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"Bring It On"¹:

The High-Stakes Battle Over Whether the Courts, Congress or the FEC Should Muzzle Independent "527" Television Advertising

[By Christopher G. Johnson*]

John Kerry lied to get his Bronze Star. I know, I was there—I saw what happened.¹

"George Bush misled us into war with Iraq."²

"John Kerry secretly met with enemy leaders in Paris—though we were still at war."³

"We were given these ideas that there were weapons of mass destruction.... It was just a lie, and it

Those who closely followed the 2004 presidential election are familiar with the firestorm surrounding these controversial television ads. Last year's political advertising brouhaha set the stage for the current, no-holds-barred battle over whether organizations claiming tax exempt status under 26 U.S.C. § 527 ("527's") should be allowed to exist in their present incarnation. Behind the scenes, heavyweight Washington insiders are now brawling over whether Congress, the

{ "The 527 debate boils down to two things: money and power." }

wasn't a proper use of American troops."⁴

"John Kerry betrayed the men and women he served with in Vietnam."⁵

"George Bush used his father to get into the National Guard, was grounded and then went missing."⁶

courts, or the Federal Election Commission ("FEC") should require 527's to register as "political committees" and abide by soft money restrictions.⁷ The outcome of this high-stakes debate could shift the balance of political power and dramatically affect how groups and individuals spend a substantial amount of television advertising money during future election cycles.

The 527 debate boils down to two things: money and power. To fully understand the motives of the players in the current 527 contest, one must recall how the dispute reached its current boiling point. During the 2004 election cycle, independent 527's such as Swift Boat Veterans For Truth ("SBVFT"), MoveOn.org, and Media Fund burst onto the scene in the wake of the Bipartisan Campaign Reform Act ("BCRA") and almost instantly became powerful players in the biggest political contest in decades.⁸ Television stations in battleground states found themselves swimming in money as 527's poured more than a half-billion dollars into the 2004 presidential campaign⁹ and spent over \$146 million on advertising.¹⁰ Moreover, according to a post-election survey in battleground states, two of the three most influential 2004 presidential campaign commercials were produced by 527's.¹¹

At different points during the 2004 campaign, both Republicans and Democrats cried foul over the broadcast of specific 527 ads, depending on whose ox was being gored at the time. For example, the Chairmen of both the Republican National Committee ("RNC") and the Democrat National Committee ("DNC") wrote letters to television stations urging them to refrain from broadcasting certain 527 ads.¹² Furthermore, both the Bush and Kerry Campaigns filed complaints with the Federal Election Commission ("FEC") alleging 527 campaign finance violations.¹³

As the 527 battle rages, pending court cases¹⁴ or proposed legislation¹⁵ could force the FEC to tighten regulatory clamps on loose, free-wheeling 527's. However, if left unregulated and unstoppable by the courts, 527 television advertising will snowball during future election cycles.¹⁶

This Note analyzes possible FEC actions, pending court decisions, and proposed legislation that could once again dramatically change the landscape of political advertising. Section I of this Note examines the BCRA and the Supreme Court's subsequent ruling in *McConnell v. FEC* that created the environment that caused 527's to flourish. Section II focuses on FEC enforcement of campaign finance laws and examines a pending court case considering whether the FEC acted arbitrarily by failing to require all 527's to register as political commit-

tees. Section III considers whether courts or lawmakers should require 527's to register as political committees in light of the plain language of campaign finance laws, Supreme Court cases, and policy considerations. Section IV suggests a course of action.

I. Unintended Consequences

Section 527 of the Internal Revenue Code, the legal vehicle enabling the creation of 527's, became law in 1974.¹⁷ However, 527 groups existed in relative obscurity from the media spotlight for nearly thirty years.¹⁸ At least two major factors led to last year's 527 advertising explosion. First, Congress passed the BCRA in an attempt, *inter alia*, to take soft money out of federal campaigns and thereby enhance the public's confidence in the political process.¹⁹ Second, the Supreme Court upheld most of the BCRA, noting that Congress' interest in preventing corruption—or the appearance of corruption—among elected officials, justified any free speech limits the BCRA imposed.²⁰

A. The BCRA Changes the Political Advertising Game

The BCRA, which amended the Federal Election Campaign Act of 1974 ("FECA"), was the result of a hard-fought seven-year battle waged by campaign finance reform advocates like Senators McCain and Feingold.²¹ The Act, in part, prohibits federal candidates and national parties from accepting or spending large, unregulated campaign contributions.²² Reformers hoped the legislation would change federal politics in at least three ways: first, by eliminating soft money and its corrupting influence from politics;²³ second, by enhancing the public's confidence in the political system;²⁴ and third, by encouraging civility during campaigns.²⁵ As part of the BCRA, Congress charged the FEC with the responsibility of promulgating detailed regulations necessary to implement and enforce the Act.²⁶

First, BCRA advocates hoped Title I of the Act would limit the corrupting influence of soft money on federal campaigns by prohibiting candidates and political parties from accepting or spending unauthorized funds.²⁷ Before the BCRA was enacted, "soft money" was of-

ten defined as funds that are used for political purposes but are unregulated by campaign finance laws.²⁸ Prior to the BCRA's passage, national parties raised substantial amounts of soft money from corporations, unions and wealthy individuals.²⁹ Political parties used soft money to pay for overhead expenses, run issue ads, and support state and local party-building activities.³⁰ Title I of the BCRA sought to eliminate the influence of soft money on federal campaigns by prohibiting political candidates and national parties' political committees from soliciting, receiving, directing, and spending unregulated funds.³¹

