

## REGULATING NONCONNECTED 527s: UNNECESSARY, UNWISE, AND INCONSISTENT WITH THE FIRST AMENDMENT<sup>1</sup>

One of the biggest stories emerging from the 2003–2004 election cycle was the rise of the 527 organization<sup>2</sup> as a formidable force in campaign politics.<sup>3</sup> Politicians and pundits alike reviled these organizations as “an abuse of fair elections”<sup>4</sup> and “unscrupulous.”<sup>5</sup> Some of the most vocal critics of these groups were from within the two main political parties themselves.<sup>6</sup> The popular consensus seemed to be that 527s were “not healthy for democracy.”<sup>7</sup> The root of the problem was simple: these groups operated outside the scope of regulation by the Federal Election Commission (FEC) and thus were able to accept huge, sometimes multimillion dollar contributions from wealthy individuals.<sup>8</sup>

Largely in response to this critical view of 527s, both the FEC and members of Congress launched efforts to curb the 527 juggernauts.<sup>9</sup> In August

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<sup>1</sup> Language borrowed, with all due respect, from *Kyllo v. United States*. 533 U.S. 27, 41 (2001) (Stevens, J., dissenting).

<sup>2</sup> The appellation “527” is derived from the Internal Revenue Code section number, which provides tax exempt status for election-related organizations. I.R.C. § 527 (2000); see discussion *infra* Part I for further detail. Both candidate-connected fundraising organizations and independent, or “nonconnected” organizations are registered as § 527 groups. This Comment is intended primarily to address the role of the latter.

<sup>3</sup> See Thomas B. Edsall, *Democratic ‘Shadow’ Groups Face Scrutiny: GOP, Watchdogs to Challenge Fundraising*, WASH. POST, Dec. 14, 2003, at A5.

<sup>4</sup> Editorial, *The Soft Money Boomerang*, N.Y. TIMES, Dec. 29, 2004, at A20.

<sup>5</sup> John McCain, *Plugging the Loophole*, NEWSWEEK, Sept. 20, 2004, at 24.

<sup>6</sup> See, e.g., John Harwood, *Capital Journal: Union Activist Sets Sights on Future, Boldly Optimistic*, WALL ST. J., Dec. 22, 2004, at A4 (noting that some Democratic party members were “resentful” of the nonconnected 527 organization “America Coming Together”); Charles Lewis & Aron Pilhofer, *The Lesson of 527 Groups for Campaign Finance*, NEWHOUSE NEWS SERVICE, Dec. 20, 2004 (noting that President George W. Bush was among the voices calling for stricter regulations on 527 organizations).

<sup>7</sup> Ken Herman, *Big Independent Donors Bad for Democracy, Rove Says*, STATESMAN.COM, Nov. 10, 2004, [http://64.233.187.104/search?q=cache:dSTXcyJL\\_ool:www.statesman.com/news/content/shared/news/politics/stories/11/10rove.html](http://64.233.187.104/search?q=cache:dSTXcyJL_ool:www.statesman.com/news/content/shared/news/politics/stories/11/10rove.html) (citing White House advisor Karl Rove blasting 527 organizations).

<sup>8</sup> See Stephen Dinan, *Congress Ponders How 527s Add Up in Wake of Election*, WASH. TIMES, Nov. 14, 2004, at A1 (attributing Congress’s efforts to regulate 527s to their ability to spend unlimited amounts of money).

<sup>9</sup> The FEC was under tremendous political pressure to act against nonconnected 527s spending soft money. See, e.g., Defendant Federal Election Commission’s Motion for Summary Judgment, *Shays v. FEC*, No. 04-1597 (D.D.C. June 7, 2005), available at [http://www.fec.gov/law/litigation/motion\\_summary\\_judgment\\_shays\\_bush\\_041597\\_041612.pdf](http://www.fec.gov/law/litigation/motion_summary_judgment_shays_bush_041597_041612.pdf); Complaint, *Democracy 21 v. America Coming Together* (FEC No

2004, the FEC passed new regulations that would affect a number of activities by nonconnected 527s.<sup>10</sup> Asserting that these regulations were insufficient and poorly enforced,<sup>11</sup> Senator John McCain (R-Ariz.) and others introduced the 527 Reform Act of 2005, featuring restrictive contribution limits that apply to a broad range of groups.<sup>12</sup> Other bills, including the 527 Fairness Act of 2005<sup>13</sup> and the 527 Transparency Act,<sup>14</sup> would provide alternative means to level the playing field between 527 organizations and political parties, such as increasing contribution limits for political organizations<sup>15</sup> and enhancing disclosure requirements for 527s.<sup>16</sup>

This Comment argues that the push to regulate nonconnected 527 organizations is misguided. Far from threatening democracy, nonconnected 527s play an important and positive role in the context of two-party politics. These groups can provide an outlet for voters who are increasingly alienated from the major parties and offer an antidote to the decline in voting and civic participation that has resulted from this alienation.<sup>17</sup> Otherwise, voters are stuck with the options of toeing the party line or throwing their vote away on a third party.<sup>18</sup> This latter option is particularly unsatisfactory because legislatures and courts have conspired to ensure that the major parties have a lock on power, virtually fencing third parties out of the game.<sup>19</sup>

Viewed through the lens of the “voice/exit” paradigm,<sup>20</sup> the activities of nonconnected 527s provide increased opportunity for voters and partisan activists to exercise their voices within the two-party structure.<sup>21</sup> These new

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65938-1) (June 21, 2004), available at <http://www.campaignlegalcenter.org/attachment.html/ACT+complaint+June+21+2004.pdf?id=1199> (last visited Nov. 14, 2005).

<sup>10</sup> 11 C.F.R. §§ 100, 102, 104, 106. See *infra* Part III for discussion of these regulations.

<sup>11</sup> See McCain, *supra* note 5, at 24.

<sup>12</sup> S. 271, 109th Cong. (2005); see discussion *infra* Part III. The bill would redefine political committees under FECA to include all but a narrow group of 527s, thus requiring them to register with the FEC and be subjected to hard money limits. The legislation places caps on both federal and nonfederal contributions. Amy Keller, *Critics of 527s Introduce Regulatory Bill*, ROLL CALL, Sept. 23, 2004, at 3.

<sup>13</sup> H.R. 1316, 109th Cong. (2005).

<sup>14</sup> H.R. 2204, 109th Cong. (2005).

<sup>15</sup> H.R. 1316 §§ 2–3.

<sup>16</sup> H.R. 2204 § 2.

<sup>17</sup> ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 46 (2000); RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 2–3 (1992); see *infra* note 155 and accompanying text.

<sup>18</sup> LISA JANE DISCH, *THE TYRANNY OF THE TWO-PARTY SYSTEM* 127 (2002).

<sup>19</sup> See discussion *infra* Part II.

<sup>20</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970); see discussion *infra* Part II (evaluating the role of 527s in the context of the voice/exit model).

<sup>21</sup> Voice/exit theory has been applied to political party structure by a number of authors. See, e.g.,

avenues for voice have increased active political participation by citizens.<sup>22</sup> Furthermore, nonconnected 527 groups have brought to voters' attention information on candidates that otherwise might not have been made public.<sup>23</sup>

The FEC's new regulations may have a dramatic effect on some groups, but likely can be avoided by others.<sup>24</sup> The need for these regulations is far from clear. Recently proposed legislation, particularly the 527 Reform Act of 2005, goes much further to choke nonconnected 527s.<sup>25</sup> Supreme Court precedent raises serious issues of the Act's constitutionality.<sup>26</sup> In sum, these regulations may have a detrimental effect on America's democracy.

Part I of this Comment will provide a brief background of 527 organizations and outline the popular perception of the role that 527 organizations played in 2003–2004. Part II will evaluate specific activities undertaken by some of the best known and most controversial 527s through the lens of the voice/exit paradigm, and in the context of the judicially-enforced two-party system. Part III will review the various regulatory schemes that might apply to nonconnected 527 organizations in the 2005–2006 election cycle and beyond, including the proposed 527 Reform Act of 2005.<sup>27</sup> The Comment will conclude by arguing that the increasingly restrictive regulation of nonconnected 527s is both wrong and unnecessary.

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Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 874–77 (2002) (examining the Supreme Court's treatment of political parties and political speech in the context of voice/exit theory). Although this Comment attempts to demonstrate that 527 organizations can serve to strengthen the current two-party system as opposed to weaken it, as critics charge, it is not intended to promote the current structural disincentives to entry and strength of third parties. Rather, the argument simply acknowledges the current reality and attempts to highlight how nonparty groups can nonetheless play an important and positive role within the current political context.

<sup>22</sup> For example, MoveOn.org boasts more than two million members, Moveon.org, Frequently Asked Questions, <http://www.moveon.org/about> (last visited Nov. 20, 2005), while America Coming Together received contributions from nearly 150,000 individuals to support its get-out-the-vote (GOTV) campaigns. Harwood, *supra* note 6.

<sup>23</sup> Swift Vets and POWs for Truth, an organization whose campaign ads attacked Senator John Kerry's military record from Vietnam, is the best known group that worked toward this end. The group was originally known as Swift Boat Veterans for Truth, but subsequently joined forces with a Prisoner of War (POW) group and changed its name to Swift Vets and POWs for Truth. See Press Release, Swift Vets and POWs for Truth, Swift Boat Veterans Join Forces With POWs, Launch \$1.4 Million National TV and Mail Campaign (Sept. 29, 2004), available at <http://horse.he.net/~swiftpow/article.php?story=2004092911015589>.

<sup>24</sup> See discussion *infra* Part III.

<sup>25</sup> S. 271, 109th Cong. (2005); see discussion *infra* Part III.

<sup>26</sup> See discussion *infra* Part III.

<sup>27</sup> S. 271.

## I. THE 527 ORGANIZATION

This Part will provide a brief overview of the legal foundation of the 527 organization. It then will review the role these groups played in the 2003–2004 election cycle. This information provides context for the following Part, which examines a number of nonconnected 527 organizations in the context of voice/exit theory and political parties.

### A. *Defining I.R.C. § 527 Organizations*

One of the most confusing issues to observers not intimately familiar with campaign finance regulations (and indeed, to some who are) is the difference between a 527 organization and a political committee under the Federal Election Campaign Act (FECA).<sup>28</sup> Both the Internal Revenue Code (IRC)<sup>29</sup> and the FECA refer to “political committee[s].”<sup>30</sup> However, the term is used in a different manner in each statute. Differentiating between the two definitions is central to a critical examination of the controversy surrounding the use of unrestricted contributions by nonconnected 527 organizations.

Section 527 of the IRC provides tax-exempt status to organizations whose primary purpose is to conduct election-related activity.<sup>31</sup> The statute does not differentiate between state and federal election activity.<sup>32</sup> Furthermore, it defines election activity broadly, as “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office . . . .”<sup>33</sup>

In contrast, political committees are defined under FECA as organizations that accept contributions or undertake expenditures in excess of \$1000 a year “for the purpose of influencing any election for Federal office.”<sup>34</sup> The Supreme Court in *Buckley v. Valeo* applied a limiting construction to both contributions and expenditures, holding those terms to include only

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<sup>28</sup> Pub. L. No. 92-225, 86 Stat. 3, 3–20 (1972) (codified as amended in scattered sections of 2 U.S.C.).

<sup>29</sup> I.R.C. § 527 (2004).

<sup>30</sup> 2 U.S.C. § 431(4) (Supp. 2002)

<sup>31</sup> I.R.C. § 527 (2004).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*; see also Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 263–65 (2004) (comparing § 527 definitions with FECA political committees).

<sup>34</sup> 2 U.S.C. § 431(9)(A) (Supp. 2004).

contributions and expenditures intended for express advocacy.<sup>35</sup> Express advocacy was defined to be broadcast political advertising specifically calling for the election or defeat of a clearly identified candidate for federal office, using such words as “vote for” or “defeat.”<sup>36</sup> The Supreme Court further limited the definition of “political committee” to include only “organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”<sup>37</sup>

The content and application of the “major purpose test” are hugely controversial.<sup>38</sup> The FEC nonetheless recently reiterated that the major purpose test relates directly to contributions and expenditures under FECA, apparently limiting its scope.<sup>39</sup>

In short, organizations whose activities fell short of express advocacy, and which did not state that their purpose was to influence federal elections, were not regulated by the FEC in the past election cycle.<sup>40</sup> Therein lies the heart of the controversy surrounding the activities of those 527 organizations that did not qualify as political committees under FECA. Unlike groups with closer links to the political parties and candidates, nonconnected 527s could (and did) accept unlimited contributions from any source.<sup>41</sup>

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<sup>35</sup> 424 U.S. 1, 42–44, 80 (1976). The definition of expenditures, at least for the purpose of defining coordination with a candidate for federal office, was expanded by the Supreme Court in *McConnell v. FEC* to include electioneering communications. 540 U.S. 93, 104 (2004).

