ENFORCING THE GOALS OF THE BIPARTISAN CAMPAIGN REFORM ACT: SILENCING NONPROFIT GROUPS AND STEALTH PACS IN FEDERAL ELECTIONS

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This note examines the ever-increasing role that nonprofit groups are playing in federal elections as independent fundraisers of "soft money" for political candidates. After examining the history and rationales surrounding enactment of the Bipartisan Campaign Reform Act, the author concludes that the emergence of 527 and 501(c) groups as major players in federal elections threatens the integrity of the electoral system. As conduits for soft money, the groups greatly increase the potential for, and the appearance of, corruption in federal elections by continuing to allow large donations from corporations, unions, special interest groups, and wealthy individuals. In addition, the groups limit the field of potential candidates in federal elections because otherwise qualified individuals, with little or no ties to large soft-money contributors, are highly discouraged from running for office. Lastly, the groups effectively restrict the dissemination of information among potential voters because they encourage political parties to limit their fundraising activities to potentially large donors of soft money, rather than including individual voters. Therefore, the author concludes that Congress should pass legislation to take 527 and 501(c) groups out of the soft-money game in federal elections. Such legislation would almost certainly be constitutionally permissible and would finally accomplish the Bipartisan Campaign Reform Act's goal of increasing the public's confidence in this country's electoral system and in its elected officials.

I. INTRODUCTION

The Bipartisan Campaign Reform Act (BCRA)[1] is widely considered the most significant campaign finance legislation of the past two decades.[2] Because of money's significance in our political system, its

1. Bipartisan Campaign Finance Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C. and 47 U.S.C.) (popularly referred to as the "McCain-Feingold" legislation after its Senate sponsors).

2. *See* Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 244 (2004); Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the* McConnell *Decision*, 22 YALE L. & POL'Y REV. 235, 237 (2004).

regulation within that system has long been the subject of much debate among legislators and campaign finance reformers.[3] In a lawsuit immediately following passage of the BCRA, the Supreme Court recognized the difficulty of effectively regulating money in the political arena, stating that "[m]oney, like water, will always find an outlet."[4] The BCRA is Congress's latest attempt to maintain credibility in federal elections. Its primary purpose is "to preserve the integrity of existing contribution limits in federal campaigns—limits that had been rendered meaningless over the last decade in the real world of politics."[5]

One of the biggest threats to the effectiveness of the BCRA is the use of nonprofit groups as conduits for "soft money"—anything of value given or spent for federal election purposes but falling outside federal contribution limits, source restrictions, and disclosure requirements.[6] Because the BCRA severely restricts candidates and parties from raising and spending soft money,[7] political contributors have turned to these lesser scrutinized groups as a means of making political contributions. This emergence of nonprofit groups as independent fundraisers suggests that the BCRA has not achieved its goal of curbing big money contributions from wealthy partisan contributors in American politics.

This note will examine how nonprofit groups so rapidly emerged on the political scene and will propose legislative solutions to ensure that the BCRA's goals are satisfied. Part II traces the recent history of campaign finance reform laws, including the origins of nonprofit groups in the political sphere. Part III discusses why the Supreme Court's decisions in two landmark cases support the conclusion that protecting the integrity of elections outweighs any First Amendment concerns regarding nonprofit groups. Part IV concludes that the only way to protect the integrity of elections is to ban all nonprofit groups from raising money for any electioneering activity.

II. BACKGROUND

A. Campaign Finance Reform Under the Federal Election Campaign Act

Since the 1970s, federal campaign finance law had been governed by the Federal Election Campaign Act of 1971 (FECA),[8] which Congress passed in 1974 in response to suspicions of financial abuse and criminal

3. Holman, *supra* note 2, at 244.
4. McConnell v. FEC, 540 U.S. 93, 224 (2003).
5. Holman & Claybrook, *supra* note 2, at 237.
6. The Campaign Legal Center, The Campaign Finance Guide: Glossary (2006), http://www.campaignfinanceguide.org/guide-glossary.html#5.
7. Bipartisan Campaign Finance Reform Act, 2 U.S.C. § 441(a) (2002).
8. Federal Election Campaign Act (FECA) of 1971, 2 U.S.C. §§ 431–456 (2000).

misconduct by President Richard Nixon after the Watergate scandal.[9] FECA changed campaign finance regulations in two ways. First, it limited the amount of money a candidate could give his or her own campaign and the amount a candidate could spend on television advertisements.[10] Second, it revised regulations for disclosing contributions and expenditures by requiring candidates, political action committees (PACs), and active party committees to file reports on a quarterly basis.[11] Congress, via its 1974 amendments, also created a new federal agency to administer and enforce federal campaign finance laws, the Federal Election Commission (FEC).[12]

The Supreme Court considered the constitutionality of FECA in *Buckley v. Valeo*.[13] The *Buckley* Court found that FECA's government ceilings on political expenditures were unconstitutional under the First Amendment because candidates have a right to spend as much as they want for federal campaigns.[14] However, the Court upheld the limitations on contributions to candidates, finding that First Amendment concerns were outweighed by the potential for corruption, or the appearance of corruption, stemming from candidates' dependence on large contributors.[15] Thus, the Court held that the government may safeguard the integrity of the electoral process by setting limits on contributions to candidates and committees so long as those limits are justified by the prevention of actual or perceived corruption.[16]

The *Buckley* Court made a major change to FECA by narrowing the law's broad language regulating party and group expenditures for a "clearly identifiable candidate" to only those expressly advocating the election or defeat of a candidate.[17] In doing so, the Court made a distinction between "campaign ads," which were subject to the campaign restrictions, and "issue ads," which were left unrestricted.[18] In footnote 52 of the *Buckley* opinion, the Court provided what became known as the "magic words test" by naming eight examples of words that expressly advocated for or against a candidate.[19] Advertisements that used one of these terms were classified as campaign ads and were subject to the

9. Holman & Claybrook, *supra* note 2, at 239.

10. The Campaign Legal Center, The Federal Election Campaign Act: A New Era of Reform (2006), http://www.campaignfinanceguide.org/guide-34.html [hereinafter The Federal Election Campaign Act].

