

# Disclosing the Election-Related Activities of Interest Groups through 527 of the Tax Code

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## NOTE

### DISCLOSING THE ELECTION-RELATED ACTIVITIES OF INTEREST GROUPS THROUGH § 527 OF THE TAX CODE

*Richard Kornylak*†

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#### INTRODUCTION

On the eve of the March 2000 Super Tuesday primaries, a dramatic new television advertisement attacking presidential candidate John McCain aired in several key states.<sup>1</sup> With the Arizona senator’s face superimposed against a backdrop of factory chimneys spewing black smoke, the advertisement’s narrator intoned, “Last year, John McCain voted against solar and renewable energy. That means more

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<sup>1</sup> See Adam Nagourney & Richard Pérez-Peña, *Bush and McCain Trade Bitter Criticism as Campaigns in New York Gather Steam*, N.Y. TIMES, Mar. 3, 2000, at A15. The advertisement aired on television stations in New York, California, and Ohio. *Id.*

use of coal-burning plants that pollute our air.”<sup>2</sup> The advertisement then praised McCain opponent George W. Bush for his environmental record as governor of Texas.<sup>3</sup> The narrator concluded, “Governor Bush: Leading so each day dawns brighter.”<sup>4</sup>

One could easily imagine that the Bush campaign itself scripted and aired this anti-McCain announcement, or requested another organization to do the same. But it did neither: the advertisement was the independent effort of a little-known group calling itself Republicans for Clean Air.<sup>5</sup> It was the cloak of anonymity surrounding this mysterious group, rather than the advertisement’s allegedly misleading claims,<sup>6</sup> that caused such a stir.

The organization, created under § 527 of the Internal Revenue Code,<sup>7</sup> was not required to disclose its funding and spending to the Federal Election Commission because its advertisements did not expressly advocate the election or defeat of a candidate.<sup>8</sup> Only later did the financial backer of the \$2.5 million, last-minute advertising blitz emerge, causing an even greater stir: Sam Wyly, a Texas billionaire and major contributor to the Bush campaign.<sup>9</sup> This and other examples of § 527 organizations running critical advertisements<sup>10</sup> while operating in virtual anonymity fueled the ongoing debate over whether nondisclosure by the organizations encouraged a lack of accountabil-

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<sup>2</sup> Richard Pérez-Peña, *Air of Mystery Clouds Shot at McCain*, N.Y. TIMES, Mar. 3, 2000, at A15.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See id.* (detailing the “flaws in every claim” of the advertisement and noting “the outcry from environmentalists who say the advertisement is inaccurate”).

<sup>7</sup> I.R.C. § 527 (1994), amended by I.R.C. § 527 (West Supp. 2001). *See generally* BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 361–75 (7th ed. 1998) (describing § 527 political organizations in detail).

<sup>8</sup> *See* John M. Broder & Raymond Bonner, *A Political Voice, Without Strings*, N.Y. TIMES, Mar. 29, 2000, at A1. The Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976), construed reporting requirements for entities (other than candidates or political committees) to “apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Id.* at 44. The Court reasoned that a clear rule was necessary in order to preserve the reporting requirement against invalidation on vagueness grounds because “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” *Id.* at 42. A rule that does not clearly distinguish between issue and candidate advocacy “‘puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers.’” *Id.* at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

<sup>9</sup> Barry Meier, *The View from GreenMountain: Financier Mixes Business, the Environment and Politics*, N.Y. TIMES, Mar. 16, 2000, at C1.

<sup>10</sup> *See* Broder & Bonner, *supra* note 8, for other examples of issue advocacy attacking candidates in the 2000 election cycle. *See also* PUB. CITIZEN, PHONY “ISSUE ADS” FROM THE 1996 CAMPAIGN, at [http://www.citizen.org/congress/reform/phony\\_ads.htm](http://www.citizen.org/congress/reform/phony_ads.htm) (last visited Oct. 8, 2001), for examples from the 1996 election cycle.

ity by candidates and hindered the electorate's ability to be informed of the candidates' positions.<sup>11</sup>

With uncharacteristic speed,<sup>12</sup> Congress responded to the controversy by amending the Internal Revenue Code to require § 527 organizations that engage in issue advocacy<sup>13</sup> and spend above a threshold amount to report their contributions and spending in order to maintain their tax-exempt status.<sup>14</sup> Hailed as the first successful campaign finance reform in a generation,<sup>15</sup> the new legislation for the first time forced independent groups to disclose finances related to issue advocacy, a type of speech the Supreme Court has protected from the reach of campaign finance laws since its 1976 decision in *Buckley v. Valeo*.<sup>16</sup> In the closing months of the 2000 election season, the new legislation gave the general electorate an unprecedented and informative glimpse into issue spending by political groups.<sup>17</sup> Meanwhile, a number of organizations have argued that campaign finance reform's incursion into the realm of issue advocacy chills political speech.<sup>18</sup>

This Note addresses § 527's constitutionality as well as its effectiveness in revealing election-related spending information to voters. Part I of this Note briefly summarizes the *Buckley* Court's exemption of

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<sup>11</sup> See, e.g., Broder & Bonner, *supra* note 8 ("Advocates of campaign finance reform see the 527 loophole as a pernicious and proliferating vehicle for getting and spending tens of millions of undisclosed dollars."); see also Kenneth P. Doyle, *Price Tag for 2000 Campaign Up 45% over Last Election, Could Reach \$4 Billion*, 447 Money & Pol. Rep. (BNA) 1 (Nov. 8, 2000) (reporting at least \$150 million in issue advocacy spending for federal races in 2000, much of it undisclosed).

<sup>12</sup> Cf. Deirdre Davidson, *Campaign Reform Law: A Flawed Fix*, LEGAL TIMES, July 24, 2000, at 1 ("It was passed in a frenzy, without much time or care in what are certainly two of the most esoteric areas of the law—tax law and election law." (quoting Mark Braden, former chief counsel for the Republican National Committee)); *id.* (stating that "Congress usually does everything it can to avoid" campaign finance reform).

<sup>13</sup> See ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 85 (2000) (defining issue advocacy as any communication that does not expressly advocate the election or defeat of a candidate); *infra* Part I.B.

<sup>14</sup> See Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (2000); *infra* Part II.

<sup>15</sup> See Susan Schmidt, *Political Groups Change Status to Avoid Disclosure*, WASH. POST, Sept. 15, 2000, at A1 (calling the amendment "the first major change in the campaign finance laws in more than two decades").

<sup>16</sup> 424 U.S. 1, 80 (1976); see also *id.* at 14 ("The First Amendment affords the broadest protection to [discussion of public issues and debate on the qualifications of candidates] in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" (second alteration in original) (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

<sup>17</sup> See, e.g., Doyle, *supra* note 11 (reporting an \$11.7 million donation from Jane Fonda to a § 527 organization in September 2000, a probable record). The contribution and spending information submitted by § 527 organizations under the new law is available on the Internal Revenue Service's website at [http://eforms.irs.gov/search\\_result.asp](http://eforms.irs.gov/search_result.asp) (last visited Oct. 8, 2001).

<sup>18</sup> The legislation is currently being challenged on First Amendment grounds. See Kenneth P. Doyle, *Republican Group Launches Challenge to New Law on Section 527 Organizations*, 171 Daily Tax Rep. (BNA) G-4 (Sept. 1, 2000) (discussing the lawsuit); *infra* Part III.A; sources cited *infra* note 168.

issue advocacy from federal campaign finance laws, as well as subsequent court decisions and agency rulemakings that facilitated the rise of issue advocacy as a major feature of the campaign finance landscape. Part II examines in detail the § 527 legislation and its underlying rationales. Part III argues that, although the legislation should survive constitutional attack under *Buckley* and more recent First Amendment cases, the legislation's effectiveness is limited because it uses the formal identity of an organization—that is, its classification under the Internal Revenue Code—as a disclosure trigger rather than the election-related nature of the organization's activities. Part IV briefly examines alternative proposals that are both consistent with *Buckley* and do not suffer from the limitations of the § 527 disclosure legislation.

## I

### CAMPAIGN FINANCE REFORM AND ITS LIMITS: THE “PROBLEM” OF ISSUE ADVOCACY

#### A. Creating the Issue Advocacy–Electioneering Divide: *Buckley v. Valeo*

In the wake of the Watergate scandal and reports of fundraising abuses in the 1972 presidential campaign,<sup>19</sup> Congress enacted its boldest campaign finance reform to date by amending<sup>20</sup> the Federal Election Campaign Act of 1971 (FECA).<sup>21</sup> The comprehensive new legislation<sup>22</sup> sought to regulate all monies raised and spent in federal elections.<sup>23</sup> The FECA Amendments set stringent limits on spending by federal campaigns<sup>24</sup> and contributions by individuals and political committees (other than a candidate's principal campaign committee) “with respect to any election for Federal office.”<sup>25</sup> In addition, the

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<sup>19</sup> See CAMPAIGN FINANCE REFORM: A SOURCEBOOK 53 (Anthony Corrado et al. eds., 1997) [hereinafter SOURCEBOOK].

<sup>20</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

<sup>21</sup> Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

<sup>22</sup> See generally SOURCEBOOK, *supra* note 19, at 53–55, for a summary of the 1974 Amendments' provisions.

<sup>23</sup> See CORRADO, *supra* note 13, at 9; see also *Buckley v. Valeo*, 424 U.S. 1, 12–13 (1976) (“The intricate statutory scheme adopted by Congress to regulate federal election campaigns includes restrictions . . . that apply broadly to all phases of and all participants in the election process.”); *id.* at 76 (observing that the 1971 Act's reporting requirements are “part of Congress' effort to achieve ‘total disclosure’ by reaching ‘every kind of political activity’” (quoting S. REP. No. 92-229, at 57 (1971))).

<sup>24</sup> Federal Election Campaign Act Amendments of 1974, sec. 101(a), § 608(c)(1), 88 Stat. at 1264, *repealed by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 202(a), 90 Stat. 475, 496; see also *Buckley*, 424 U.S. at 54–55 (describing in detail the campaign spending limits under the FECA Amendments).

<sup>25</sup> Federal Election Campaign Act Amendments of 1974, sec. 101(a), § 608(b), 88 Stat. at 1263 (codified as amended at 2 U.S.C. § 441a(a)(1)–(3) (1994)).

Amendments limited the ability of individuals and organizations to "make any expenditure . . . relative to a clearly identified candidate" to \$1,000 during a calendar year.<sup>26</sup>

The 1974 Amendments retained the FECA's strong disclosure provisions requiring every candidate or political committee active in a federal campaign to disclose any contribution or expenditure of \$100 or more.<sup>27</sup> The required disclosure included the name, address, occupation, and principal place of business of the donor or recipient.<sup>28</sup> This disclosure was to be made available to the public within 48 hours of its filing.<sup>29</sup> The 1974 Amendments broadened the original disclosure provisions by requiring "[e]very person (other than a political committee or candidate) who makes contributions or expenditures, other than by contribution to a political committee or candidate . . . [to] file with the Commission a statement containing the [same] information [required of political committees and candidates]."<sup>30</sup> "Contributions" and "expenditures" were defined by the 1974 Amendments to be "anything of value made for the purpose of . . . influencing the nomination for election, or [the] election, of any person to Federal office."<sup>31</sup> The Amendments also created the Federal Election Commission (FEC), a bipartisan agency empowered to receive campaign reports, conduct audits and investigations, and seek civil injunctions to ensure compliance with the law.<sup>32</sup>

The Supreme Court drastically reduced the reform's broad scope two years later in *Buckley v. Valeo*,<sup>33</sup> a case involving a constitutional challenge brought by various candidates for federal office.<sup>34</sup> The Court applied a strict scrutiny analysis to the challenged regulations because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues

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<sup>26</sup> *Id.* sec. 101(a), § 608(e)(1), 88 Stat. at 1265, *repealed by* Federal Election Campaign Act Amendments of 1976 § 202(a).

<sup>27</sup> *See* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 304(b), 86 Stat. 3, 15 (1972) (codified as amended at 2 U.S.C. § 434 (1994)).

<sup>28</sup> *Id.* § 304(b)(2).

<sup>29</sup> *See id.* § 308(a)(4), 86 Stat. at 17 (codified as amended at 2 U.S.C. § 438 (1994)).

<sup>30</sup> Federal Election Campaign Act Amendments of 1974, sec. 204(c), § 304(e), 88 Stat. at 1278 (codified as amended at 2 U.S.C. § 434(c) (1994)), *amended by* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 104(d), 90 Stat. 475, 481.

<sup>31</sup> *Id.* sec. 201(a)(4), (5), § 201(e), (f), 88 Stat. at 1272-73 (codified as amended at 2 U.S.C. § 431(8), (9) (1994)).

<sup>32</sup> *See id.* sec. 208(a), §§ 310, 311(a), 88 Stat. at 1280-83 (codified as amended at 2 U.S.C. §§ 437c, 437d (1994)); *see also* SOURCEBOOK, *supra* note 19, at 54 (describing the creation of the FEC as "[t]he most important" of the 1974 Amendments and listing the FEC's functions).