<sup>36</sup> *Buckley*, 424 U.S. at 44 n.52.

<sup>37</sup> *Id.* at 79. The Court provided further clarity to the “major purpose” test in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 249–54 (1986). A group could qualify as a political committee if a preponderance of its expenses would be classified as expenditures under FECA. Alternatively, a group could qualify as a FECA political committee if its publicly-stated purpose was to influence federal elections. *Id.*

<sup>38</sup> Compare James Bopp, Jr. & Richard E. Coleson, *The First Amendment Is Still Not a Loophole: Examining McConnell’s Exception to Buckley’s General Rule Protecting Issue Advocacy*, 31 N. KY. L. REV. 289, 318–45 (2004) (arguing that the limitation of express advocacy in defining FECA political committee status is valid and necessary), with Edward B. Foley, *The “Major Purpose” Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 352–55 (2004) (calling the continued inclusion of express advocacy in determining political committee status “absurd”).

<sup>39</sup> Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,058 (Nov. 23, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106).

<sup>40</sup> See Thomas B. Edsall, *In Boost for Democrats, FEC Rejects Proposed Limits on Small Donors*, WASH. POST, May 14, 2004, at A9 (noting that in rejecting proposed regulatory changes, the FEC allowed groups “to continue to raise and spend millions of dollars in unrestricted contributions . . . in the 2004 election”); see also Bopp & Coleson, *supra* note 38, at 318–45.

<sup>41</sup> Edsall, *supra* note 40; see also Holman, *supra* note 33, at 266–67.

### B. 527 Organizations in the 2003–2004 Election Cycle

In the most recent election cycle, unprecedented amounts of money entered into the process through 527 organizations. According to the Center for Responsive Politics, an independent group that tracks political campaigns and contributions, well over \$400 million was poured into these organizations in the 2003–2004 election cycle.<sup>42</sup> While a great deal of this money went to political advertising,<sup>43</sup> other groups conducted more grassroots oriented voter registration and “get-out-the-vote” (GOTV) drives.<sup>44</sup>

Most reports have attributed the unprecedented strength and popularity of 527 organizations in the most recent election cycle to the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>45</sup> Under BCRA, which reformed FECA, contribution limits for the first time were applied to political parties<sup>46</sup> and political committees that either were directly linked to candidates for federal office or that engaged in electioneering activity, such as bundling contributions for candidates for federal office.<sup>47</sup> A “soft money”<sup>48</sup> ban meant that national political parties could no longer receive huge, unregulated contributions from any source, but instead were limited to contributions of no more than \$25,000 solely from individuals.<sup>49</sup> In addition, BCRA increased the limit that any individual could contribute directly to a candidate from \$1000 to \$2000.<sup>50</sup>

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<sup>42</sup> Ctr. for Responsive Politics, 527 Committee Activity: Expenditure Breakdown—Federally Focused Organizations, <http://www.opensecrets.org/527s/> (click “Expenditures” and choose 2004) (last visited Nov. 14, 2005).

<sup>43</sup> For example, the Media Fund sponsored a multimillion dollar advertising campaign, largely in the swing states of Ohio, Pennsylvania, and Florida, criticizing President George W. Bush’s performance on a wide range of issues. See Ctr. for Responsive Politics, Media Fund, 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=15> (last visited Oct. 9, 2005); see also James V. Grimaldi & Thomas B. Edsall, *Super Rich Step into Political Vacuum: McCain-Feingold Paved Way for 527s*, WASH. POST, Oct. 17, 2004, at A1 (reciting the role of various 527 organizations, including the Media Fund, in the 2004 election cycle).

<sup>44</sup> See, e.g., Michael S. Kang, *From Broadcasting to Narrowcasting*, 73 GEO. WASH. L. REV. 1070, 1082 (2005) (describing GOTV efforts of America Coming Together); Grimaldi & Edsall, *supra* note 43 (noting ACT’s effort toward in support of the Democratic Party’s “ground game”); Andrew Kiraly, *ACTing Out*, LAS VEGAS MERCURY, Sept. 2, 2004, available at <http://www.lasvegasm Mercury.com/2004/MERC-Sept-02-Thu-2004/24664257.html> (describing voter registration and other local publicity efforts of America Coming Together in Las Vegas as “ferociously local, tenaciously grassroots and creative”).

<sup>45</sup> Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C.).

<sup>46</sup> BCRA § 101(a), 2 U.S.C. 431 (Supp. 2004).

<sup>47</sup> See Holman, *supra* note 33, at 263–65.

<sup>48</sup> Soft money is defined by both source (corporate as opposed to individual) and amount. *Id.* at 256–57.

<sup>49</sup> BCRA § 307, 2 U.S.C. § 441a(a)(1) (Supp. 2004).

<sup>50</sup> *Id.*

Political party observers believed that these new restrictions would dramatically impair the Democratic Party's ability to match Republican fundraising efforts. The Democratic Party historically had relied on soft-money contributions more than the Republican Party.<sup>51</sup> Further, it was widely believed that more Republican donors would be able to take advantage of the higher hard-money limits, while a smaller number of Democrats would be able to donate up to the new \$2000 cap.<sup>52</sup> Thus, even as BCRA was being debated on the floors of the House and Senate, Democratic Party officials were planning their strategy to use independent, nonconnected organizations to continue to take advantage of large dollar donations.<sup>53</sup> Indeed, elected officials were well aware that soft money could still find its way into the political process. Politicians opposed to BCRA predicted that more dollars would flow to these organizations, and no less money would be involved in future campaigns.<sup>54</sup>

Media accounts of the role of 527 organizations have been largely negative. A *Newsweek* article accused these groups of "hijacking the race for the White House,"<sup>55</sup> while Senator John McCain called their activities "abusive" and "illegal."<sup>56</sup> Following the controversial attack ads against Senator John Kerry sponsored by 527 group Swift Vets and POWs for Truth, President Bush called on all 527 groups to cease broadcast advertising.<sup>57</sup> Even after the election, Presidential political advisor Karl Rove accused Democratic groups of trying to "derail democracy," adding that 527 groups weaken political parties.<sup>58</sup>

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<sup>51</sup> Harold Ickes, former Chief of Staff to President Bill Clinton, issued an ominous warning to Democratic Party officials, saying that without soft money, Republican expenditures would have been almost double those of the Democrats in 1999–2000. Grimaldi & Edsall, *supra* note 43.

<sup>52</sup> *Id.* These predictions turned out to be false; the Democratic Party's hard money fundraising edged out Republican Party efforts between January 1, 2003 and November 22, 2004. Thomas B. Edsall & Derek Willis, *Fundraising Records Broken by Both Major Political Parties: Democrats Got More Money than GOP for 1st Time Since '70s*, WASH. POST, Dec. 3, 2004, at A7.

<sup>53</sup> Grimaldi & Edsall, *supra* note 43.

<sup>54</sup> Press Release, Statement of U.S. Senator Mitch McConnell on Supreme Court Ruling on Campaign Finance Law, Dec. 10, 2003, available at <http://mccconnell.senate.gov/news.cfm>; see also Mitch McConnell, *The Future Is Now*, 3 ELECTION L.J. 123, 124 (2004) (predicting that outside groups would spend hundreds of millions of dollars in the wake of BCRA).

<sup>55</sup> Mark Hosenball et al., *The Secret Money War*, NEWSWEEK, Sept. 20, 2004, at 22.

<sup>56</sup> Statements on Introduced Bills and Joint Resolutions, 150 CONG. REC. S9526, 9527 (daily ed. Sept. 22, 2004) (statement of Sen. John McCain).

<sup>57</sup> Elisabeth Bumiller & Kate Zernike, *President Urges Outside Groups to Halt All Ads: But Doesn't Single Out Swift Boat Claims*, N.Y. TIMES, Aug. 24, 2004, at A1.

<sup>58</sup> Herman, *supra* note 7. Ironically, Republican groups outspent Democratic groups in the last reporting quarter prior to the election. Thomas B. Edsall, *After Late Start, Republican Groups Jump into the Lead: Since August, 527s Raised Six Times as Much as Democrats*, WASH. POST, Oct. 17, 2004, at A15.

Despite the criticism, however, some of the groups most active in the recent election have vowed to continue their activities in the coming elections.<sup>59</sup> Thus, the question remains whether this critical perception of 527s is accurate, or whether in fact there is a positive role that 527s can play.

## II. VOICE/EXIT AND 527S

This Part will establish the potential of 527 organizations to strengthen democracy, in large part because of the entrenched duopoly represented by the two-party system of American democracy. By analyzing the American political system through the lens of the voice/exit paradigm, this Comment argues that political party members, as opposed to political party leadership, need additional opportunities for voice in order to remain active and participating within the two parties. Nonconnected 527 organizations have created such opportunities. Greater voice leads to decreased incentives to exit from the major parties, either through the option of nonparticipation or by choosing a third-party option.

This Part will begin by briefly outlining the voice/exit model. The Comment then explains why voice is difficult for rank-and-file party members to exercise, while at the same time third parties pose inadequate exit opportunities. The final and most detailed section of this Part will examine certain activities of specific nonconnected 527 organizations. These activities demonstrate that these groups provide additional opportunities for citizens to exercise voice within the major political parties.

### A. *The Voice/Exit Model*

The voice/exit theory posits that members or supporters of an organization have two options if they are dissatisfied with the group: either voice or exit. Voice is generally described as “any attempt at all to change, rather than to escape from, an objectionable state of affairs.”<sup>60</sup> Voice can be exercised individually or collectively and includes efforts “meant to mobilize public

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<sup>59</sup> See, e.g., Harwood, *supra* note 6 (quoting the head of ACT as making plans for the group to become a “political fixture”); Lewis & Pilhofer, *supra* note 6 (“[T]he lesson learned by Democratic donors and operatives . . . is probably this: Spend more money on 527s next time . . .”); David Brown & John Dimsdale, *Marketplace: Battle Begins Between Pro- and Anti-Social Security Reform Groups* (National Public Radio broadcast Jan. 11, 2005); Ctr. for Responsive Politics, *527 Committee Activity, 2006 Election Cycle*, <http://www.opensecrets.org/527s/527cmtes.asp?level=C&cycle=2006> (last visited Jan. 20, 2006).

<sup>60</sup> HIRSCHMAN, *supra* note 20, at 30.

opinion.”<sup>61</sup> As the discussion below highlights, however, voters and rank-and-file party members frequently encounter difficulty in exercising voice because of the way political party leaders are allowed to wield their authority.<sup>62</sup>

The alternative option for dissatisfied customers or group members is to exit. Exiting sends a strong signal to the organization that something is wrong and creates an incentive to address these problems.<sup>63</sup> An important predicate to exit being a viable option is a competitive market.<sup>64</sup> The duopoly of the major parties in the U.S. political system, reinforced by structural disincentives to third parties, means that current exit options are wholly inadequate for the purpose.<sup>65</sup>

### *B. Exercising Voice within Political Parties*

For the purposes of this Comment, political parties are discussed in terms of party leadership and the party in the electorate.<sup>66</sup> Party leadership consists of two distinct groups: elected officials who represent the political party in government and professional leaders within the formal political party organization.<sup>67</sup> The party in the electorate, on the other hand, is made up of activists and other members who often volunteer and provide contributions to the party, but who have little or no formal role in setting the party’s agenda.<sup>68</sup> Party leadership is usually given tremendous deference by courts, with the result that the party in the electorate faces obstacles in exercising its voice to “change . . . an objectionable state of affairs . . . .”<sup>69</sup>

Prior jurisprudence has construed political parties as private, self-governed groups, providing individual members only limited rights to exercise their voices in opposition to the party leadership.<sup>70</sup> Political party leadership has

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<sup>61</sup> *Id.*

<sup>62</sup> See *infra* notes 66–76 and accompanying text.