11. *Id.* The information to be disclosed included the name, occupation, address and business of each contributor of more than $100. For contributions of $5000 or more, disclosure was required within forty-eight hours of receiving the contribution. *Id.*

12. *Id.*

13. Buckley v. Valeo, 424 U.S. 1 (1976).

14. *Id.* at 58.

15. *Id.* at 67.

16. *Id.* at 58.

17. *Id.* at 44.

18. *Id.*

19. *Id.* at 44 n.52. These words were "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject." *Id.*

source prohibitions, contribution limits, and reporting requirements of FECA.[20] Advertisements that avoided these words, but still mentioned a candidate, were classified as issue ads and were left unregulated by FECA.[21]

During its first decade, FECA, through the FEC, was tremendously effective at clearing up the cloudiness of campaign finance and improving enforcement of campaign finance reforms.[22] However, changing campaign tactics and new innovations began to erode the structure of FECA, reducing its effectiveness.[23] One major problem stemmed from a new type of campaign financing—soft money.[24]

B. The Influence of Soft Money on Campaign Finance Reform

In the late 1970s, the FEC decided to allow national parties to finance some party-building activities with soft money.[25] Prior to the BCRA's adoption, soft money referred to nonfederal money raised by party committees that was used to pay some of the costs of federal election activities.[26] Before the BCRA, soft-money contributions were supposed to be used to support only nonelectioneering party activities, with "hard money"—funds raised within the contribution and source limitations of the FECA—used by candidates, parties, and groups to pay for ads that expressly advocated a candidate under the magic words test.[27] However, political parties began to use these funds on voter registration and turnout programs, as well as activities supporting the election of specific federal candidates.[28]

Beginning in the 1980s, presidential candidates and members of Congress began to play an active role in raising large amounts of soft money, in many cases for their own campaigns.[29] Political parties also sought large contributions in the form of soft-money gifts, particularly from corporations and unions with strong policy interests.[30] As a result, more and more soft money entered the political arena.

In the 1990s, political parties found a way to exploit *Buckley*'s magic words test by using candidate-specific issue ads that were not restricted by FECA.[31] Under *Buckley*'s magic words test, political ads could avoid

20. Holman & Claybrook, *supra* note 2, at 247.
21. *Id.*
22. The Federal Election Campaign Act, *supra* note 10.
23. *Id.*
24. *Id.*
25. Holman, *supra* note 2, at 248.
26. The Campaign Legal Center, Soft Money / Non-federal Funds (2006), http://www.campaignfinanceguide.org/f-softmoney.html.
27. Holman, *supra* note 2, at 248.
28. The Federal Election Campaign Act, *supra* note 10.
29. *Id.*
30. *Id.*
31. Holman, *supra* note 2, at 247.

campaign finance regulation so long as they did not use one of the eight magic words.[32] Thus, even though these issue ads specifically mentioned candidates for federal office, they were beyond the reach of any federal campaign finance regulations and thus could be financed with unlimited amounts of soft money.[33]

By the 2000 federal elections, the parties' exploitation of the magic words test through the use of soft money rendered FECA almost entirely ineffective.[34] Political parties had raised approximately $500 million in soft money, with most of that going to television ads advocating for specific candidates, but they had not used any of *Buckley*'s magic words.[35] These ads were certainly campaign ads, though not regulated under the *Buckley* test, and the greatest amount of soft money spent by parties for federal elections was to finance these candidate-specific issue ads.[36]

C. The BCRA and Modern Campaign Finance Reform

As a result of the growing amount of soft money making its way into the political system, Congress debated campaign finance reform almost every year between 1986 and 2002.[37] Senators John McCain of Arizona and Russell Feingold of Wisconsin cosponsored the principle bill addressing problems of soft-money contributions in the 1996 election, with versions of this bill presented in every session of Congress between 1996 and 2002.[38] Under tremendous public pressure, Congress finally passed the BCRA and President George W. Bush signed it into law on March 27, 2002.[39]

The BCRA is divided into five titles, but the two key titles for purposes of this note are: (1) a ban on the raising and spending of soft money by national political parties, federal officeholders, and candidates;[40] and (2) a new definition of electioneering communications to address the problem of candidate-specific issue ads.[41] In effect, the BCRA limited how corporate and labor treasury funds could be used in federal elections, reinstituted limits on the sources and size of political party contributions, and provided a broader regulation of funds used for campaign advertising.[42] Under the BCRA, national party committees could use only hard money, governed by federal contribution limits, to finance

32. *Id.*
33. *Id.* at 248.
34. Holman & Claybrook, *supra* note 2, at 240.
35. *Id.*
36. *Id.* at 242–43.
37. The Campaign Legal Center, The Bipartisan Campaign Reform Act: Restoring the Reforms (2006), http://www.campaignfinanceguide.org/guide-35.html [hereinafter Restoring the Reforms].
38. *Id.*
39. *Id.*
40. Bipartisan Campaign Finance Reform Act, 2 U.S.C. § 441(i) (Supp. III 2003).
41. Bipartisan Campaign Finance Reform Act, 2 U.S.C. § 434(f)(3) (Supp. II 2002).
42. Restoring the Reforms, *supra* note 37.

