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THE POLITICAL IMPLICATIONS OF 527 ORGANIZATIONS NECESSITATE REFORM

Ryan Watkins*

I. INTRODUCTION

During the 2004 presidential campaign, an organization called the Swift Boat Veterans for Truth (Swift Boat) televised controversial commercials attacking Democratic presidential challenger John Kerry's military service in Vietnam.1 In response, the Kerry campaign accused the group of misrepresenting information about his military record and of being "tools of the Bush campaign."2 Because it was organized under section 527 of the Internal Revenue Code,3 Swift Boat was able to accept millions of dollars in contributions from wealthy donors.4 Swift Boat spent at least $10 million on the presidential campaign,5 and while 527 organizations were not as controversial in the 2008 presidential election, they remained powerful political contributors because, under section 527, their donors are free

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to provide an unlimited amount of money. Arguably, the "wealthiest of the wealthy" are permitted to control the electoral process through donations to 527 organizations.

This comment explores the political and legal complexities surrounding 527 organizations. First, it tracks the development of 527 organizations through the 2008 election cycle and articulates the problems raised by their involvement in political elections. Second, it will analyze the potential constitutional difficulties that are created by the regulation of 527 organizations, and examine specific actions that Congress or the Federal Election Commission (FEC) can take. Finally, this comment proposes that Congress pass the 527 Reform Act of 2007, or legislation with a similar effect, in order to close this loophole.

II. BACKGROUND

In 1971, Congress passed the Federal Elections Campaign Act (FECA), which limited the amount of money candidates could personally contribute to their campaigns, and required disclosure of campaign contributions and expenditures. Congress amended FECA in 1974 to limit the amount that any individual could contribute to candidates and political committees, after the Watergate scandal raised serious concerns about the role money played in our political system. These contribution limits included a $1000 cap on individual donations to candidates for federal office, and a $5000 per-election cap on individual donations to political

6. See Michael Luo, Ready to Attack Obama, if Some Money Arrives, N.Y. TIMES, June 21, 2008, at A1 (noting that 527s are "free to accept unlimited contributions.")
8. See infra Part II–III.
9. See infra Part IV.
11. See infra Part V.
13. Id. at 818.
FECA defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1000 during a calendar year or which makes expenditures aggregating in excess of $1000 during a calendar year.” In addition, the amendments created the FEC to enforce the FECA’s rules. Prior to the amendments, the Department of Justice was the sole enforcer of campaign finance laws.

One year later, in 1975, Congress passed section 527 of the Internal Revenue Code. This legislation made it so campaign contributions were not taxable income for political organizations. Furthermore, under this section, donations to 527 organizations were not taxable to the donor. These donations were intended to be independent from the parties and campaigns. Section 527 defined a political organization as one that is operated to accept contributions for some sort of “exempt function,” however, section 527 was interpreted in conjunction with FECA, and problems developed.

A. Buckley v. Valeo: Upholding FECA, but Limiting Its Effect

The United States Supreme Court decision in Buckley v. Valeo addressed whether FECA’s limitations on contributions and expenditures violated the First Amendment by infringing

15. Id. § 431(4)(A).
17. David M. Peterson, Do the Swift Boat Vets Need to MoveOn? The Role of 527s in Contemporary American Democracy, 84 TEX. L. REV. 767, 768 (2006). The Department of Justice still remains responsible for enforcing campaign finance laws, even though the FEC has been the regulatory body since 1974. Id. These provisions are codified in 2 U.S.C. § 437g. See 2 U.S.C. § 437g(a)(5)(A)–(B) (2006).
18. “A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.” 26 U.S.C. § 527(a) (2006).
19. A 527 organization is taxable on non-exempt income. See id. § 527(e)(2).
20. See id.
22. 26 U.S.C. § 527(e)(2). An “exempt function” is “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.” Id.
23. See infra Part II.A.
on individual donors' freedom of expression. The Court generally upheld the disclosure and reporting requirements in FECA and FECA's limit on individual contributions to political campaigns. It based its decision on three governmental interests: providing the electorate with information about candidates and their supporters, deterring corruption, and facilitating enforcement of FECA.

The Buckley Court limited the effect of its decision by narrowing the scope of FECA's disclosure requirement. The Court held that FECA's definition of expenditure, the use of money or other valuable assets "for the purpose of . . . influencing an election," could restrict groups truly engaging in a legitimate discussion of the issues effecting Americans. The Court also struck down the FECA provisions regulating expenditures based on First Amendment concerns, reasoning that expenditures—unlike contributions—conveyed why a spender supported or opposed a candidate. Thus, in the eyes of the Buckley Court, limiting expenditures would restrict the quantity and quality of political discourse. The Court applied strict scrutiny, its most searching form of review, and did not find a governmental interest that was sufficient to justify such severe limitations of the First Amendment's guarantees of freedom of expression and association.