Second, campaign reform advocates argued that the BCRA would restore the public's confidence in their government by avoiding the appearance of governmental impropriety.³² Large campaign contributions “look suspiciously like bribes” when politicians grant political favors to donors.³³ The BCRA sought to fight the fire of deep-seated public mistrust in politicians by eliminating perceived corruption that naturally occurs when “large contributions [facilitate] access to public officials.”³⁴ Many believed that taking soft money out of political campaigns would help change the negative public perception that elected federal officials often auction their Congressional votes to the highest bidder.³⁵

Third, lawmakers expected the Act to increase civility in politics. The “stand by your ad” provision was designed to discourage politicians from running attack ads by requiring the candidates to appear in and “approve” their commercials.³⁶ By making candidates take responsibility for their advertisements, reformers hoped to reduce the abrasiveness, number, and influence of negative campaign ads.³⁷

B. *McConnell* Sets the Stage for the 527 Drama

After the President signed the BCRA into law “with reservations,”³⁸ numerous plaintiffs, including Senator Mitch McConnell, filed eleven lawsuits in the United States District Court for the District of Columbia challenging the constitutionality of the new act.³⁹ The lawsuits were consolidated and considered by the Supreme Court in *McConnell v. FEC*.⁴⁰ Under-scoring the case's importance, the Supreme Court cut its summer recess short to hear *McConnell*.⁴¹ The Court also permitted four hours of oral arguments, the longest period allowed since a 1975 case in which the Supreme Court considered the constitutionality of campaign reform laws enacted shortly after Watergate.⁴²

In *McConnell*, the Court upheld the two main pillars of the BCRA: “the control of ‘soft money’ and the regulation of electioneering communications.”⁴³ The Court invalidated only two minor BCRA provisions: a ban on political contributions accepted from minors and a regulation requiring parties to choose between making “independent” expenditures or “coordinated expenditures.”⁴⁴ Furthermore, a portion of the opinion written by Justices Stevens and O'Connor rebuked the FEC, implying that BCRA regulations were necessary because the agency, contrary to legislative intent, had done a poor job of enforcing previous campaign finance laws.⁴⁵

As a result of the BCRA and the Court's *McConnell* ruling, wealthy individuals who were barred from contributing large sums of “soft money” to political candidates and political parties began to fund 527's groups.⁴⁶ Political

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activists, candidates, and pundits began to ask whether the donations were legal.

II. "Money, Like Water, Will Always Find an Outlet"⁴⁷

In passing the BCRA, Congress repealed several FEC regulations and charged the agency with the responsibility of promulgating new rules and definitions necessary to enforce the law.⁴⁸ The FEC adopted regulations designed to implement the new campaign finance laws⁴⁹ and failed to enact other proposed rules.⁵⁰ The Commission postponed a vote on a proposed regulation that would have classified almost all 527 groups as 'political committees,' and consequently would have forced the groups to comply with campaign finance laws prohibiting them from receiving large, soft money donations.⁵¹ Groups and congressmen who thought the FEC failed to adequately regulate 527's filed lawsuits seeking to require the FEC to vigorously apply soft money restrictions to all 527's by adjusting their regulatory definition of the term "political committee."⁵²

A. The FEC Allows 527 Activity to Heat Up

As 527 ads took center stage during the 2004 presidential election, campaign finance reform advocates were generally dismayed with the FEC's unwillingness to require all 527's to abide by soft money restrictions.⁵³ Reformers believed that the Commission acted in a manner contrary to Congress' intent in passing campaign finance legislation.⁵⁴ Political watchdog organizations petitioned the FEC to force 527's to halt controversial activities and advertising.⁵⁵

Additionally, the Bush-Cheney Campaign and the RNC jointly filed a complaint⁵⁶ with the FEC alleging that at least eight 527's⁵⁷ and nine individual contributors⁵⁸ violated campaign finance laws.⁵⁹ Republicans vehemently argued that 527 organizations such as MoveOn.org were political committees, and were therefore illegally raising and spending soft money, and unlawfully coordinating their activities with the Democratic Party.⁶⁰

The FEC didn't buy it. On May 13, 2004, a few weeks after holding hearings regarding whether the definition of "political committee" should apply to "nonconnected com-

mittees" such as 527's, FEC commissioners voted to delay a decision on the matter for 90 days.⁶¹ The move shattered Republican hopes of getting a timely shield to defend their presidential candidate against the onslaught of left-leaning 527 ads and activities.⁶²

At the end of its 90-day extension period, the FEC finally took a stand—of a sort. By a vote of 4-2, the Commission adopted watered down rules designed to regulate 527's.⁶³ However, because the rules did not go into effect until January 1, 2005, they had no noticeable effect on the 2004 presidential election. The new rules, moreover, failed to address the larger issue of whether 527's are "political committees," which are regulated by campaign finance laws.⁶⁴ Ben Ginsberg, a GOP attorney who resigned from the Bush-Cheney campaign because of his involvement with a Republican-leaning 527, claimed that the FEC "took a pass" by failing to address the "political committee" question.⁶⁵