<sup>33</sup> 424 U.S. 1 (1976).

<sup>34</sup> *See id.* at 15 ("Appellants [contend] that contributions and expenditures are at the very core of political speech, and that the Act's limitations thus constitute restraints on First Amendment liberty that are both gross and direct.").

discussed, the depth of their exploration, and the size of the audience reached,” thus impinging upon First Amendment political expression.<sup>35</sup>

First, the Court determined that the FECA’s contribution limits passed muster. According to the Court, the corruptive influence of large financial contributions on candidates’ positions and on their actions if elected to office<sup>36</sup> sufficiently justified the “marginal restriction” on a contributor’s ability to express support for a candidate.<sup>37</sup> In contrast, the Court held that “the Act’s expenditure limitations impose far greater restraints on the freedom of speech and association than do its contribution limitations.”<sup>38</sup> The Court found no governmental interest sufficient to justify this restraint because “[t]he interest in alleviating the corrupting influence of large contributions is served by the Act’s contribution limitations and disclosure provisions rather than by [the] campaign expenditure ceilings.”<sup>39</sup> Leveling the financial playing field among candidates was not a valid or sufficient interest.<sup>40</sup>

The Court next found that the restraint on campaign-related spending that is not coordinated<sup>41</sup> with candidates was unjustified. In order to save the Act’s provision limiting independent expenditures<sup>42</sup> from unconstitutional vagueness and from its tendency to infringe upon non-candidate-related issue advocacy, the Court construed spending “relative to” a candidate to mean “advocating the election or defeat of” a candidate.<sup>43</sup> Yet even after the Court narrowed the provision to limit only spending expressly advocating the election or defeat of a clearly identified candidate, it found that the government’s interest in preventing corruption or the appearance of corruption did not

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<sup>35</sup> *Id.* at 19 (observing that “virtually every means of communicating ideas in today’s mass society requires the expenditure of money”).

<sup>36</sup> *Id.* at 25.

<sup>37</sup> *Id.* at 20–21 (noting that contribution limits “do[ ] not in any way infringe the contributor’s freedom to discuss candidates and issues”). The Court recently indicated that contribution limits which, adjusted for inflation, fall far below *Buckley*’s limits are not per se unconstitutional, so long as candidates are not thereby prevented from launching effective campaigns. See *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 395–97 (2000).

<sup>38</sup> *Buckley*, 424 U.S. at 44.

<sup>39</sup> *Id.* at 55.

<sup>40</sup> See *id.* at 55–57.

<sup>41</sup> See 11 C.F.R. § 109.1(b)(4) (2001) (defining “coordinated” to mean “with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate”); see also *id.* § 100.23 (defining “coordination” in the context of “general public political communication that includes a clearly identified candidate”); *infra* note 75 and accompanying text (discussing 11 C.F.R. § 100.23).

<sup>42</sup> See 2 U.S.C. § 431(17) (1994) (defining “independent expenditures” to mean expenditures “expressly advocating the election or defeat of a clearly identified candidate” but that are not coordinated with any candidate).

<sup>43</sup> *Buckley*, 424 U.S. at 41–42.

justify the restriction on speech. The absence of control by, or coordination with, the candidate “alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”<sup>44</sup> As in the case of spending limits, the Court held that “equalizing the relative ability of individuals and groups to influence the outcome of elections” could not justify the limits on uncoordinated express advocacy.<sup>45</sup> According to the Court, “the 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>46</sup>

The Court also reviewed the Act’s disclosure requirements under strict scrutiny because of their “potential for substantially infringing the exercise of First Amendment rights.”<sup>47</sup> According to the Court, three independent and sufficiently important governmental interests justified the burden imposed by the disclosure requirements. First, disclosure provides the electorate with sufficient information to evaluate the candidates because “[t]he sources of a candidate’s financial support . . . alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”<sup>48</sup> Second, “disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.”<sup>49</sup> Third, disclosure is an “essential means of gathering the data necessary to detect violations of the contribution limitations.”<sup>50</sup>

*Buckley*’s holding—that the governmental interests in voter information, corruption deterrence, and violation detection sufficiently outweigh the speech burden caused by disclosure—contained some important caveats. First, when there is “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties,” that party may be protected from the disclo-

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<sup>44</sup> *Id.* at 47; *see also id.* at 48 (“Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation.”). The Court in *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996), held that political parties had the same right as individuals, candidates, and ordinary political committees to engage in unlimited independent spending. While independent expenditures are not limited as to amount, however, they still must be publicly disclosed through the FEC and must come from contributions that are subject to federal contribution limits. *See SOURCEBOOK*, *supra* note 19, at 238; *CORRADO*, *supra* note 13, at 15, 17.

<sup>45</sup> *Buckley*, 424 U.S. at 48–49.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 66.

<sup>48</sup> *Id.* at 67.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 68.

sure requirements.<sup>51</sup> Second, reporting requirements imposed on individuals or groups (as opposed to candidates or political committees<sup>52</sup>) can only reach contributions and spending “unambiguously related to the campaign of a particular federal candidate.”<sup>53</sup> While recognizing as valid Congress’s interest in providing the maximum amount of election-related information to voters,<sup>54</sup> the Court held that a disclosure law reaching all expenditures “made for the purpose of influencing” federal elections<sup>55</sup> did not provide sufficient guidance to those wishing to avoid liability while engaging in non-election advocacy.<sup>56</sup> In order to avert this unconstitutional vagueness, the Court narrowly construed the disclosure provision to apply only to spending on “communications that expressly advocate the election or defeat of a clearly identified candidate.”<sup>57</sup> This construction, according to the Justices, “precisely furthers [Congress’s] goal” of ensuring “both the reality and the appearance of the purity and openness of the federal election process.”<sup>58</sup> The Court upheld the required disclosure of independent expenditures because of the governmental interest in “increas[ing] the fund of information concerning those who support the candidates,”<sup>59</sup> information that would otherwise not be available if independent expenditures were not reported.<sup>60</sup>

*Buckley* thus established the constitutional limits of campaign finance laws. Its five main parameters are: (1) restrictions on any cam-

<sup>51</sup> *Id.* at 74; *see also id.* at 64 (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”).

<sup>52</sup> *See id.* at 79 (construing “political committee” to encompass only those “organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate”).

<sup>53</sup> *Id.* at 80; *see* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 104(d), § 304(e)(1), 90 Stat. 475, 480 (codified as amended at 2 U.S.C. § 434(c) (1994)).

<sup>54</sup> *See Buckley*, 424 U.S. at 76 (“The [broad disclosure] provision is responsive to the legitimate fear that efforts would be made, as they have in the past, to avoid the disclosure requirements by routing financial support of candidates through avenues not explicitly covered by the general provisions of the Act.” (footnote omitted)).

<sup>55</sup> *See supra* text accompanying note 31.

<sup>56</sup> *See Buckley*, 424 U.S. at 77–78.

<sup>57</sup> *Id.* at 80 (footnote omitted); *see id.* at 77–78.

<sup>58</sup> *Id.* at 78.

<sup>59</sup> *Id.* at 81.

<sup>60</sup> Indeed, after the Court struck down the 1974 Amendments’ limit on independent expenditures, Congress amended the FECA again in 1976 to ensure the disclosure of virtually all independent express advocacy spending. *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 104(d), § 304(e)(1), 90 Stat. 475, 481 (codified as amended at 2 U.S.C. § 434(e) (1994)) (requiring “[e]very person (other than a political committee or candidate) who makes contributions or independent expenditures expressly advocating the election or defeat of a clearly identified candidate . . . in an aggregate amount in excess of \$100” to disclose the same “information required of a person who makes a contribution in excess of \$100 to a candidate or political committee and the information required of a candidate or political committee receiving such contribution”).

paigned-related financial activity must be subjected to a strict scrutiny analysis; (2) the government may not limit independent, election-related spending by individuals and organizations, as they have the same right as candidates to spend unlimited amounts of their own money to participate in the electoral process; (3) three compelling state interests—voter information, corruption deterrence, and violation detection—justify the disclosure of all election-related spending, including independent expenditures; (4) pure issue advocacy is outside the scope of the FECA; and (5) in order to satisfy vagueness and overbreadth concerns, limitations and disclosure provisions must incorporate a clear, bright-line test of what constitutes election-related activity.<sup>61</sup>

### B. Testing *Buckley's* Limits: The Rise of Unregulated Issue Spending

Any discussion of issue advocacy and campaign finance reform should consider the strong electoral impact of interest groups,<sup>62</sup> the large-scale and professional purveyors of issue-related speech. The goals and methods of interest groups are inextricably linked to elections at every level of government.<sup>63</sup> Interest groups have been involved in electoral politics since before the nation's founding.<sup>64</sup> Most interest group activities have a positive effect on democratic participation by teaching political skills to group members<sup>65</sup> as well as by educating and informing voters about issues and candidates' positions.<sup>66</sup> The groups communicate on multiple levels: with their own members and supporters, with candidates, with political parties, and directly with voters.<sup>67</sup> Interest groups take such an active role in elections because they "seek to influence governmental policies, and their leaders

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<sup>61</sup> See *Buckley*, 424 U.S. at 44 & n.52 (setting forth an "express words of advocacy" test and listing examples). The line separating "express" from "issue" advocacy is a subject of ongoing judicial debate. Compare *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (holding that implied meaning of an advertisement can form the basis for a finding of express advocacy), with *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir. 1991) (adopting *Buckley's* bright-line express advocacy test).

<sup>62</sup> "Interest groups are simply collections of individuals who seek to influence public [or government] policy," or groups that "seek to promote specific policies by electing and influencing members of one political party." MARK J. ROZELL & CLYDE WILCOX, *INTEREST GROUPS IN AMERICAN CAMPAIGNS: THE NEW FACE OF ELECTIONEERING* 6, 10 (1999).

<sup>63</sup> See *id.* at 2.

<sup>64</sup> *Id.* at 3-4.

<sup>65</sup> See *id.* at 24, 35-45 (describing how a number of interest groups often recruit from their own ranks and provide training for candidates and campaign managers).

<sup>66</sup> *Id.* at 169 ("[I]nterest groups help democratize the political system.").

<sup>67</sup> *Id.* at 27-28; see also *id.* at 111 (observing that interest groups "often try to persuade their members and other voters to support (or not to support) a particular candidate," for example via television and radio advertisements, voter guides, and direct mailings).

believe that participation in the electoral process can help achieve this goal."<sup>68</sup>

Direct advertising is one of the most effective tools that independent organizations use to influence elections.<sup>69</sup> Organizations can either expressly advocate the election or defeat of a specific candidate, or instead advocate particular positions on issues without expressly endorsing a particular candidate.<sup>70</sup> Most groups prefer the latter type of advertising, called "issue advocacy,"<sup>71</sup> because it may be just as effective as express advocacy<sup>72</sup> while remaining free from federal contribution limits<sup>73</sup> and disclosure requirements.<sup>74</sup> The caveat is that, to remain free from FECA regulation, interest groups must maintain some degree of independence from the candidates they support. The FEC has recently ruled that broadcast announcements that would oth-

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<sup>68</sup> *Id.* at 2; see also JAMES Q. WILSON, *POLITICAL ORGANIZATIONS* 79–80, 89 (1995) (describing how "the separation of powers among the various branches of the government . . . offers manifold opportunities for politically active voluntary associations to intervene and in turn makes officeholders at every level attentive to, though rarely bound by, the views of such associations").

Interest groups' election strategies are twofold. "First, by helping to elect candidates who share their views, interest groups can change the personnel of government, thereby increasing the likelihood that the policies they support will be implemented." ROZELL & WILCOX, *supra* note 62, at 2. Second, "by aiding incumbents in their reelection bids, interest groups can more easily approach policy makers to argue their cases." *Id.* Thus, interest groups sometimes use electoral activity merely as an adjunct to later lobbying efforts, as demonstrated by the frequent assistance that interest groups provide to candidates who are not in close races. See *id.* at 26–27 ("There are many ways to gain access to policy makers, but one important way is to develop an ongoing relationship through campaign aid.").

<sup>69</sup> See ROZELL & WILCOX, *supra* note 62, at 113–14 (arguing that "[f]or groups . . . seeking to influence the outcome of elections, direct communication [uncoordinated with candidates] with voters has several advantages over a simple campaign contribution," including the absence of spending limits, control of the message's content, and control of how and where the money is spent); see also JONATHAN S. KRASNO & DANIEL E. SELTZ, *BUYING TIME: TELEVISION ADVERTISING IN THE 1998 CONGRESSIONAL ELECTIONS* 2–3 (2000) ("Paid television advertising is hardly the full extent of the campaign in most states and congressional districts, but it remains the single most important and expensive component in most federal races."), available at <http://www.buyingtime.org> (last visited Oct. 8, 2001).

<sup>70</sup> See ROZELL & WILCOX, *supra* note 62, at 113.

<sup>71</sup> "Issue advocacy" is defined in contraposition to "express advocacy." See *supra* notes 53–57 and accompanying text.