<sup>63</sup> HIRSCHMAN, *supra* note 20, at 4.

<sup>64</sup> *Id.*

<sup>65</sup> *Infra* notes 77–97 and accompanying text.

<sup>66</sup> A more complex version of political party structures distinguishes the three groupings separately as the party in government, the party organization, and the party in the electorate. V.O. KEY, JR., *POLITICS, PARTIES & PRESSURE GROUPS* 163–65 (5th ed. 1964). Numerous law review articles apply this paradigm in analyzing political parties and courts’ treatment thereof. See, e.g., Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 95–143; Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 778–79 (2000).

<sup>67</sup> See KEY, *supra* note 66, at 344.

<sup>68</sup> *Id.*

<sup>69</sup> HIRSCHMAN, *supra* note 20, at 30.

<sup>70</sup> This proposition is covered in far more depth in Garrett, *supra* note 66, at 95–143; Daniel Hays

thus been successful at forcing one state to overturn a popularly-decided blanket primary system.<sup>71</sup> In other instances, party leadership has forced states to conduct open primaries to dilute the more ideological party base.<sup>72</sup> At least for the sake of internal governance, political parties are considered private organizations, and thus as organizations, can exercise their decision-making structures and set policies however they see fit.<sup>73</sup>

While these judicial decisions provide an important autonomy for political parties, this autonomy comes only at the cost of curtailing the voice of rank-and-file party members. Both the Supreme Court and lower courts have (perhaps inadvertently) allowed the party organization and the party in government to overrule court decisions and ignore the concerns of the party in the electorate.<sup>74</sup> Even when the electorate asserts its opinion concerning political party issues through the ballot box, such as determining the form that primaries are to take, the party leadership can override such majoritarian decision making through the courts.<sup>75</sup> Thus, the leadership is the only real group in the traditional political party structure with the ability to exercise voice freely.<sup>76</sup>

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Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1747–54 (1993); see also Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 101–30 (2004) (arguing that current jurisprudence based on an individual rights model is inappropriate for political parties).

<sup>71</sup> See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 577 (2000) (holding that the state's blanket primary violated political parties' associational rights).

<sup>72</sup> *Tashjian v. Connecticut*, 479 U.S. 208, 215–17 (1986) (forcing state to allow an open primary).

<sup>73</sup> See, e.g., *Eu v. S.F. County Democratic Cent. Comm.*, 489 U.S. 214, 224–25 (1989) (basing decision on political parties' private associational rights). Because political parties also play a public role in controlling political primaries, government does have a limited role in regulating political party activities in that context. See, e.g., *White Primary Cases*, 345 U.S. 461, 469–70 (1953); 321 U.S. 649, 663–64 (1944) (striking down official and unofficial nominating processes that prevented blacks from running for office on the Democratic ticket). However, even a state's ability to regulate the primary process is limited. See *supra* notes 70–72 and accompanying text.

<sup>74</sup> See, e.g., *Republican Party of Tex. v. Dietz*, 940 S.W.2d 86, 92–93 (Tex. 1997) (holding that as a private association, the state Republican Party could revoke permission from a group of gay party activists to sponsor a booth at the state party convention and refuse to publish its advertisement because the party disagreed with the content of the group's message).

<sup>75</sup> *Cal. Democratic Party*, 530 U.S. at 601 (Stevens, J., dissenting) (noting the irony that the blanket primary the majority struck down had been passed by popular referendum with sixty percent support of the members of both major parties).

<sup>76</sup> See *supra* notes 71–75 and accompanying text.

### C. *The Limits and High Costs of Exit*

Increasingly, Americans, including those who in the past considered themselves loyal party members, have become disenchanted with the traditional political party organization and government.<sup>77</sup> One alternative, then, for members of the party in the electorate dissatisfied with the major parties is to exit from the traditional party structure and instead engage with a third party.<sup>78</sup> Exiting through aligning with and voting for third parties is an unattractive choice because the cost is high.<sup>79</sup>

Voters frequently choose the other exit option, that of rational abstention.<sup>80</sup> The numbers are striking; between the mid-1960s and 2000, Americans have become forty percent less likely to be engaged in political party organizations.<sup>81</sup> Most observers view this recent decline in political participation as a threat to democracy.<sup>82</sup>

#### 1. *Third Parties: An Unsatisfactory and Inefficient Exit Option*

As noted above, a predicate to exit as a viable alternative to voice is a competitive market.<sup>83</sup> This competitive market does not exist for the major political parties.<sup>84</sup> In the context of the judicially-enforced two-party duopoly in the United States, exit is ineffective as either a message or a threat to major parties.<sup>85</sup>

In the current system, third parties will virtually never be powerful or competitive enough to pose any serious threat to the major parties.<sup>86</sup> The major parties in government, supported by the courts, have worked to ensure

<sup>77</sup> JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS* 1–2 (1995). The authors cite numerous other publications supporting the wave of public discontent with politics and government. See also Theodore J. Lowi, *The Party Crasher*, N.Y. TIMES, Aug. 23, 1992, § 6 (Magazine), at 28 (asserting that the two major parties are “brain dead,” being kept alive only by regulatory restrictions against third parties).

<sup>78</sup> STEVEN J. ROSENSTONE ET AL., *THIRD PARTIES IN AMERICA: CITIZEN RESPONSE TO MAJOR PARTY FAILURE* 4–5 (2d ed. 1996).

<sup>79</sup> See HIRSCHMAN, *supra* note 20, at 37 (“in some situations, exit will . . . be a reaction of *last resort* after voice has failed”).

<sup>80</sup> See generally TEIXEIRA, *supra* note 17.

<sup>81</sup> PUTNAM, *supra* note 17, at 46. Other forms of civic participation are likewise on the decline, although the numbers are not as dramatic as political party participation. *Id.* at 48–64.

<sup>82</sup> DISCH, *supra* note 18, at 107, 111; PUTNAM, *supra* note 17, at 27–28.

<sup>83</sup> HIRSCHMAN, *supra* note 20, at 21–29.

<sup>84</sup> See *infra* notes 86–95 and accompanying text.

<sup>85</sup> HIRSCHMAN, *supra* note 20, at 26.

<sup>86</sup> ROSENSTONE ET AL., *supra* note 78, at 15.

that third parties are relegated to insignificant roles.<sup>87</sup> Thus, voters choose third parties “only under the most extreme conditions,” and this choice represents “an extraordinary act that requires the voter to reject explicitly the major parties.”<sup>88</sup> A vote for a third party usually will be a wasted or a protest vote.<sup>89</sup>

State legislatures and Congress alike, filled with representatives of the major parties, have enacted statute after statute to create structural barriers to third parties.<sup>90</sup> Measures upheld by the Supreme Court have included ballot access restrictions for third parties,<sup>91</sup> federal funding for major parties’ presidential candidates,<sup>92</sup> and bans on “fusion.”<sup>93</sup>

In addition to banning the practice of fusion, the Supreme Court went one step further in cementing a peripheral role for third parties in *Timmons v. Twin Cities Area New Party*.<sup>94</sup> There, the Court asserted that “political stability is best served through a healthy two-party system,” demonstrating an outright hostility to third parties.<sup>95</sup>

Added to structural disincentives, society has attached a stigma to exit in the context of politics. “[E]xit has often been branded as *criminal*, for it has been labeled desertion, defection, and treason.”<sup>96</sup> Thus, not only are voters’ options limited, but the choice of exit is extremely costly.<sup>97</sup>

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<sup>87</sup> *Id.* at 15–47.

<sup>88</sup> *Id.* at 15.

<sup>89</sup> DISCH, *supra* note 18, at 127.

<sup>90</sup> *Id.* at 3–4.

<sup>91</sup> *Munro v. Socialist Workers Party*, 479 U.S. 189, 193–94 (1986) (upholding minimum vote requirement for third-party access to the general election ballot).

<sup>92</sup> *Buckley v. Valeo*, 424 U.S. 1, 93–96 (1976) (rejecting the argument that federal funding for major party presidential candidates unconstitutionally discriminated against third parties).

<sup>93</sup> *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354–55 (1997). Fusion allows a third party to list a major party candidate on a separate line on the ballot. This allows votes for the third party to be counted separately, which would mean greater influence for that party should their candidate win an office. Garrett, *supra* note 67, at 121. The *Timmons* decision has been criticized specifically for ignoring “the relationship between voice and exit” and failing to “respond to the dissent’s observation that fusion candidacies allow minor parties vitality while preserving political stability.” *Id.* at 124.

<sup>94</sup> 520 U.S. at 367.

<sup>95</sup> *Id.* This bias toward two parties has been criticized as both unnecessary and wrong-headed. *See, e.g., id.* at 377–82 (Stevens, J., dissenting); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 683–87 (1998) (criticizing the Court’s approach in *Timmons* as anticompetitive).

<sup>96</sup> HIRSCHMAN, *supra* note 20, at 17.

<sup>97</sup> In addition to the cost of stigma, most voters perceive a vote for a third party to be “wasted,” further burdening a voter’s choice to exit. DISCH, *supra* note 18, at 127.

## 2. *Why Voters Choose the Exit Option*

Voters nonetheless choose to support third parties over the major parties, despite the long odds that third-party candidates will actually win an election.<sup>98</sup> Two primary reasons that voters take the drastic step of voting for a third party are major party deterioration and issue unresponsiveness.<sup>99</sup>

Major party deterioration occurs when voters lose faith in both parties and their candidates in their ability to govern effectively and ensure security and prosperity for their constituencies.<sup>100</sup> Voters abandon the major parties once they believe that avenues within the major party structures to achieve their goals have been foreclosed. In this instance, “[a] third party vote is a vote *against* the major parties.”<sup>101</sup>

A second motivation for voter support for third parties is the perception that neither party’s candidate is addressing effectively either a major ideological preference or a specific issue.<sup>102</sup> The former becomes a significant problem when the major party candidates stray too far from their parties’ ideological roots, thereby alienating some of the party base.<sup>103</sup> As Professor Elizabeth Garrett stated, “[a]ctivists who become frustrated with the party because its leaders and candidates do not meet their ideological expectations may first seek to influence party policy from within. If that fails, they may leave the party to join a more ideologically focused minor party.”<sup>104</sup> As the distance between a candidate and a voter’s position increases, so does the likelihood that that voter will vote for a third party.

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<sup>98</sup> ROSENSTONE ET AL., *supra* note 78, at 126–46.

<sup>99</sup> *Id.* at 126–27. Other issues identified by the authors include economic adversity, unacceptable major party candidates, and loyalty to third parties. *Id.* at 134–44. Although some of these issues may well have been at play in the 2003–2004 election cycle, they are not issues to which 527 organizations lend themselves to providing alternative solutions.

<sup>100</sup> *Id.* at 126.

<sup>101</sup> *Id.* at 127.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 128. The authors trace support for George Wallace in the 1968 election to the relative centrist-liberal positions on civil rights that Nixon and Humphrey took during the campaign. *Id.* at 131–32. The 2000 third-party Presidential candidacy of Patrick Buchanan for the right, Pildes, *supra* note 70 at 38, and Ralph Nader on the left, are more recent examples of third party attempts to attract the more ideological factions of both major parties who believed that the major party candidates were too centrist. Nancy L. Rosenblum, “*Extremism and Anti-Extremism in American Party Politics*,” 12 J. CONTEMP. LEGAL ISSUES 843, 858 (2002).

<sup>104</sup> Garrett, *supra* note 66, at 105.

Alternatively, third party support grows when there are specific issues that the major parties fail to address.<sup>105</sup> Voters who base their vote solely on issues, without regard to major party loyalty or candidate personality, are significantly more likely to vote for a third-party candidate.<sup>106</sup>

### *C. 527s: An Alternative Opportunity for Voice*

As outlined above, the dilemma that many voters and political activists have faced is simple. Voters are alienated from the major parties because they believe the party no longer represents their ideologies or will not fight for the issues that the voters find important.<sup>107</sup> The other major party, however, may be even less likely to meet these needs. The question for these voters is how to get their message across, without risking a “wasted” vote and potentially handing victory to the opponents.<sup>108</sup> Other potential voters face a slightly different frustration: that of being fed up with politics as usual, exemplified in the traditional two-party structure.<sup>109</sup> Into this breach steps a possible alternative: the 527 group.