24. Buckley v. Valeo, 424 U.S. 1, 23 (1976). Although the Court was concerned with freedom of association issues, it upheld FECA's limit on individual contributions to political campaigns. Id. at 25. Similar to its decision on reporting requirements, the Court found that the government had an important interest and "employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms." Id. Reducing corruption and the appearance of corruption was sufficient. Id. at 28–29.

25. Id. at 25, 66–68. Individual contributions were related to freedom of association instead of freedom of speech, but the Court upheld them for similar reasons.

26. Id. at 66–68.

27. Id. at 79.

28. Id.

29. Id.


31. Id. On the other hand, contributions convey only the fact that a donor supported a candidate, not why the donor supported that candidate. BROOKINGS INST., CAMPAIGN FINANCE REFORM: A SOURCEBOOK 63 (Anthony Corrado et al. eds., 1997). Therefore, the Court found that Congress could broadly limit and regulate contributions, so long as Congress did not restrict contributions so severely that it gravely penalized campaigns or blocked the basic signals of support. Id. "Strict scrutiny" asks whether the limitation is
The Buckley Court limited its holding further by finding that FECA's disclosure requirement only applied to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." For all other organizations, FECA could only require disclosure of funds used for communication expressly advocating the election or defeat of an identified candidate. The Court proposed examples of express advocacy "such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'"

B. The Aftermath of Buckley and the Bipartisan Campaign Reform Act

After Buckley, 527 organizations endorsed or opposed federal candidates in advertisements but avoided using the "magic words" of express advocacy; they categorized their advertisement as advocating for particular issues, and not for a particular candidate, so as to avoid the FECA's disclosure requirements. Additionally, 527s avoided being considered political committees, as defined under FECA, because they stated their major purpose as avoiding undue influence on federal elections. Although the purpose of 527 organizations may be to influence elections, the FEC has chosen not to treat these organizations as political committees. In this manner, many political organizations and interest groups have received tax-exempt status under section 527, while avoiding the disclosure requirements of FECA.

justified by a sufficiently important interest and closely drawn to avoid unnecessary abridgment. McConnell v. FEC, 540 U.S. 93 (2003).

32. Buckley, 424 U.S. at 79.
33. Id. at 80.
34. Id. at 44 n.52.
35. See id.
36. See id.
37. Sablatura, supra note 12, at 826.
38. Id. The author further states:
The policy reason for forming such a narrow definition of express advocacy appears to be the fear of a potential chilling effect on individual speakers and small groups. If speakers must comply with an abundance of regulations, they will suppress their speech because they do not have the resources to comply with the rules.

Id. at 823.
The IRS further increased the impact of section 527 in a series of letter rulings, finding that issue advocacy advertising fell within section 527's definition of an exempt function. These decisions made it easier for 527 organizations to straddle the line of when they were considered election-related—not election-related enough to trigger FECA's disclosure requirements, but election-related enough to be tax-exempt under section 527.

After the 2000 election, Congress amended section 527 to impose new reporting and disclosure requirements that remain in force today. Now, political organizations that seek inclusion under section 527 are required to report the names and addresses of their officers, directors, and principal employees to the IRS. Such organizations must also periodically report the names and addresses of those who have contributed $200 or more per year, the amounts they have donated, as well as expenditures by the organization of $500 or more per year.

In 2002, Congress amended FECA by passing the Bipartisan Campaign Reform Act (BCRA), which addresses the FECA loopholes that allow monetary contributions that are not subject to regulation, commonly referred to as "soft money" loopholes. It banned national parties and officeholders from raising and spending soft money and replaced the express-versus-issue-advocacy distinction with a new test. Under BCRA, Congress defined "electioneering communication" as any advertisement that addresses a federal candidate before a certain time within the election cycle, and regulated all electioneering communications as

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40. Id.
41. See Frances R. Hill, Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle, 86 TAX NOTES 387, 389 (2000).
44. Id. § 527(j)(2).
48. "Electioneering communication" is made within "[sixty] days before a general, special, or runoff election for the office sought by the candidate; or
expenditures. A number of lawsuits were filed in response to the BCRA that challenged the constitutionality of its restriction of freedom of speech and association.