<sup>72</sup> See ROZELL & WILCOX, *supra* note 62, at 113 ("[Ninety] percent of issue advocacy ads in 1996 mentioned a candidate by name, and more than half included the candidate's picture. The ban on explicit endorsements is thus a minor hindrance.").

<sup>73</sup> See SOURCEBOOK, *supra* note 19, at 227 ("Because . . . 'issue advocacy' advertisements were designed to avoid the narrow legal definition of federal election spending, the sponsors were free to underwrite the campaigns with money that is prohibited or severely restricted when used in connection with federal elections . . .").

<sup>74</sup> See *id.*; ROZELL & WILCOX, *supra* note 62, at 113 ("Perhaps most important, neither the activities undertaken nor the donor list need be disclosed to the government or media.").

erwise be considered "issue advocacy" may be regulated under the FECA if those announcements are coordinated with candidates.<sup>75</sup>

These advantages, along with the dramatic increase in the number, variety, and involvement of interest groups in the political arena,<sup>76</sup> have allowed issue advocacy to become a major force in the American political system. The 1996 election cycle was the watershed for election-related issue advertising; the Democratic and Republican national committees together spent over \$54 million<sup>77</sup>—much of it unregulated "soft money"<sup>78</sup>—on media advertisements to promote their respective presidential candidates.<sup>79</sup> Following the parties' lead, labor organizations, business coalitions, and interest groups soon ran issue advertising of their own.<sup>80</sup> The Sierra Club, for instance, engaged in a \$6.5 million advertising campaign aimed at federal candidates in the 1996 general election campaign.<sup>81</sup> (In contrast, the group spent only \$100,000 on issue advocacy in the 1994 election cycle.)<sup>82</sup> In many cases, groups formed ad hoc interest organizations specifically to undertake issue advocacy campaigns.<sup>83</sup>

Issue spending continues to grow. Political parties, their committees, and various groups spent between \$250 and \$340 million on broadcast issue advocacy advertising during the 1998 congressional elections, compared to between \$135 and \$150 million during the

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<sup>75</sup> See General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138, 76,141 (Fed. Election Comm'n Dec. 6, 2000) (rejecting the argument that the FECA can only reach *express advocacy* spending by outside parties); 11 C.F.R. § 100.23(b) (2001) (subjecting "general public political communications" to contribution limits and reporting requirements).

<sup>76</sup> ROZELL & WILCOX, *supra* note 62, at 4–5 ("From the 1970s onward, interest groups were actively engaged in all stages and aspects of electoral contests.")

<sup>77</sup> See CORRADO, *supra* note 13, at 87–88 (reporting \$54 million in spending); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1761 n.76 (reporting \$68 million in spending).

<sup>78</sup> See Briffault, *supra* note 77, at 1752 (observing that "[s]oft money and issue advocacy are often intertwined, and soft money pays for much of the issue advocacy undertaken by political parties").

<sup>79</sup> The FEC's evolving standards on soft money spending partly fueled the sudden increase in issue advertising by the national parties. In 1978, the FEC decided that spending on generic party activities such as voter registration and turnout drives could be partly financed with funds raised under state law. See FEC Advisory Opinion 1978-10, available at [http://www.fec.gov/finance\\_law.html](http://www.fec.gov/finance_law.html). This gave rise to the distinction between "hard money" raised under federal contribution limits and disclosure requirements and "soft money" regulated not by federal law but by individual state laws, many of which do not limit the amount a donor may contribute to a political party. See CORRADO, *supra* note 13, at 23. In a later advisory opinion, the FEC allowed soft money to be allocated to media campaign costs, even if the advertisement makes reference to a federal officeholder, so long as there is no express advocacy, electioneering message, or reference to federal elections. FEC Advisory Opinion 1995-25, available at [http://www.fec.gov/finance\\_law.html](http://www.fec.gov/finance_law.html).

<sup>80</sup> See CORRADO, *supra* note 13, at 88–89.

<sup>81</sup> *Id.* at 89.

<sup>82</sup> *Id.*

<sup>83</sup> ROZELL & WILCOX, *supra* note 62, at 141.

1996 elections.<sup>84</sup> Such spending increased dramatically in the 2000 election cycle, with some estimates as high as \$509 million.<sup>85</sup> Independent groups alone spent \$56.5 million during the 2000 campaigns.<sup>86</sup> This rapid increase in issue advertising is not necessarily a result of more voices in the political arena: only six interest groups accounted for more than one-half of the total spending for issue advertisements by non-party organizations in the 2000 election cycle.<sup>87</sup>

The growth of election-related issue advocacy has shifted the focus of debate from limitations on contributions and campaign spending to the need to improve disclosure of all election-related spending.<sup>88</sup> Amid criticism that this new spending threatens to subvert the federal election system,<sup>89</sup> Congress has recently considered several proposals to regulate issue advocacy advertising.<sup>90</sup>

## II

### THE § 527 DISCLOSURE LEGISLATION

#### A. Section 527 Political Organizations: How They Began, Why They Grew

As most interest groups seek to avoid taxation on contributions and spending, they usually attempt to organize under any one of the tax-exempt classifications set forth in § 501(c) of the Internal Revenue

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<sup>84</sup> ANNENBERG PUB. POLICY CTR., UNIV. OF PA., *ISSUE ADVERTISING IN THE 1999–2000 ELECTION CYCLE 1* (2001), available at <http://www.appcpenn.org/issueads/1999-2000issueadvocacy.pdf>.

<sup>85</sup> *Id.* at 4. A Brennan Center study of “issue ads” in presidential and congressional races has estimated total advertising spending by candidates, parties, and independent groups to be \$482.8 million in the 2000 election cycle. See Kenneth P. Doyle, *Brennan Center Study Finds Parties Spent More than Candidates on Ads in 2000 Race*, 470 *Money & Pol. Rep.* (BNA) 1 (Dec. 13, 2000).

<sup>86</sup> See Doyle, *supra* note 85 (reporting that groups allied with Republicans spent \$27.5 million and groups allied with Democrats spent \$29.0 million). While groups allied with Republicans spent three-quarters of their total on House races alone, Democratic-leaning groups spent roughly half of their total in the presidential contest. Such strategic spending patterns led one election spending expert to observe that the independent issue advertisements were “calculated with great precision” to benefit their preferred candidates. *Id.*

<sup>87</sup> ANNENBERG PUB. POLICY CTR., *supra* note 84, at 4–5.

<sup>88</sup> See Briffault, *supra* note 77, at 1752 (“The world of campaign finance regulation has conventionally been divided into two parts—contributions and expenditures. But in today’s world the contribution/expenditure distinction increasingly pales in significance when compared to the difference between campaign contributions and expenditures on the one hand and issue advocacy on the other.”); see also CORRADO, *supra* note 13, at 4 (“No longer was the [legislative] debate about the role of PACs or the need for spending limits in congressional races. Now the discussion centered around the need to limit soft money, restrict issue advocacy expenditures, and improve disclosure.”).

<sup>89</sup> See, e.g., CORRADO, *supra* note 13, at 92 (“This type of spending . . . undermines the notion of a well-informed electorate, and increases the risk of corruption since the sources of funding for these efforts are not subject to public scrutiny.”).

<sup>90</sup> See *id.* at 106–09 (discussing proposals); *infra* note 244 and accompanying text.

Code.<sup>91</sup> Because § 501(c) places various limitations on organizations engaging in political activities,<sup>92</sup> many groups have organized under § 527 instead. Section 527 provides favorable tax treatment to “political organizations,” which may engage in political activities without limit.<sup>93</sup>

The Internal Revenue Code defines § 527 organizations primarily by their activities rather than their structure.<sup>94</sup> Thus, a § 527 organization may be nothing more than a checking account.<sup>95</sup> The only requirement is that the organization operate primarily for the purpose of carrying out exempt functions.<sup>96</sup> An exempt function includes any activity “influencing or attempting to influence the selection, nomination, [or] election . . . of any individual to any Federal . . . office.”<sup>97</sup>

Political organizations have traditionally neither paid tax on their contributions nor reported their income or spending.<sup>98</sup> The rationale behind this treatment was that political contributions are gifts that, while nondeductible by the donor, are not considered taxable income to the political organization as long as the funds are for nonpersonal, political use.<sup>99</sup> Entities treated as political organizations subject to this special tax treatment included political parties, candidate funds, and action committees.<sup>100</sup>

Section 527, enacted in 1975,<sup>101</sup> made this tax-exempt status automatic for committees that raise money to support or oppose candidates for public office.<sup>102</sup> Congress did not intend to affect the longstanding prohibition against § 501(c)(3) tax-exempt organizations engaging in electioneering activities.<sup>103</sup> However, Congress did

<sup>91</sup> I.R.C. § 501(a), (c) (1994); see HOPKINS, *supra* note 7, at 370 & n.67.

<sup>92</sup> See Judith E. Kindell & John F. Reilly, *Election Year Issues, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 400, 476–77* (Internal Revenue Serv. ed., 16th ed. 1992), available at <http://www.unclefed.com/ForTax-Prof/1996>; *infra* notes 109–15 and accompanying text.

<sup>93</sup> I.R.C. § 527 (West Supp. 2001); see HOPKINS, *supra* note 7, at 363–65.

<sup>94</sup> Milton Cerny & Frances R. Hill, *The Tax Treatment of Political Organizations*, 71 TAX NOTES 651, 653 (1996).

<sup>95</sup> *Id.*

<sup>96</sup> Treas. Reg. § 1.527-2(a)(3) (as amended in 1985); Cerny & Hill, *supra* note 94, at 653.

<sup>97</sup> I.R.C. § 527(e)(2) (West Supp. 2001).

<sup>98</sup> Cerny & Hill, *supra* note 94, at 652.

<sup>99</sup> See S. REP. NO. 93-1357, at 25–26 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7501–02; Cerny & Hill, *supra* note 94, at 652. There is some indication that Congress believed political contributions were not taxable. See S. REP. NO. 93-1357, at 26, reprinted in 1974 U.S.C.C.A.N. at 7502 (“[P]olitical activity (including the financing of political activity) as such is not a trade or business which is appropriately subject to tax.”).

<sup>100</sup> See I.R.C. § 527(e)(1) (West Supp. 2001).

<sup>101</sup> Act of Jan. 3, 1975, Pub. L. No. 93-625, 88 Stat. 2108.

<sup>102</sup> See James R. Sutton, *Nonprofits & Politics: Issues Are OK, Candidates Aren't*, BUS. L. TODAY, Sept./Oct. 2000, at 57, 59.

<sup>103</sup> I.R.C. § 501(c)(3) (1994); S. REP. NO. 93-1357, at 30, reprinted in 1974 U.S.C.C.A.N. at 7507.

intend that § 501(c) organizations already permitted to engage in political activities (such as § 501(c)(4) nonprofit groups) would establish separate political organizations to carry out their exempt-function activities.<sup>104</sup> “In this way,” according to the Senate Committee Report, “the campaign-type activities would be taken entirely out of the section 501(c) organization, to the benefit both of the organization and the administration of the tax laws.”<sup>105</sup> Also, the new legislation would allow corporations and labor organizations that are otherwise prohibited from making contributions and expenditures in connection with federal elections to establish “segregated funds” through which the entities could carry on election-related activities on a limited basis.<sup>106</sup> Thus, § 527 codified the tradition of automatic<sup>107</sup> favorable tax treatment to organizations that engage in a broad range<sup>108</sup> of political activities.

Section 527 organizations, as compared with other tax-exempt organizations, enjoy certain advantages in their ability to engage in unlimited issue advertising. Section 501(c)(3) organizations may not intervene in political campaigns, but may influence legislation on the local level as long as these lobbying activities do not constitute a “substantial part” of their activities.<sup>109</sup> One advantage of § 501(c)(3) organizations, however, is that the tax code “allows them . . . to receive large contributions from wealthy donors” because these contributions are deductible by the donor.<sup>110</sup> Section 501(c)(4) organizations, on the other hand, may engage in political activities so long as these activities do not become the organization’s “primary activity.”<sup>111</sup> However, a major drawback of § 501(c)(4) status is that large contributors are subject to the gift tax when they exceed the annual gift tax limit of \$10,000.<sup>112</sup>

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104 See Cerny & Hill, *supra* note 94, at 673.

105 S. REP. NO. 93-1357, at 30, *reprinted in* 1974 U.S.C.C.A.N. at 7506.

106 See 2 U.S.C. § 441b(b)(2) (1994).

107 See Cerny & Hill, *supra* note 94, at 653 (“Section 527 allows broad flexibility as to the form and structure of political organizations. . . . Consistent with this structural flexibility, a section 527 organization is not required to file an application for recognition of exemption.”); Sutton, *supra* note 102, at 59 (noting that “[s]ection 527 organizations do not have to file the lengthy applications that other types of nonprofits have to file”).

108 See Cerny & Hill, *supra* note 94, at 675 (“There seems to be a trend toward a very inclusive concept of what activities constitute exempt function activities . . .”).

109 I.R.C. § 501(c)(3) (1994). However, these nonprofits may spend money on initiative campaigns such as ballot measures and referenda. 11 C.F.R. § 114.4 (2001).