their political activities.[43] Furthermore, in addition to *Buckley*'s magic words test, any broadcast advertisement that refers to a clearly identified federal candidate within sixty days of a general election, or thirty days before a primary election, and targets that candidate's constituency, is considered a campaign ad.[44]

The same day the law was signed, Senator Mitch McConnell and others filed lawsuits challenging the law's constitutionality.[45] *McConnell v. FEC* eventually involved eleven separate lawsuits with more than eighty plaintiffs, "ranging from the Republican National Party and California Democratic Party to the American Civil Liberties Union and National Rifle Association."[46] After a mixed ruling by a three-judge District Court panel, the case went directly to the Supreme Court on fast-track review.[47] The Supreme Court decided to hear *McConnell* before the start of its fall 2003 term.[48]

In a five-to-four decision, the Supreme Court upheld nearly all elements of the BCRA.[49] Specifically, the Court upheld the law's (1) ban on national parties and officeholders raising and spending soft money, (2) limit on state parties spending soft money affecting federal elections, (3) new definition of campaign ads subject to campaign finance regulations, (4) requirement that special interest groups use only regulated hard money to pay for electioneering communications and that they disclose the source of those funds, and (5) mandate that broadcast stations keep public records of political ads and who paid for them.[50] In upholding these provisions, the Court specifically noted that "the statute's two principal, complementary features—Congress's effort to plug the soft-money loophole and its regulation of electioneering communications—must be upheld in the main."[51] The decision was widely considered a sweeping victory for campaign finance reform.[52]

D. The Emergence of Nonprofit Organizations as Conduits for Soft Money in National Politics

Although the BCRA has been somewhat effective in limiting the amount of soft money spent by candidates themselves,[53] its efficacy is

43. *Id.*

44. Bipartisan Campaign Reform Act, 2 U.S.C. § 431(f)(3) (Supp. II 2002). An ad targets a candidate's constituency if it can be received by 50,000 or more people in the candidate's district. *Id.* Broadcast ads include television, radio, cable or satellite advertisements, but not Internet ads. *Id.*

45. *See* McConnell v. FEC, 540 U.S. 93 (2003).

46. The Campaign Legal Center, Constitutional Challenge to New Law (2006), http://www.campaignfinanceguide.org/guide-36.html.

47. *Id.*

48. *Id.*

49. *McConnell*, 540 U.S. at 224, 233, 246.

50. *Id.* at 94.

51. *Id.*

52. Holman & Claybrook, *supra* note 2, at 244.

53. *Id*. at 245.

now being threatened by a new type of political player: nonprofit organizations.[54] The BCRA was intended to regulate the rising costs of political campaigns, but it left a major loophole for nonprofit organizations not officially connected with political parties to spend unlimited amounts of soft money.[55] Similar to the pseudo issue ads that helped prompt the BCRA's enactment, ads by nonprofit groups are not classified as electioneering communications, and thus are not regulated by the BCRA, though their electioneering purpose is usually clear.[56]

In the 2004 election, nonprofit groups developed two separate roles for political influence: mobilizing voters for election day, and orchestrating attack ads that candidates or national parties did not want to launch themselves.[57] In one such television ad, playing off the MasterCard "priceless" advertising campaign, an announcer described Presidential candidate John Kerry's $75 haircuts, $250 designer shirts, and $30 million worth of summer and winter homes. Then, as pictures of Kerry and Massachusetts Senator Edward M. Kennedy appeared on the screen, the announcer exclaimed: "Another rich, liberal elitist from Massachusetts who claims he's a man of the people. Priceless."[58] The BCRA was enacted to curb the influence of large, soft-money donations in American politics,[59] yet these groups, which raise and spend unlimited amounts of soft money to pay for the ads, have emerged to do what the BCRA was supposed to prevent.[60]

The two main players that have emerged are 527 and 501(c) groups.[61] To understand the difference between 527 and 501(c) groups, and their history, it is important to understand the different sets of laws that govern them. There are two different laws that regulate these groups: FECA, as amended by the BCRA, and the Internal Revenue Code (IRC).[62] FECA specifically regulates campaigning and electioneering communications by candidates, political parties, and political committees.[63] The IRC regulates the tax status of organizations using a broad definition of political activity.[64]

These laws apply differently to different types of organizations. PACs falling under FECA's definition of electioneering must register

54. *Id.*

55. Tim Jones & John McCormick, *Attack Ads by 527s Spark Bitter Debate*, CHI. TRIB., Aug. 27, 2004, at C1.

56. Jennifer Sanderson, *Political Observers Debate 'Stand by Your Ad' Measure*, ARGUS LEADER (Sioux Falls, S.D.), Aug. 30, 2004, at 1A.

57. Thomas B. Edsall & James V. Grimaldi, *New Routes for Money to Sway Voters: 501c Groups Escape Disclosure Rules*, WASH. POST, Sept. 27, 2004, at A01.

58. *Id.*

59. Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12.

60. Edsall & Grimaldi, *supra* note 57.

61. *See* Holman & Claybrook, *supra* note 2, at 247–49.