C. Upholding the BCRA: McConnell v. FEC

In McConnell v. FEC, the Court, in a five-to-four decision, upheld many of BCRA's key provisions. The McConnell Court reiterated that First Amendment associational rights are not absolute, and may be restricted if closely limited to the government's objective. It then held that the government's interest in the prevention of corruption was sufficient because "contribution limits impose serious burdens on free speech only if [the limits] are so low as to 'prevent[ ] candidates and political committees from amassing the resources necessary for effective advocacy.'" The McConnell Court agreed that candidates, parties, and others believe money has an influence in the outcome of elections. It also upheld limitations imposed on electioneering communications, recognizing that the government has an interest in eliminating advertisements that appear to be issue advertisements, but actually favor a particular candidate.

Justice Scalia argued in his dissenting opinion that the limitation of contributions by third party groups infringed on their free speech rights. He analogized the restriction on contributions to that of an author, stating that while an author could single-handedly write a novel, it would be difficult for an author to publish a novel by himself.

[thirty] days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate." Id. § 434(f)(3)(A).

49. Id.

50. See McConnell v. FEC, 251 F. Supp. 2d 176, 206 (D.D.C. 2003) (noting that Senator McConnell and the National Rifle Association filed lawsuits challenging BCRA the same morning it was signed into law).


52. Id. The Court held that the two principal features of BCRA, its regulations of electioneering communications and its efforts to close the soft money loopholes, were constitutional. Id. at 251.

53. Id. at 136, 171.

54. Id. at 118–20.

55. Id. at 135 (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

56. Id. at 93.


58. Id. (Scalia, J., dissenting).

59. Id.
Similarly, if a candidate is limited to the amount of money he or she can receive from supporters, there is a limit placed on his or her fundamental free speech rights. 60

The closure of soft money loopholes has had a great effect on 527 organizations. Because the BCRA banned national parties and officeholders from raising and spending soft money, an increase in unregulated money has shifted to 527 organizations. 61 Although BCRA placed limits on campaign finance, none of the current legislation affected 527s. 62 Therefore, BCRA did not adequately address the increasingly significant impact of 527 organizations on campaign spending. 63

D. The Impact of 527 Organizations on the 2004 Presidential Election

Donations to, and expenditures by 527 organizations surged in the 2004 election cycle. 64 During the 2004 cycle, 527s raised a total of $434 million—sixty million more than the combined amount raised in the previous three years. 65 Eighty 527 organizations raised more than $200,000 each, drawing in a total of $405 million in political donations. 66 Wealthy donors contributed eight of every ten dollars for liberal 527 organizations, and nine of every ten dollars for conservative 527 organizations. 67 Opinion polls asked voters in six states about campaign advertisements and found that 527 organizations produced two of the cycle’s three most influential advertisements. 68 Many Americans were critical

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60. Id.
62. Id.
63. Id.
64. Id.
65. Id.
68. Peterson, supra note 17, at 777 n.77. These 527 organizations were Swift Boat and the “Ashley’s Story.” Id. Public Opinion Strategies is a survey research company that specializes in corporate, public policy, and litigation research, with offices in Washington, Denver, and Los Angeles. See Public Opinion Strategies, About Us, http://www.pos.org/about/index.cfm (last visited Oct. 9, 2009).
of 527 organizations after the 2004 election, provoking a public backlash across the United States, as voters demanded Congressional action.\(^{69}\)

After the 2004 election, in *Shays v. FEC*,\(^{70}\) Representatives Christopher Shays (Republican of Connecticut) and Martin Meehan (Democrat of Massachusetts) challenged the FEC’s refusal to publicize a rule clarifying when a 527 organization must register as a political committee.\(^{71}\) The district court found that the FEC violated the Administrative Procedure Act (APA) by failing to explain its decision not to issue a rule requiring 527 organizations that influence federal elections to register as political committees.\(^{72}\) Despite that finding, the court held that the FEC’s error was “not sufficiently compelling” for the courts to order the FEC to promulgate such a rule.\(^{73}\) Subsequently, the court remanded the issue to the FEC for further explanation of its decision not to promulgate a rule.\(^{74}\)

In response, the FEC published an explanation of why it used a case-by-case approach instead of a blanket rule.\(^{75}\) Rather than first considering an organization’s “major purpose” and then applying a broad statutory definition of “expenditure for the purpose of influencing,” the FEC first applies a narrow express advocacy definition to the term “expenditure.”\(^{76}\) If the FEC finds that the organization has surpassed the statutory thresholds, it then looks to the organization’s major purpose.\(^{77}\) Following the FEC’s revised ruling, the Congressmen filed a renewed motion for summary judgment, alleging that the FEC misinterpreted the

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\(^{69}\) See Public Opinion Strategies, *supra* note 68.