110 ROZELL & WILCOX, *supra* note 62, at 20; see I.R.C. § 170(c)(2) (1994).

111 See I.R.C. § 501(c)(4) (1994); Rev. Rul. 81-95, 1981-1 C.B. 332 (1981); see also SOURCEBOOK, *supra* note 19, at 18-19 (“The Internal Revenue Service (IRS) interprets this restriction to allow 501(c)(4) organizations to participate in an election by doing such things as rating candidates on a partisan basis . . . [and] promot[ing] legislation.”).

112 See I.R.C. §§ 2501(a), 2503(b), 2522 (1994); Frances R. Hill, *Probing the Limits of Section 527 to Design a New Campaign Finance Vehicle*, 86 TAX NOTES 387, 389 (2000) (“Since one of the main reasons for using section 501(c)(4) structures was to facilitate contribu-

While issue advocacy activities do not automatically threaten a nonprofit's tax-exempt status,<sup>113</sup> the organizations described above are limited as to the character (in the case of § 501(c)(3) organizations) and volume of issue advocacy in which they may engage. In addition, because they would presumably be required to file detailed reports with the FEC,<sup>114</sup> political organizations were not subject to the same stringent application filing requirements as nonprofit organizations such as § 501(c) groups.<sup>115</sup> All three types of tax-exempt organizations enjoyed the benefits of donor anonymity as well as the ability to finance issue advertisements in amounts and from sources (including corporations and labor unions) that would be prohibited under federal election law.<sup>116</sup>

Interest groups seeking to influence electoral politics thus generally maintain one or even several of these tax-favored entities.<sup>117</sup> Because of the advantages of § 527 status and the rapid growth of issue advocacy, perhaps it is not surprising that, twenty-five years after its creation, this one-time "obscure provision in the Internal Revenue Code"<sup>118</sup> became interest groups' tool of choice for influencing the outcome of elections.

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tions well in excess of this amount, the gift tax made section 501(c)(4) organizations tax inefficient. The search for an alternative lead [sic] to the creation of the new section 527 organizations."). Contributors to § 501(c)(3) and § 527 organizations are not subject to the gift tax. See I.R.C. §§ 2501(a)(5), 2522(a)(2) (1994).

<sup>113</sup> The Internal Revenue Service has explicitly concluded that issue advocacy activities alone do not threaten a nonprofit's tax-exempt status. See Priv. Ltr. Rul. 89-36-002 (May 24, 1989); see also Sutton, *supra* note 102, at 59 (noting that properly conducted issue advocacy activities do not threaten tax-exempt status).

<sup>114</sup> Compare I.R.C. § 527(e)(2) (West Supp. 2001) (describing an exempt function as "influencing or attempting to influence the . . . election . . . of any individual to any . . . public office"), with 2 U.S.C. § 431(9)(A)(i) (1994) (defining "expenditure" under the FECA as "anything of value, made by any person for the purpose of influencing any election for Federal office").

<sup>115</sup> See Sutton, *supra* note 102, at 59 ("One of the justifications for this exemption [from filing 'lengthy applications'] was that Section 527 organizations would have to file detailed reports with the FEC or state campaign-filing officers (because, by definition, they would participate in campaign-related activities)."); see also Cerny & Hill, *supra* note 94, at 653 (noting that the lack of application requirement is consistent with § 527's structural flexibility).

<sup>116</sup> See Sutton, *supra* note 102, at 58-59.

<sup>117</sup> See SOURCEBOOK, *supra* note 19, at 20 (observing that "many organizations maintain a collection of entities under one umbrella, such as the Sierra Club, which has a 501(c)(3), a 501(c)(4), and a PAC"). During the 2000 elections, the Sierra Club also established a § 527 organization through which it ran its issue advocacy activities. See Sutton, *supra* note 102, at 59. See generally ROZELL & WILCOX, *supra* note 62, at 20-21, 112 (describing how tax law both benefits and limits interest groups' electoral strategies).

<sup>118</sup> Sutton, *supra* note 102, at 59; see also Cerny & Hill, *supra* note 94, at 389-90 (describing the origins of § 527).

## B. The Issue Advocacy Disclosure Loophole

Section 527's transformation from an obscure tax provision to a lightning rod for controversy began in 1998, when the Sierra Club planned to conduct mass media campaigns "strategically aimed at altering the political process" and whose "format, timing, and targeting [were] designed to have an impact on how the public views the candidates."<sup>119</sup> The Sierra Club sought an opinion from the Internal Revenue Service (IRS), which subsequently issued a private letter ruling stating that "[b]ecause these activities serve a political purpose, they are for an exempt function within the meaning of section 527(e)(2)."<sup>120</sup> Following this ruling, § 527 organizations formed by interest groups (as opposed to political committees) greatly proliferated, attracted by favorable tax treatment and the ability to support candidates on a larger scale.<sup>121</sup>

These organizations also benefitted from a disclosure loophole: Because they could fit the definition of political organizations, which seek "primarily"<sup>122</sup> to "influenc[e] or attempt[ ] to influence the . . . election . . . of any individual,"<sup>123</sup> yet at the same time stopped short of "expressly advocat[ing] the election or defeat of a clearly identified candidate,"<sup>124</sup> these interest groups were not required to disclose their contributors and spending to the IRS or the FEC.<sup>125</sup> Thus, much spending intended to influence elections could escape public scrutiny.

Interest groups might also take advantage of the greater amount of coordination that § 527 allows between the groups, political parties, and the candidates themselves.<sup>126</sup> Congress envisioned that § 527 status would extend to "political parties, committees, . . . or similar political organizations"<sup>127</sup> and that such groups could carry out their activities with a high degree of coordination without endangering their tax-favored status. While a certain degree of coordination with a candidate or political committee will cause third-party activities to fall

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<sup>119</sup> Priv. Ltr. Rul. 1999-25-051 (June 25, 1999).

<sup>120</sup> *Id.*

<sup>121</sup> See Sutton, *supra* note 102, at 59.

<sup>122</sup> Treas. Reg. § 1.527-2(a)(3) (as amended in 1985).

<sup>123</sup> I.R.C. § 527(e)(2) (West Supp. 2001).

<sup>124</sup> Buckley v. Valeo, 424 U.S. 1, 80 (1976).

<sup>125</sup> See Sutton, *supra* note 102, at 59.

<sup>126</sup> See, e.g., Broder & Bonner, *supra* note 8 (describing various § 527 groups established by members of Congress); see also Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 659 n.160 (2000) (discussing the "loose affiliations" between "party committees and allied nonparty organizations," and the concomitant need for "a legal determination of when non-party committee activities are coordinated with the parties that takes into account current campaign practices").

<sup>127</sup> S. REP. NO. 93-1357, at 26 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7503; see also I.R.C. § 527(e)(1) (West Supp. 2001) (defining "political organization").

under the campaign finance limitations and disclosure provisions,<sup>128</sup> the FEC has deliberately set the level of coordination that would trigger disclosure at a high level.<sup>129</sup> Thus, a wide range of coordination between § 527 organizations and the very candidates they intend to help could remain hidden from public scrutiny. The fact that such coordination would be sanctioned by law further calls into question the supposedly purely issue-related orientation of many § 527 organizations.

### C. Congressional Reform: Closing the Loophole

Faced with the “prospect of widespread circumvention of federal campaign finance laws”<sup>130</sup> as well as abuses of the tax code,<sup>131</sup> Congress passed legislation<sup>132</sup> restricting the virtual anonymity under which increasing numbers of § 527 organizations raised and spent tens of millions of dollars to influence the outcome of federal races.<sup>133</sup> Passed swiftly with overwhelming bipartisan support,<sup>134</sup> the law apparently changed the automatic § 527 status given to organizations engaging in “exempt functions.”<sup>135</sup> Congress declared that “an organization shall not be treated as an organization described in [§ 527]” unless it gives notice to the IRS.<sup>136</sup> If the organization does not give notice, then “the taxable income of such organization shall be computed by taking into account any exempt function income.”<sup>137</sup>

An organization electing § 527 status must file the name, address, and (in the case of individuals) employer of “all contributors [that]

<sup>128</sup> See *supra* note 75 and accompanying text.

<sup>129</sup> See General Public Political Communications Coordinated with Candidates and Party Committees; Independent Expenditures, 65 Fed. Reg. 76,138, 76,142 (Fed. Election Comm’n Dec. 6, 2000) (“[T]he Commission believes . . . that a high standard is required to safeguard protected core First Amendment rights.”).

<sup>130</sup> CORRADO, *supra* note 13, at 94.

<sup>131</sup> Cf. H.R. Rep. No. 106-702, at 12 (2000), available at <http://thomas.loc.gov/cp106/cp106query.html>.

<sup>132</sup> Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477 (codified in scattered sections of I.R.C.); see also Recent Legislation, *Act of July 1, 2000, Pub. L. No. 106-230, 114 Stat. 477*, 114 HARV. L. REV. 2209 (2001) (describing the § 527 legislation).

<sup>133</sup> See CORRADO, *supra* note 13, at 94.

<sup>134</sup> The legislation, sponsored by Representative Amo Houghton, Chairman of the House Ways and Means Committee’s Oversight Subcommittee, was introduced in the House on June 27, 2000; passed overwhelmingly in the House that same day (385 to 39), see 146 CONG. REC. H5289-90 (daily ed. June 27, 2000); passed overwhelmingly in the Senate only two days later (92 to 6), see *id.* at S6047 (daily ed. June 29, 2000); and was presented thereafter to the President, who promptly signed it into law on July 1, 2000, see *id.* at D711 (daily ed. July 10, 2000).

<sup>135</sup> See *supra* text accompanying notes 101-02.

<sup>136</sup> I.R.C. § 527(i)(1) (West Supp. 2001). If an organization fails to give notice of § 527 status within twenty-four hours of its establishment, the organization will not be treated as a § 527 organization for the period before such notice is given. *Id.* § 527(i)(1)(B).

<sup>137</sup> *Id.* § 527(i)(4).

contributed an aggregate amount of \$200 or more to the organization during the calendar year and the amount of the contribution.”<sup>138</sup> The IRS is then required to disclose this information to the public.<sup>139</sup> The “penalty”<sup>140</sup> for failing to provide the IRS with this information is an amount equal to 35% of the amount of undisclosed contributions.<sup>141</sup> In addition, the timeline for filing this information is tied into the election cycle,<sup>142</sup> and in this respect resembles the filing schedule required by the FECA.<sup>143</sup>

The notice and reporting requirements do not apply to any organization that “reasonably anticipates” receiving less than \$25,000 in a given year<sup>144</sup> or to those organizations already required to report to the FEC as a political committee.<sup>145</sup> In addition, “independent expenditures,” which must already be reported to the FEC,<sup>146</sup> and “any State or local committee of a political party or political committee of a State or local candidate” are exempt from the reporting requirements.<sup>147</sup> The new law took effect immediately with the President’s signature and covered all contributions to political committees made after the law’s enactment date.<sup>148</sup>

The push for § 527 disclosure legislation actually began several months earlier.<sup>149</sup> Several competing proposals circulated through Congress, all differing with respect to which organizations, in addition to § 527 groups, would be subject to increased scrutiny.<sup>150</sup> One pro-

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<sup>138</sup> *Id.* § 527(j)(3)(B).

<sup>139</sup> *Id.* § 6104(d)(6).

<sup>140</sup> See *Nat’l Fed’n of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273, 1279 (S.D. Ala. 2001) (order denying in part government’s motion to dismiss) (construing exaction imposed for failure to provide disclosure to be a “penalty” rather than a “tax”).

<sup>141</sup> I.R.C. § 527(j)(1) (West Supp. 2001) (“In the case of . . . a failure to make the required disclosures . . . there shall be paid by the organization an amount equal to the rate of tax specified in subsection (b)(1) multiplied by the amount to which the failure relates.”). I.R.C. § 527(b)(1) specifies the tax rate for nonexempt income of political organizations as “the highest rate of tax specified in section 11(b),” which is 35%. *Id.* § 11(b)(1)(D) (1994).

<sup>142</sup> *Id.* § 527(j)(2). During the year of “any election with respect to which the organization makes a contribution or expenditure,” § 527 organizations must file quarterly, pre-election, and post-general election reports; otherwise they must file biannual reports. *Id.* § 527(j)(2)(A). Alternatively they may file monthly reports and pre- and post-general election reports. *Id.* § 527(j)(2)(B).

<sup>143</sup> See 2 U.S.C. § 434(a) (1994).

<sup>144</sup> I.R.C. § 527(i)(5)(B), (j)(5)(C) (West Supp. 2001).

<sup>145</sup> *Id.* § 527(i)(6), (j)(5)(A).

<sup>146</sup> See 2 U.S.C. § 434(c) (1994).

<sup>147</sup> I.R.C. § 527(j)(5)(B), (E) (West Supp. 2001).

<sup>148</sup> Act of July 1, 2000, Pub. L. No. 106-230, § 3(d), 114 Stat. 477, 483.