62. Holman, *supra* note 2, at 264.

63. *Id.*

64. *Id.*

with the FEC and must conform with the restrictions promulgated by campaign finance law.[65] Nonprofit groups who avoid the electioneering definition of FECA, yet have electioneering as their primary purpose, must register with the Internal Revenue Services (IRS) as 527 groups.[66] Ideological groups intending to engage in substantial amounts of electioneering activity, but not as their primary purpose, may register with the IRS as 501(c) groups, entitling them to reduced disclosure and contribution requirements.[67] Together, FECA and the IRC have left a loophole through which nonprofit groups can side-step the BCRA's restrictions.

Named for their corresponding section in the IRC, 527 groups were originally established so that nonprofit groups could practice campaign activity without losing their tax-exempt status.[68] These groups can be founded by a variety of organizations, including unions, corporations, advocacy groups, and individuals on either side of the political spectrum.[69] At the time of their establishment, it was assumed that the financial activity of 527s would be fully disclosed because political parties were required to file financial reports with the FEC.[70] Recently, however, 527s have become known for pouring huge amounts of soft money into television and radio ads, and for conducting massive direct mailing and telemarketing campaigns in an attempt to influence federal elections.[71]

In the 1990s, 527 groups acquired their reputation as soft-money machines as they discovered not only that the IRC protected their tax status, but that federal election law did not impose contribution and expenditure requirements upon them.[72] As these groups realized that they were not subject to the same financial disclosure requirements as PACs and other party committees, the money they raised for political activities dramatically increased and these groups came to be known as "stealth PACs."[73] Soon, these groups were even used to pay for the administrative costs of running the PACs that could pay only for campaign advertisements by raising and spending hard money.[74]

Congress's passage of the "Brady-Lieberman" legislation in 2002 has somewhat curbed the effects of 527 groups.[75] Under this legislation, 527 groups are now subject to similar disclosure requirements as PACs

65. *Id.* at 265 (citing 2 U.S.C. § 434 (2000)).
66. *Id.* (citing 26 U.S.C. § 527 (2003)).
67. *Id.*
68. Holman & Claybrook, *supra* note 2, at 247.
69. *Id.*
70. Holman, *supra* note 2, at 266.
71. Holman & Claybrook, *supra* note 2, at 247.
72. Holman, *supra* note 2, at 266.
73. *Id.*
74. Holman & Claybrook, *supra* note 2, at 247.
75. Pub. L. No. 107-276, § 6, 116 Stat. 1929, 1933 (2002).

regulated under FECA.[76] However, these groups may still raise and spend soft money for federal elections, though not for any broadcast ads specifically mentioning a candidate within sixty days of a federal election.[77] This leaves 527 groups as an attractive alternative to those wishing to use soft money to influence federal elections, and many 527s have in fact been established by federal officeholders and well-connected political players.[78]

Even more so than 527 groups, 501(c) groups remain conduits for steady streams of soft money flowing into federal elections.[79] Like the 527s, 501(c) groups are named for their corresponding section of the IRC, and they remain unregulated in the conduct of substantial electioneering activities financed with soft money.[80] Unlike 527s, 501(c) groups are not yet subject to any disclosure requirements, leaving them as the only organizations unfettered by restrictions.[81] Furthermore, the BCRA's ban on soft-money fundraising by federal officials does not apply to 501(c) groups.[82] Thus, whereas 527s are restricted because electioneering activity is their primary purpose, 501(c) groups may conduct similar activities without restrictions so long as electioneering is not their primary purpose.[83]

501(c) groups were created primarily to allow specialized organizations to pursue their individual needs, but they may also conduct substantial campaign activities so long as those activities are important to the organization's interests.[84] Because the concept of "electioneering activity" is still nebulous, this imprecision opens up 501(c) groups as a potentially more influential soft-money conduit than even the 527s.[85] This potential is only increased by relaxed disclosure requirements on 501(c)s, as compared to 527s.[86]

The effect of both 527 and 501(c) groups is that candidates for federal office may now stand on the sidelines while others do their dirty work for them, especially when it comes to outright attacks on opponents.[87] Few candidates wish to publicly insult their opponents, and with the loopholes in federal election law, they can now sit back and deny responsibility as nonprofit groups do this work for them.[88] This is because the money for these ads is not collected by the candidates themselves,

76. *Id.*
77. Holman, *supra* note 2, at 267.
78. *Id.*
79. Edsall & Grimaldi, *supra* note 57.
80. Holman & Claybrook, *supra* note 2, at 248.
81. Edsall & Grimaldi, *supra* note 57.
82. Holman & Claybrook, *supra* note 2, at 248.
83. Holman, *supra* note 2, at 267.
84. *Id.* at 267–68.
85. *Id.* at 268.
86. *Id.*
87. Sanderson, *supra* note 56.
88. *Id.*

but instead by allies and associates within nonprofit organizations.[89] Thus, these nonprofit loopholes are an attractive alternative for those looking to stay in the soft-money game and avoid the caps on hard money.[90] The BCRA was supposed to prevent the dumping of large amounts of soft money into federal elections, but the existence and growth of these nonprofit groups have undermined the spirit of the BCRA, and have irritated campaign finance reformers[91] because through the development of these nonprofit organizations, soft-money donors have been able to escape contribution caps, successfully channeling millions of soft-money dollars into the heart of federal elections.[92]

III. ANALYSIS

In its *McConnell* opinion, the Supreme Court recognized the heightened role of nonprofit groups in federal elections following passage of the BCRA. The Court stated:

> Parties and candidates have also begun to take advantage of so-called "politician 527s," which are little more than soft-money fronts for the promotion of particular federal officeholders and their interests. . . . These 527s have been quite successful at raising substantial sums of soft money from corporate interests, as well as from the national parties themselves. . . . Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives for parties to exploit such organizations will only increase.[93]

Despite these concerns, the Court did not solve the nonprofit problem because it was not called upon to address the issue.