There are likely as many reasons for supporting 527 organizations as there are supporters, and it is a dangerous exercise to impute general motivation to individuals. However, it appears that 527 organizations in the past election cycle alleviated several of the pressures that historically drive voters to support third parties. Some groups filled an organizational breach left by the major parties.<sup>110</sup> Some groups provided an outlet and publicity for a more

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<sup>105</sup> ROSENSTONE ET AL., *supra* note 78, at 132–33. To illustrate this issue, the authors trace the rise of the Greenback and Populist parties in the late nineteenth century to the failure of the major parties to address major economic issues that created severe strains on powerful agricultural interests. *Id.* at 133. A more modern analogue can be seen in tremendous public support for Ross Perot’s Reform Party candidacy in 1992, in the face of major party ambivalence to facing the issues of deficit reduction and fiscal responsibility.

<sup>106</sup> *Id.* at 164. While the prestige of the third-party candidate affects his or her support, issue-driven voters are still twenty percent more likely to vote for even a nonprestigious candidate. *Id.* As the authors explain, “People intensely concerned with issues are apt to be disappointed with what the major parties have to offer. Major party candidates strive for ambiguity . . .” *Id.*

<sup>107</sup> See *supra* notes 102–06 and accompanying text.

<sup>108</sup> See DISCH, *supra* note 18, at 1. The risk of “spoiler” candidates is real. Many observers attributed the success of Bill Clinton in 1992 to Ross Perot’s conservative Reform Party candidacy, which split the Republican vote. See, e.g., Philip Klinkner, *Democratic Party Ideology in the 1990s*, in THE POLITICS OF IDEAS: INTELLECTUAL CHALLENGES FACING THE AMERICAN POLITICAL PARTIES 113, 117 (John Kenneth White & John C. Green eds., 2001).

<sup>109</sup> See HIBBING & THEISS-MORSE, *supra* note 77, at 1.

<sup>110</sup> See, for example, the grass roots organizing activities of ACT, described *infra* notes 117–33 and accompanying text.

ideologically-driven faction of a major party.<sup>111</sup> Others highlighted specific issues and positions that neither major party had addressed in the campaign.<sup>112</sup> All of them played a hand in providing opportunities for the political party base to send a message to the major parties' leadership.

### 1. *Filling the Party Void: America Coming Together*

It must be acknowledged from the outset that some very wealthy individuals donated massive amounts of money to 527 organizations simply because they wanted to support or defeat a particular political candidate.<sup>113</sup> It is impossible to know whether these same people would have channeled their funds through political parties had the so-called "soft-money loophole" not been closed under BCRA.<sup>114</sup>

However, the enormous contributions to these independent groups during the past election cycle represented a marked change in the donating patterns of several of the top individual contributors to nonconnected 527 organizations.<sup>115</sup> Something different must have been motivating these individuals.<sup>116</sup>

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<sup>111</sup> See, for example, the activism by MoveOn.org, detailed *infra* notes 134–41 and accompanying text.

<sup>112</sup> See, for example, the campaign of Swift Vets and POWs for Truth, *infra* notes 142–49 and accompanying text.

<sup>113</sup> The most famous example of this is George Soros, who donated tens of millions of his personal fortune with the singular goal of defeating George W. Bush's candidacy for President in 2004. See Leslie Wayne, *And for His Next Feast, a Billionaire Sets Sights on Bush*, N.Y. TIMES, May 31, 2004, at A13.

<sup>114</sup> BCRA § 101, 2 U.S.C. § 441i (Supp. 2004). A recent analysis of the effect of BCRA on 527s concludes that while some soft money was transferred from the major political parties to 527s, many of the donations in the last election cycle were far beyond what the same donors had provided to political parties in past years. Steve Weissman & Ruth Hassan, *BCRA and the 527 Groups*, in THE ELECTION AFTER REFORM: MONEY, POLITICS AND THE BIPARTISAN CAMPAIGN REFORM ACT 1, 9 (Michael J. Malbin ed.) (forthcoming fall 2005) [hereinafter THE ELECTION AFTER REFORM], available at [http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR\\_Chapter5\\_WeissmanHassan.pdf](http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_Chapter5_WeissmanHassan.pdf).

<sup>115</sup> Weissman & Hassan, *supra* note 114, at 2. A recent analysis of the effect of BCRA on 527s concluded that while some pre-BCRA soft money was transferred from the major political parties to 527s "ex-soft money donors gave far more to 527s in '04 than they had previously given as soft money to parties." See Robert G. Boatright et al., *Interest Groups and Advocacy Organizations After BCRA*, in THE ELECTION AFTER REFORM, *supra* note 114, at 1, 6, available at [http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR\\_Chapter6\\_Boatrightetal.pdf](http://www.cfinst.org/studies/ElectionAfterReform/pdf/EAR_Chapter6_Boatrightetal.pdf) (analyzing donations from the top supporters of 527s in the 2004 election cycle, noting, "[c]learly, this is not mere replacement; something more is going on . . .").

<sup>116</sup> The natural counter-argument is that the rather unique political context drove a great deal of the large scale donations during this particular election cycle. That argument may suggest that a highly polarized electorate, due in part to factors such as the closely contested election of 2000; the ongoing, immensely controversial, and divisive war in Iraq; deep concerns about national and global security following the terrorist attacks of 9/11; and bitter partisanship surrounding both parties campaigns, particularly the presidential campaign, helped drive the high level of support for outside groups. This begs the question, however, whether in the *absence* of these groups, these polarizing issues would have played as large a role in the political debate

One traditional Democratic Party supporter stated of his recent support for the 527 group ACT, “We’re not looking to go through the party, which has all kinds of agendas and deals to cut.”<sup>117</sup> This strikes at the heart of one of the primary complaints about the failure of the major political parties, and indeed political institutions in general. “[D]issatisfaction with the political system . . . is due in no small part to public perceptions of the *processes* involved.”<sup>118</sup>

Other major supporters of 527 groups have never been involved in political parties in the past. One such donor, Linda Pritzker, donated at least \$2.5 million to 527 organizations during the past election cycle.<sup>119</sup> Previously, however, her giving had been limited to a few thousand dollars to individual candidates.<sup>120</sup> Her contributions to political parties since 1990, including the 2003–2004 cycle, amounted to a single gift of \$2000 to a state party central committee.<sup>121</sup> When asked about her decision to donate millions to ACT, Pritzker responded that she “was impressed with the effectiveness of ACT, in encouraging and informing citizens in the voting process. . . . I thought it important to support the health of our democracy in this way.”<sup>122</sup> Pritzker found something different in ACT than what she could find in a political party.

While the controversy has swirled around the “super-rich” donors to 527s, perhaps the more interesting story lies in the smaller donors. A random search of five \$1000 donors to ACT,<sup>123</sup> for example, revealed that only one of them had previously donated significant amounts of money to both candidates and

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as they did, as these groups sometimes pushed these agendas to the fore of the debate.

<sup>117</sup> David Postman, *Democrats Worried by Emerging Liberal Force*, SEATTLE TIMES, Dec. 6, 2003, at A1. *But see* Weissman & Hassan, *supra* note 114, at 6–8 (providing a fascinating account of the emergence of ACT, in which major party leaders played key roles).

<sup>118</sup> HIBBING & THEISS-MORSE, *supra* note 77, at 1.

<sup>119</sup> Ctr. for Responsive Politics, Top Individual Contributors to 527 Committees 2004 Election Cycle, <http://www.opensecrets.org/527s/527indivs.asp?cycle=2004> (last visited Oct. 1, 2005). Other sources put Pritzker’s total donations to various 527 organizations at twice that number. *See, e.g.*, Grimaldi & Edsall, *supra* note 43 (placing Pritzker’s total donations to 527s at \$5 million, with more than half coming from the Sustainable World Corporation, a newly-registered organization funded by Pritzker).

<sup>120</sup> Ctr. for Responsive Politics, Donor Look-up: Find Individual and Soft-Money Contributors, <http://www.opensecrets.org/indivs/index.asp> (last visited Oct. 1, 2005). Pritzker’s candidate of choice in 2000 was Ralph Nader.

<sup>121</sup> *Id.*

<sup>122</sup> Grimaldi & Edsall, *supra* note 43.

<sup>123</sup> Donors researched included Michael Stipe, Cheryl Coon of Lutra Press, Myron M. Cherry Associates, Jane Meranus Interiors, and Emily Little. Ctr. for Responsive Politics, *supra* note 120. This methodology was admittedly unscientific; the difficulty was compounded by the fact that a number of donors shared the same name. Thus, it was impossible to determine, based on the information provided by the website, for example which Barbara M. Miller contributed to ACT and might also perhaps have contributed to other groups. The information here is meant to be illustrative only.

political party committees in the past; the others had donated less than \$1000 total to any candidate since the 2000 election cycle.<sup>124</sup> While ACT was in the spotlight as a recipient of multiple million-plus dollar contributions, it also received more than \$11 million from a base of small donors consisting of 150,000 individuals.<sup>125</sup> Steve Rosenthal, head of ACT, stated that he intends to position his group to “become a ‘permanent infrastructure’ for activists and donors who *don’t want to be tied to the formal party structure.*”<sup>126</sup>

ACT focused its activities on the “ground war”—efforts to register and mobilize partisan voters.<sup>127</sup> The organization concentrated its resources in swing states, such as Ohio, utilizing both paid door-to-door canvassers and volunteers.<sup>128</sup> Most observers agree that the Democratic Party’s grassroots efforts in recent years have fallen flat.<sup>129</sup> ACT’s efforts were designed in part to meet a need that the party was no longer meeting.<sup>130</sup>

ACT is poised to be engaged in the 2006 mid-term Congressional elections.<sup>131</sup> Reports suggest that not only the organization’s leadership, but also its members and volunteers are strategizing about their next moves.<sup>132</sup> By mid-June 2005, ACT had raised nearly \$6 million for the 2006 elections, and had plans to bring that total up to \$30 million; the groups had already hired directors in a number of targeted states.<sup>133</sup>

## 2. *Appealing to the Ideological Base: MoveOn.org*

One of the more well-known groups involved in advertising has been the left-leaning MoveOn.org.<sup>134</sup> The group has been involved in much more than

<sup>124</sup> Ctr. for Responsive Politics, *supra* note 120.

<sup>125</sup> Harwood, *supra* note 6. This averages out to individual donations amounting to slightly more than seventy dollars per person.

<sup>126</sup> *Id.* (emphasis added).

<sup>127</sup> Farhad Manjoo, *The Revolution that Failed—For Now*, SALON, Dec. 15, 2004, <http://www.salon.com/news/feature/2004/12/15/527/print.html>. For a discussion on the mobilization efforts of a number of 527s, see Boatright et al., *supra* note 115, at 10–19.

<sup>128</sup> Kang, *supra* note 44.

<sup>129</sup> Terry M. Neal, *The Democrats’ Mini-Deans*, WASH. POST, Feb. 28, 2005 (Online Extras), <http://www.washingtonpost.com/wp-dyn/articles/A59479-2005Feb28.html>.

<sup>130</sup> Kang, *supra* note 44.

<sup>131</sup> Harwood, *supra* note 6.

<sup>132</sup> Harold Meyerson, Op-Ed, *Energetic New Faces*, WASH. POST, Dec. 29, 2004, at A19.

<sup>133</sup> Alexander Bolton, *ACT to Spend \$30 Million: Focus on Midterms for 527 at Head of “Shadow Party,”* HILL, June 4, 2005, at 1.