<sup>149</sup> In February 2000, Representative Dennis Moore filed his Campaign Integrity Act of 2000, which was very similar to the legislation that later passed in the House. See 146 CONG. REC. H5285 (daily ed. June 27, 2000) (statement of Rep. Moore); 146 CONG. REC. E653 (daily ed. May 4, 2000) (speech of Rep. Moore).

<sup>150</sup> See Cheryl Bolen & Kenneth P. Doyle, *Houghton Considering Broad Bill for Disclosure by Tax-Exempt Groups*, 347 Money & Pol. Rep. (BNA) 1 (June 19, 2000).

posal by Representative Amo Houghton<sup>151</sup> would have applied reporting and disclosure requirements not only to § 527 organizations, but to “political activity expenditures” of a variety of § 501(c) tax-exempt groups.<sup>152</sup> Another bill, sponsored by Senator Gordon Smith,<sup>153</sup> would have resulted in similar coverage, but would not have included § 501(c)(4) organizations. A third proposal, submitted by Senator John McCain as an amendment to a defense authorization bill,<sup>154</sup> later became the basis for the § 527 disclosure legislation that eventually became law.<sup>155</sup>

Thus, on the one hand, the new disclosure law was less ambitious than the competing proposals as its coverage extended only to § 527 groups and not to § 501(c) groups that might be influencing elections. Yet on the other hand, compromise was probably necessary for the bill to pass so quickly and with such firm bipartisan support.<sup>156</sup> Section 527 issue spending was seen as a more pressing concern than alleged abuses of § 501(c) status by politically oriented groups. As Representative Smith declared, “While the bill does not address the campaign activities of other [§ 501(c)] organizations, coverage of the 527s will address the fastest growing problem in campaign advertising—independent groups that can spend millions of dollars to influence a campaign—without disclosing their contributors.”<sup>157</sup> The floor speeches concerning the bill convey this sense of urgency, exemplified by Representative Lloyd Doggett’s lament that “while we have waited for this coming together on this approach there have been those who . . . have been working as hard as they can to raise as much secret money as they can to fill . . . our mailboxes with misinformation.”<sup>158</sup> Many supporters of the bill focused on serving the public’s informational interests by swiftly passing the bill, as incomplete as the result might be.<sup>159</sup>

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<sup>151</sup> Representative Houghton sponsored an alternative proposal that eventually became Public Law 106-230. See H.R. 4762, 106th Cong. (2000).

<sup>152</sup> See H.R. REP. NO. 106-702 (2000), available at <http://thomas.loc.gov/cp106/cp106query.html>.

<sup>153</sup> S. 2742, 106th Cong. (2000).

<sup>154</sup> See Cheryl Bolen, *Senate Passes McCain Amendment to Require Section 527 Group Disclosure*, 343 Money & Pol. Rep. (BNA) 1 (June 9, 2000).

<sup>155</sup> See 146 CONG. REC. H5289 (daily ed. June 27, 2000) (statement of Rep. Smith).

<sup>156</sup> See *id.* at H5285 (statement of Rep. Archer). Representative Archer stated: I am sad that we could not broaden it more. I think any tax exempt entity that is excused from paying any income tax under our law and engages in significant political activity should have to disclose and report. It should not be simply limited to one group, but, unfortunately, that was not going to be accepted on a bipartisan basis.

*Id.*

<sup>157</sup> *Id.* at H5289 (statement of Rep. Smith).

<sup>158</sup> *Id.* at H5288 (statement of Rep. Doggett).

<sup>159</sup> See, e.g., *id.* at H5289 (statement of Rep. Coyne) (“I urge my colleagues to support this important legislation. If we can’t pass comprehensive campaign finance legislation

## III

CONSTITUTIONALITY AND EFFECTIVENESS OF THE § 527  
DISCLOSURE LEGISLATION

## A. The First Court Challenge

Although Congress enacted the new law as a tax amendment and empowered the IRS, not the FEC, to oversee its implementation, the stated rationales behind the amendment were inescapably focused on campaign finance reform.<sup>160</sup> Arguably, the new law empowered the IRS to do what the FEC could not, as the FECA's campaign finance restrictions, as interpreted by the Supreme Court and lower federal courts,<sup>161</sup> can apply only to political speech that expressly advocates the election or defeat of clearly defined federal candidates, or that is coordinated with the candidates.<sup>162</sup> In fact, the § 527 legislation specifically envisioned reaching only non-express advocacy because the law exempted from its scope those organizations that are already required to report to the FEC.<sup>163</sup>

In addition to its campaign finance focus, the § 527 amendment also seemed to conflict with the policy objectives that Congress had in mind when it passed the original § 527 legislation in 1974. Several years prior to the original legislation's enactment, the IRS ruled that candidates who used contributions to generate investment income could be taxed on that income, despite the exclusion rules that generally applied to political organizations.<sup>164</sup> Congress addressed this matter itself "[b]ecause the questions involved in this area require a delicate balance between the need to protect the revenue and . . . the need to encourage political activities which are the heart of the democratic process."<sup>165</sup> The major purposes of the 1974 legislation were to provide for the taxation of political organizations' investment income and to clarify that political contributions were not gifts subject to the

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this year, let's at least subject the activities of these organizations to public scrutiny. It is essential in a democracy that the voters know who is spending money to influence elections.").

<sup>160</sup> See *id.* at H5282-90; Davidson, *supra* note 12 ("The bill is unique because it uses the tax code, not the Federal Election Campaign Act, to force disclosure on 527s . . ."); see also Nat'l Fed'n of Republican Assemblies v. United States, 148 F. Supp. 2d 1273, 1279 (S.D. Ala. 2001) (explaining that "the required disclosures do not further any actual tax purpose and are instead utilized for campaign finance regulation").

<sup>161</sup> See, e.g., Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 657-58 (1990); FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 248 (1986); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 788 n.26 (1978); FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), *aff'd*, No. 95-2600, 1996 WL 431996 (4th Cir. Aug. 2, 1996).

<sup>162</sup> See *supra* Part I.A.

<sup>163</sup> See *supra* note 145 and accompanying text.

<sup>164</sup> S. REP. No. 93-1357, at 25 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7502.

<sup>165</sup> *Id.* at 26, *reprinted in* 1974 U.S.C.C.A.N. at 7502; see also *id.* at 32, *reprinted in* 1974 U.S.C.C.A.N. at 7508 ("[T]he tax system should not be used to reduce or restrict political contributions.").

gift tax.<sup>166</sup> Thus, Congress's balance generously tilted toward the autonomy of political organizations—a balance that the new disclosure legislation seemed to disturb.

The unusual nature of the § 527 amendment was not lost on an umbrella group of conservative Republican organizations, who filed the first lawsuit<sup>167</sup> challenging the legislation on constitutional free speech grounds.<sup>168</sup> The coalition, called the Free Speech Alliance, is seeking to enjoin application of § 527's notice and disclosure requirements to their organizations and to have the law declared unconstitutional.<sup>169</sup> Their First Amendment attack in *National Federation of Republican Assemblies v. United States* relies on two arguments. First, according to the plaintiffs, "[a]lthough this new law is disguised as 'tax' legislation, it actually amounts to broad-based federal regulation of political speech and association."<sup>170</sup> Therefore, the plaintiffs argue, the law violates *Buckley v. Valeo* by extending disclosure requirements to groups not engaged in express advocacy.<sup>171</sup> Secondly, the coalition argues that the government, by compelling self-disclosure by contributors to political organizations, violates their contributors' right to engage in anonymous political speech.<sup>172</sup>

In passing the § 527 amendment, congressional supporters anticipated constitutional arguments similar to those raised by the Free

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<sup>166</sup> *Id.* at 26, reprinted in 1974 U.S.C.C.A.N. at 7502 ("[P]olitical organizations are to be treated as tax-exempt organizations, since political activity (including the financing of political activity) as such is not a trade or business which is appropriately subject to tax.")

<sup>167</sup> Doyle, *supra* note 18, at G-4.

<sup>168</sup> See Amended Complaint, Nat'l Fed'n of Republican Assemblies v. United States, No. 00-759-C (S.D. Ala. filed Oct. 11, 2000), available at <http://527legalfund.com/complaint.html> (last visited Oct. 8, 2001); Brief in Support of Motion for Preliminary Injunction, *Republican Assemblies* (No. 00-759-C), available at [http://527legalfund.com/prelim\\_injunc.html](http://527legalfund.com/prelim_injunc.html) (last visited Oct. 8, 2001); Nat'l Fed'n of Republican Assemblies v. United States, 148 F. Supp. 2d 1273, 1286 (S.D. Ala. 2001) (order denying government's motion to dismiss with respect to plaintiffs' First Amendment challenge to § 527 disclosure requirements).

<sup>169</sup> See Amended Complaint at 2, *Republican Assemblies* (No. 00-759-C). In addition to their amended complaint, the plaintiffs have filed a motion for preliminary injunction. The United States has filed a motion to dismiss the complaint on jurisdictional and substantive grounds. On May 31, 2001, the district court denied the government's motion to dismiss as to all the plaintiffs except for the political candidate, who lacked standing to challenge § 527's registration requirements. *Republican Assemblies*, 148 F. Supp. 2d at 1285. In addition, the court found that the Anti-Injunction Act, I.R.C. § 7421 (1994), did not bar the plaintiffs' challenge to the disclosure requirements of I.R.C. § 527(j), as the 35% excaction imposed on organizations that fail to disclose requisite information constituted a penalty rather than a tax. 148 F. Supp. 2d at 1283.

<sup>170</sup> Amended Complaint at 2, *Republican Assemblies* (No. 00-759-C).

<sup>171</sup> Brief in Support of Motion for Preliminary Injunction at 16-17, *Republican Assemblies* (No. 00-759-C).

<sup>172</sup> See *id.* at 12-15; Melanie Fonder & Alexander Bolton, *Reformer Seeks Changes in Campaign Law*, HILL, Sept. 27, 2000, at 51. The groups also claim that the new law places too much discretion with the IRS to determine which organizations are political and thus required to disclose their donors. See Doyle, *supra* note 18, at G-4.

Speech Alliance. Representative Houghton, the bill's sponsor, argued that while "we have no way of knowing how the courts will rule on any legislation we consider in Congress," nevertheless "it is clear that no group has a constitutional right to tax-exempt status. There is no question that Congress has the right to impose conditions on such privileged status."<sup>173</sup>

Congressman Houghton's statement is apparently based on the Supreme Court's ruling in *Regan v. Taxation with Representation of Washington*.<sup>174</sup> In that case, a nonprofit organization sought a declaration of tax-exempt status under § 501(c)(3) after the IRS denied that status. The IRS based its denial on the organization's proposal "to advocate its point of view before the Congress, the Executive Branch, and the Judiciary" in apparent violation of § 501(c)(3)'s prohibition against "attempting to influence legislation."<sup>175</sup> The Court, comparing tax-exempt status to a conditional grant awarded by Congress,<sup>176</sup> held that "Congress is not required by the First Amendment to subsidize lobbying. . . . We again reject the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.'"<sup>177</sup> Justice Rehnquist, writing for the Court, regarded the choice of whether to extend tax-exempt status to certain groups and not to others as a policy question entrusted to the Congress: "We have no doubt that this statute is within Congress' broad power in this area. . . . Congress [and not this Court] has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying. . . ." <sup>178</sup> *Republican Assemblies* raises the novel issue of whether the subsidy rationale of *Taxation with Representation*, which dealt with § 501(c)(3) organizations, also holds true for political groups organized under § 527.<sup>179</sup>

The tax regulations in *Republican Assemblies* are distinguishable in several respects from those in *Taxation with Representation*. First, in the latter case, the benefits enjoyed by § 501(c)(3) groups that do not engage in substantial lobbying are clearly "a form of subsidy that is

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<sup>173</sup> 146 CONG. REC. H5289 (daily ed. June 27, 2000) (statement of Rep. Houghton).

<sup>174</sup> 461 U.S. 540 (1983).

<sup>175</sup> *Id.* at 542; see I.R.C. § 501(c)(3) (1994).

<sup>176</sup> *Taxation with Representation*, 461 U.S. at 548.

<sup>177</sup> *Id.* at 546 (quoting *Cammarano v. United States*, 358 U.S. 498, 515 (1959) (Douglas, J., concurring)). The Court, however, also pointed out that "[t]he case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to 'aim[ ] at the suppression of dangerous ideas.'" *Id.* at 548 (quoting *Cammarano*, 358 U.S. at 513).

<sup>178</sup> *Id.* at 550. The government offers an identical argument in *Republican Assemblies*. See Brief of United States of America in Support of Its Motion to Dismiss at 22, Nat'l Fed'n of Republican Assemblies v. United States, No. 00-759-C (S.D. Ala. filed Oct. 25, 2000).