B. The Court Battle

In September 2004, Congressmen Shays and Meehan added their voices to a growing chorus of litigants arguing that the FEC failed to enforce BCRA provisions by dodging the "political committee" question.⁶⁶ They filed a lawsuit against the FEC ("*Shays II*")⁶⁷ in the D.C. District Court alleging that the FEC acted arbitrarily and capriciously by failing to sufficiently define the term "political committee," and failing to require 527's to register as political committees.⁶⁸ Oral arguments in *Shays II* have been scheduled for May 12, 2005; a three-judge panel, consisting of D.C. Court of Appeals Judges Henderson, Edwards, and Tatel will hear the high stakes case on an expedited basis.⁶⁹

Senators McCain and Feingold quickly filed an amicus brief supporting their fellow congressmen.⁷⁰ The new suit was filed just days before a D.C. District Court judge struck down fifteen FEC regulations as a result of a separate lawsuit (*Shays I*) filed two years earlier by the same congressmen.⁷¹ The Representatives contend that 527's filing as "political organizations" with the IRS are, by their own admission, political committees, and should therefore be classified as 'political committees' and be subject to "soft money" restrictions.⁷²

Shays II hinges on the definition of "po-

litical committee.”⁷³ Statutorily, the term “political committee” is defined as a group or organization which “receives contributions,” or “makes expenditures” of more than \$1,000 during a calendar year.⁷⁴ Contributions and expenditures are defined as money or anything else of value used to influence a federal election.⁷⁵

To avoid the overreaching effect a literal interpretation of the preceding statutes would have,⁷⁶ the Supreme Court, in 1976, defined a political committee as an organization that is “under the control of a candidate or the major purpose of which is the nomination or election of a candidate.”⁷⁷ However, this definition does not apply to “groups engaged purely in issue discussion.”⁷⁸ Ten years later,

contributions totaling more than \$5,000 from any individual during any calendar year.⁸⁵

Shays and Meehan argue that 527 organizations, by their very nature, are political committees.⁸⁶ 527’s register for tax-exempt status as “political organizations” under 26 U.S.C. 527.⁸⁷ The Congressmen contend that all 527’s should be required to register as political committees because, according to Internal Revenue Code, these groups’ self-declared “major purpose” is to influence or attempt to influence elections or political appointments.⁸⁸ Shays and Meehan argued that groups like SBVFT and Media Fund illegally avoided the implications of the BCRA by failing to properly register as “political committees” as required by campaign finance laws.⁸⁹ The *Shays II* com-

“The new rules, moreover, failed to address the larger issue of whether 527’s are “political committees,” which are regulated by campaign finance laws.”

the Court expounded on the “major purpose test” by stating that if an organization’s “major purpose may be regarded as a campaign activity, the corporation would be classified as a political committee.”⁷⁹ Nevertheless, the FEC declined to incorporate the “major purpose test” into its definition of “political committee,” although the commission considers a group’s purpose as one factor in determining whether or not the group should be classified as a political committee.⁸⁰

An organization required to register with the FEC as a “political committee” must obey multiple campaign finance laws.⁸¹ For example, political committees must file periodic financial disclosure reports,⁸² may not directly accept donations from national banks, most corporations, or labor unions,⁸³ and must adhere to contribution limits.⁸⁴ Specifically, a political committee unaffiliated with a political party or a political candidate may not accept

plaint petitions the court to declare FEC actions arbitrary and capricious, to “issue an order requiring the Commission ...to define the term political committee” and to declare that almost all 527’s must register as political committees.⁹⁰

After filing an amicus brief supporting Representatives Shays and Meehan in *Shays II*, and proposing anti-527 legislation, Senator Feingold joked, “[s]ometimes it seems a little bit like our mission in life is to clean up the mess that the FEC has made.”⁹¹ On the other hand, FEC commissioners may contend that campaign finance advocates filed *Shays II* only because they could not pass legislation explicitly making soft money restrictions applicable to independent 527’s.⁹² The court’s decision in *Shays II*, and in similar cases, could once again change the landscape of 527 political advertising.

Whether or not lawsuits like *Shays II* are successful, television stations will probably con-

tinue to benefit from an increase in political advertising revenue during elections. However, the manner in which campaign finance laws are applied to 527's could have a dramatic effect on the type of groups that will fund future political television advertising, which in turn could determine the nature of the commercials.

If lawsuits like *Shays II* are successful, they could have one of two effects on television advertising. The courts could restrict 527's, causing the flood of independent television advertising money to slow to a trickle. However, it is more likely that a such a court decision would merely cause the flood of independent money to be rerouted through other channels.⁹³

On the other hand, if suits like *Shays II* are unsuccessful, and Congress does not pass new 527 legislation, the amount of money television stations receive from independent 527 advertisements will probably skyrocket.⁹⁴ 527's will "multiply like the proverbial heads of [the] hydra" growing in strength and number "far beyond their original pioneer[s]" of 2004.⁹⁵ Furthermore, because campaigns usually don't have the time to fight inaccurate political ads in court, candidates will have to spend more and more time and money responding to damaging 527 ads with commercials of their own, further changing the nature of political advertising.

