Rul. 72-355, 1972-2 C.B. 532; Announcement 73-84, 1973-2 C.B. 461; I.R.S. News Release, IR-1341 (December 11, 1973). The Court of Appeals for the Fifth Circuit rejected the Service's interpretation. See *Stern v. United States*, 436 F.2d 1327 (1971). The Service acquiesced in the decision, but only in that circuit. Rev.

property as well as on dividends and income earned from its revenues and on business income, if any, of the political organization.¹⁷²

To qualify for the favorable tax treatment set forth in section 527, an organization must be a “political organization,” defined as a “party, committee, association, fund, or other organization...organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.¹⁷³ Exempt function, in turn, is defined to mean

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....Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162(a).¹⁷⁴

Rul. 72-583, 1972-2 C.B. 534. For the current provision exempting contributions to section 527 from gift tax, see I.R.C. § 2501(a)(5). Senator Adlai E Stevenson proposed an amendment to the bill in the Senate to subject contributions to political organizations to gift tax because he feared that the consequence would be “large, illegal contributions in Federal campaigns” and “placing the Internal Revenue Service in the middle of politics, the enforcement of political campaign contributions.” 120 Cong. Rec. S40386-S40387 (Dec. 17, 1974). Because the result was a tie vote (45-45), the amendment failed. *Id.*, at S40387.

¹⁷² I.R.C. § 527(b), (c).

¹⁷³ I.R.C. § 527(e)(1). An organization is also required to register as a political organization and file periodic reports with the Service in order to qualify for the favorable tax status unless it is registered as a political committee with the FEC or certain other exceptions, not relevant here, apply. See I.R.C. § 527(i), (j). See also SUMMARY of Pub. L. No. 107-276 (2001), prepared by The Joint Committee on Taxation.

¹⁷⁴ I.R.C. § 527(e)(2).

Because of the broad reach of the definition of exempt function, section 527 affords favorable tax treatment to organizations that engage in Federal, state, or local political activity as well as to groups engaged in non-electoral politics, such as the nomination and appointment of individuals to public offices. Of course, attempts to *defeat* the nomination, appointment, or election of an individual for public office are also considered part of a 527 group's exempt function.¹⁷⁵

As was noted earlier, the controversy surrounding 527 groups concerns the groups active in federal elections that do not register as political committees for FECA purposes. Since qualification for section 527 tax status for such groups presupposes being primarily engaged in influencing or attempting to influence the nomination or election of any individual for any federal office, it might seem that the controversial 527 groups conform to FECA's definition of a "political committee" simply by satisfying the definition of a "political organization" set forth in section 527 of the Code. However, the congruence of section 527 political organizations¹⁷⁶ under the Code with political committees under FECA ultimately should depend upon the equivalence of their functions rather than the similarity of the language describing them in the two statutes. There are numerous

¹⁷⁵ See Judith E. Kindell and John Francis Reilly, *Election Year Issues*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FOR FISCAL YEAR 2002 335, 403 (2002) (hereinafter *Election Year Issues 2002*). The EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM is an official publication of the Internal Revenue Service published annually. It is written to train employees of the I.R.S. of the current state of specific areas of exempt organization tax law. Although the positions discussed in the publication cannot be "used or cited for authority settling or sustaining a technical position," see <http://www.irs.gov/charities/article/0,,id=96441,00.html>, they are widely regarded as indications of the Service's thinking, especially in areas in which there is no precedential authority on point.

¹⁷⁶ For the rest of this article, "political organization" will be used only for those groups exempt under I.R.C. § 527 because of their engagement in federal election activities, *i.e.*, the controversial 527 groups, unless otherwise noted.

differences, discussed in what follows, between the range of activities covered by the influencing language in the two bodies of law. Determining the correct treatment of the controversial 527 groups under FECA, however, should depend not on the existence of these differences but upon their salience from the perspective of the purposes of the campaign finance legal regime.