<sup>179</sup> See Cerny & Hill, *supra* note 94, at 653 n.15.

administered through the tax system."<sup>180</sup> In contrast, the district court in *Republican Assemblies* specifically determined that nondisclosure under § 527(j) resulted in a penalty, not a tax.<sup>181</sup> Because the penalty specified by the statute is equal to the rate of tax that would be paid on a political organization's nonexempt income,<sup>182</sup> the penalty could be viewed as a functional equivalent of a tax. Yet this interpretation is hindered by the language of § 527, which makes clear that nondisclosure does not cause otherwise exempt-function activity to become nonexempt.<sup>183</sup>

Second, it is unclear whether the inability of § 527 groups to carry out a substantial amount of anonymous, election-related issue advocacy under another tax-exempt classification prevents the *Taxation with Representation* rationale from applying. Justice Blackmun, concurring with the result in *Taxation with Representation*, explained that the plaintiff organization was not denied its "right to receive deductible contributions to support its nonlobbying activity"<sup>184</sup> because the organization was free to form a separate § 501(c)(4) organization to "make known its views on legislation," an activity protected by the First Amendment.<sup>185</sup> Third, the subsidy rationale of *Taxation with Representation* might not apply if political contributions are not taxable income in the first place.<sup>186</sup>

The plaintiffs in *Republican Assemblies* also invoke the Supreme Court's ruling in *McIntyre v. Ohio Elections Commission*,<sup>187</sup> arguing that the § 527 legislation infringes upon their right to anonymously engage in political speech. *McIntyre* involved a statute prohibiting the distribution of campaign literature that does not disclose the name and address of the person or campaign official issuing the literature.<sup>188</sup> Justice Stevens, writing for the majority, explained that "a respected tradition of anonymity in the advocacy of political causes"<sup>189</sup>

<sup>180</sup> *Taxation with Representation*, 461 U.S. at 544.

<sup>181</sup> See *Republican Assemblies*, 148 F. Supp. 2d at 1286.

<sup>182</sup> See I.R.C. § 527(b)(1), (c), (j)(1) (West Supp. 2001).

<sup>183</sup> See *id.* § 527(j)(1).

<sup>184</sup> *Taxation with Representation*, 461 U.S. at 553 (Blackmun, J., concurring) (quoting *id.* at 545 (Rehnquist, J.)).

<sup>185</sup> *Id.* (Blackmun, J., concurring); see also S. REP. NO. 93-1357, at 30 (1974), reprinted in 1974 U.S.C.C.A.N. 7478, 7506 ("[G]enerally, a section 501(c) organization that is permitted to engage in political activities would establish a separate organization that would operate primarily as a political organization . . . . In this way, the campaign-type activities would be taken entirely out of the section 501(c) organization . . . .").

<sup>186</sup> There is some indication that Congress believed political contributions were not taxable. See S. REP. NO. 93-1357, at 26, reprinted in 1974 U.S.C.C.A.N. at 7502 ("[P]olitical activity . . . as such is not a trade or business which is appropriately subject to tax.").

<sup>187</sup> 514 U.S. 334 (1995).

<sup>188</sup> *Id.* at 338 n.3.

<sup>189</sup> *Id.* at 343 (construing *Talley v. California*, 362 U.S. 60, 64-65 (1960)).

required the statute to be analyzed with “exacting scrutiny.”<sup>190</sup> In striking down the statute, the Court held that Ohio’s interest in informing the electorate of the identity of the author could not justify the burdening of McIntyre’s political speech.<sup>191</sup>

In its opinion, the Court took pains to distinguish *McIntyre* from *Buckley*, which permitted the FEC to require disclosure of the names of contributors to campaigns and those who engage in “independent expenditures” not coordinated with a campaign but expressly advocating the election or defeat of a candidate.<sup>192</sup> While a written campaign leaflet is typically “a personally crafted statement of a political viewpoint,”<sup>193</sup> contributions indicate symbolic support for a candidate<sup>194</sup> and are therefore less likely to be the subject of retaliation.<sup>195</sup> In addition to being more intrusive than the disclosure requirements that passed muster in *Buckley*, the Court found that the *McIntyre* statute “rest[ed] on different and less powerful state interests.”<sup>196</sup> Given the minimal intrusiveness and the *Buckley*-related interests of the § 527 disclosure legislation, it is unlikely that the rationale of *McIntyre* is sufficient to hold the legislation unconstitutional.

## B. Constitutionality: Alternative Arguments

Another ground for the constitutionality of the § 527 amendment does not rely on the subsidy argument, but instead addresses the important governmental concerns expressed in *Buckley v. Valeo*. In *Buckley*, the Court struck down the FECA’s mandatory disclosure provisions as applied to issue advocacy. The Court did not weigh the three recognized governmental interests against the resulting burden on political speech, but instead cited vagueness and overbreadth problems with the FECA provision requiring “[e]very person (other than a political committee or candidate) who makes contributions or expenditures”<sup>197</sup> “for the purpose of . . . influencing the nomination

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<sup>190</sup> *Id.* at 347.

<sup>191</sup> *Id.* at 348 & n.11.

<sup>192</sup> See *supra* Part I.A; see also Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. Rev. 265, 274–76 (2000) (describing additional ways in which *Buckley* and *McIntyre* may be distinguished).

<sup>193</sup> *McIntyre*, 514 U.S. at 355.

<sup>194</sup> See *Buckley v. Valeo*, 424 U.S. 1, 21 (1976)

<sup>195</sup> *McIntyre*, 514 U.S. at 355. As Justice Stevens stated: “[E]ven though money may ‘talk,’ its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.” *Id.*

<sup>196</sup> See *id.* at 356–57 (holding that government may not prohibit anonymous election-related speech in order to prevent fraud).

<sup>197</sup> Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, sec. 204(c), § 304(e), 88 Stat. 1263, 1278 (codified as amended at 2 U.S.C. § 434(c) (1994)),

for election, or [the] election, of any person to Federal office"<sup>198</sup> to file disclosure with the FEC. According to the Court, this language "shares the same potential for encompassing both issue discussion and advocacy of a political result."<sup>199</sup>

The fact that an organization engaging in exempt-function activities must actually *elect* to become a § 527 organization<sup>200</sup> ameliorates *Buckley's* vagueness concerns. It is unlikely that an interest group could successfully claim that the *Buckley* disclosure criteria are too vague when the group has already notified the IRS that it intends to "influenc[e] or attempt[ ] to influence the selection, nomination, election, or appointment of [an] individual to any Federal . . . office."<sup>201</sup> In addition, disclosure of spending by § 527 groups does not threaten to "reach groups engaged purely in issue discussion"<sup>202</sup> because, by definition, political organizations seeking § 527 status are not engaged in "pure issue discussion." Like expenditures by candidates or political committees,<sup>203</sup> spending by § 527 groups "can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related."<sup>204</sup>

Thus, the § 527 legislation does not run afoul of *Buckley's* vagueness and overbreadth concerns. In addition, at least two of the disclo-

amended by Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, § 104(d), 90 Stat. 475, 481.

<sup>198</sup> *Id.* sec. 201(a)(4), (5), § 301(e), (f), 88 Stat. at 1272-73 (codified as amended at 2 U.S.C. § 431(8), (9) (1994)).

<sup>199</sup> *Buckley*, 424 U.S. at 79.

<sup>200</sup> See *supra* notes 136-37 and accompanying text.

<sup>201</sup> I.R.C. § 527(e)(2) (West Supp. 2001).

<sup>202</sup> *Buckley*, 424 U.S. at 79. *Buckley* may not, in fact, hold that all issue advocacy is outside the scope of the FECA. As this Note's discussion in Part I.B demonstrates, issue advocacy can be a very effective election tool. See, e.g., Richard E. Levy, *The Constitutional Parameters of Campaign Finance Reform*, KAN. J.L. & PUB. POL'Y, Winter 1999, at 43, 50-51 (stating that "*Buckley* indicates that the scope of permissible reporting and disclosure requirements is somewhat broader than permissible limits on contributions and expenditures because [the former] are less restrictive of speech," and suggesting that *Buckley's* narrowing construction on the reporting and disclosure requirements are "generally thought" to reflect constitutional requirements). *Contra* Ian Ayres & Jeremy Bulow, *Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 864 (1998) ("*Buckley v. Valeo* suggests that mandated disclosure of [independent issue advocacy] speaker identity is unconstitutional . . ." (footnote omitted)).

<sup>203</sup> *Buckley* construed "political committee" to "encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. The second half of this definition is identical to § 527's definition of "exempt function activity." See I.R.C. § 527(e)(2). There is some controversy regarding whether § 527 organizations can properly be treated as "political committees" subject to the FECA. See *FEC v. Akins*, 524 U.S. 11, 26-29 (1998) (describing one question for certiorari to be whether *Buckley* narrowed the definition of "political committee" to no longer require making expenditures or receiving contributions as those terms are defined by the FECA), *vacating and remanding* 101 F.3d 731 (D.C. Cir. 1996); Hill, *supra* note 112, at 400.

<sup>204</sup> *Buckley*, 424 U.S. at 79.

sure interests discussed in *Buckley*<sup>205</sup>—preventing corruption and informing the electorate—are applicable to § 527 disclosure. There is also a separate but related interest, unique to interest groups that engage in election-related issue advocacy: the public interest in electoral integrity and accountability.

Issue advocacy is controversial because it is often designed to influence federal elections, yet its ultimate financial sources remain hidden from public view. Most election observers seem to agree that “[t]his type of spending . . . undermines the notion of a well-informed electorate, and increases the risk of corruption since the sources of funding for these efforts are not subject to public scrutiny.”<sup>206</sup> These two interests—a well-informed electorate and the elimination of corruption or its appearance—were the two governmental interests that the Court already found sufficient to allow disclosure of election-related activities in *Buckley*.<sup>207</sup>

As noted above, a new governmental interest—electoral accountability—has evolved with the rise of issue spending by interest groups.<sup>208</sup> This interest takes into account the dramatic change in the electoral landscape since the Court decided *Buckley* over a quarter-century ago. As discussed in Part I.B, interest groups have become increasingly involved in elections at all levels of government. According to two observers of interest groups:

<sup>205</sup> See *supra* Part I.A.

<sup>206</sup> CORRADO, *supra* note 13, at 92; see also ROZELL & WILCOX, *supra* note 62, at 158–59 (“[Issue advocacy] undermines the disclosure system, the most successful aspect of the current campaign finance regime. . . . When interest groups can spend unlimited amounts of undisclosed and untraceable funds, the disclosure system is perhaps fatally damaged—which is, in turn, likely to increase public cynicism about the political system.”); Ayres & Bulow, *supra* note 202, at 861 (“[I]t is clear that independent expenditures and issue advocacy still pose some danger of corruption. ‘Candidates often know who spends money on their behalf, and for this reason, an [independent] expenditure may in some contexts give rise to the same reality and appearance of corruption.’” (quoting Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1395 (1994) (alteration in original))). Professor Sunstein identifies corruption as the “[f]irst and most obvious” ground for campaign finance reforms. Sunstein, *supra*, at 1391.

<sup>207</sup> See *supra* Part I.A.

<sup>208</sup> See *supra* text accompanying notes 205–06. It is possible to view the electoral accountability interest as closely akin to the interest—endorsed by the *Buckley* Court—in deterring not only actual corruption, but “avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity,” *Buckley*, 424 U.S. at 67 (emphasis added). Not only does disclosure of large contributors allow the public to better monitor instances of post-election *quid pro quo*, see *id.*, but maintains confidence in the electoral system, see *id.* at 27 (“Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.” (quoting *United States Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, AFL-CIO*, 413 U.S. 548, 565 (1973))); *supra* text accompanying note 58. Similarly, the public’s inability to ascertain those interests that influence elections may significantly erode confidence in the electoral system.

The 1996 elections may well have marked the beginning of yet another era. Interest groups poured record amounts of money into campaigns. . . . [C]oalitions of interest groups mounted their own independent campaigns on behalf of candidates in specially targeted House races, spending millions of dollars on advertising that defined candidates' positions on issues and attacked their opponents' records and even their character.<sup>209</sup>

Such increased involvement comes at the expense of electoral accountability. A candidate who benefits from an advertisement criticizing her opponent is not accountable for that advertisement. Neither is that candidate's party accountable. This lack of accountability for misleading or even maliciously false advertisements is but one problem associated with issue advocacy. According to observers, the "[c]ontroversy over the factual accuracy of issue advocacy campaigns is [only] one aspect of broader concerns—namely, candidates' inability to control either the themes or positions articulated in such campaigns."<sup>210</sup>

The problem of accountability and control was evident in a number of races during the 2000 election cycle in which interest groups played a role. Near the end of the presidential campaign, Republican nominee George W. Bush, in a strategic effort to appeal to moderate voters, chose not to attend a Christian Coalition convention and, while on the campaign trail, avoided making pronouncements on gun control and abortion.<sup>211</sup> Despite feeling that the Bush campaign "had marginalized them," conservative groups "pour[ed] millions of dollars into phone banks, commercials and voter drives to help elect" him.<sup>212</sup> Much of the conservative groups' media campaign highlighted the themes that candidate Bush worked so hard to avoid.<sup>213</sup> In this way, Bush benefitted from the lack of accountability of the interest groups: his conservative core did not feel forsaken, yet he was able to distance himself from the conservative groups' advertisements in order to appeal to moderate voters.