<sup>134</sup> MoveOn.org operated a 527 organization in the 2004 election cycle for much of its activities. See Ctr. for Responsive Politics, *527 Committee Activity, Top 50 Federally Funded Organizations, 2004 Election*

advertising, however. Established originally in response to the impeachment hearings of Bill Clinton, MoveOn.org became a powerhouse in mobilizing progressives, claiming more than two million members nationwide.<sup>135</sup>

MoveOn.org sponsored an early issue ad that received widespread attention, largely for a major network's refusal to air it during the Super Bowl in 2004.<sup>136</sup> Other efforts have included large-scale participatory efforts such as Bake Sales for Democracy, house parties, and numerous issue-based petition drives. MoveOn.org sponsored phone banks, grass roots voter drives, and an eleven state concert tour with more than a dozen musical groups.<sup>137</sup> Its mobilization efforts have been admired by some as "ferocious and dedicated,"<sup>138</sup> while characterized less charitably as "exciting a finite universe of hysterical liberals."<sup>139</sup>

MoveOn.org is widely seen as to the left of the Democratic Party mainstream and as an increasingly powerful force.<sup>140</sup> The group evidently intends to wield as much influence over the Democratic Party as it possibly can. To that end, shortly after the November 2004 election, the group sent an e-mail to its members asserting that power: "Now it's our Party: we bought it, we own it, and we're going to take it back."<sup>141</sup>

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Cycle, <http://www.opensecrets.org/527s/527cmtes.asp?level=C&format=&cycle=2004> (last visited Nov. 20, 2005). Since the election cycle, however, MoveOn.org has reorganized into two entities—a federal PAC and a 501(c)(4). MoveOn.org, About the MoveOn.org Family of Organizations, <http://www.moveon.org/about.html> (last visited Dec. 29, 2005). This reorganization reinforces this Comment's assertion that classifying all 527 organizations as political committees will encourage many of them to organize under different tax codes, which operate under significantly less transparency. See *infra* Part IV.

<sup>135</sup> MoveOn.org, *supra* note 134.

<sup>136</sup> Jonathan Darman, *Censored at the Super Bowl*, NEWSWEEK, Jan. 30, 2004 (Web Exclusive), <http://www.msnbc.msn.com/id/4114703/>. One of the more interesting (and highly democratic) aspects was the process by which it developed the television spot. The group sponsored a contest for member submissions, then allowed members to view and vote on their favorite spot. The winning submission, featuring children performing difficult menial labor, subtly criticized the Bush administration's budget deficit. The group raised the \$1.5 million price tag for the Super Bowl slot entirely through member donations. *Id.*

<sup>137</sup> 2004 MoveOn PAC Action Archives, <http://www.moveonpac.org/archive> (last visited Nov. 1, 2005).

<sup>138</sup> Hanna Rosin, *Vote Swingers: Suddenly Politics Is Hot Again. Sometimes, Really Hot*, WASH. POST, Oct. 17, 2004, at D1.

<sup>139</sup> Chris Suellentrop, *Feel-Good Politics: The Therapeutic Activism of MoveOn.org*, SLATE, Dec. 8, 2004, <http://slate.msn.com/id/2110819> (quoting an unidentified aide to a Democratic Presidential candidate).

<sup>140</sup> MoveOn.org's executive director Eli Pariser was ranked third among the top fifty most powerful men by *Details* magazine. Rosin, *supra* note 128.

<sup>141</sup> Manjoo, *supra* note 127.

### 3. *Bringing Issues to the Table: Swift Vets and POWs for Truth*

Much of the criticism surrounding 527 organizations focuses on broadcast media advertising. Unquestionably, the highest profile and one of the most controversial of these groups was the Swift Vets, whose focus was on attacking Democratic Presidential challenger John Kerry's military service record from Vietnam.<sup>142</sup> The Kerry campaign accused the Swift Boat group of distorting information and simply being a front for the Republican Party.<sup>143</sup> This simplistic critique, however, ignores a basic reason for the group's formation: its founders had a message that they wanted the electorate to hear, and they were unable to interest mainstream media.

The origins of the Swift Vets bear strongly on the validity of their mission. Some of the original founders called a press conference in May 2004 to highlight their charges against Kerry.<sup>144</sup> When this failed to draw significant attention, the group decided instead to form its own group to launch a media campaign, driven by advertising and a book.<sup>145</sup>

Even Democrats conceded that the efforts of the Swift Vets were devastatingly effective and changed the content of the electoral debate.<sup>146</sup> The group successfully brought an issue to the table that neither major party was willing to debate openly. While the group was originally funded by a few large contributions,<sup>147</sup> it eventually received donations from more than 100,000 individuals.<sup>148</sup> Given the fact that a number of these individual contributors had given little or nothing to the Republican Party or to President George W. Bush's campaign directly,<sup>149</sup> at least some of the donors likely were motivated by their ideological commitment to the issue itself.

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<sup>142</sup> See Swift Vets and POWs for Truth, <http://www.swiftvets.com/index.php> (last visited Oct. 1, 2005) (outlining criticism of John Kerry's representation of his war record).

<sup>143</sup> See, e.g., Press Release, Kerry-Edwards 2004, Hand-in-Glove: The Bush-Cheney Ties to Swift Boat Veterans for "Truth" (Aug. 25, 2004), available at <http://releases.usnewswire.com>.

<sup>144</sup> Dinan, *supra* note 8.

<sup>145</sup> *Id.*

<sup>146</sup> Edsall, *supra* note 58 (quoting two Democratic consultants as saying that Republican ads had more "bang for the buck," and that the Swift Boat ads went "for the jugular of the Kerry campaign")

<sup>147</sup> Swift Boat Veteran for Truth, Swift Boat Veterans for Truth Political Organization Report of Contributions and Expenditures Form 8872, <http://forms.irs.gov/politicalOrgsSearch/Search/basicSearch.jsp> (check "Form 8872" and type "Swift Boat Veterans for Truth" in "organization name" field, then click "submit basic search") (last visited Nov. 20, 2005).

<sup>148</sup> Dinan, *supra* note 8.

<sup>149</sup> Based on a random choice of Swift Vet donors from Chevron Texaco (William Forga, Doug Lucidi, and Keith Swainson), Mark Brenflick of Superior, and Gene Brett of Brett/Robinson, only Brett had donated to any candidate or political party since 2000, and Brett's total donations amounted to \$2300. *Id.* It is possible

#### D. 527s in a Two-Party Democracy

Americans today are deeply cynical of partisan politics and the government created thereby. Nearly three-quarters of Americans distrust the government, and more than half believe that government leaders “don’t really care what happens to you.”<sup>150</sup> When 527 organizations can surmount these ingrained predispositions and create alternative opportunities for political participation, they perform a valuable service for American democracy.

To look at one particular example of the role that 527s can play, a strong critique of MoveOn.org is that its activism is more akin to group therapy than to effective politics.<sup>151</sup> This criticism is justified if an organization’s sole purpose is to elect specific candidates into office.<sup>152</sup> It ignores, however, other valuable facets and objectives of group activity.

MoveOn.org has arguably been extremely influential *within* the Democratic Party, both before and after the 2004 Presidential election.<sup>153</sup> It was the first major political organization publicly to oppose the war in Iraq, forcing Democratic candidates to nuance their previous support for the war. Following the election, the liberal group threw its support behind Howard Dean in his successful bid to head the Democratic National Committee.<sup>154</sup>

More fundamentally, MoveOn.org energized a vast number of interested, motivated, but previously inactive individuals and created opportunities for genuine political participation.<sup>155</sup> Few would argue with the value of increasing citizen participation in the political process.<sup>156</sup>

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that Brenflick made soft money contributions under his business name, listed only as “Superior” on the Center for Responsive Politics website, and could not be identified as a separate donor. The same caveats listed for the ACT donors, *supra* note 123, apply here as well.

<sup>150</sup> PUTNAM, *supra* note 17, at 46–47.

<sup>151</sup> Suellentrop, *supra* note 139.

<sup>152</sup> Although both I.R.C. § 527 and FECA, 2 U.S.C. § 431, define political committees as having the *major* purpose of influencing elections, major is by no means *sole*.

<sup>153</sup> See *supra* notes 140–41 and accompanying text.

<sup>154</sup> Ronald Brownstein, *MoveOn Steps into DNC Chair Contest*, L.A. TIMES, Jan. 26, 2005, at A19.

<sup>155</sup> MoveOn.org claims to have brought “somewhere over 600,000 voters who would not have voted otherwise to the polls.” 2004 MoveOn PAC Action Archives, <http://www.moveonpac.org/archive> (last visited Oct. 18, 2005).

<sup>156</sup> See, e.g., Steven Breyer, *Our Democratic Constitution*, Harvard University Tanner Lectures on Human Values 2004–2005, Nov. 17, 18, & 19, 2004, available at <http://www.ethics.harvard.edu/EventShow.php?id=166> (noting that the concept of a citizenry actively participating in democracy is at the core of the U.S. Constitution); see also John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 594, 632, 634 (2005) (proposing the reintroduction of a tax credit for political contributions with the goal of increasing political participation, both as a normative end in itself and as a means of diluting the influence of

A great deal of concern over undue influence in political campaigns seems to focus on political advertising, particularly television advertising.<sup>157</sup> Swift Vets and POWs for Truth was savaged by critics accusing it of smear tactics by spreading unsubstantiated rumors.<sup>158</sup> The story never would have developed legs, however, if it did not trigger a deep-seated voter concern. Advocacy of ideas is influential “only to the extent that it brings to the people’s attention *ideas* which—despite the . . . source—strike them as true.”<sup>159</sup> The group voiced genuine and legitimate concerns over particular issues. In the words of Justice Powell, “[t]o be sure, [such] advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . .”<sup>160</sup> Democracy is enhanced, not subverted, by an electorate informed on the issues.<sup>161</sup>

More insidiously, political party insiders may view 527 organizations as upstarts, threatening their tightly held decisionmaking authority inside the formal political party structure.<sup>162</sup> From the perspective of the party organization, these groups might be considered subversive and dangerous.<sup>163</sup>

To many supporters of nonconnected 527 organizations, however, that is precisely the point.<sup>164</sup> These groups represent something entirely different and are attractive precisely because they are *not* the major parties. As one observer noted, “an amazing thing happened this year—grassroots activism, online and in the real world, invaded the heart and soul of the Democratic Party. Ordinary

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special interests and therefore the appearance of corruption).

<sup>157</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 42–44 (1976) (defining expenditures only in terms of political advertising). Ironically, the most recent FEC regulations do not discuss advertising at all, which begs the question of the basis on which they can be justified. See *infra* Part III for a discussion of the regulations. Focusing on the influence of political *advertising* also ignores the arguably more influential role of media editorializing, both explicit and implicit. For a discussion of this aspect of the campaign process, see generally Joshua L. Shapiro, Comment, *Corporate Media Power, Corruption, and the Media Exemption*, 55 EMORY L.J. 163 (2005).

<sup>158</sup> Nicholas D. Kristof, Op-Ed, *Washing Away the Mud*, N.Y. TIMES, Sept. 22, 2004, at A23.

<sup>159</sup> *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 684 (Scalia, J., dissenting).

<sup>160</sup> *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978). The Court went on to say, “The Constitution ‘protects expression which is eloquent no less than that which is unconvincing.’” *Id.* (quoting *Kingsley Int’l Pictures Corp. v. Regents*, 360 U.S. 684, 689 (1959)).

<sup>161</sup> See *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976).

<sup>162</sup> See, e.g., Brownstein, *supra* note 154; Postman, *supra* note 117.

<sup>163</sup> See, e.g., Herman, *supra* note 7.

<sup>164</sup> Harwood, *supra* note 6.

people, folks who'd never before expressed the slightest interest in politics, suddenly developed an abiding enthusiasm for the game."<sup>165</sup>

### III. REGULATING 527S IN THE FUTURE: THE FEC'S AUGUST 2004 REGULATIONS AND PROPOSED LEGISLATIVE REFORMS

As noted above, both independent observers and politicians alike viewed the participation of 527 organizations operating under virtually no funding restrictions as problematic.<sup>166</sup> In response to this pressure, the FEC passed new regulations in August 2004 that would affect some activities of these groups and may result in some nonconnected 527s being classified as political committees under FECA.<sup>167</sup> Dissatisfied that these regulations did not go further in restricting the activities of nonconnected 527s, Senator John McCain and Representatives Christopher Shays (R-Conn.) and Martin Meehan (D-Mass.) led the charge in Congress to introduce legislation that would subject *all* 527 organizations engaged in federal election activity to political committee status and the concomitant regulations.<sup>168</sup> An alternative solution, named the 527 Transparency Act, would require 527s to submit to enhanced disclosure requirements and to file monthly reports with the Commissioner of the Internal Revenue Service along with pre- and post-election reports.<sup>169</sup>

This Part will examine both the regulations and the Reform and Transparency Acts. The overview of the new regulations will look at how they may impact the work of nonconnected 527s in future elections. Discussion of the 527 Reform Act will include a brief analysis of the constitutional challenges that the bill will likely face, should it become law.

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<sup>165</sup> Manjoo, *supra* note 127.

<sup>166</sup> Herman, *supra* note 7.