The most striking difference between the tax and campaign finance regimes is that the Service has interpreted the influencing language expansively through its regulations and rulings, whereas the FEC tends to interpret the influencing language narrowly. For example, expenditures made in connection with a candidate testing the waters fall squarely under the influencing language for purposes of the tax law. Thus, a 527 group would not be taxed on contributions it receives and funds it spends to enable an individual to hire polling firms, political consultants, and research firms, to travel to speak to groups on public issues or meet with “opinion makers,” and in general to engage in any activity that enables him or her to decide whether to run for office.¹⁷⁷ Contributions made to a group established to enable an individual to explore the desirability of running for office will, based upon the same reasoning, not be subject to gift tax.¹⁷⁸ Under campaign finance law, in contrast, contributions and expenditures for exploratory purposes will not be classified as contributions and expenditures in the technical sense and, thus, should not count in determining whether an organization has satisfied either the statutory or the major purpose prong of the definition of a

¹⁷⁷ Private Letter Ruling 82-43-142, at 1982 PRL Lexis 2691. Private Letter Rulings do not serve as precedent for any person other than the taxpayer who requested the ruling. These rulings are, however, taken as indications of the Service’s positions on the subjects addressed. The ruling cited in this note was included in Kindell and Reilly, *Election Year Issues 2002*, supra note 175, at 398.

¹⁷⁸ The gift tax status of contributions made for the various purposes discussed in this passage are the same, but this fact will not be repeated each time.

political committee.¹⁷⁹ In short, the costs of testing the waters for a federal office will count as electoral for purposes of a 527 political organization, but will not count as electoral under FECA's contribution and expenditure definitions. Were such an exploratory group to disband when the individual reaches a decision, to run or not, it would have been a legal 527 group for purposes of the favorable section 527 tax regime, whereas the same group would not have been a political committee for purposes of campaign finance law.

The inclusive nature of the Service's approach to the influencing language can also be seen from its position that activities engaged in between elections are considered to meet the tax law's influencing standard if they support "the process of selection, nomination, or election of an individual in the next applicable political campaign."¹⁸⁰ Given that Senators are elected every six years, a 527 organization can raise and spend funds for a wide variety of activities in the five years between elections that would be unlikely to be considered campaign activity under FECA. Among other things, a 527 organization's exempt function will include (and, correspondingly, its taxable income will exclude) expenses such as those incurred to train staff for the next election even though the group does not during that time "support any particular individual for public office."¹⁸¹ The influencing language associated with most FECA's provisions, in contrast, require the existence of a clearly identified candidate.¹⁸² The regulations implementing section 527 consider the example of an

¹⁷⁹ See 11 C.F.R. §§ 100.72(a), 100.131(a). There are anti-abuse measures, however. The exemption is lost, for example, if the individual "conducts activities in close proximity to the election or over a protracted period of time" or significantly more money is raised than can reasonably be spent on testing the waters. *Id.*, at §§ 100.72(b), 100.131(b).

¹⁸⁰ Treas. Reg. § 1.527-2(c)(1).

¹⁸¹ Treas. Reg. § 1.527-2(c)(5)(vii).

¹⁸² See 2 U.S.C. §§ 431(17) (defining an independent expenditure), 431(20)(A)(iii) (defining public communications in terms of the PASO standard), 434(f)(3)(A)(I) (defining an electioneering

organization that “finances seminars and conferences which are intended to influence persons who attend to support individuals to public office whose political philosophy is in harmony with the political philosophy of [the organization].” Although the impact, if any, of the seminars on the election prospects of any particular candidate is speculative and at best indirect, the Service takes the position that the expenditures for such activities would be part of the exempt function of a 527 organization.¹⁸³ In contrast, it is unlikely that funding such seminars would constitute an expenditure under FECA, required to be paid with hard money, except in unusual circumstances.

A similar discrepancy between the two legal regimes can occur with respect to state ballot referenda and other voter initiatives. Ordinarily, such activities would not be considered as part of a 527 group’s exempt function, and therefore not entitled to section 527 tax treatment, because they involve issues and legislation rather than campaigns for public office. However, a 527 group successfully argued that its involvement in state and local ballot referenda and initiatives had the purpose and likely effect of promoting its federal electoral agenda more effectively and more cheaply than if it made donations directly to the campaigns of individual candidates for federal office. It reasoned that contested ballot measures on the ticket would increase voter turnout and force candidates to state their views on the subjects involved whether they wanted to or not.¹⁸⁴

communication), 441d(a), 441i(b)(2)(B)i). *See also id.*, §§ 431(9)(B)(iii).