III. The Current, High-Stakes 527 War

Because of the dramatic effect that cases like *Shays II* and proposed 527 legislation could have on the nature of future political advertising, television stations and Washington insiders are following the 527 battle closely. When sifting through the legal issues in lawsuits such as *Shays II*, courts may first consider whether Congress intended to apply soft money prohibitions, such as those found in the BCRA, to independent 527 groups. Second, courts may have to determine whether, under *McConnell* and other decisions, 527 groups' ability to accept and use soft-money contributions is protected by the First Amendment. Third, if proposed 527 legislation is enacted, courts will probably consider whether campaign-finance restrictions on independent organizations serve a compelling governmental interest, or whether

politicians merely intend to censor political speech with which they disagree. Finally, courts may consider whether closing the 527 loophole will merely expose another loophole and encourage even less responsible political advertising by channeling money through even less-regulated avenues.

A. Congressional Intent

The persuasive attorneys who filed the *Shays II* complaint make a compelling, although somewhat hyper-technical, argument. Perhaps the *Shays II* argument (which strings together pieces of several disassociated statutes and court decisions) can best be summarized as a logical syllogism. First, 527's are, by their own admission, "organized and operated primarily for the purpose" of influencing elections or political appointments.⁹⁶ Second, influencing elections or political appointments can be classified as a campaign activity.⁹⁷ Third, if a group's "major purpose" is a campaign activity, it is a political committee.⁹⁸ Fourth, all political committees must register with the FEC and abide by soft money regulations.⁹⁹ Therefore, all 527's should be required to abide soft money restrictions. The FEC, however, does not integrate *Buckley's* "major purpose test" into its definition of political committee, and thus does not necessarily accept the third premise.¹⁰⁰ Instead, the FEC analyzes each 527 group on a case-by-case basis, and considers a group's purpose as only one factor in determining whether that group should be required to register as a political committee.¹⁰¹

It may appear contradictory for 527's to claim tax-exempt status by asserting they are "influencing or attempting to influence" elections,¹⁰² and then fail to register with the FEC as political committees. One might initially think that the FEC acted arbitrarily and capriciously by not explicitly requiring all 527 groups to register as political committees. However, upon closer inspection, the complaint may take an unreasonably narrow view of the issue. For example, the complaint may incorrectly assume that Congress intended to make independent 527's subject to soft money regulations when nothing in Title I of the BCRA itself supports such an assumption.¹⁰³

FEC Commissioner Ellen Weintraub argues that requiring all 527's to register as po-

litical committees would go against legislative intent.¹⁰⁴ She pointed out that, in 2000, Congress “looked at the issue of 527’s,” considered requiring 527’s to report to the FEC, then “rejected” the idea, and “instead decided to have them report to the IRS.”¹⁰⁵ If lawmakers wanted the FEC to hold 527’s accountable for campaign finance violations, she argued, Congress would have specifically required the groups to report to the FEC, rather than an agency unauthorized to enforce federal campaign laws.¹⁰⁶

Similarly, FEC Chairman Brad Smith, while testifying before the Senate Rules Committee, argued that requiring all 527’s to register as political committees would vastly expand the number and scope of organizations regulated by the FEC, contrary to the intent Congress had when it enacted campaign finance laws.¹⁰⁷ While testifying before the Senate Rules Committee, Smith pointed out that classifying all 527’s as political committees would have been “the most far-reaching expansion of regulation in this area since the 1974 amendments to the Federal Election Campaign Act, and far more expansive than the Bipartisan Campaign

Feingold, Shays, and Meehan would now like to extend the BCRA to prohibit 527’s from accepting soft money donations, their campaign finance views are clearly more progressive than the views of most other members of Congress. The BCRA was a culmination of a hard-fought, seven-year effort led by the four Congressmen.¹¹¹ The legislation was revised, changed, amended and reintroduced numerous times before Congress passed it.¹¹² The text of the BCRA provides more of a window into Congressional intent than does hindsight allegations of four of the most adamant campaign finance reform advocates in Congress. The plain language of the act itself clearly suggests that Congress intended Title I only to apply to federal candidates, national parties, and political committees who coordinate with such candidates or parties.¹¹³

Congress intended Title I of the BCRA to stop soft money from flowing through national parties, not independent organizations.¹¹⁴ In *McConnell*, the Supreme Court explains that soft money restrictions found in Title I of the BCRA came about as a congressional attempt to prohibit “national parties and their agents”

“... the FEC analyzes each 527 group on a case-by-case basis, and considers a group’s purpose as only one factor in determining whether that group should be required to register as a political committee.”

Finance Reform Act itself.”¹⁰⁸ Mr. Smith explained to “expedient partisans on the right” who, at the time, advocated regulating groups like MoveOn.org, that doing so would have also “crushed” conservative groups such as the College Republicans, the Young Republicans, and the Republican National Lawyers Association.¹⁰⁹ When enacting the BCRA, he argued, neither Congress nor the public intended to restrict such groups’ ability to advocate a political viewpoint.¹¹⁰

Even if Congressmen McCain,

from trafficking in soft money.¹¹⁵ Certainly, the text of the Act does not suggest that Congress as a whole intended to subject independent political groups, not coordinating with national parties, to soft money prohibitions.¹¹⁶ In fact, if anything, the BCRA has been interpreted to suggest that Congress did not intend to hamper truly independent political organizations with soft-money prohibitions¹¹⁷ (although Congress did intend to subject independent groups to disclosure requirements and advertising content restrictions.)¹¹⁸

Smith also argues that if the federal government chooses to expand campaign finance laws to gag 527's, Congress, and not an unelected bureaucracy, should do so.¹¹⁹ Late last year Senators McCain, Feingold, Schumer, and Lieberman introduced legislation designed to smother 527's.¹²⁰ The bills would force the FEC to incorporate the "major purpose test" into its definition of a political committee, which would compel almost all 527's register with the FEC and abide by campaign finance laws.¹²¹ Congress, therefore, is currently considering legislation regarding the exact question the court is asked to address in *Shays II*.¹²² Courts considering whether to force unelected FEC commissioners to take action that would significantly expand campaign finance regulation should take into account that Congress itself will clearly declare its intent by either taking or not taking the same action.