<sup>167</sup> Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056 (Nov. 23, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, and 106) (discussed *infra* Part III).

<sup>168</sup> 527 Reform Act of 2005, S. 271, 109th Cong.; H.R. 513, 109th Cong.

<sup>169</sup> 527 Transparency Act of 2005, H.R. 2204, 109th Cong. An additional piece of legislation, entitled the 527 Fairness Act, likewise was introduced. H.R. 1316, 109th Cong. (2005). However, this bill would have the practical effect of dismantling much of the campaign finance reforms of BCRA. Examples of the changes the bill would instate include repealing aggregate limits that any individual could contribute in federal dollars, removing restrictions on coordinated political party expenditures on behalf of candidates, and allowing state and local parties to raise and spend soft money for voter registration efforts. An analysis of such wholesale revisions of the campaign finance machinery is well beyond the scope of this Comment, and thus the 527 Fairness Act will not be discussed in any detail here.

A. *FEC Regulations: Classifying Donations as Contributions and Allocating Voter Drive Expenses*

During its August 19, 2004 meeting, the FEC adopted rules that would classify certain donations as contributions under FECA, which has implications for a wide-ranging group of organizations.<sup>170</sup> Other regulations force some nonconnected 527s that are classified as political committees under FECA to cover at least a portion of expenses for certain voter drive activities with federal funds, subject to both contribution caps and source limitations.<sup>171</sup> What did not pass, however, was a new version of the “major purpose” test,<sup>172</sup> which would have applied political committee status to a broad swath of nonconnected 527s.<sup>173</sup>

1. *The Remaining Lacuna: Political Committee Status*

In the FEC rule-making process leading up to the August 2004 regulations, most public attention was focused on the aborted attempt to create a hard-and-fast “major purpose” test to apply to all 527 organizations.<sup>174</sup> Ultimately, the FEC decided to continue to assess political committee status on an ad hoc basis, rather laconically noting, “[t]he Commission has been applying [the judicial construct of the ‘major purpose’ test] for many years without additional regulatory definitions, and it will continue to do so in the future.”<sup>175</sup>

In those same comments, the FEC noted that the test limits the extent to which political committee status can be applied.<sup>176</sup> Thus, it appears that the FEC subscribes to the requirement that an organization must receive

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<sup>170</sup> 11 C.F.R. § 100.57 (2004), discussed *infra* notes 179–87 and accompanying text.

<sup>171</sup> 11 C.F.R. § 106.6 (2004), discussed *infra* notes 188–97 and accompanying text. The FEC also passed regulations affecting political committees’ accounting and reporting responsibilities, which will not be discussed in this Comment. See 11 C.F.R. § 102.5 (2004) (requiring establishment of separate federal accounts for certain activities); 11 C.F.R. § 104.10 (2004) (mandating reporting of allocations for certain activities).

<sup>172</sup> See *supra* notes 37–40 and accompanying text. For a text of the proposed but rejected new regulations, see FEC Agenda Document No. 04-75, Aug. 12, 2004, available at <http://www.fec.gov/agenda/2004/mtgdoc04-75.pdf>.

<sup>173</sup> See Edsall, *supra* note 40. Ironically, the FEC is being sued both by groups accusing the agency of not going far enough in its regulation of 527s, Peter Urban, *Shays Files Suit over “Soft Money,”* CONN. POST, Sept. 15, 2004 at A4, and by 527s for going too far in regulating them. *Emily’s List Sues to Block New FEC Rules*, UPI, Jan. 12, 2005.

<sup>174</sup> See Political Committee Status, 69 Fed. Reg. 68,056, 68,064–65 (2004) (noting that the FEC received “tens of thousands of comments” with regard to the proposed regulations on the major purpose test).

<sup>175</sup> *Id.* at 68,065.

<sup>176</sup> *Id.*

contributions or undertake expenditures, as defined by the Supreme Court in *Buckley v. Valeo*, to be classified as a political committee under FECA.<sup>177</sup> The FEC has nonetheless demonstrated its willingness to apply that test to purportedly nonconnected 527 organizations, with its recent complaint filed against the Club for Growth for its failure to register as a political committee.<sup>178</sup>

## 2. *Defining Solicited Funds as Contributions*

New FEC regulations stipulate that funds received in response to solicitations that “indicate[] that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate” are considered contributions under FECA.<sup>179</sup> Contribution status entails a whole cadre of regulations, including source and amount restrictions, and can even trigger political committee status.<sup>180</sup>

In its explanation of the regulation, the FEC stated that it intended for the rule to turn on the “plain meaning of the words used in the communication.”<sup>181</sup> While a communication that refers to giving a politician “four more years” would fall under the rule, the following statement would not:

The President wants to cut taxes again. Our group has been fighting for lower taxes since 1960, and we will fight for the President’s tax cuts. Send us money for our important work.<sup>182</sup>

Neither timing nor context of a solicitation is considered when determining whether a donation is classified as a contribution. Thus, even if the above statement were included in a mailing two months prior to an election in which taxes are the overriding issue, it still would not be subject to the new FEC rule and thus would not qualify as a contribution under FECA.<sup>183</sup> The regulation

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<sup>177</sup> 424 U.S. 1, 79–80 (1976); see discussion *supra* Part I.

<sup>178</sup> Complaint for Declaratory, Injunctive, and Other Appropriate Relief, *FEC v. Club For Growth, Inc.* (D.D.C. Sept. 19, 2005), available at [http://www.fec.gov/law/litigation/club\\_for\\_growth\\_complaint.pdf](http://www.fec.gov/law/litigation/club_for_growth_complaint.pdf).

<sup>179</sup> 11 C.F.R. § 100.57. This regulation applies to all organizations, regardless of the tax code under which they are registered, thus concerning 501(c)(3) and 501(c)(4) organizations in addition to 527s. Political Committee Status, 69 Fed. Reg. at 68,057.

<sup>180</sup> See 11 C.F.R. § 300.2(g) (2004) (noting restrictions placed on federal funds); 69 Fed. Reg. 68,056, 68,058 (2004) (“Any funds that are ‘contributions’ by operation of new section 100.57 are contributions for purposes of the ‘political committee’ definition in 2 U.S.C. 431(4)(A) . . . .”); discussion *supra* Part I.

<sup>181</sup> Political Committee Status, 69 Fed. Reg. at 68,057.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

also gives no consideration to the use that ultimately will be made of the contribution once it is received by the group.<sup>184</sup>

This ruling likely will have little impact on groups that can tailor their messages on an ideological or issue basis, without reference to a clearly identified federal candidate or political office.<sup>185</sup> The regulation may be most problematic for groups created in the context of an election, engaged in the political debate solely to address a specific candidate.<sup>186</sup> The group Emily's List has filed suit in federal court seeking to block these regulations from coming into force.<sup>187</sup>

### 3. *Allocation of Expenses for Separate Segregated Funds and Nonconnected Committees*<sup>188</sup>

A second rule deals with allocation of expenses to federal and nonfederal funds<sup>189</sup> for nonconnected committees and separate segregated funds.<sup>190</sup> The rule would force these organizations to pay for some or all of their election-related communications and voter drives with federal funds, subject to contribution and source limits.<sup>191</sup>

Under this rule, a committee must use only federal funds for communications that refer to candidates only for federal office (as opposed to candidates for nonfederal office) or voter drives that refer to a specific

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<sup>184</sup> *Id.*; cf. *McConnell v. FEC*, 540 U.S. 93 (2003) (upholding soft money bans applied to political parties). *But see Buckley v. Valeo*, 424 U.S. 1, 42–44 (1976) (limiting statutory definitions of contributions and expenditures, which had been defined as “relative to” a candidate for federal office, to those contributions and expenditures to be used for express advocacy).

<sup>185</sup> See 11 C.F.R. § 100.57 (2004); see also 11 C.F.R. § 100.17 (2004) (defining “clearly identified” in reference to a candidate for federal office).

<sup>186</sup> This regulation would affect groups such as Swift Vets and POWs for Truth, and the Media Fund, formed solely to create and broadcast advertisements opposing the reelection of George W. Bush. See Ctr. for Responsive Politics, Media Fund: 2004 Election Cycle, <http://www.opensecrets.org/527s/527events.asp?orgid=15> (last visited Nov. 20, 2005).

<sup>187</sup> *Emily's List Sues to Block New FEC Rules*, *supra* note 173.

<sup>188</sup> “Nonconnected committees” are defined as “any committee which conducts activities in connection with an election, but which is not a party committee, an authorized committee of any candidate for federal election, or a separate segregated fund.” 11 C.F.R. § 106.6(a) (2004).

<sup>189</sup> Federal funds are “funds that comply with the limitations, prohibitions, and reporting requirements” of FECA. 11 C.F.R. § 300.2(g) (2004).

<sup>190</sup> Separate segregated funds, often referred to as “political action committees” (PAC), are funds established under the authority granted by 2 U.S.C. § 441b(b)(2)(C) by corporations and unions to accept individual contributions from members or employees. These organizations are considered political committees under FECA and are thus subject to FECA regulations.

<sup>191</sup> 11 C.F.R. § 106.6.

candidate for federal office.<sup>192</sup> If only nonfederal candidates are mentioned, a committee can use one hundred percent nonfederal funds for communications and voter drives, regardless of whether those efforts generally refer to a specific political party or candidates who support particular issues.<sup>193</sup> If a voter drive or communication is purely partisan, without referring to candidates at all, at least fifty percent of the expenses must be allocated to a federal account.<sup>194</sup> In addition, at least fifty percent of the administrative costs of nonconnected committees must be allocated to a federal account.<sup>195</sup>

As the rule is written, it applies only to those organizations that are political committees under FECA.<sup>196</sup> Thus, it would not affect nonconnected organizations that do not fall under the FECA classification.<sup>197</sup>

### *B. The 527 Reform Act: A Statutory, But Unconstitutional, Solution*

As should be apparent from the foregoing analysis, FECA political committee status cannot be applied to nonconnected 527 organizations that do not engage in express advocacy. Pro-reform members of Congress are moving to reach that result instead through new legislation in the form of the 527 Reform Act of 2005.<sup>198</sup> The question, however, is whether such sweeping regulation is even constitutional.<sup>199</sup>

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<sup>192</sup> 11 C.F.R. § 106.6(f)(1)(i)–(ii).

<sup>193</sup> 11 C.F.R. § 106.6(f)(2)(i)–(ii).

<sup>194</sup> 11 C.F.R. § 106.6(c).

<sup>195</sup> *Id.* Separate segregated committees can have one hundred percent of their administrative costs covered by the affiliated organization. 11 C.F.R. § 106.6(b)(1)(i).

<sup>196</sup> 11 C.F.R. § 106.6; *see also* FEC Advisory Opinion No. 2003-37, Feb. 19, 2004, *available at* <http://ao.nictusa.com/ao/no/030037.html>. The FEC Advisory Opinion noted, in reference to a request from Americans for a Better Country concerning, in part, specific allocation requirements for voter mobilization programs, “[t]he fact that ABC is a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt entities.” *Id.*

<sup>197</sup> This naturally begs the question of which nonconnected organizations, in coming election cycles, will be classified as political committees, as per the FEC’s interpretive notes reviewed *supra* notes 174–177 and accompanying text.

<sup>198</sup> S. 271, 109th Cong. (2005). Promoters of strong campaign finance regulation, both within and outside government, support the general goals of the 527 Reform Act; that is, classifying all 527s as political committees and thus mandating that they conform to the restrictive contribution limits and other regulations in FECA. Utilizing the language of the Act provides a convenient forum for analysis of this general goal, whether reformers ultimately use this or other measures.

<sup>199</sup> With the exception of the discussion of the tailoring of the Act, this same analysis can be used concerning the application of political committee status to any specific nonconnected 527 organization.