¹⁸³ Treas. Reg. § 1.527-2(c)(5)(vii).

¹⁸⁴ See Private Letter Ruling 9249002 (June 30, 1992), at 1992 PLR LEXIS 1865. *See also* Kindell and Reilly, *Election Year Issues 2002*, *supra* note 175, at 401; Private Letter Ruling 1999-25051. Foley and Tobin note that, while the IRS and the FEC generally treat partisan voter mobilization efforts the same, i.e., as influencing an election, the Service’s interpretation of partisan is far more expansive than is that of the FEC. Foley and Tobin, *Section 527 Groups Not an End-Run around McCain-Feingold*, *supra* note 43, at 2405, n. 10. The consequence is that a much wider range of voter mobilization activities would be considered to influence an election for Code purposes than for purposes of FECA.

These examples captures the central difference between the tax law's influencing standard and that of campaign finance law. The tax law standard encompasses activities that, directly or indirectly, relate to and support *any aspect* of the *process* of influencing or attempting to influence the nomination or election of an individual to a public office, whereas the campaign finance standard seeks to subject to regulation only those types of political speech that have a clear and direct bearing on the election of one or more specific candidates.¹⁸⁵

Other tax law positions reflect the inclusive nature of the influencing standard for purposes of section 527. Costs incurred by a former office holder after leaving office are considered to be part of a section 527 group's exempt function under the Code during the period in which the individual considers another run for office, as long as the expenses reasonably relate to making a decision about a future candidacy.¹⁸⁶ The cost incurred by a candidate or potential candidate to take voice and speech lessons would count as an exempt function expenditure for a 527 group,¹⁸⁷ as would the costs associated with an office holder attending certain dinners and political events related to his office.¹⁸⁸ Certain expenses incurred after an election is *over* are also considered to be for the purposes of influence an election, according to the Service, because they form an integral part of the election process.¹⁸⁹ Moreover, the Service has repeatedly concluded that the intent of the party making an

¹⁸⁵ Treas. Reg. § 1.527-2(c)(1). See also Kindell and Reilly, *Election Year Issues 2002*, *supra* note 175, at 397.

¹⁸⁶ See Technical Advice Memorandum 93-20-002 (June 14, 1993), at 1993 PRL Lexis 340, cited in Kindell and Reilly, *Election Year Issues 2002*, *supra* note 175, at 398.

¹⁸⁷ Treas. Reg. § 1.527-2(c)(5)(iii).

¹⁸⁸ Treas. Reg. § 1.527-2(c)(5)(iv).

¹⁸⁹ See Revenue Ruling 87-119, 1987-2 C.B. 151, Q&A 1 (holding that the cost of an election night party and post-election bonuses for campaign staff can be classified as part of a 527 group's exempt function activities).

expenditure is integral to determining whether or not the activity is part of a group's section 527 exempt function.¹⁹⁰

The rationale for the different approaches by the two bodies of law is instructive. The tax law standard is capacious because the consequence of activity meeting the influencing test is a tax benefit to the person who funds the activity, and the drafters of section 527 had as one of their goals encouraging political speech by providing a tax favored vehicle within which political speech could, and should, be carried out.¹⁹¹ Campaign finance law, in contrast, tends toward narrow constructions of the influencing standard to avoid the constitutional issues raised when political speech is burdened by intrusive regulation, regulation that cannot be justified by a compelling state interest, or regulatory measures not narrowly tailored to further that interest.¹⁹² Relatedly, the tax law regime assesses a group's activities in light of the influencing standard based upon a broad facts and circumstances test, so that all relevant factors can be appreciated in aggregate.¹⁹³ Given that long-term as well as short-term impacts, direct and indirect effects, and subjective as well as objective criteria are intended by the Service to be part of the calculation, the facts and circumstances method is reasonable. In contrast, and in keeping with the campaign finance law's concern about the inhibiting effects on political speech from imprecise boundaries and uncertain calculations, campaign finance law eschews facts and circumstances tests to the greatest degree possible and strives for bright-line rules to clarify behavior that does or does not carry the risk of FECA consequences.