\(^{70}\) Shays v. FEC, 424 F. Supp. 2d 100, 117 (D.D.C. 2006). First, the Congressmen argued that the FEC refused to promulgate a rule and therefore was acting arbitrarily and capriciously in violation of the Federal Administrative Procedure Act (APA). *Id.* at 113. Second, they argued the FEC analysis of a political committee was contrary to FECA and violated the APA. *Id.* at 103.

\(^{71}\) *Id.*

\(^{72}\) *Id.*

\(^{73}\) *Id.* at 116.

\(^{74}\) *Id.* at 117.


\(^{76}\) *Id.* at 498.

\(^{77}\) *Id.*
definition of political committee as previously defined in *Buckley*. The district court held that the FEC did indeed misinterpret *Buckley's* definition of political committee, but again held that it constituted harmless error. The court concluded that the law requires a great deal of deference for agency decisions as to whether to promulgate rules, and that the FEC met that burden under the APA.

In response to separate issues, the FEC announced settlement agreements with various 527 organizations in December of 2006. These agreements settled claims the FEC brought against several 527 organizations after the 2004 election. The League of Conservation Voters's 527 and 527II, Swift Boat Veterans and POWs for Truth, and MoveOn.org Voter Fund collectively paid almost $630,000 to settle charges that the organizations failed to register and file disclosure reports as federal political committees, and accepted contributions in violation of federal limits as well source prohibitions. The Commission approved all three conciliation agreements by a unanimous vote of six to zero.

The FEC settlement agreements shed light on three distinct areas. First, the FEC agreements did not rely on the “magic words” of “express advocacy” as articulated in *Buckley*. Instead, the FEC relied on a broad definition of issue advocacy, whereby a payment to produce any communication “that could only be interpreted by a reasonable person as containing advocacy of the election or

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79. Id.
80. Id.
82. Id. These organizations also agreed to stop “violating applicable laws and regulations and to file reports with the Commission for the relevant periods containing all of the information that must be disclosed by federal political committees.” Id.
83. Id.
84. Id. Subsequently, although the FEC did not clarify the political committee status of 527 organizations, it amended its rules to designate funds received by an organization as “contributions” under federal law if the funds were received in response to communication that “indicate[d] that any portion of the funds received [would] be used to support or oppose the election of a clearly identified Federal candidate.” 11 C.F.R. § 100.57(a) (2007); Ryan, supra note 75, at 491.
85. Ryan, supra note 75, at 491.
defeat" of a candidate would be considered an expenditure that must be reported.\textsuperscript{86} Second, the FEC categorized several organizations as political committees based solely on their contribution solicitations, even without a showing of express advocacy.\textsuperscript{87} Finally, in determining a 527 organization's "major purpose," the FEC looked to extrinsic evidence, such as statements actually made by the organizations rather than focusing on how 527 organizations labeled themselves.\textsuperscript{88} The FEC reiterated that if an organization receives contributions or makes expenditures in excess of $1000, and its major purpose was involvement in campaign activity, it must register with the Commission, and abide by the contribution restrictions and reporting requirements of FECA.\textsuperscript{89}

E. The Diminished Impact of 527 Organizations on the 2008 Presidential Election

Compared to the $338 million spent by 527 organizations in 2004, they only spent $185 million during the 2008 election.\textsuperscript{90} However, 527 organizations did have a role to play, as millions of dollars were spent in the last week of the 2008 campaign.\textsuperscript{91} Independent groups reported about $11.4 million in spending on television advertisements and "get-out-the-vote" efforts.\textsuperscript{92}

The main reasons for the limited 527 contributions was the 2008 financial crisis, which left donors with less money to give on 527 organizations.\textsuperscript{93} Another may have been that the Republican Party's candidate choice, John McCain, was a less-than-enthusiastic choice among the conservative base,

\textsuperscript{86}Id. at 492 (internal quotation marks omitted).
\textsuperscript{87}Id.
\textsuperscript{88}Id. at 492–93.
\textsuperscript{89}Press Release, Federal Election Commission, supra note 81.
\textsuperscript{92}Id.
\textsuperscript{93}See Press Release, The Campaign Finance Institute, supra note 90.
and there was already a strong perception that he had a diminished chance of winning the election.\footnote{94}