As the Supreme Court predicted, nonprofit groups have emerged as major players in national politics, leaving Congress with yet another loophole to close in campaign finance reform.[94] Despite the First Amendment concerns of reform opponents, the corruptive potential that nonprofit organizations have over the political system supports the conclusion that nonprofits should be banned from raising or spending any money in federal elections.

89. Editorial, *Editorials*, CLARION-LEDGER (Jackson, Miss.), Sept. 12, 2004, at 4G.
90. Sanderson, *supra* note 56.
91. Editorial, *supra* note 89.
92. Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 620 (2000).
93. McConnell v. FEC, 540 U.S. 93, 176–77 (2003).
94. *See supra* text accompanying notes 52–64.

A. Modern Campaign Finance Reform and the First Amendment

1. Standard of Review Under the First Amendment

The Supreme Court has upheld the constitutionality of campaign finance laws against First Amendment[95] challenges if they are "narrowly tailored" to advance a "compelling public interest."[96] Courts use two tests to determine the constitutionality of campaign finance laws.[97] "Suspect-content" tests require the legislature to "narrowly tailor" statutes to promote a compelling state interest.[98] Overbreadth tests forbid a statute "from restricting a substantial amount of speech that does not pose the threat that the regulation was intended to prevent."[99] Both tests balance state and private interests in expression and association.[100]

In *Buckley*, the Supreme Court confirmed that political donations and expenditures were directly correlated with political speech and thus any restrictions on either are subject to scrutiny under the First Amendment. The Court stated that "a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs,"[101] and that raising and spending money was a form of speech because "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[102]

Despite *Buckley*, other case law suggests that "the role of the First Amendment is less complete in its application to campaign speech restrictions than it is in other areas."[103] Specifically, Justices Scalia[104] and Breyer[105] have explicitly stated that a state's interest in having an informed electorate and in protecting the political process give the state "greater power to regulate election speech than speech in other areas."[106] Furthermore, the *Buckley* Court itself stated that "[e]ven a 'significant interference' with protected [First Amendment] rights of political association may be sustained if the State demonstrates a sufficiently impor-

95. The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. CONST. amend. I.

96. *See McConnell*, 540 U.S. at 93*;* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431 (2001); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377 (2000); Buckley v. Valeo, 424 U.S. 1 (1976).

97. Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 674 (2004).

98. *Id.*

99. *Id.* at 682.

100. *Id.* at 676.

101. *Buckley*, 424 U.S. at 14 (quoting Millo v. Alabama, 384 U.S. 214, 218 (1966)). The Court also noted that "[t]he First Amendment protects political association as well as political expression." *Id.* at 15.

102. *Id.* at 19.

103. William P. Marshall, *False Campaign Speech and the First Amendment*, 152 U. PA. L. REV. 285, 286 (2004).

104. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 378–79 (1995) (Scalia, J., dissenting).

105. *See* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 253 (2002).

106. Marshall, *supra* note 103, at 293.

tant interest . . . ."[107] Thus, the Court has made clear that campaign speech receives different treatment under the First Amendment than other types of speech.

In *McConnell*, the Supreme Court relaxed the standard of review for campaign finance regulations under the First Amendment. There, the Court required only that finance restrictions be "closely drawn," rather than "narrowly tailored," to a legitimate state interest.[108] The Court stated that this less rigorous standard of review "provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[109] However, the Court failed to specify the amount of protected activity a regulation must restrict to be facially invalid.

2. State's Interest in Combating Corruption

In assessing the constitutionality of campaign finance laws, the Supreme Court has found that combating corruption, or the appearance of corruption, is a sufficiently compelling interest to withstand First Amendment scrutiny. In *Buckley*, opponents challenged FECA on the basis that it infringed upon the speech and association guarantees of the First Amendment.[110] In upholding FECA's contribution limits,[111] the Court voiced its concerns about the potential for corruption from large donations to parties and candidates:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . . Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.[112]

Thus, the danger of inappropriate influence, and of the appearance of inappropriate influence, is posed when federal candidates and officeholders solicit, collect, or direct the contribution of funds received in the form of large donations.[113] The Court has stated that "[d]emocracy works 'only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activi-

107. *Buckley*, 424 U.S. at 25.

108. McConnell v. FEC, 540 U.S. 93, 137 (2003).

109. *Id.*

110. *Buckley*, 424 U.S. at 11.

111. FECA limited contributions by individuals to any single candidate for federal office to $1,000 per election. Federal Election Campaign Act of 1971, § 203, 86 Stat. 3, 9–10 (1972) (current version at 2 U.S.C. § 441(a) (Supp. II 2002). The Court struck down a provision in FECA placing $1,000 annual ceilings on independent expenditures linked to specific candidates. *Buckley*, 424 U.S. at 51.

112. *Buckley*, 424 U.S. at 26–27.

113. Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1189 (2002).

ties which arouse suspicions of malfeasance and corruption.'"[114] Accordingly, the government's compelling interest in campaign finance regulation is to ensure the public's faith in the electoral system.[115]

The Supreme Court again relied on this anticorruption rationale to uphold the BCRA in *McConnell*. There, the Court noted that the idea that large contributions can create at least the appearance of corruption is neither new nor implausible.[116] The Court went on to explain that the dangers of corruption are not just the possibility for quid pro quo relationships, but also undue influence over elected officials by large contributors:

> Just as troubling to a functioning democracy as classic *quid pro quo* corruption is the danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. . . . [S]uch corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.[117]

The Court also found that evidence linked soft-money contributions to manipulations of the legislative calendar, leading to Congress's failure to enact legislation affecting generic drugs, tort reform, and tobacco products.[118] The Court found that these strong governmental interests in preventing corruption justified upholding the BCRA against First Amendment scrutiny.[119]

Satisfied that the government had sufficiently compelling interests to pass the "suspect-content" test, the *McConnell* Court found that the BCRA passed the overbreadth test of the First Amendment as well.[120] Against a challenge that the BCRA was overbroad because it placed restrictions on too many groups with no corrupting potential, the Court "concluded that the number of [political] advertisements that posed no threat of corruption was small relative to the number of corrupting activities that would occur in the absence of the statute."[121] Furthermore, the Court found that the "vast majority of ads," which are largely paid for by political contributions, "clearly had an electioneering purpose."[122] Thus, the Court was satisfied that the BCRA did not infringe on too much

114. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 390 (2000) (quoting United States v. Miss. Valley Generating Co., 364 U.S. 520, 562 (1961)).

115. *See* Jonathan S. Krasno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 132 (2003).

116. McConnell v. FEC, 540 U.S. 93, 95 (2003) ("[T]he idea that large contributions to a national party can corrupt or, at the very least, create the appearance of corruption of federal candidates and officeholders is neither novel nor implausible. . . .").

117. *Id.* at 153.

118. *Id.* at 150.

119. *Id.* at 187.

120. *See supra* text accompanying notes 95–100.

121. Overton, *supra* note 97, at 668.

122. *Id.* at 689.

speech that was not intended to be regulated by the statute, and therefore upheld the constitutionality of its significant provisions.

Despite the Supreme Court's rulings in *Buckley* and *McConnell*, it is still unclear when campaign reform legislation crosses the line and infringes on First Amendment protections. The tests that the Supreme Court has used to judge the constitutionality of campaign reforms do not specify precisely how much speech such laws must restrict to be invalid.[123] So far, the Court has relied on the anticorruption rationale for upholding major campaign finance laws, but sooner or later that rationale will lose its force, and campaign finance regulations will give way to outright censorship.[124] However, given the corruptive potential of nonprofit groups, the anticorruption rationale sufficiently supports banning these groups from spending and raising soft money in federal elections.

B. The Corruptibility of Nonprofit Organizations Engaged in Electioneering Activities

1. The Definition of Corruption

Though the Supreme Court used the anticorruption rationale in *Buckley*, the Court failed to precisely define corruption and, subsequently, that definition has evolved and expanded. Congressional debates over both the BCRA and FECA indicate that Congress intended corruption to include both undue influence over, and unequal access to, policymakers.[125] Undue influence refers to wealthy individuals exercising disproportionate influence on policy through an implicit understanding that a candidate's vote or action will generate financial support.[126] Unequal access refers either to explicit quid pro quo bribery or unequal opportunities to influence policymakers that acquiesce to wealthy contributors' interests.[127] Typically, large contributors pursue unequal access in the hopes that it will lead to undue influence, often leaving the line between access and influence hazy.[128] However, the distinction is usually inconsequential as the Supreme Court has made it clear that it includes both forms of corruption from large contributions.[129]

The BCRA was intended to curb the potential for corruption by taking soft money out of federal elections, but instead it has opened the

123. *Id.* at 666.

124. *See* Michael C. Dorf, *Why 527 Groups Can't Be Silenced*, Aug. 31, 2004, http://www.cnn.com/2004/LAW/08/31/dorf.527s/.

125. Krasno & Sorauf, *supra* note 115, at 123.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 389 (2000) ("In speaking of 'improper influence' and 'opportunities for abuse' in addition to '*quid pro quo* arrangements,' we recognized a concern . . . extending to the broader threat from politicians too compliant with the wishes of large contributions.").

door for nonprofit organizations to emerge as the newest threat to the integrity of our electoral system. The primary objectives of the BCRA were to end large contributions from corporations, unions, and wealthy individuals to national parties and federal policymakers, and to capture the majority of electioneering issue ads under federal campaign finance law.[130] However, the BCRA's ban on soft money within national parties has merely redirected the money to electioneering nonprofit groups, making these groups a substitute recipient for donors who want to stay in the soft-money game.[131] In fact, so far, the BCRA has helped nonprofits,[132] and soft-money players now envision using nonprofit groups to complement the role of political parties in federal elections[133] because nonprofits are now the primary players in the soft-money game.[134] Politicians themselves have become accustomed to using soft money to supplement campaign efforts,[135] and candidates for office now consider not only what their opponents may do with hard money but also what outside nonprofit groups can do with soft money.[136] These nonprofits, and their corruptive influence, vitiate the spirit of the BCRA,[137] and it is now up to Congress to avoid sanctioning the evasion of the statute through those groups.[138]

2. Why Nonprofits Have Great Potential for Corruption

The corruptive potential of nonprofits stems from the lack of effective limits on the amount of money that contributors can give to them.[139] Much like donations to political parties, large-dollar contributions to electioneering nonprofits present risks of improper influence, or at least the appearance of improper influence, on policymakers.[140] In *McConnell*, the Supreme Court recognized that "large soft-money contributions . . . are likely to create actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately used."[141] Just as the Court assumed that corporations and unions can engage in political activities by funding advertisements through independent organizations,[142] the same is true of individuals. Candidates will