¹⁹⁰ See, e.g., *supra* note 184 and accompanying text.

¹⁹¹ See H.R. REP. No. 93-1502, at 104 (1974)

¹⁹² See *infra* Parts II and III.

¹⁹³ Treas. Reg. § 1.527-2(c)(1). See Revenue Ruling 2004-6, 2004-1 Cum. Bull. 328 (discussing the facts and circumstances test for determining if activity is legislative or educational, on the one hand, or section 527 exempt function activity, on the other, for purposes of section 527(f)).

Compiling and circulating lawmakers' voting records and voter guides is common to many types of exempt entities, *i.e.*, 501(c)(3) organizations that are prohibited from engaging in campaign activity altogether; other entities described in section 501(c), which are generally permitted to engage in campaign activity to the extent consistent with the group's exempt purpose; and 527 organizations, which are subject to no limits on the amount or type of campaign intervention they are permitted. Voter education activities of this kind are the most troublesome for any attempt to distinguish political organizations from political committees. The Service has developed a short list of rules that helps taxpayers determine whether their voter education activities will be considered related to a campaign or not. Some of these rules are obvious. For example, timing the publication and distribution of a voting record or a voter guide with an election or targeting them to a geographical area in which some or all of the lawmakers referred to are candidates are factors that suggest electioneering.¹⁹⁴ Other rules seem idiosyncratic. For example, the Service has stated categorically that a voter guide that is limited to specific subject areas (e.g., environmental issues or animal rights) suggests electioneering, whereas a voter guide that covers a wide range of topics of general interest to the population at large does not, even though the organization monitoring and publishing the voting records is itself a single issue interest group.¹⁹⁵ Because of the Service's established rules, voter education efforts limited to a narrow range of subjects might cause a 527 group to be considered engaged in campaign activities under the Code, but not necessarily under FECA. Again, because the two regimes are animated by different principles, one cautious, the other inclusive, similar activities could well be judged differently.

¹⁹⁴ See Revenue Ruling 78-248, 1971-1 Cum. Bull. 174; Revenue Ruling 80-282, 1980-2 Cum. Bull. 178.

¹⁹⁵ See Revenue Ruling 78-248, 1971-1 Cum. Bull. 174; Revenue Ruling 80-282, 1980-2 Cum. Bull. 178.

Clearly, then, the two regulatory regimes have distinct principles and purposes and, thus, to some extent their prescriptions target different conduct or treat the same conduct in different ways. The question that must be raised in connection with the controversial 527 groups is whether, in light of the actual operation of such groups in recent elections, the differences suggest the necessity, as a constitutional matter, or the desirability, as a policy matter, of retaining an area for 527 groups engaged in federal election activity that exists outside the strictures of the rules applicable to political committees.

One aspect of this question could be illuminated by an empirical analysis of what most 527 groups in the past several election cycles have actually been doing. Are large parts of their operations devoted to activities of the kind just described, *i.e.*, activities such as testing the waters, long range staff training, and party activities not directed toward clearly identified candidates? To what extent have the activities of the controversial 527 groups been focused on party building or on holding events to attract and enlarge the pool of people attracted to the political philosophy of one party or ideology and, thus, indirectly for candidates that are or may in the future come to be affiliated with those ideas? If only a small proportion of 527 groups in fact devote the larger part of their operations to activities of this kind, then it would be reasonable to create a presumption that 527 groups oriented towards federal elections should be considered political committees and required to register and abide by the political committee regulatory regime.¹⁹⁶ If, on the other hand, only a small proportion of 527 groups devote the larger part of their operations to the type of campaign activities characteristically subjected to the full panoply of FECA restrictions, then the reform proposal's presumption would be overinclusive and would subject to rigorous campaign finance rules significantly more organizations than is warranted by the logic of FECA's legal framework.

¹⁹⁶ This is the approach taken by The 527 Tax Reform Act of 2005, *supra* note 8.