Another example of how interest groups attempt to set the electoral agenda occurred during the New York Senate race between Hillary Rodham Clinton and Rick Lazio. After fighting over "spending by advocacy groups independent of the parties, particularly conservative

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<sup>209</sup> ROZELL & WILCOX, *supra* note 62, at 5.

<sup>210</sup> *Id.* at 142; see also CORRADO, *supra* note 13, at 92 (highlighting similar concerns); Ayres & Bulow, *supra* note 202, at 861 ("[B]ecause candidates are not accountable for 'independent' ad campaigns, these campaigns are likely to be particularly negative and reckless.").

<sup>211</sup> Richard L. Berke, *Some Quiet Support on Polarizing Topics*, N.Y. TIMES, Sept. 27, 2000, at A19.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

ones that are committed to defeating Mrs. Clinton,”<sup>214</sup> the two candidates agreed to ask independent groups supporting them to refrain from broadcasting issue advertisements.<sup>215</sup> A *New York Times* editorial praised the deal, stating that the independent groups should refrain from running television and radio advertisements according to the agreement “as a matter of civic-mindedness and loyalty to the candidate they support.”<sup>216</sup> However, independent groups including the AFL-CIO, the Sierra Club, and the National Abortion and Reproductive Rights Action League (NARAL)<sup>217</sup> were not pleased with this pressure to refrain from advertising.<sup>218</sup> For them, it was not a matter of loyalty to their candidate, but a matter of having their message heard. Kelli Conlin, executive director of the New York state affiliate of NARAL, told the *New York Times*: “We’re forced to do advertising, and without advertising our message becomes very small and muted. We’re hesitating to go along with [the Clinton-Lazio pact]. We feel we have a responsibility to pro-choice people to inform them.”<sup>219</sup>

These examples demonstrate that independent groups are not merely surrogates of the candidates that they support, and yet the efforts of interest groups often overwhelm the message of the candidates themselves.<sup>220</sup> Thus, in addition to candidates and political parties, interest groups have become the third major actor on the election stage. The unique and pressing issue of accountability to the voters arises from this fact, and acts as yet another justification for disclosure of § 527 groups.

### C. Effectiveness

Regardless of arguments concerning § 527’s constitutionality under either the tax subsidy argument or the *Buckley* rationales, there are several significant limitations upon the new legislation’s effectiveness. First, § 527 is but one form an interest group can take to obtain tax benefits while engaging in election-related issue advocacy.<sup>221</sup> Many organizations are likely to switch to § 501(c)(4) status, which

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<sup>214</sup> Randal C. Archibold, *Lazio Issues New Challenge on Soft Money*, N.Y. TIMES, Sept. 21, 2000, at B1.

<sup>215</sup> Randal C. Archibold, *Lazio Extols Agreement to Ban Use of Soft Money*, N.Y. TIMES, Sept. 25, 2000, at B5.

<sup>216</sup> Editorial, *A Soft-Money Treaty*, N.Y. TIMES, Sept. 26, 2000, at A22.

<sup>217</sup> *Id.*

<sup>218</sup> *See, e.g.*, Archibold, *supra* note 215.

<sup>219</sup> *Id.*

<sup>220</sup> ROZELL & WILCOX, *supra* note 62, at 5.

<sup>221</sup> *See supra* note 111 and accompanying text (discussing permissible political activities by § 501(c)(4) groups).

will allow them to engage in political activity without having to disclose their income sources.<sup>222</sup>

Second, the § 527 disclosure legislation will only impact disclosure of those political organizations who value nontaxable contributions more than anonymity. Although the choice of tax status does influence the ways in which interest groups engage in electoral activity,<sup>223</sup> obtaining a favored tax status is not the sole determining factor of whether groups will engage in electoral activities. In fact, many interest groups relinquish valuable tax subsidies in order to realize the opportunity to play a larger role in campaigns.<sup>224</sup>

Third, the IRS has not “constituted as much of an enforcement threat as have the auditors and investigators of our state and federal election watchdogs.”<sup>225</sup> The IRS audits less than one percent of non-profit organizations every year,<sup>226</sup> and there are indications that the IRS has become even less aggressive in its scrutiny of potential tax abuses. This is attributable in large part to the IRS’s lack of resources and personnel.<sup>227</sup> In addition, given the lack of a strong public disclosure mandate like that of the FEC, some experts doubt whether the IRS will be able to provide information about § 527 organizations in a

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<sup>222</sup> See John M. Broder, *Finding Another Loophole, a New Secretive Group Springs Up*, N.Y. TIMES, Aug. 11, 2000, at A14; Davidson, *supra* note 12; Schmidt, *supra* note 15 (reporting that “instead of complying with the new law, a number of groups are . . . reconstituting themselves under other provisions of the tax code that do not force them to reveal their donors and require far less—and less frequent—reporting overall”).

Professor Frances Hill argues that the dearth of clear rules regarding political participation by exempt organizations—as well as the mistaken conflation of “issue advocacy” with the much narrower range of permissible exempt activities—have enabled exempt organizations “to serve as conduits for political money and thus as financial intermediaries for rent-seeking.” Frances R. Hill, *Softer Money: Exempt Organizations and Campaign Finance*, 91 TAX NOTES 477, 504 (2001); see *id.* at 493–502 (discussing how lack of clarity in the law allows tax-exempt classifications to be used for political purposes unrelated to exemption). Professor Hill proposes a “public support test” requiring “that the [exempt] organization be supported by a minimum number of individuals who are qualified voters, perhaps 100 or perhaps more, and that no one contributor provide more than a certain percentage of the organization’s support, perhaps no more than 5 percent.” *Id.* at 504. This test would “ensure that exempt organizations speak in their own voices and not in the voice of a very limited number of wealthy contributors who could not otherwise move as much money into the political process.” *Id.*

<sup>223</sup> See *supra* notes 109–17 and accompanying text.

<sup>224</sup> See Hill, *supra* note 112, at 389 (“The widespread use of section 501(c)(4) organizations as campaign finance vehicles in the 1996 election established that deductibility of political contributions by directing political money through section 501(c)(3) would be sacrificed, if necessary, to the goal of avoiding FEC limitations and reporting.” (footnote omitted)).

<sup>225</sup> Sutton, *supra* note 102, at 58.

<sup>226</sup> *Id.*

<sup>227</sup> David Cay Johnston, *Rate of All I.R.S. Audits Falls; Poor Face Particular Scrutiny*, N.Y. TIMES, Feb. 16, 2001, at A1. Despite this overall auditing decline, however, the IRS may still be “aggressive” in its treatment of nonprofit organizations. See Davidson, *supra* note 12.

sufficiently timely manner to allow scrutiny by election watchdogs and the public.<sup>228</sup>

Whether the § 527 amendment is successful depends on how one views the objective it is meant to serve. If the goal of the legislation is merely to effectively deny tax benefits to secretive political organizations, then success is likely. But if Congress indeed wishes to let “the American people know where the money is coming from” and “measure the significance of the special interest bias,”<sup>229</sup> then the amendment may prove to be a disappointment.

#### IV

#### THE DIRECTION OF FUTURE DISCLOSURE REFORM

Proposals for increased disclosure of election-related finances by interest groups must recognize the increased involvement of interest groups in the electoral process. For instance, Congress may withdraw tax subsidies to groups who choose to engage in anonymous election-related speech.<sup>230</sup> Alternatively, proposals may emphasize and foster the positive role of political parties in the election process, as the Supreme Court recently did in *Colorado Republican Federal Campaign Committee v. FEC*,<sup>231</sup> in order to offset the negative effects of anonymous election speech by interest groups.<sup>232</sup> The concurring opinion in *Colorado Republican*, which invalidated a federal statute that limited independent expenditures by campaign committees,<sup>233</sup> emphasized the “unique role” that political parties have historically played in the robust debate of public issues.<sup>234</sup> The concurring Justices further stated that “[t]he party’s speech, legitimate on its own behalf, cannot be sep-

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<sup>228</sup> Kenneth P. Doyle, *Some Reports from 527 Groups Online; IRS Says Others Not Immediately Available*, 210 Daily Tax Rep. (BNA) G-3 (Oct. 30, 2000) (reporting criticism of the IRS’s “slow pace in making reports available” because “much of the information in the reports will be of little value after the election”).

<sup>229</sup> 146 CONG. REC. H5289 (daily ed. June 27, 2000) (statement of Rep. Smith).

<sup>230</sup> Cf. H.R. REP. NO. 106-702, at 14–15 (describing proposal that would have required § 527 organizations and other tax-exempt groups to disclose their political activities), available at <http://thomas.loc.gov/cp106/cp106query.html>.

<sup>231</sup> 518 U.S. 604 (1996).

<sup>232</sup> See Paul S. Edwards, *Madisonian Democracy and Issue Advocacy: An Argument for Deregulating Private Funding of Political Parties*, 50 CATH. U. L. REV. 49, 62 (“Political parties help to mediate and to stabilize democratic politics. Accordingly, we should encourage private money to flow freely to political parties. Such a system would provide mediated, responsive, and certain outcomes that would minimize concerns about individual corruption.”). See generally Briffault, *supra* note 126 (noting that certain party practices raise the specter of corruption, and suggesting ways for dealing with these activities to bolster the positive role parties play in the political process).

<sup>233</sup> 2 U.S.C. § 441a(d)(3) (1994).

<sup>234</sup> *Colorado Republican*, 518 U.S. at 630 (Kennedy, J., concurring in part) (“We have a constitutional tradition of political parties and their candidates engaging in joint First Amendment activity; we also have a practical identity of interests between the two entities during an election.”).

arated from speech on the candidate's behalf without constraining the party in advocating its most essential positions and pursuing its most basic goals."<sup>235</sup>

However, these attempts to minimize the impact of interest groups are unlikely to succeed. First, the rise of interest groups predates *Buckley* and the growth of "soft money." Thus, the level of interest group involvement may be affected by, but does not entirely depend upon, the level of campaign finance regulation.<sup>236</sup> Second, the changing nature of government, manifested largely through regulatory agencies that affect both economic and noneconomic interests on many levels, has encouraged the formation of voluntary associations that represent the interests of those who stand to be affected by regulations.<sup>237</sup> In order for these voluntary associations and interest groups to realize their goals,<sup>238</sup> they must "develop close relationships with policy makers—and one important way to do so is through electoral politics."<sup>239</sup> A third reason why interest groups thrive is technology, which "has made it much easier for interest groups to participate in electoral politics."<sup>240</sup>

Issue spending by non-party organizations is not only an established part of the modern electoral landscape, but may provide some benefits as well. For instance, the efforts of interest groups may lessen the extraordinary fundraising burden on elected officials, who must expend considerable efforts during their terms raising money for the next election. Issue spending also increases the flow of independent

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<sup>235</sup> *Id.* (Kennedy, J., concurring in part). The concurring Justices would have gone further and allowed unlimited party spending even when it is made "in cooperation, consultation, or concert with" a candidate as it is "indistinguishable in substance" from expenditures by a candidate's own committee, which under *Buckley* cannot be limited. *Id.* (Kennedy, J., concurring in part). However, a later Supreme Court opinion held that coordinated spending of political parties may be limited, as the danger of corruption is always present. See *FEC v. Colo. Republican Fed. Campaign Comm.*, 121 S. Ct. 2351, 2365 (2001), *rev'g* 213 F.3d 1221 (10th Cir. 2000).

<sup>236</sup> Cf. Andrew C. Geddis, *Democratic Visions and Third-Party Independent Expenditures: A Comparative View*, 9 TUL. J. INT'L & COMP. L. 5, 105 (2001) (noting that "regulation of campaign financing can actually lead to a worse situation through shifting spending away from accountable, public actors into the unaccountable, private realm").

<sup>237</sup> PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 208–09 (1989); see also ROZELL & WILCOX, *supra* note 62, at 3 (discussing "the expansion of government involvement in everyday life" beginning in the 1960s); cf. WILSON, *supra* note 68, at 340–41 (discussing the widened scope of governmental activity).

<sup>238</sup> See ROZELL & WILCOX, *supra* note 62, at 13–14 (discussing how legislation affects particularized and definable interest groups).

<sup>239</sup> *Id.* at 14.

<sup>240</sup> *Id.* at 3 ("Technology has made it possible to identify the twenty closest congressional races, to match the zip codes of interest group members against congressional districts, and to produce targeted mailings just in time to sway members' votes.").

information regarding the candidates and the issues,<sup>241</sup> although this information may often be distorted or misleading due to the lack of candidate control. Lastly, it is likely that the ideal of direct citizen participation in politics is realized to a greater extent through interest groups: while only 0.33% of Americans gave direct contributions of \$200 or more to congressional candidates in the 1991–1992 election cycle,<sup>242</sup> 61% “are associated with a group that they describe as taking a stand on politics.”<sup>243</sup>

Issue advocacy by interest groups will likely increase if proposed restrictions on the role of soft money<sup>244</sup> ever become law. Restricting the soft money fundraising and issue advocacy spending by parties will likely drive more campaign money into the coffers of non-party organizations. This would have the perverse effect of decreasing the amount of contribution information available to voters and “greatly increasing the campaign role of organizations which, unlike the major political parties, are not accountable to the public.”<sup>245</sup>

Most important for efforts toward disclosure of election-related issue advocacy will be an understanding of the various typologies of issue advertisements. The dismissal of all issue advocacy intended to help candidates as “sham issue advocacy”<sup>246</sup> is perhaps overly simplistic. Such a view is also ultimately counterproductive, as it overlooks the legitimate and important role that interest groups play in the formation of public policy and in elections. Only certain types of issue advocacy implicate the dangers that were the concern of the *Buckley* Court.