### 1. *The 527 Reform Act: A Brief Overview*

The 527 Reform Act<sup>200</sup> would get around the statutory difficulties in FECA<sup>201</sup> by amending the definition of political committee to include “applicable 527 organizations.” The Act operates on a presumption that *all* 527 organizations must register with the FEC and abide by political committee regulations.<sup>202</sup> It creates an exemption only for organizations that do not engage in activity related to elections for federal office.<sup>203</sup>

The Act contains similar allocation rules to those recently passed by the FEC.<sup>204</sup> Activities that must be supported by federal funds are subject to federal dollar limits of \$2000.<sup>205</sup> The legislation also places contribution limits on even *nonfederal* accounts of \$25,000 from any individual in any calendar year.<sup>206</sup>

### 2. *Analyzing the Act’s Constitutionality*

The 527 Reform Act raises serious constitutional questions. By classifying nonconnected 527 organizations as political committees under FECA, these groups would be subject to FECA’s contribution limits, source restrictions, and disclosure regime.<sup>207</sup> Contribution limits implicate the First Amendment’s associational and speech rights.<sup>208</sup>

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<sup>200</sup> S. 271; *see also* Amy Keller & Mark Preston, *Lott, McCain Prepare Bill to Crack Down on 527s*, ROLL CALL, Jan. 26, 2005, *available at* 2005 WL 63693556.

<sup>201</sup> *See* 2 U.S.C. § 431(4) (Supp. 2004) (providing limited definition for political committee).

<sup>202</sup> S. 271 § 2(b).

<sup>203</sup> S. 271 § 2.

<sup>204</sup> *Supra* notes 188–197 and accompanying text.

<sup>205</sup> S. 271 § 3, 109th Cong. (2005); *see also* 2 U.S.C. § 441(a) (defining contribution limits for federal funds).

<sup>206</sup> S. 271 § 3(a). Anticipating the litigation that is certain to follow, the Act also creates a special process for “actions brought on constitutional grounds.” Such an action will be heard by a three-judge panel in the D.C. District Court, whose decision may be appealed directly to the Supreme Court. *Id.* § 5(a).

<sup>207</sup> 2 U.S.C. § 441 (Supp. 2002).

<sup>208</sup> Professors Lillian BeVier and Kathleen Sullivan provide strong critiques of contribution limits on the basis of First Amendment arguments. Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045 (1985); Kathleen Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663 (1997). For an excellent example of the counter argument, *see* Ronald Dworkin, *Free Speech and the Dimensions of Democracy*, in IF BUCKLEY FELL: A FIRST AMENDMENT BLUEPRINT FOR REGULATING MONEY IN POLITICS 63, 63–101 (E. Joshua Rosenkranz ed., 1999) [hereinafter IF BUCKLEY FELL].

*a. The Constitutionality of Contribution Limits*

Campaign finance reform efforts began in earnest by Congress in 1971 with the passage of FECA.<sup>209</sup> The original drafters of FECA attempted to regulate both contributions and expenditures, but the Supreme Court in *Buckley v. Valeo* held that expenditure limits were an unconstitutional violation of the free speech rights of organizations.<sup>210</sup> Thus, contribution limits became the primary tool for campaign finance reform.<sup>211</sup>

Because contribution limits impinge on First Amendment freedoms of expression and association, they are constitutional only when they are “‘closely drawn’ to match a ‘sufficiently important interest.’”<sup>212</sup> Although money itself is not speech, it is nonetheless inextricably bound with communication, particularly in the context of an electoral campaign.<sup>213</sup> The act of contributing is a communicative act, thus deserving constitutional protection.<sup>214</sup> However, the Court viewed contribution limits as affecting the more penumbral associational rights rather than core speech rights.<sup>215</sup>

The *Buckley* Court ultimately held that contribution limits on candidates for federal office were constitutional.<sup>216</sup> The compelling state purpose justifying contribution limits that the Court has since supported is to diminish both actual and perceived corruption.<sup>217</sup> Congress also justified limits on the basis of attempts to circumvent candidate contribution limits, which the Court supported most recently in *McConnell v. FEC*.<sup>218</sup>

<sup>209</sup> Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended in scattered sections of 2 U.S.C.).

<sup>210</sup> 424 U.S. 1, 58–59 (1976). The Court’s differing treatment of expenditures and contributions has been excoriated by commentators over the years. See, e.g., E. Joshua Rosenkranz, *Introduction*, in *IF BUCKLEY FELL*, *supra* note 208, at 1, 1.

<sup>211</sup> Frank J. Sorauf, *What Buckley Wrought*, in *IF BUCKLEY FELL*, *supra* note 208, at 11, 12.

<sup>212</sup> *McConnell v. FEC*, 540 U.S. 93, 136 (2003) (quoting *FEC v. Beaumont*, 539 U.S. 146, 162 (2003)).

<sup>213</sup> *Buckley*, 424 U.S. at 16.

<sup>214</sup> *Id.* at 21.

<sup>215</sup> *Id.* at 23.

<sup>216</sup> *Id.* at 20–21.

<sup>217</sup> *E.g., id.* at 26–27; *McConnell*, 540 U.S. at 143–56.

<sup>218</sup> 540 U.S. at 171–72; see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 617 (1996) (noting that Congress could justifiably strengthen contribution limits for political parties as a prophylactic measure to avoid evasion of candidate contribution limits); *Cal. Med. Ass’n v. FEC*, 453 U.S. 182, 197–98 (1981) (upholding contribution limits placed on coordinated multicandidate PACs on the basis of avoiding circumvention of candidate limits). *But see McConnell*, 540 U.S. at 231–32 (striking down a ban on contributions from minors that had been justified by the government on the basis of circumvention, because the Court determined there was no evidentiary support for the asserted justification).

The *Buckley* Court also noted that candidate contribution limits were narrowly focused and allowed for unlimited political expression outside of the control of candidates.<sup>219</sup> Similarly, the *McConnell* Court upheld contribution limits on political parties on the basis of the close relationship between them and candidates, saying that parties are “inextricably intertwined with federal officeholders.”<sup>220</sup>

At the same time, however, the Court rejected the equalization argument, in which the government offered another justification for the various limits that it attempted to establish in FECA, including a limit on independent expenditures.<sup>221</sup> Asserting that more information strengthens democracy, the majority famously stated, “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”<sup>222</sup>

*b. Applying Contribution Limits to Independent 527 Organizations*

When applying the Supreme Court’s analysis of contribution limits to the 527 Reform Act of 2005, several questions arise. Issues include the Act’s tailoring, the extent of the burden it places on organizations to which it applies, and the applicability of the corruption and circumvention rationales to nonconnected groups.

*i. 527 Reform Act’s Tailoring*

A facial attack on the 527 Act can easily be made on the basis that it is not closely drawn.<sup>223</sup> The law would apply political committee status to 527 organizations that expend more than \$1000 in federal advocacy.<sup>224</sup> Even strong supporters of regulating certain 527 organizations question the

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<sup>219</sup> *Buckley*, 424 U.S. at 28–29.

<sup>220</sup> *McConnell*, 540 U.S. at 155 (quoting 148 CONG. REC. H409 (Feb. 13, 2002) (statement of Rep. Shays)).

<sup>221</sup> *Buckley*, 424 U.S. at 48. The Court characterized the government’s asserted interest as “equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Id.* For a defense of the use of the equalization argument to justify campaign finance regulation, see Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994).

<sup>222</sup> *Buckley*, 424 U.S. at 48–49.

<sup>223</sup> See *McConnell*, 540 U.S. at 136 (stating that contribution limits must be closely drawn to pass constitutional muster).

<sup>224</sup> 527 Reform Act of 2005, S. 271, 109th Cong.

applicability of these regulations to groups that engage in limited advocacy in the context of a completely different organizational agenda.<sup>225</sup>

*ii. The Burden Imposed*

The Supreme Court in *McConnell v. FEC* stated that “contribution limits impose serious burdens on free speech only if they are so low as to ‘preven[t] candidates and political committees from amassing the resources necessary for effective advocacy.’”<sup>226</sup> Despite the assertions of the bill’s backers,<sup>227</sup> these limits can have precisely this effect on nonconnected 527 organizations, which do not have the advantage of being backed by a major political party or candidate. Although many nonconnected 527s in the last election cycle attracted small donations that would have qualified under FECA’s limits, they only did so after receiving a large initial donation that allowed the group to launch and gain a public profile.<sup>228</sup> As one donor to ACT stated, “[u]nfortunately, to get it off the ground we have to start with really wealthy people. . . . It is not just about rich, powerful Americans. But the beginning of America Coming Together is trying to get a strong economic base.”<sup>229</sup> Without the ability to take advantage of large, foundational donations, many of these groups may not be able to function.

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<sup>225</sup> See Donald B. Tobin, *New 527 Bill Plugs Some Major Holes, But Is it Constitutional?* (Feb. 22, 2005), <http://moritzlaw.osu.edu/electionlaw/comments/2005/050222.php> (stating that 527s engaging in just over \$1000 in federal advocacy pose little threat of corruption).

<sup>226</sup> 540 U.S. 93, 135 (2003) (quoting *Buckley*, 424 U.S. at 21).

<sup>227</sup> Statements on Introduced Bills and Joint Resolutions, 150 CONG. REC. S9526, S9527 (Sept. 22, 2004) (statement of Sen. McCain) (stating, “[o]ur proposal will not shut down 527s, it will simply require them to abide by the same Federal regulations every other Federal political committee must abide by in spending money to influence Federal elections”).

<sup>228</sup> For instance, Swift Vets and POWs for Truth was initially funded largely through a \$100,000 contribution from Bob Perry, a large Republican donor from Texas. See Swift Boat Veterans for Truth IRS Filings, *supra* note 147. Perry eventually donated nearly \$4.5 million dollars to the group. Ctr. for Responsive Politics, 527s: Top Individual Contributors to 527 Committees <http://www.opensecrets.org/527s/527indivsdetail.asp?ID=11001109962&Cycle=2004> (last visited Oct. 24, 2005). The Swift Boat Veterans eventually topped \$17 million by November 2004. Ctr. for Responsive Politics, 527s: 527 Committee Activity <http://www.opensecret.org/527s/527cmtes.asp?level=C&cycle=2004&format=> (last visited Oct. 24, 2005). However, a survey of the group’s IRS filings in September 2004 by Georgetown Law Professor Roy Schotland showed that a vast majority of the contributors at that time, 473 of 507, provided less than \$5000 in individual donations. Rick Hasen, *Election Law: Size of Individual Contributions to Swift Boat Veterans for Truth* (Sept. 23, 2004), <http://electionlawblog.org/archives/001816.html>. ACT has a similar pattern, having received million dollar donations from thirty donors, and small amounts from more than 150,000 individuals. Harwood, *supra* note 6.

<sup>229</sup> Postman, *supra* note 117.

Contribution limits effectively prevent individuals from bundling large contributions in order to make their expenditures more effective. The Supreme Court has held this effect to violate the First Amendment.<sup>230</sup> Contribution limits would be most burdensome to moderately wealthy individuals who wish to donate more than the \$25,000 cap that would be applied to 527s under the Act.<sup>231</sup> Although the Court noted in *Buckley v. Valeo* that extremely wealthy individuals still have the capacity to engage in direct independent expenditures,<sup>232</sup> contribution limits act as a functional equivalent of expenditure limits on those who wish to provide significant support to a nonconnected 527 organization.<sup>233</sup>

*iii. The Government Interest: Corruption*

The Supreme Court in *McConnell v. FEC* described the government's interest in regulating contributions as preventing "undue influence on an officeholder's judgment, and the appearance of such influence."<sup>234</sup> In support of its holding, the Court cited instances of manipulation of the legislative calendar due to corporate contributions to members of Congress.<sup>235</sup> The Court also stated, however, that "mere political favoritism or opportunity for influence alone is insufficient to justify regulation."<sup>236</sup>

While this rationale is sufficient to uphold contribution limits placed both on candidates and on political parties, the Court has also held consistently that when the risk of corruption is too attenuated, regulation is unconstitutional. For example, independent expenditures<sup>237</sup> pose a significantly lower risk that they will be seen by the public as an effort to purchase influence with a

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<sup>230</sup> See *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 298–99 (1981) (holding that an ordinance imposing contribution limits on committees formed to support or oppose ballot measures violated First Amendment association and expression rights).

<sup>231</sup> 527 Reform Act of 2005, S. 271, 109th Cong. These limits are already applied to FECA political committees. 2 U.S.C. § 441a(a)(1) (Supp. 2004).

<sup>232</sup> *Buckley v. Valeo*, 424 U.S. 1, 26 n.26 (1976).

<sup>233</sup> *Citizens Against Rent Control*, 454 U.S. at 299 (asserting that a contribution limit applied to committees formed to influence ballot measures "automatically affects expenditures" by severely restricting individuals' ability to bundle funds and express views through a committee).