Although this is an empirical question, the inquiry cannot move forward in the absence of answers to the theoretical question raised in Parts II and III of this Article, namely, what exactly is the nature of the campaign activity that Congress sought to restrict through the campaign finance laws? When groups do not voluntarily self-identify as political committees, which of their activities should be counted to determine if they satisfy the definition of political committee and should be required to register? As the previous two Parts have made clear, because of the protected nature of political speech under the Constitution, regulation that circumscribes or otherwise burdens campaign speech has, as it were, a burden of justification. A common thread in many of the Service's rulings under section 527 is the relationship between arguably nonpartisan research, polling of public opinion on issues, and focus groups and the subsequent use to which these activities are put. It is the Service's position that, if the taxpayer asserts that the ultimate purpose of engaging in these activities is partisan, *i.e.*, to support or defeat one or more specific candidates for federal office or builds some level of bias into the questionnaires or other projects, the taxpayer qualifies for favorable 527 tax treatment.¹⁹⁷ As a practical matter it is tempting to say that all such activity should be evaluated in light of the product's subsequent use, especially since the principals are prepared, in order to receive favorable tax status, to say that their purpose throughout is influencing a campaign. Yet as a constitutional matter, it is less obvious that the potential indirect bearing of certain kinds of political and social research on the campaign prospects of one or more individuals does or should justify requiring such projects to be funded using hard money, even if the researchers were to declare that they hope their work will improve the prospects of one or more named candidates or even if the researchers admit that they designed their projects in the hopes that the results would have a direct impact on the conduct of certain campaigns.

¹⁹⁷ See Private Letter Ruling 1999-25051 (March 29, 1999), *at* 1999 PRL LEXIS 500.

It was the position of the Supreme Court in *Buckley* that “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”¹⁹⁸ The *McConnell* Court, when confronted by the empirical evidence regarding contemporary campaign practices, was forced to say that the distinction between issue discussion and express advocacy had proven impossible to sustain in the manner it had hoped.¹⁹⁹ At the same time, the *McConnell* Court’s meticulous analysis of each of BCRA’s amendments in light of the problem Congress was addressing and the competing considerations, constitutional and statutory, suggests that the Court has not adopted the view that all discussion of issues and candidates must be funded with hard money, regardless of how direct or indirect the connection between the discussion and an election for federal office nor that the intent of parties to influence a federal election will be dispositive regardless of the character of the activities themselves and their context. It is more likely that the Court will require a high level of constitutional argument and empirical evidence before agreeing that 527 groups engaged primarily or exclusively in federal elections are by definition political committees, regardless of the type of electoral activities that occupy them. If the Court were to conclude that the characteristic mission of such 527 groups is campaigning, in the sense that this is the characteristic mission of candidates, political parties, and political committees, it could, under existing precedents, dismiss vagueness and overbreadth concerns on the grounds that the groups’ characteristic mission provides a “limiting connotation” that eliminates vagueness and overbreadth, or at least reduces them to constitutionally manageable proportions. It is, however, unlikely that the Court will *deduce* these groups’ characteristic mission

¹⁹⁸ *Buckley*, 424 U.S. at 64.

¹⁹⁹ *See McConnell*, 540 U.S. 93, 126-28, 124 S. Ct. 619, 650-51.

predominantly much less exclusively from the way they are characterized in the tax law, despite the similarity between the descriptions in tax and campaign finance law. In a matter with such wide-ranging ramifications, it would be prudent to follow the tax law maxim that substance, rather than form, should determine the treatment of a transaction or an event.

V. CONCLUSION

The preceding analysis of FECA, FEC regulations, and court decisions makes clear the impossibility, based exclusively upon the language or literal texts of these sources, of reaching a definitive interpretation of the types of advocacy activities that Congress can constitutionally incorporate into the definition of a political committee. The Supreme Court has interpreted the critical phrase—“for the purpose of influencing an election to federal office”—broadly or narrowly depending upon the specific campaign finance provision in which it occurs. Since the Court has not yet addressed the meaning of the influencing language for purposes of the political committee definition,²⁰⁰ it is necessary to mine the logic of the determinations it has made to discern the principles that guide them.