B. "Special" First-Amendment Protection

If the proposed legislation¹²³ that is intended to quash 527 groups becomes law, it will inevitably have to survive a constitutional

Individuals who pool their money and purchase television commercials espousing a political position are exercising their First Amendment rights of freedom of speech and political association.¹²⁴ Of course, in *McConnell* the Supreme Court recognized that these First Amendment rights could be restricted to prevent corruption.¹²⁵ When upholding the portion of the BCRA that regulates soft money, the *McConnell* court justified the political speech restrictions that the provision placed on national parties, candidates, federal office holders, and groups that "coordinate" with candidate or parties.¹²⁶ The Court reasoned that the government had a compelling interest to avoid corruption or the appearance of corruption that results when political candidates accept large donations and then reward contributors by promoting legislation that benefits donors.¹²⁷

However, "at some point, the anti-corruption rationale runs out, and the constitutional rights of the speaker take over."¹²⁸ Avoiding corruption or the appearance of corruption cannot justify congressional or presidential attempts to silence independent political groups who do not coordinate activities with national

“Congress intended Title I of the BCRA to stop soft money from flowing through national parties, not independent organizations.”

challenge. If such a challenge ever makes its way to the Supreme Court, whether the law survives may depend on whether the Court thinks that the anti-corruption arguments expressed in *McConnell* should be extended to apply to independent 527 groups. The Court could decide that prohibiting independent groups from accepting large soft money donations would significantly restrict political speech, and that government doesn't have a compelling anti-corruption interest to silence groups that do not coordinate with elected officials or national parties.

parties and have no power to reward donors with political favors.¹²⁹ Groups trying to stretch *McConnell's* reasoning to justify prohibiting 527 groups from using soft money to advertise encourage the "legalized demolition of the First Amendment."¹³⁰

Even without forcing 527's to register as political committees, the groups' ability to engage in political speech is already significantly restricted because of cumbersome reporting and disclosure laws.¹³¹ Mr. Smith points out that groups "who criticize or praise the voting

records of their elected representatives have less Constitutional protection than pornographers, tobacco advertisers, Klan members who burn crosses outside black churches, flag burners, or topless dancers.”¹³² Smith also asserted that saddling independent 527’s with campaign finance regulation stifles political discourse and is “not mandated by either BCRA or the Supreme Court’s decision in *McConnell v. FEC*.”¹³³

Language in *McConnell*’s majority opinion seems to validate Commissioner Smith’s argument that the court did not interpret FECA § 323(a) (as amended by the BCRA) to apply to independent political groups unaffiliated with national parties.¹³⁴ In fact, one can even make a strong argument that *McConnell* affords special constitutional protection to such independent groups.¹³⁵

In a 5-4 portion of its opinion addressing soft-money BCRA restrictions, the *McConnell* majority emphasized the government’s long-recognized interest in regulating expenditures “controlled by or coordinated with the candidate as contributions.”¹³⁶ But when explaining its *Buckley* decision the Court explicitly stated, “we were not persuaded that independent expenditures posed the same risk of real or apparent corruption as coordinated expenditures.”¹³⁷

The *McConnell* Court differentiated between independent expenditures, which are entitled to “special protection,” and coordinated expenditures, which are regulated by campaign finance laws.¹³⁸ “We repeatedly have struck down limitations on expenditures ‘made totally independently of the candidate and his campaign,’” the majority opinion explained, “on the ground that such limitations ‘impose far greater restraints on the freedom of speech and association’ than do limits on contributions and coordinated expenditures.”¹³⁹ The majority reasoned that “[i]ndependent expenditures ‘are poor sources of leverage for a spender because they might be duplicative or counterproductive from a candidate’s point of view.’”¹⁴⁰ The Court went on to differentiate coordinated expenditures from independent donations by ruling that the former are “made ‘at the request or suggestion of’ a candidate.”¹⁴¹

Thus, 527 groups operating independent of political parties should be entitled to the special free-speech protection as long as fed-

eral candidates do not request that contributors donate money to 527’s, solicit money from the groups, or give money to 527’s.¹⁴² This author finds no credible evidence that, during the 2004 campaign, either President Bush or Senator Kerry specifically suggested that wealthy donors give money to groups like SBVFT or MoveOn.org, or that Federal Candidates encouraged such 527’s to make specific expenditures. Furthermore, this author finds no credible evidence of national parties transferring funds to 527’s, or vice versa. Regardless of whether or not independent 527’s engaging in political speech should receive special First Amendment protection, certainly *McConnell* doesn’t require the FEC to prohibit groups unaffiliated with candidates or national parties from accepting soft money.¹⁴³

C. Principled Debate or Power Struggle?

The courts may ultimately have to decide whether politicians trying to hush 527’s intend to rid politics of soft-money corruption, or whether they merely seek to quash political opposition and increase the probability that they or their fellow party members will be re-elected. Muzzling independent political groups may advantage incumbents by enabling them to streamline and control issues discussed in campaigns and magnify their fundraising and name recognition advantages. Moreover, many politicians who quickly shift their positions and rhetoric on the 527 debate as political winds change give the impression that they are more concerned with silencing vocal opposition than with eliminating political corruption.