130. Holman & Claybrook, *supra* note 2, at 251.
131. Holman, *supra* note 2, at 275.
132. *Id.* at 287.
133. *Id.* at 275.
134. *Id.* at 278.
135. David D. Storey, *The Amendment of Section 527: Eliminating Stealth PACs and Providing a Model for Future Campaign Finance Reform*, 77 IND. L.J. 167, 185 (2002).
136. Krasno & Sorauf, *supra* note 115, at 167.
137. Holman & Claybrook, *supra* note 2, at 251.
138. Holman, *supra* note 2, at 283.
139. *See supra* text accompanying notes 53–60.
140. Edward B. Foley, *The "Major Purpose" Test: Distinguishing Between Election-Focused and Issue-Focused Groups*, 31 N. KY. L. REV. 341, 345 (2004).
141. McConnell v. FEC, 540 U.S. 93, 155 (2003).
142. Overton, *supra* note 97, at 690.

likely look to see who donated large amounts of money, will feel grateful to those donors, and ultimately will be more willing to grant those donors favors.[143] Thus, by allowing unlimited donations to nonprofit groups, current campaign finance laws still enable the wealthy few to gain influence over the political process.[144]

Some commentators have argued that donations to nonprofit groups are not as susceptible to corruption as political parties because there is no direct link to the candidate,[145] but the opposite is more likely true. A donor's interest in contributing large sums of money to a nonprofit group is similar to his interest in contributing to a political party or a candidate's own official campaign.[146] Donors who are blocked from contributing large sums of money directly to the candidate, or the candidate's party, will likely see nonprofit organizations as a good alternative to "invest" in that candidate's election.[147] Donations to candidate-specific nonprofit groups are, in fact, more likely to gain influence over that candidate than contributing to the candidate's party.[148] This is due to the nature of political parties: because the goal of parties is to elect "a wide array of candidates," a contribution to that party does not ensure that a specific candidate will be grateful to the donor.[149] By contrast, a large contribution to a nonprofit group focused on electing one candidate will almost certainly put the donor in that candidate's good graces once elected to office.[150] In *McConnell*, the Supreme Court recognized that "[e]ven when not participating directly in the fundraising, federal officeholders [are] well aware of the identities of their donors" because parties either distribute lists of donors or the donors themselves report their generosity to the officeholders.[151] Thus, the rationales for the BCRA's restrictions on large contributions to political parties are even stronger with respect to nonprofit organizations because the donor's motive would likely be the same in either case.[152] Accordingly, any legislation regulating the finances of nonprofit organizations should be upheld using the same rationales to defeat First Amendment challenges as legislation regulating contributions to political parties.[153]

143. Foley, *supra* note 140, at 346.
144. Storey, *supra* note 135, at 184.
145. *See* Holman, *supra* note 2, at 278–79.
146. Foley, *supra* note 140, at 345.
147. *Id.*
148. *Id.* at 346.
149. *Id.*
150. *Id.*
151. McConnell v. FEC, 540 U.S. 93, 147 (2003).
152. *Id.* at 178–79.
153. *Id.* at 352 (Rehnquist, C.J., dissenting).

3. The Future of Campaign Finance Reform

Eliminating nonprofits from the soft-money game in politics is the next logical step in campaign finance law. After the BCRA, large-dollar contributors are becoming less accountable than ever before, while at the same time, becoming more influential.[154] Heading into the 2004 presidential election, more than two dozen people had contributed one million dollars or more to 527 groups.[155] These contributors can be very successful at influencing policy and building relationships with policymakers, particularly in areas of little interest to the general public but of great importance to a narrow group of interested persons.[156] The more money these contributors donate, the better relationships they build with policymakers and the more influence they obtain over the legislative process.[157] This soft-money process is fueled by direct contacts between large-dollar contributors, or potential contributors, and national political leaders.[158] The potential for actual, or at least perceived, corruption in this system will be directly proportional to the large donations moving through it.[159] This system will foster citizen suspicion of elected officials and government,[160] which is particularly dangerous considering that a majority of Americans are already skeptical of the fairness of the U.S. political system.[161] Combating this skepticism is a major goal of campaign finance reform, a goal that makes the public's perceptions as vitally important as reality.[162] Thus, at issue here is not just the integrity of federal elections and the electoral process, but also public trust and confidence in elected officials and the U.S. government itself.[163]

Allowing large sums of soft money to continue to flow through politics also increases the danger of keeping many qualified candidates from running for office. The increasing use and effectiveness of electioneering issue ads has led to an increase in the demands for soft-money donations and hard-money spending in elections.[164] The rising costs of these campaigns are precluding potential candidates from entering the market, and candidates with potentially strong bases of support are often overlooked in favor of wealthier candidates, or candidates with wealthier supporters.[165] During campaigns, these candidates are then able to institute a di-

154. *See Statement by Campaign Legal Center, Common Cause, Democracy 21, League of Women Voters and Public Citizen in Support of 527 Reform Act of 2005*, U.S. NEWSWIRE, Mar. 7, 2005.

155. Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12.

156. Krasno & Sorauf, *supra* note 115, at 124.

157. *Id.*

158. Briffault, *supra* note 113, at 1197.

159. Krasno & Sorauf, *supra* note 115, at 176.

160. *Id.* at 177.

161. *Id.* at 126.

162. *Id.* at 132.

163. *Id.* at 180.

164. *Id.* at 176.