Proposals have been introduced in Congress to amend the definition of a political committee to include most 527 groups except those that focus exclusively on state elections or on non-electoral activities, e.g., ballot measures or the selection and appointment of judges.²⁰¹ Using these proposals

²⁰⁰ The Court was presented with the opportunity to review key features of the definition of a political committee, but in *FEC v. Akins*, 524 U.S. 11 (1998), it remanded the case to the FEC for further action and the agency dismissed the private party complaint that had triggered the lawsuit. *See Akins v. FEC*, 146 F.3d 1049 (D.C.Cir. 1998).

²⁰¹ *Supra* note 8. There are also exceptions for certain 527 entities with gross receipts of less than \$25,000 a year, *see* I.R.C. § 527(i)(5). *See* H.R. 513, § 2(b), *supra* note 8.

as a template, this Article has analyzed the constitutional issues that will be debated and ultimately litigated at the Supreme Court, in the event that the legislation is enacted. Some aspects of the constitutional analysis favor the likelihood that the Court would uphold legislation creating a virtual presumption that 527 groups should register as political committees under FECA,²⁰² while other aspects suggest that there is not a sufficiently strong nexus between what 527 groups, as a class, are and do and the campaign entities and campaign activities that the Court has permitted Congress to regulate in the past.²⁰³ This Article has also argued that the fate of such legislation will depend to a large degree on the kind and amount of historical and empirical evidence presented to the Court, given the tendency of recent decisions to be heavily influenced by the actual practices characteristic of the contemporary campaign landscape, as it endeavors to apply its previous holdings, including the logic of its precedents, to the complex practices characteristic of the landscape of modern elections.

Even assuming that Congress can, as a constitutional matter, enact the type of legislation currently proposed, it is still appropriate to ask whether it should. In particular, most of the current proposals treat all 527 federal campaign activities as fundamentally homogeneous. Thus, advertisements on radio and television are treated as qualitatively the same for election law purposes as voter registration and other types of voter mobilization activities.

Arguably this one-size-fits all approach fails to capitalize on one of the more positive consequences of the high level of 527 activity in the election of 2004, namely, the extraordinary energy and resources that were dedicated to mobilizing the voting public. It is still unclear whether

²⁰² See Part III.

²⁰³ See Part II.

some portion of the fever pitched partisanship of the recent campaign was a cause or consequence of the increased level of voter participation, but it is clear that 527 groups were instrumental in inspiring people of all ages and professions to engage in registering, canvassing, volunteering, and motivating people to vote. It is also worth exploring whether, as an empirical matter, the potential benefit to federal candidates from generic voter mobilization²⁰⁴ efforts undertaken by 527 groups is as predictable²⁰⁵ or as corrupting as the potential benefit to them from positive and negative political advertisements targeting individuals. Given the high social cost of civic apathy and the importance of civic participation for certain types of civic goods, it seems prudent at this juncture to consider whether as a policy matter meaningful distinctions can and should be made among the kinds of public activities engaged in by 527 groups and their likely costs and benefits for the integrity of the electoral process. If so, reformers in Congress should consider harnessing the 527 groups' voter mobilization potential at the same time that they attempt to rein in the groups' excesses in the area of political advertising masquerading as nonpartisan voter education.²⁰⁶

²⁰⁴ Generic voter mobilization is partisan because it can promote a particular political party, but it is not permitted to mention specific federal or non-federal candidates. *See* 2 U.S.C. 431(21).

²⁰⁵ For example, given that roughly one-fifth to one-quarter of voters split their tickets when they vote, a voter mobilized by a 527 group promoting Democratic party candidates might vote for Republican as well as Democratic candidates when she gets to the polls.

²⁰⁶ Senator Charles Schumer (D.-N.Y.) added a provision to the proposed 527 Tax Reform Act during the mark-up in April to except from automatic treatment as political committees under FECA those 527 organization engaged exclusively in voter mobilization. *See supra* note 8. However, because of other amendments added at the same time, Senator Schumer withdrew his support for the legislation, which is scheduled to be considered again in the fall of 2005.