Some, like Justice Kennedy, viewed BCRA soft-money restrictions as an unconstitutional effort by elected officials to silence critics and enhance their reelection chances.¹⁴⁴ Justice Kennedy’s dissenting *McConnell* opinion characterized Title I of the BCRA as “an incumbency protection plan.”¹⁴⁵ The dissenting opinion cites James E. Miller who argues, in part, that regulations restricting the free-flow of political ideas during a federal election benefit the incumbent.¹⁴⁶

Miller’s argument is even more compelling when free speech restrictions are extended to independent 527’s that do not coordinate activities or expenditures with any national

party. Taking independent 527 groups out of the political picture could increase the media's role in controlling the main issues in congressional campaigns. This would give incumbents a huge advantage given that they can more easily call high-profile press conferences and have tax-funded staffs and press spokespersons helping them 'stir-up' and spin issues.¹⁴⁷ Furthermore, hushing 527's may allow incumbents (especially those in mid-sized and small media markets) to more easily control political topics their local news agencies discuss because of their access to inside information and involvement in political issues attracting media attention.¹⁴⁸

Restricting the ability of independent 527 groups to put issues at the forefront of a campaign also gives incumbents even greater control over political discourse through advertising. Typically, incumbents enjoy a fundraising advantage enabling them to purchase more commercials and to produce higher quality commercials.¹⁴⁹ Furthermore, incumbents can "carry over [money] from election to election," continually adding to their campaign war chests and then using excess money only when their positions are in real jeopardy because

Democrat and Republican, behave more like self-interested actors trying to control what others say about them than sincere public servants striving to limit political corruption. Certainly some politicians, like Senators McCain and Feingold, are deeply concerned about government corruption resulting from what they perceive to be excessive amounts of soft money injected into the political process. However, many other politicians seem to support regulating 527 groups only when it appears that doing so will help their parties or help their reelection chances. The 527 controversy surrounding the 2004 election illustrates this point.

Democrats got off to an early start in the 527 race, while Republicans were the first to complain. In early 2004, several democrat-leaning 527 organizations flooded the Internet and television airwaves with pro-democrat (or more accurately, anti-Bush) advertisements.¹⁵³ MoveOn.org, for example, featured ads calling Bush a Nazi.¹⁵⁴ Subsequently, the Republican National Committee sent a letter to 250 television stations urging managers not to run MoveOn.org advertisements.¹⁵⁵ The letter opined that broadcasters had a responsibility to

“Taking independent 527 groups out of the political picture could increase the media’s role in controlling the main issues in congressional campaigns.”

of a strong challenge.¹⁵⁰ By diminishing 527 groups' control over election discourse, incumbents magnify their fundraising advantage because their commercials, and not independent groups, frame campaign issues.¹⁵¹ Also, silencing independent 527's may enable incumbents to more easily ride the wave of name recognition to reelection by avoiding issues and attacks the independent groups would otherwise raise.¹⁵²

Moreover, close examination of the 527 debate suggests that most politicians, both

“refrain from complicity in any illegal ...violations of our nation’s Federal Election Laws.”¹⁵⁶ Furthermore, the RNC and the Bush-Cheney campaign jointly filed a complaint with the FEC alleging that certain 527's were violating campaign finance laws.¹⁵⁷

About two months later, when the FEC failed to take aggressive action to stop Democrat-leaning 527's, Republicans vehemently predicted a politically-bloody 527 advertising Armageddon.¹⁵⁸ Bush-Cheney Campaign Chairman Marc Racicot and RNC Chairman Ed

“Bring It On”

Gillespie issued a joint statement calling FEC inaction “irresponsible,” and claiming it would lead to “a total meltdown of federal campaign finance regulation in 2004.”¹⁵⁹ The duo further warned that the Commission gave conservative 527’s the “green light” to “forge full steam ahead” with controversial ads of their own.¹⁶⁰ The two leading Republicans predicted that a “soft money arms race for the 2004 election”¹⁶¹ would escalate into “a full scale, two-sided war,” which they predicted would “rage unabated through Election Day.”¹⁶²

However, the party whose members were expressing almost universal, emphatic indignation over perceived loose enforcement of soft-money restrictions is the same party that, for years, stood in the way of campaign finance reform bills like McCain-Feingold, which proposed harsher soft money regulations.¹⁶³ Republican senators on the Rules Committee even initiated investigative hearings and sharply reprimanded the FEC because the agency failed to quickly “enforce” campaign finance laws by silencing 527’s.¹⁶⁴ However, only three years earlier many of the same Republican Senators adamantly led the fight opposing (and voted against) the BCRA.¹⁶⁵ Moreover, approximately 18% of members of Congress voting to pass the “Bipartisan” Campaign Reform Act were Republicans.¹⁶⁶