\textbf{F. The 527 Reform Act of 2007}

The 527 Reform Act of 2007 (Reform Act) was introduced in the House of Representatives and Senate in January 2007, but has yet to receive a vote.\footnote{95} The Reform Act would amend FECA’s definition of political committee to include 527 organizations that participate in federal elections.\footnote{96} Thus, 527 organizations that meet the criteria would be subject to disclosure requirements and limits on contributions.\footnote{97} The Reform Act also includes an “exclusivity test,” to be used in determining whether an organization's activities related exclusively to a federal election.\footnote{98} An organization would fail to meet the “exclusivity test” if it made disbursements totaling more than $1000 for a public communication that promotes, supports, attacks, or opposes a federal candidate within a year of that candidate’s election.\footnote{99} Furthermore, the Reform Act would exclude those 527 organizations that reasonably anticipate gross receipts of less than $25,000 for the taxable year; state and local candidates, and political party committees; and 527 organizations engaged in voter drive activities “with respect to elections in only [one] State” that do not refer to a federal candidate from the definition of political committee.\footnote{100} Despite its introduction in the House and Senate, the bill has never been voted on. The last major action was its referral to the House Committee on House

\begin{footnotes}
\footnote{94}{Martin, \textit{supra} note 90.}
\footnote{96}{See H.R. 420; S. 463.}
\footnote{97}{See H.R. 420; S. 463. “Specifically, the [Reform] Act would add a subpart (D) to the existing definition of ‘political committee’ at 2 U.S.C. §431(4) to include within that definition ‘any applicable 527 organization.’” Ryan, \textit{supra} note 75, at 501. The Reform Act would define the term “any applicable 527 organization” to mean any organization that “has given notice to the Secretary of the Treasury under section 527(i) of the Internal Revenue Code of 1986 that it is to be treated as an organization described in section 527 of such Code” and that is not exempt under the “Excepted Organizations” section. \textit{Id.} (internal quotation marks omitted).}
\footnote{98}{Ryan, \textit{supra} note 75, at 501.}
\footnote{99}{\textit{Id.} at 502.}
\footnote{100}{\textit{Id.} (internal quotation marks omitted).}
\end{footnotes}
III. THE ISSUE: SHOULD WE CARE THAT 527 ORGANIZATIONS HAVE NOT BEEN CLOSELY REGULATED?

The FEC has failed to strictly define 527 organizations as political committees and, therefore, these organizations have not been subject to strict disclosure requirements and regulations. This allows wealthy donors to circumvent FEC restrictions and provide tremendous financial support to the candidates of their choice. Arguably, through these individual donations to 527 organizations, the “wealthiest of the wealthy” influence the electoral process. This advantageous role can lead to actual corruption or the appearance thereof, with sponsoring donors seeking political favors in return for their sizeable donations. Although this was not a prominent issue in the 2008 election, without proper regulation, national advertisements produced by 527 organizations can continue to misrepresent positions and deceive the American electorate. Thus, the issue is not only whether to regulate 527 organizations more closely, but how to regulate them while at the same time safeguarding the rights of free expression and association.

IV. ANALYSIS

The first issue facing Congress is whether or not the current political environment, in the context of active 527 organization participation, must be changed. Congress could conclude that no change is required and the status quo should remain so as not to infringe on the First Amendment rights of donors. Conversely, Congress could determine that the current situation is inadequate and propose change. When considering how to change the law, Congress could consider whether disclosure requirements should be augmented or

103. See Buckley v. Valeo, 424 U.S. 1 (1976). The Supreme Court in Buckley had already determined that corruption played a role in 527 organizations and the government had an interest in preventing this. See id. at 45.
105. See infra Part IV.A–IV.B.
106. See infra Part IV.C–IV.D.
whether the FEC should include 527 organizations in its definition of political committee.\textsuperscript{107}

A. An Argument for the Status Quo: Concerns for Freedom of Speech and Association

The First Amendment provides its greatest protection to political expression and association.\textsuperscript{108} Restrictions on a citizen’s ability to contribute to 527 organizations arguably burden their freedom of speech as well as their freedom to associate with these groups.\textsuperscript{109} Associating with a larger group can be beneficial because it legitimizes an individual’s message, which may ultimately increase the message’s influence.\textsuperscript{110} These First Amendment rights allow individuals to band together, pool their resources, and support a shared message.\textsuperscript{111} Limitations on an individual’s ability to contribute to such groups ultimately hinder their participation in the democratic process, which centers on a citizen’s right to be heard on issues of importance to them.\textsuperscript{112}

Although \textit{McConnell} and other Supreme Court decisions recognize that freedom of speech can be restricted to avoid corruption, at some point, the constitutional rights of the speaker will outweigh the government’s concern with corruption.\textsuperscript{113} Additionally, the governmental interest in preventing corruption should not be invoked to include attempts to equalize the influence of different individuals or groups.\textsuperscript{114} The 527 organizations do not appear to present an element of corruption because expenditures aimed at voters are not associated with any particular candidate.\textsuperscript{115}

\textsuperscript{107} See infra Part IV.D.