165. *Id.* at 168.

vision of labor whereby they take the high road and leave the dirty work to their wealthy supporters.[166] This practice increases the effectiveness of these groups because voters do not blame the harshness of their advertisements on candidates, allowing candidates to hurl mud at their opponents without it being splashed back at them.[167] Moreover, the current campaign system requires candidates and officeholders to devote large amounts of time to fundraising, leading some candidates to decline to seek reelection and decreasing the competitiveness of elections.[168] By placing restrictions on soft money, legislators force politicians and their parties to reach out to a broader base of support and reduce the number of corrupting large-dollar contributions.[169]

Some commentators have suggested that the nonprofit dilemma would be solved by capturing 527 groups within the scope of the BCRA and through strengthening the disclosure requirements for 501(c) groups.[170] However, as with the BCRA, this approach would likely just redirect soft money to the next best alternative. Because the history of campaign finance regulation is a story of evolution and evasion as participants have taken advantages of weaknesses in the system, Congress should focus on closing loopholes when they appear as opposed to simply creating new alternatives.[171] If Congress were to simply capture 527 groups within the BCRA, but only restrict 501(c) groups with disclosure requirements, the result would likely be no better than the current BCRA—donors would likely turn to 501(c) organizations.[172] Thus, to effectively close the nonprofit loophole, legislation is needed that will eliminate soft money from *all* nonprofit organizations.

IV. RESOLUTION

The ease with which nonprofit organizations are able to escape the BCRA's reach supports the conclusion that the anticorruption rationale should be used to adopt legislation banning all nonprofit groups from raising and spending money for electioneering purposes. The Supreme Court made it clear in *McConnell* that it will give Congress latitude to regulate campaign finance if it furthers the goal of preventing the appearance of, or actual, corruption.[173] By prohibiting nonprofit groups from engaging in any form of campaign finance, Congress would effectively close the newest major loophole around soft-money restrictions. Currently, Senators Feingold and McCain have proposed legislation that

166. *Id.* at 169.

167. Luiza Ch. Savage, *Election Highlights the Powerful Staying Power of 527s*, N.Y. SUN, Sept. 13, 2004, at 5.

168. Briffault, *supra* note 113, at 1213.

169. Krasno & Sorauf, *supra* note 115, at 181–94.

170. *See* Holman, *supra* note 2, at 287.

171. *See* Krasno & Sorauf, *supra* note 115, at 175.

172. *See* Foley, *supra* note 140, at 347.

173. *See supra* text accompanying notes 108–09, 116–22.

would bar only 527 groups from raising and spending money on federal campaign advertisements.[174] Although the passage of this bill would be a good start, it would most likely just redirect large soft-money contributions to 501(c) organizations.[175] In passing new campaign finance regulations, Congress should not simply close one loophole without inquiring into whether they are opening another. Thus, Congress should take it one step further, and take both 527 and 501(c) groups out of the soft-money game in federal politics.

The First Amendment provides the biggest obstacle to any legislation prohibiting the raising or spending of money in politics. The Supreme Court has left no doubt that political donations and expenditures directly affect speech and are thus subject to the First Amendment.[176] However, although fears that too much regulation could lead to censorship have merit, those concerns are not sufficient to invalidate legislation regulating the nonprofit groups' finances involved in electioneering activities. Prohibiting those groups from raising and spending money in federal elections would not completely silence them. Instead, such legislation would merely force them to register as PACs and would subject them to the BCRA's restrictions. Thus, such legislation would not act as censorship because it would still leave those groups with ample alternatives to engage in electioneering communication,[177] albeit subject to the BCRA. Furthermore, nonprofit organizations who raise and spend money for purposes other than creating political communications will not be affected by the regulation, leaving them with no basis for a First Amendment challenge. Thus, legislation prohibiting nonprofit organizations from raising and spending money in federal elections would not likely be facially invalid under the First Amendment.

Another argument against campaign finance regulation is that attempts to shut down nonprofit groups would reduce the amount of available information and result in less informed voters. However, this argument is unpersuasive, and the opposite result is more probable. Because nonprofit organizations currently rely on relatively few numbers of large soft-money contributors, the current system actually limits the amount of ideas and information available to the general public. By shutting down nonprofit organizations, and forcing them to register as PACs under the restrictions of the BCRA, candidates would be forced to solicit from a broader base of potential donors, which would result in the dissemination of a wider variety of ideas and information. This is precisely the argument that the Supreme Court made in *McConnell* in regards to restric-

174. Rebecca Zeifman, *Campaign Finance Fix; Bill to Target 527 Groups*, CAP. TIMES (Madison, Wis.), Sept. 24, 2004, at 3A.

175. *See supra* text accompanying notes 170–72.

176. *See supra* text accompanying notes 101–02.

177. *See* Savage, *supra* note 167 ("Advocates of stricter reforms want the groups to be classified as political action committees, or PACs, and limited to accepting no more than $5,000 in individual contributions.").

tions on the amount of soft money parties could raise: "[restriction by the BCRA] tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors."[178] Thus, prohibiting nonprofits from using soft money in federal elections squares with the purposes of the BCRA.

V. CONCLUSION

The purpose of campaign finance law is to preserve the integrity of federal elections by ensuring public trust and confidence in our electoral system. The BCRA was supposed to eliminate soft money from federal elections once and for all, thereby removing a major source of potential corruption from the system. However, soft-money contributors have once again managed to take advantage of weaknesses in the system by using nonprofit organizations as soft-money conduits and evading the BCRA's requirements. Prohibiting nonprofit groups from raising or spending money in federal elections would effectively close this most recent loophole because it would force nonprofit organizations engaged in electioneering activities to register as PACs, thus placing soft money within the scope of the BCRA as Congress intended.

178. McConnell v. FEC, 540 U.S. 93, 140 (2003).