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<sup>241</sup> See *id.* at 157 (“In an era of weak political parties and candidate-centered, media-driven campaigns, interest groups play a crucial role by assessing the candidates’ records, not just their rhetoric.”).

<sup>242</sup> See *CTR. FOR RESPONSIVE POLITICS, MONEY IN POLITICS REFORM: PRINCIPLES, PROBLEMS, AND PROPOSALS (PART II: PROBLEMS THAT HAVE TO BE SOLVED)* (1996), at <http://www.opensecrets.org/pubs/reform/reform3.htm> (last visited Oct. 8, 2001).

<sup>243</sup> ROZELL & WILCOX, *supra* note 62, at 11 (“Such broad citizen involvement would seem to support a pluralist view of interest groups.”). But see WILSON, *supra* note 68, at 79 (reporting that only “[e]ven percent of Americans . . . mentioned belonging to a civic or political association”).

<sup>244</sup> See, e.g., Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 101 (2001), available at <http://thomas.loc.gov/home/c107query.html>; CORRADO, *supra* note 13, at 105–06 (describing various legislative proposals). The Bipartisan Campaign Reform Act, popularly known as the McCain-Feingold bill, see Alison Mitchell, *Senate Extends Restrictions on Advertising*, N.Y. TIMES, Mar. 27, 2001, at A18, was passed in the Senate in April 2001, see Helen Dewar, *Campaign Finance Petition Sails*, WASH. POST, Aug. 1, 2001, at A5. Legislation in the House that would similarly ban soft money in federal races is currently stalled in the House of Representatives. *Id.*

<sup>245</sup> Briffault, *supra* note 126, at 659 n.160 (arguing that any closing of the soft money loophole should be accompanied by “appropriate amendments to the Internal Revenue Code”).

<sup>246</sup> See Hasen, *supra* note 192, at 283.

Some experts view issue advocacy as falling within at least one of three broad typologies: (1) legislatively focused, (2) general policy-oriented, or (3) candidate-oriented.<sup>247</sup> Of these categories, candidate-oriented issue advertisements are most likely to resemble express advocacy and are clearly designed to influence the outcome of an election.<sup>248</sup> In the two months preceding the 2000 general elections, the percentage of issue advertisements featuring candidates in federal races jumped from 43% to 89%.<sup>249</sup> In addition, issue advertisements tended to be more “attack oriented” than other forms of political discourse, including candidate advertisements and debates, and the level of attack increased dramatically in the months leading to the election.<sup>250</sup> A recent, comprehensive empirical study of issue advertisements during the 1998 congressional elections is consistent with these findings. In this latest study, a focus group of college students considered nearly one-third of issue advertisements run by interest groups to constitute electioneering.<sup>251</sup> In addition, only 4% of advertisements run by candidates themselves would have met *Buckley v. Valeo*'s definition of “express advocacy.”<sup>252</sup> Even in the final week before the election, only 9% of advertisements by candidates, party organizations, and independent groups constituted express advocacy.<sup>253</sup> Faced with these and other data, critics argue that the issue/express advocacy distinction is in reality merely a fig leaf for much electioneering activity.<sup>254</sup>

There is a need to supplement the current so-called “magic words” test<sup>255</sup> with this new learning about the role of interest groups. The current standard, deliberately narrowed by the Court, serves as a bright line by which speakers can know in advance which speech is considered election-related and thus subject to governmental regula-

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<sup>247</sup> See ANNENBERG PUB. POLICY CTR., UNIV. OF PA., WHAT IS AN ISSUE AD?: A TYPOLOGY (2000), at <http://www.appcpenn.org/issueads/typology.htm> (last visited Oct. 8, 2001). Other experts caution that issue advocacy is not so easily classifiable. See Hill, *supra* note 222, at 495–96 (describing the overlap among educational, lobbying, and political activities carried out by exempt organizations, and noting “the complexity of the issue advocacy construct”).

<sup>248</sup> See ANNENBERG PUB. POLICY CTR., *supra* note 247.

<sup>249</sup> ANNENBERG PUB. POLICY CTR., *supra* note 84, at 13.

<sup>250</sup> *Id.* at 15, 18.

<sup>251</sup> KRASNO & SELTZ, *supra* note 69, at 9.

<sup>252</sup> *Id.* The Supreme Court in *Buckley* illustrated what would constitute “express advocacy” that could be reached under the FECA: “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976). Commentators have referred to this limitation as the “magic words” test for express advocacy. See, e.g., Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1768 (1999).

<sup>253</sup> KRASNO & SELTZ, *supra* note 69, at 9.

<sup>254</sup> See, e.g., Hasen, *supra* note 192, at 280.

<sup>255</sup> See *supra* note 252.

tion. While this rigid approach has the virtue of predictability, rigidity is also the reason for the standard's ineffectiveness. With the increasing amount of soft money and the changing nature of interest group participation in elections, the express words test captures only a fraction of those advertisements perceived by voters to be election-related.<sup>256</sup> Indeed, the express words test is incapable of reaching even those advertisements that are admittedly and unabashedly related to the election of a specific candidate.<sup>257</sup> Nonetheless, the lower courts have been hesitant to extend the definition of express advocacy beyond the "magic words" test.<sup>258</sup>

Given the more numerous governmental interests<sup>259</sup> and the smaller burden relative to other limitations (that is, contribution and spending limits) on election-related speech, it is likely that a mandatory disclosure requirement for issue advocacy that unambiguously references a candidate and is broadcast within a certain amount of time before an election would be constitutionally permissible. The data regarding interest groups demonstrate a marked change in the tenor and focus of issue advertisements in the weeks preceding an election.<sup>260</sup> Based on this fact, a number of proposals define issue advocacy as "electioneering" when it falls within a specified time preceding an election and refers to a candidate.<sup>261</sup> The time and candidate-likeness limitations alleviate the vagueness concern with issue

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<sup>256</sup> See *supra* notes 252–53 and accompanying text.

<sup>257</sup> See *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000) (striking down as overbroad a North Carolina statute requiring disclosure of advertisements where the sponsor has admitted his attempt to cause the defeat of a clearly specified candidate), *cert. denied*, 121 S. Ct. 1229 (2001).

<sup>258</sup> See Kirk L. Jowers, *Issue Advocacy: If It Cannot Be Regulated when It Is Least Valuable, It Cannot Be Regulated when It Is Most Valuable*, 50 *CATH. U. L. REV.* 65, 75–86 (2000) (criticizing reform proposals that "magically seek to convert issue advocacy to express advocacy by looking at the speech's proximity to election day" and citing to lower court decisions); see also *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997) (holding that FEC prosecution for failure to disclose expenditures for an advertisement "implicitly" advocating defeat of President Clinton in 1992 was so clearly outside the scope of FECA as to justify award of attorney fees under the Equal Access to Justice Act). *But see* *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir. 1987) (holding that a newspaper advertisement criticizing then-President Carter immediately before the 1980 election was express advocacy even though it did not include any of "the words listed in *Buckley*").

<sup>259</sup> See *supra* Part III.B.

<sup>260</sup> See *supra* note 249 and accompanying text.

<sup>261</sup> See Bipartisan Campaign Reform Act of 2001, S. 27, 107th Cong. § 201 (2001) (defining "electioneering communications" as media communication that "refers to a clearly identified candidate for Federal office" and is made within sixty days of a general election or thirty days before a primary election), available at <http://thomas.loc.gov/home/c107query.html>; see also Hasen, *supra* note 192, at 282–83 (discussing various legislative proposals).

advertisements, while ensuring that issue advocacy that is not election-related and purely issue-oriented is not impermissibly burdened.<sup>262</sup>

This approach offers advantages over the § 527 legislation. It focuses on the type of election-related activity to which voters should have access, as opposed to the tax classification of those organizations that engage in issue advocacy.<sup>263</sup> An approach that focuses on the interests of voter information, electoral accountability, and electoral integrity is far more capable of realizing the goals of disclosure reform in all areas than is the overly formal approach of the § 527 amendment. The proposed reforms also signal a more intuitive and voter-centered approach to achieving the ideal level of campaign finance disclosure that is also consistent with the demands of the First Amendment.

### CONCLUSION

*[T]he right of electing the members of the government constitutes more particularly the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.*

—James Madison<sup>264</sup>

James Madison's words, though spoken in a different era and context, nevertheless reveal the tension that currently exists between the governmental interest in ensuring a healthy democracy and an informed electorate, and the danger that disclosure laws might chill

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<sup>262</sup> A recent task force of campaign finance experts and professionals has similarly recommended that inquiry into a speaker's intention be eschewed in favor of objective markers, such as whether an advertisement refers to a clearly identified candidate within a certain time before an election. See TASK FORCE ON DISCLOSURE, CAMPAIGN FIN. INST., ISSUE AD DISCLOSURE: RECOMMENDATIONS FOR A NEW APPROACH 18–20 (2001) (“[W]e want to focus on the potential effect on voters, more than on the intentions of speakers.”), available at <http://www.cfinst.org/disclosure/index.html>. In addition to the time frame and candidate identification markers, the task force would add a third marker to weed out non-election speech and thus further avoid overbreadth: “whether a substantial portion of the audience for a purchased advertisement was made up of the relevant electorate.” *Id.* at 20; see also *id.* at 22–23 (defining “targeted” advertising for various media); Hill, *supra* note 222, at 504 (suggesting a voter-targeting marker to separate exempt from election-related activities).

<sup>263</sup> See TASK FORCE ON DISCLOSURE, *supra* note 262, at 15 (“[D]isclosure should [not] depend upon an organization's legal form because . . . it is too easy for an organization to move from one form to another. The public's interest lies in getting disclosure for certain kinds of activities, no matter what kind of organization sponsors the activities.”).

<sup>264</sup> James Madison, Report on the Virginia Resolutions, reprinted in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546, 575 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) (criticizing the Alien and Sedition Acts' “pernicious influence on the freedom of the press”), quoted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 n.15 (1964).

political speech. Both the informational interest and danger of infringement are intertwined when the government attempts to mandate disclosure of election-related issue advocacy. It is clear that some government regulation of disclosure is necessary to allow voters to determine their candidates' sources of support, particularly as broadcast advertisements become the primary medium through which candidates and interest groups attempt to sway public opinion in their favor.

The Court in *Buckley v. Valeo* clearly recognized that campaign finance disclosure enables the public to detect fraud by candidates, allows "voters to define more of the candidates' constituencies,"<sup>265</sup> and prevents official concealment of misgovernment.<sup>266</sup> The *Buckley* Court illustrated the beneficial effects of disclosure by quoting the famous words of Justice Brandeis: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>267</sup>

The growth in the number of interest groups since the *Buckley* decision, their increased involvement in electoral politics, and their greater technological and media savvy, have allowed these groups to become the third major player (in addition to the candidates and the parties) on the campaign finance scene. While this development is beneficial—for instance, it increases the volume of speech during an election year and prevents candidates from having a monopoly over the issues—the lack of information regarding the groups' sources of support is troubling. The cacophonous din of influential but anonymous election-related issue advertising may confuse voters and, in the end, foster cynicism regarding the integrity of the American election system. This phenomenon could be observed in the most recent election cycle.

It is important to remember that *Buckley v. Valeo* did not hold that the regulation of all but the most narrowly defined express advocacy is impossible. Instead, *Buckley* required that any disclosure regulation satisfy the First Amendment concerns of vagueness and overbreadth; that is, the regulation should draw a clear line between issue advocacy and express advocacy, and reduce the probability that the former will be included with the latter. While a definitive answer must await the outcome of the ongoing court challenge, the recent § 527 legislation apparently satisfies the vagueness and overbreadth requirements because political organizations, by definition, seek to influence elections. However, it is not as clear whether the government may

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<sup>265</sup> *Buckley v. Valeo*, 424 U.S. 1, 81 (1976).

<sup>266</sup> *See id.* at 67 n.79.

<sup>267</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (1933), *quoted in Buckley*, 424 U.S. at 67 n.80.

require, as a condition of tax-exempt status, disclosure by § 501(c) groups of their election-related spending. Even more uncertain is the applicability of disclosure laws to interest groups that do not receive tax benefits as § 501(c) and § 527 groups do, but whose advertisements mention a candidate by name or air within a certain time prior to an election.

In an effort to avoid vagueness and overbreadth concerns, current legislative proposals should use meaningful, objective criteria such as an advertisement's content, timing, and audience—as opposed to a narrow “magic words” test—to determine the election-relatedness of that advertisement. Together with the strong interests in an informed electorate and the continued integrity of the electoral process, these proposals present a compelling case for reasonable campaign disclosure reform that is faithful to the Constitution as interpreted by the *Buckley* Court.