\textsuperscript{108} \textit{Buckley}, 424 U.S. at 14.


\textsuperscript{110} Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.


\textsuperscript{115} Id. Two Supreme Court decisions seem to indicate that an independent expenditure does not present danger of corruption and should not limited. \textit{Id.} at 800. \textit{California Medical Association v. FEC} involved contributions by a trade association to its own political action committee. Cal. Med. Ass’n v. FEC, 453 U.S. 182 (1981). In this case, the Court held that a committee that makes only independent expenditures poses no threat of corruption or the appearance of corruption. \textit{Id.} at 201. In \textit{Citizens Against Rent Control v. City of Berkeley}, the
Conceivably, 527 organizations are engaged in political speech, and should only be subject to regulation under laws that do not compromise the rights of free speech and association. Imposing unnecessary requirements would compel donors to find other loopholes to exploit. Alternatively, instead of restricting First Amendment rights, more viewpoints on an issue could remedy the problems opponents of 527 organizations complain of. As Justice Brandeis memorably wrote in his concurrence in Whitney v. California, "the fitting remedy for evil counsels is good ones." The result of this approach would be less of an infringement on First Amendment rights. Additionally, 527 advertisement activities during the 2004 presidential election may have been of less consequence than the controversy led the public to believe. Perhaps voters are...
still more likely to vote for a candidate that they chose based on sound logic and accurate information, regardless of whether that candidate was attacked by 527 organizations.\footnote{122} If 527 organizations did not impact voters in a way that affected the ballot box, there may be no reason to regulate them more closely.\footnote{123}

B. An Argument for Change: Controlling the Undue Influence of the Wealthy

Wealthy contributors often use money to implement their agenda by influencing non-contributing voters; swaying them towards certain candidates or issues.\footnote{124} The Supreme Court agreed that candidates, parties, and others believe money has an influence in the outcome of elections.\footnote{125} The Court stated in McConnell that government rationales for campaign restrictions were not limited to preventing corruption, but also included precluding “undue influence on an officeholder’s judgment, and the appearance of such influence.”\footnote{126} The Court was concerned with situations in which officeholders can decide issues based not on the merits or the concerns of their constituencies, “but according to the wishes of those who have made large financial contributions valued by the officeholder.”\footnote{127}

Furthermore, possible links between 527 organizations and the federal candidates increase the appearance of undue influence on the part of the wealthy.\footnote{128} Ironically, “[t]he [number one] rule [of 527 organizations] that they try not to break is the one most often broken: 527s are supposed to be independent from the parties and the candidates.”\footnote{129} In reality, however, the overlap between 527 organizations and campaigns is shocking.\footnote{130} For example, 527 organizations

and campaigns often swap consultants and lawyers, making it harder to tell where one entity’s role begins and the other’s ends.\footnote{131}

\textbf{1. Taking Action: Enhancing Disclosure Requirements}

Implicitly, the \textit{Buckley} Court held that limiting contributions to political committees was constitutional, even without an anti-corruption justification.\footnote{132} Therefore, the FEC could require more extensive disclosure requirements. In 2000, the Internal Revenue Code was amended to impose something more demanding—requiring 527 organizations to publicly disclose their expenditures and contributions.\footnote{133} Currently, 527 organizations do not have to disclose expenditures and contributions to the IRS, but not the FEC.\footnote{134} The public is able to view the identities and addresses of contributors, as well as the amount they have contributed, through the IRS website.\footnote{135} The importance of this would be to create another source where voters can find information on the activities of 527 organizations.

Requiring disclosure under the FEC would likely be found to be constitutional. The \textit{McConnell} Court upheld BCRA’s disclosure requirements, which went beyond express advocacy to prohibit “electioneering communications.”\footnote{136} The Court reasoned that disclosure advances the important governmental interest of informing voters;\footnote{137} because information on the contributors are already available to the public through the IRS, it is difficult to predict how further disclosure to the FEC would impact the controversies surrounding 527 organizations.\footnote{138} Most voters are not likely to take the time to investigate the donors behind 527