<sup>234</sup> *McConnell v. FEC*, 540 U.S. 93, 150 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 441 (2001)). For a thorough discussion of the use of "appearance" of corruption, see Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

<sup>235</sup> *McConnell*, 540 U.S. at 150.

<sup>236</sup> *Id.* at 153.

<sup>237</sup> 2 U.S.C. § 431(17) (Supp. 2004) (defining independent expenditures as express advocacy that is not coordinated with a candidate or authorized political committee).

candidate or elected official, and thus limits placed on them are unconstitutional.<sup>238</sup> Indeed, the Court has acknowledged that in the absence of coordination, a large contribution to a political party is *less* likely to pose a problem of corruption than is a large independent expenditure.<sup>239</sup> Thus, a large contribution to a nonconnected 527, which has a much more attenuated relationship with candidates than do political parties, a fortiori would pose even less risk of corruption. Both the Supreme Court and advocates of strong campaign finance reform acknowledge that contributions to nonconnected groups simply do not provide the same avenue for undue influence over elected officials, the touchstone of corruption, that candidate or political party contributions do.<sup>240</sup>

In addition to preventing corruption and its appearance, the Court also has upheld contribution limits to political parties and candidate committees as a means to prevent circumvention of contribution limits directly to candidates for federal office.<sup>241</sup> At the same time, however, the Court struck down a contribution ban placed on minors, on the basis that the government had no evidentiary support that a genuine circumvention problem existed.<sup>242</sup> Thus,

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<sup>238</sup> *McConnell*, 540 U.S. 221–22 (citing *Buckley v. Valeo*, 424 U.S. 1, 47–48 (1976)); see also *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996) (holding that independent expenditures by political parties were unlikely to create a danger of corruption); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985) (holding that independent PAC expenditures posed little danger of quid pro quo corruption); cf. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 789–90 (1978) (striking down a statute that would have banned corporate contributions and expenditures on ballot initiative campaigns, on the basis that no candidates are involved and thus there exists no risk of corruption, and explicitly rejecting the concept that wealth distorts speech).

<sup>239</sup> *Colorado*, 518 U.S. at 617. As the Court noted, “an independent expenditure made possible by a \$20,000 donation, but controlled and directed by a [political] party rather than the donor, would seem less likely to corrupt than the same (or a much larger) independent expenditure made directly by that donor.” *Id.*

<sup>240</sup> *McConnell*, 540 U.S. at 187–88 (justifying the differential treatment of the soft money ban on political parties compared to special interest groups’ continued ability to raise and spend unlimited amounts of soft money by noting that interest groups wield little political power or influence over legislature); Holman, *supra* note 33, at 278–80:

There is an arm’s-length distance between electioneering non-profit groups and officeholders and candidates. Under the old regime, party officials served as a direct link between large soft money contributors and the public officials they wished to influence.

. . . .

Today’s electioneering non-profit groups do not have this connection with officeholders and can make no such promises of access in exchange for a soft money contribution.

*Id.*

<sup>241</sup> *McConnell*, 540 U.S. at 138–39.

<sup>242</sup> *Id.* at 231–32.

contribution limits on nonconnected 527 organizations only can be justified by genuine efforts at circumvention.

The record on large contributions to 527 organizations in the past election cycle is admittedly mixed. Some of the biggest donors to 527s were traditional soft money donors to political parties.<sup>243</sup> Many of them, however, significantly increased their donations compared to prior giving patterns.<sup>244</sup> Others were virtual neophytes to political donations altogether.<sup>245</sup>

The circumvention rationale is only valid, however, if it assumes that the intent of a donor seeking to circumvent a contribution limit is doing so in order to gain influence over the candidate (or her efforts appear to be directed toward that end by the public). In other words, a predicate to circumvention is actual or perceived corruption. Thus, if contributions to an independent nonconnected 527 do not pose any risk of corruption, justification by the circumvention argument is at best tenuous; at worst, it is simply code for the equalization rationale.<sup>246</sup>

### C. *An Alternative Solution: Enhanced Disclosure Through the 527 Transparency Act*

Disclosure provides an important measure by which voters can assess both the source and content of political advertising.<sup>247</sup> Mandating greater disclosure on the part of unconnected 527s can help abate some of the concern over undue influence of these groups in the electoral process. Congress has already provided for instantaneous disclosure for electioneering communications,<sup>248</sup>

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<sup>243</sup> For instance, George Soros provided more than \$23 million to Democratic-leaning 527s this past year. Likewise, Bob Perry donated more than \$8 million to Swift Vets and various other groups supporting the reelection of President Bush. Ctr. for Responsive Politics, *supra* note 229. Previously, both Soros and Perry had donated hundreds of thousands of dollars in soft and hard money contributions to the Democratic and Republican Parties, respectively, and to candidates. Ctr. for Responsive Politics, Donor Look-up, *supra* note 121.

<sup>244</sup> For example, Peter Lewis provided close to \$23 million to various 527 groups in 2004, Ctr. for Responsive Politics, 527s: Top Individual Contributors to 527 Committees <http://www.opensecrets.org/527s/527indivs.asp?cycle=2004> (last visited Oct. 24, 2005), but donated at significantly lower levels in the past.

<sup>245</sup> See, e.g., *supra* notes 119–26 and accompanying text.

<sup>246</sup> See *supra* notes 221–22 and accompanying text; cf. *McConnell*, 540 U.S. at 291 (Kennedy, J., dissenting) (asserting that the majority's anticorruption rationale was based on a per se view of money as "evil").

<sup>247</sup> See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and "Disclosure Plus,"* 50 UCLA L. REV. 1141, 1164 (2003) (describing how source disclosures assist voters in evaluating a group's message).

<sup>248</sup> 2 U.S.C. § 434 (Supp. 2004).

and quarterly contribution statements for all 527 organizations.<sup>249</sup> The proposed legislation would amend the tax code to require all 527 groups to file mandatory monthly disclosure statements, as well as pre- and post-election reports during election years for all 527 organizations.<sup>250</sup> The enhanced disclosure would create a limited administrative burden on the organizations themselves, while providing much more current information to voters, which would be increasingly important as elections draw near and advertising is at its heaviest.

Professor Michael Kang, among others, has argued that voters make more informed choices when they understand the source of funding for the advertising with which they are inevitably barraged during major elections.<sup>251</sup> Delaying or even failing to release such information “hides the involvement of financial contributors and intentionally removes salient heuristic cues from public view.”<sup>252</sup>

Indeed, such notable voices as Justice O’Connor,<sup>253</sup> Professor Elizabeth Garrett,<sup>254</sup> and Professor Kathleen Sullivan<sup>255</sup> have promoted disclosure as a key component of campaign finance reform critical to informing voters’ choices. As Professor Garrett notes, “for busy people, information about the identities of groups spending money to support or oppose candidates, and the amount of money they are spending, can be significantly more helpful than detailed information about complex issues and platforms.”<sup>256</sup> The same holds true for information about the individuals making donations to those groups. Disclosure also serves the function of providing accountability for both the donors and the groups aggregating their voices.<sup>257</sup>

Although constitutional scholars have made compelling arguments that mandatory disclosure for all 527 organizations violates the First Amendment by discouraging speech,<sup>258</sup> the Supreme Court has consistently upheld such

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<sup>249</sup> I.R.C. § 527(j)(2) (2004).

<sup>250</sup> 527 Transparency Act of 2005, H.R. 2204, 109th Cong. § 2.

<sup>251</sup> Kang, *supra* note 247, at 1156.

<sup>252</sup> *Id.* at 1159.

<sup>253</sup> *Buckely v. Am. Constitutional Law Found.*, 525 U.S. 182, 223 (1999) (O’Connor, J., dissenting in part, concurring in part).

<sup>254</sup> See Elizabeth Garrett, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress*, 27 OKLA. CITY U. L. REV. 665, 669–80 (2002).

<sup>255</sup> See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 326–27.

<sup>256</sup> Garrett, *supra* note 254, at 680.

<sup>257</sup> Sullivan, *supra* note 255, at 327.

<sup>258</sup> See, e.g., William Ty Mayton, *The Myth of 527 Organizations* 10, 33–34 (Emory Pub. Law Research

regimes in the context of campaign-related donations, starting with *Buckley*<sup>259</sup> and maintaining its reasoning through *McConnell*.<sup>260</sup> Thus, it is unlikely that any constitutional challenge to enhanced disclosure would be sustained.<sup>261</sup>

## CONCLUSION

It is difficult to come up with a valid argument against 527 organizations beyond the simple desire to reduce the influence that individuals with large amounts of accumulated wealth can wield over elections. Indeed, 527 Reform Act cosponsor Senator Trent Lott stated as much when he discussed his support for the bill.<sup>262</sup> However, regulating 527s in an attempt to reduce such influence almost surely will backfire. Campaign finance law is a study in unintended consequences, and money will continue to flow into the process, despite (and sometimes because of) government regulation.<sup>263</sup> If large contributions to 527 organizations are banned, these dollars will find their way into other groups, such as 501(c)(4) or 501(c)(3) groups not subject to the same disclosure regimes as 527 organizations.<sup>264</sup> The same money will flow in, but will be even more hidden than it is when channeled through 527s.

Reformers aiming to restrict 527s should take a longer and broader view of their role within the current structures of the American political process. Although nonconnected 527 groups may influence the party in ways that the party leadership would not choose, they nonetheless serve to *strengthen* the major parties more generally. They do so by increasing the attractiveness of

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Paper No. 05-15, June 2005), <http://ssrn.com/abstract=746604> (arguing that many 527 organizations have little or no involvement in federal elections, and thus sweeping disclosure requirements are both inappropriate and unconstitutional). Both Professors Garrett and Sullivan acknowledge these concerns, but ultimately conclude that the systemic benefits of disclosure are sufficient to overcome the First Amendment threat that they may pose. See Garrett, *supra* note 254, at 682–87; Sullivan, *supra* note 255, at 327.

<sup>259</sup> *Buckley v. Valeo*, 424 U.S. 1, 69–70 (1976).

<sup>260</sup> *McConnell v. FEC*, 540 U.S. 93, 198–201 (2003).

<sup>261</sup> This assertion is true notwithstanding the new, more conservative Court currently in place.

<sup>262</sup> Keller & Preston, *supra* note 201 (quoting Lott as saying that he “hoped that the playing field would be equalized among all the players in the federal election process”).

<sup>263</sup> See *McConnell*, 540 U.S. at 224 (stating, “[m]oney, like water, will always find an outlet”). See generally Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999) (speculating that campaign finance reform will actually increase political contributions).

<sup>264</sup> See Holman, *supra* note 33 (noting that 501 organizations are not subject to the same disclosure regulations as are 527s). Indeed, MoveOn.org is already incorporated as two separate entities, one of which is a 501(c)(4). See *supra* note 134; see also Sullivan, *supra* note 255, at 321 (“[I]t is a mistake to think that spending and contribution limits will meaningfully diminish the voice of the rich and powerful, for those limits cannot begin to cover their alternative outlets.”).

political participation within the major parties, thereby reducing incentives to exit by rational abstention or by choosing third parties.<sup>265</sup> Nonconnected 527s additionally can act both as diagnostic tools to help the major parties identify issues that they are failing to address, and as laboratories to determine what works and what does not. Their true power lies in their ability to mobilize *people*, rather than money or advertising.

That 527 organizations will remain involved in American politics is undisputable.<sup>266</sup> The great unanswered question is whether both major donors and the grand activist effort of 2003–2004 will continue to be involved with 527 organizations in future electoral cycles, even as the groups' leaders plan for future.<sup>267</sup> If not, then the efforts toward strict regulation are relatively unnecessary. If, on the other hand, 527s continue to be popular, it may be an indication that the role these groups play in providing voice within the major parties is a continuing need, which they should be allowed to fill unfettered. To do otherwise would be to condemn increasing numbers of voters who are disenchanted with politics as usual to the fringes of third parties, or worse, virtual disenfranchisement, thereby thwarting true democracy.

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<sup>265</sup> See *supra* Part II.C.

<sup>266</sup> See, e.g., Holly Bailey, *Social Security: A New Campaign*, NEWSWEEK, Feb. 21, 2004, at 8 (noting that two of the most active Republican groups in the 2003–2004 election planned to spend \$30 million in 2005 to support President Bush's Social Security proposals, in close coordination with the White House).

<sup>267</sup> *Id.*

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