During the first half of 2004, pro-Democrat 527’s enjoyed a huge financial advantage. By June 29, 2004, left-leaning 527 groups had raised approximately \$80 million compared to only \$8 Million raised by conservative 527 groups.¹⁶⁷ As Democrat-leaning 527’s used television commercials to pound their messages into the public psyche, Bush’s approval ratings dipped.¹⁶⁸ Senator Kerry rode the 527 ads to a mid-summer lead over President Bush.¹⁶⁹ Democrat politicians were noticeably silent about the increased role the groups were playing in the presidential elections. If Senator Kerry objected to the fringe 527 groups such as MoveOn.org making arguably false accusations¹⁷⁰ or using soft money, we didn’t hear about it. Democrats seemed to shift from strongly supporting legislation based on the premise that soft money should be eliminated from politics to quietly approving of Democrat-leaning, soft-money-funded 527’s.¹⁷¹ The Democrat presidential hopeful touted his vet-

eran credentials and eagerly invited a debate on national security leadership, repeatedly challenging Republicans to “bring it on.”¹⁷²

Well, SBVFT “brought it on”¹⁷³ and the 527 tide began to turn. In August, the conservative 527 unleashed a TV ad claiming Kerry lied about his Vietnam service record, his first purple heart, and his bronze star.¹⁷⁴ The Kerry Campaign filed an action with the FEC alleging that the controversial SBVFT ads were illegal.¹⁷⁵ Attorneys for the Kerry Campaign and the Democratic National Committee jointly wrote a letter to television station managers urging them not to play the advertisement.¹⁷⁶ Additionally, Senator Kerry challenged President Bush to denounce the SBVFT ad.¹⁷⁷ President Bush responded by advocating an immediate end to all 527 soft-money ads.¹⁷⁸

Many politicians (as well as the two main national parties) seem to change their positions on 527 regulation depending on whether they believe restricting the groups will help or hurt them. Such actions appear to cloak political self-interest in the robes of eliminating corruption and making politics more civil. The courts will have to decide whether to go along with the charade.

D. The Shell Game

When deciding cases such as *Shays II*, courts may attempt to determine whether prohibiting all 527’s from accepting large soft money donations would help advance the goals Congress articulated when passing the BCRA. Many McCain-Feingold proponents assumed that taking soft money away from candidates and political parties and requiring candidates to approve their messages would increase civility and truth in political campaigns.¹⁷⁹ Instead, the legislation had the opposite effect. The Act “push[ed] the money upstream,” making candidates less responsible, rather than more responsible for the content of political advertising.¹⁸⁰ For example, President Bush and Senator Kerry were able to deny having anything to do with nasty SBVFT and MoveOn.org ads, while still benefiting from them. Some argue that the further and further political money is pushed from candidates, the less and less civil and truthful political advertising will become.¹⁸¹

If courts force the FEC to prohibit 527’s from accepting soft money, large donations may

be rerouted to “stealth PACs” such as 501c groups—named for the section of the tax code under which they are organized.¹⁸² Currently, most 501c groups (such as the NRA, NAACP, and U.S. Chamber of Commerce) focus on advancing the political interests of a particular segment of the population. Unlike 527s, 501c groups are not required to reveal the identities of their donors or disclose their expenditures.¹⁸³ Although 501c organizations are required to jump through their own regulatory hoops,¹⁸⁴ some allege that politically active 501c groups regularly violate campaign finance laws applicable to them.¹⁸⁵ For example, some politically motivated 501c groups may disguise themselves as social welfare organizations to avoid 527 disclosure laws.¹⁸⁶ It is impossible to tell how much 501c groups spent on the 2004 elections because the groups are generally secretive about how they spend money.¹⁸⁷ However, the amount is estimated between \$70 and \$100 million.¹⁸⁸

The political influence 501c organizations wield would certainly increase exponentially if a court decision pushed money even further upstream¹⁸⁹ from 527s to 501c groups. Conse-

that several SBVFT donors were staunch Bush supporters with questionable motives.¹⁹³ If SBVFT had been set up as a 501c group, Mr. Kerry would have had even less of a shield to defend himself against the ads.

IV. Fight 527 Speech With More Political Speech, Not With Censorship¹⁹⁴

Courts analyzing cases such as *Shays II* should defer to the FEC’s regulation defining the term “political committee.” Courts may, understandably, disagree with the commission’s definition. However, campaign finance laws charge the FEC, and not the courts, with enforcing soft-money laws.¹⁹⁵ Generally, courts should yield to agency regulations unless the regulations are “arbitrary, capricious, or manifestly contrary to [a] statute.”¹⁹⁶ FEC commissioners have a reasonable basis to believe that Congress as a whole did not intend to mandate expansive 527 regulation when passing campaign finance legislation.¹⁹⁷ Furthermore, agency commissioners reasonably believe that *McConnell* does not require truly independent¹⁹⁸

“Rather than try to censor 527 speech, the government and the courts should stay out of the way and let candidates or other independent groups fight questionable 527 speech with more speech.”

quently, closing the perceived 527 loophole would force money from a relatively transparent scheme to more stealth groups, encouraging even less accountability.¹⁹⁰ Unlike 501c groups, 527s must disclose contributions and expenditures that exceed certain limits, or face a tax.¹⁹¹ Consequently, the Kerry campaign knew who funded SBVFT, who directed and managed it, and how much the group spent prior to the 2004 presidential election.¹⁹² As a result, the Kerry campaign was able to question the authenticity of the ads and point out