\footnotetext{131}{Id.}
\footnotetext{132}{McConnell v. FEC, 540 U.S. 93, 355 n.3 (2003). This was later acknowledged in a footnote by the Supreme Court in \textit{McConnell}. Id. Although \textit{McConnell} considered limits on contributions to political parties, 527 organizations are analogous to political parties—both want to influence voters and win elections. \textit{Lowenstein et al.}, supra note 116, at 802.}
\footnotetext{133}{26 U.S.C. §§ 527(j), 6104(d), 6652(c)(1)(C) (2006).}
\footnotetext{135}{Id.}
\footnotetext{136}{\textit{McConnell}, 540 U.S. at 321.}
\footnotetext{137}{Id.}
\footnotetext{138}{Sablatura, supra note 12, at 840.}
Essentially, the Supreme Court refused to limit Congress’s ability to regulate corruptive influences in federal elections.\(^\text{140}\)

2. A Second Alternative: Categorizing 527 Organizations As Political Committees

Alternatively, the FEC could subject 527 organizations to stricter regulations by requiring them to be treated as political committees.\(^\text{141}\) After \textit{Buckley}, 527 organizations avoided these restrictions by stating their purpose as issue advocacy, voter registration, voter mobilization, or voter education.\(^\text{142}\) The organizations assumed that, by not using the “magic words” of express advocacy in support or opposition of a candidate, they were not classified as a political committee and not subject to the requirements of FECA.\(^\text{143}\) However, \textit{McConnell} found that the express versus issue advocacy distinction was irrelevant,\(^\text{144}\) and, additionally, \textit{McConnell} upheld BCRA’s restrictions on “electioneering communication.”\(^\text{145}\) \textit{McConnell}’s significance lies in the fact that the “electioneering communication” requirement could be used to classify 527 committees as political committees and thus require these organizations to register as political committees under FECA, subjecting them to closer scrutiny.\(^\text{146}\)

If 527 organizations were classified as political committees, they would be subject to FECA’s $5000 per year limit on individual contributions.\(^\text{147}\) In the 2004 election, larger 527 organizations received $256 million from

\[\text{\textsuperscript{\text{139}}} \text{Id.}\]
\[\text{\textsuperscript{\text{140}}} \text{McConnell, 540 U.S. at 134–37. This decision demonstrated the Court’s great deference to Congress in deciding whether campaign finance policies are sufficient to meet the corruption standard. Id.}\]
\[\text{\textsuperscript{\text{141}}} \text{Id. FECA defines a political committee as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1000 during a calendar year or which makes expenditures aggregating in excess of $1000 during a calendar year.” 2 U.S.C. § 431(4)(A) (2006).}\]
\[\text{\textsuperscript{\text{142}}} \text{Briffault, supra note 39, at 970.}\]
\[\text{\textsuperscript{\text{143}}} \text{Id.}\]
\[\text{\textsuperscript{\text{144}}} \text{McConnell, 540 U.S. at 193.}\]
\[\text{\textsuperscript{\text{146}}} \text{Briffault, supra note 39, at 971.}\]
\[\text{\textsuperscript{\text{147}}} \text{LOWENSTEIN ET AL., supra note 128, at 798. This limit has not been adjusted for inflation and has not been increased since 1974. Id.}\]
individuals who donated over $5000.\footnote{148} This amounts to approximately sixty-three percent of the 527 organization funds for that election cycle.\footnote{149} Applying the FECA individual contribution limit to 527 organizations would dramatically curtail fundraising.\footnote{150}

Enacting the 527 Reform Act of 2007 would essentially reach this result. One of the fears preventing the implementation the Reform Act is the possibility of First Amendment violations. This fear is misguided. \textit{Buckley} upheld all of FECA's disclosure and reporting requirements based on the concern for having informed voters.\footnote{151} Similarly, one of the goals of the Reform Act is to ensure that large contributions are disclosed and made readily available to the public.\footnote{152} Further, the Reform Act includes an exemption for organizations that reasonably anticipate gross receipts of less than $25,000 for the taxable year, as well as an exemption for state and local candidates, political party committees, and 527 organizations engaged in voter drive activities "with respect to elections in only [one] State" that do not refer to a federal candidate.\footnote{153} This ensures that First Amendment rights are protected as organizations that genuinely advocate on behalf of a particular cause and are not involved in trying to influence elections would not be included under the legislation. They would be free to raise as much money as they wanted for their particular issue.

The \textit{Buckley} Court also concluded that freedom of association could be limited where the government had important interests and "employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms."\footnote{154} Reducing corruption and the appearance of corruption are considered sufficient reasons for abridging some First Amendment rights.\footnote{155} Therefore, the $5000 limit on campaign contributions to 527 organizations under the Reform Act would help curtail corruptive political practices that the Court recognized in \textit{McConnell}.\footnote{148. \textit{Id.}}\footnote{149. \textit{Id.}}\footnote{150. \textit{Id.} at 799.}\footnote{151. \textit{Buckley v. Valeo}, 424 U.S. 1, 66–68 (1976).}\footnote{152. \textit{Ryan}, supra note 75, at 501.}\footnote{153. 26 U.S.C. § 527(e)(1)–(5) (2006).}\footnote{154. \textit{Buckley}, 424 U.S. at 25.}\footnote{155. \textit{Id.} at 28–29.}
The FEC employed a broader definition of express advocacy in its 2006 settlements with various 527 organizations that participated in the 2004 election. There, the FEC determined that, when a payment made to produce communication that could be interpreted by a reasonable person as containing advocacy of the defeat of a candidate, that payment should be deemed an expenditure even if it did not contain the “magic words” of express advocacy. Implementation of the Reform Act would further build upon this broader definition that goes beyond the “magic words” test.

One area of the Reform Act does need additional clarification—defining penalties for those attempting to circumvent the legislation. Organizations participating in express advocacy will not likely stop without severe monetary penalties for violation of the Reform Act because their potential gains highly outweigh any financial loss that may result from penalties from the FEC. A sufficient deterrent would be fines set in proportion to the amount of contributions raised by individual groups. For example, in 2007, the organization America Coming Together was fined $775,000 for its role in trying to influence federal elections. However, the fine was inadequate because the organization raised $130 million that year. Stricter penalties must be put in place to ensure that the Reform Act has real impact on the reform of 527 organizations.

V. PROPOSAL: CONGRESS SHOULD ENACT LEGISLATION SIMILAR TO THE 527 REFORM ACT OF 2007

With the political controversies of the 2004 election, it seems unlikely that these controversies will not resurface in the future. The 527 Reform Act appears to make the clearest steps towards coming to a resolution, and better controlling these issues. The Reform Act eliminates the leeway in which many 527 organizations currently operate. This would sharply contrast with the case-by-case method currently used by the FEC. By employing a broader definition of what

156. Ryan, supra note 75, at 491.
157. Id.
158. Id. at 496.
159. Id. at 497.
constitutes a political committee, current and future 527 organizations will know what activities are acceptable, thereby providing much needed clarity.

The potentially corruptive influence of wealth in politics is a problem that may never cease. Although this problem may not have an ultimate remedy, tighter limits would ensure that more collective actions must be taken. For a 527 organization to have enough wealth to be influential, a larger citizenry will have to donate instead of a small number of wealthy donors. A $5000 limit, combined with the elimination of BCRA loopholes, would eliminate much of the controversy surrounding 527 organizations. Although some political pundits contend that if such strong limitations were implemented, wealthy donors will just find another loophole to exploit, that reason alone is a feeble excuse for inaction on the part of Congress and the FEC.

Moreover, the Buckley Court articulated that 527 organizations would not be considered political committees if they engaged in issue advocacy instead of express advocacy using the “magic words” test. This decision has dramatically increased the use of 527 organizations. Although current 527 television advertisements may not use the “magic words,” the average television viewer knows that these advertisements advocate on behalf of particular candidates. In fact, the FEC has even acknowledged that the express advocacy test articulated in Buckley is outdated.

VI. CONCLUSION

Fixing the problems that are inherent in 527 organizations and that created the extensive controversy in 2004, requires further regulation than is currently required. The 527 Reform Act of 2007 is the most recent effort to provide legitimate and necessary reform to 527 organizations, and its enactment will likely provoke a myriad of

160. See Dorf, supra note 109.
161. Buckley, 424 U.S. at 80.
162. See Briffault, supra note 39, at 958.
163. See, e.g., Charles Krauthammer, Editorial, This is Reform? McCain-Feingold Accentuates the Negative, WASH. POST, Aug. 13, 2004, at A25 (discussing how not advocating for a candidate “produces comical scripts”).
164. See Ryan, supra note 75, at 492.
constitutional challenges. However, it is vital to remember why regulation in this area is so crucial—527 organizations play a major role in federal elections and their wealthy donors are able to influence elections. Furthermore, political candidates may feel obligated to return the favors of wealthy donors who have shed their political opponents in a negative light. Although the First Amendment should always be respected, its protection does not render Congress incapable of regulating the conduct of 527 organizations. By passing legislation that defines 527 organizations as akin to political committees, Congress can take an affirmative step toward restoring political power back to common voters and away from the elites.