527 groups to register as political committees.¹⁹⁹

Proposed legislation designed to hush independent 527 organizations may infringe on the independent groups’ free speech and political association rights. American voters, not the government, have traditionally determined whether particular political speech has merit. Although the *McConnell* Court justified imposing soft money restrictions on political parties, candidates, and groups who coordinate with candidates or parties, the decision also reiterated the Court’s long standing commitment to

shield “truly independent” groups from political censorship.²⁰⁰ Allowing career politicians to control political discourse by shutting down 527’s creates a huge incentive for those politicians to trample on the First-Amendment rights of independent political groups. Many politicians zealously advocating 527 soft money restrictions seem more like self-interested actors trying to censor political opposition (in violation of the First Amendment) than principled officials seeking to eliminate government corruption.

Moreover, extending campaign finance laws to muzzle 527’s will only expose another loophole, and make political advertising even less civil and less transparent. As long as television advertising remains effective, and as long as political parties and candidates are prohibited from accepting large soft money contributions, the amount of money spent on political television advertising by independent groups will continue to increase during future election cycles. If Congress or the courts dam the 527 channel, campaign money will find another outlet, perhaps through even more stealth groups such as 501c’s.

Using the heavy boot of campaign finance laws to suppress 527 speech could stifle the American tradition of robust political debate and a free flow of political ideas. Rather than try to censor 527 speech,²⁰¹ the government and the courts should stay out of the way and let candidates or other independent groups fight questionable 527 speech with more speech.²⁰² Prohibiting independent 527’s from using soft money is America’s next step down the same road that many European countries have followed: requiring complete public funding of campaigns.²⁰³ Although some campaign finance reform advocates use the recent 527 debate to argue in support of publicly-funded elections,²⁰⁴ “[t]he European experience has shown that taking the money out of politics can also mean taking the politics out of politics.”²⁰⁵ Giving political parties even more control over which campaign issues are discussed would tranquilize the robust political debate upon which American elections have historically been built.²⁰⁶

In conclusion, the ultimate resolution of the current 527 war could significantly affect the nature of future political television advertising.

In light of both the plain language of the BCRA and the Supreme Court’s decision in *McConnell*, the FEC did not act arbitrarily and capriciously by failing to incorporate the “major purpose” test into its definition of the term “political committee.”²⁰⁷ Additionally, the Supreme Court’s anti-corruption rationale used to uphold Title I of the BCRA may not apply to political efforts intended to make independent political organizations subject to soft money restrictions. Moreover, politicians who attempt to regulate 527’s may do so in order to silence political opposition, increase their reelection chances, or help their party, rather than to limit political corruption. Also, if Congress or the courts were to close the 527 loophole, large contributions would probably flow through even more stealth groups such as 501c organizations. Silencing 527’s by forcing the FEC to define them as “political committees” would “gut the First Amendment”²⁰⁸ without effectively regulating campaign finance. Politicians should fight disingenuous 527 speech with more speech, not more government regulation.²⁰⁹

ENDNOTES

* J.D. Candidate, 2006, Vanderbilt University Law School. I would like to thank my wife, Hayley, for her unconditional support. I would also like to thank the JELP editors and staff members for their invaluable editorial contributions.

¹ At different points, both President Bush and Senator Kerry frequently repeated the line “bring it on” during high-charged political speeches; Columbia Law Professor Michael C. Dorf used the popular battle cry phrase when commenting on the 527 debate. Michael C. Dorf, *Why 527 Groups Can’t be Silenced*, at <http://www.cnn.com/2004/LAW/08/31/dorf.527s/> (Aug. 31, 2004).

² *Any Questions?* (Swift Boat Veterans for Truth television advertisement, Aug. 4, 2004), available at <http://horse.he.net/~swiftpow/index.php?topic=Ads>.

³ Press Release, MoveOn PAC, As Iraq Veers Out

of Control, New Ad Calls for Change in Leadership (September 16, 2004), available at <http://www.commondreams.org/cgi-bin/newsprint.cgi?file=/news2004/0916-09.htm>.

⁴ *Friends* (Swift Boat Veterans for Truth television advertisement, Sept. 21, 2004), available at <http://horse.he.net/~swiftpow/index.php?topic=Ads>.

⁵ *Where Are They?* (MoveOn PAC television advertisement, Aug. 2004), available at http://www.errolmorris.com/html/election04/election04_mo_buttrill.html.

⁶ *Any Questions?*, *supra* note 2.

⁷ Wolf Blitzer Reports staff, *Bush and Vietnam*, available at <http://www.cnn.com/2004/US/08/27/bush.vietnam> (Aug. 27, 2004) (quoting www.moveon.org ad).

⁸ See L. Page Whitaker, *CRS Issue Brief for Congress; Campaign Finance: Constitutional and Legal Issues of Soft Money*, available at <http://fpc.state.gov/documents/organization/34815.pdf> (July 21, 2004).

⁹ Press Release, Fabrizio, McLaughlin & Associates, Public Release of National Survey Results: 527's Matter and Swift Boat Vets Top the Heap—Best Known, Most Impact and Highest Ad Recall (November 4, 2004), available at <http://www.fabmac.com/FMA-2004-11-04-527-Effects.pdf>.

¹⁰ PoliticalMoneyLine, *Money In Politics Databases: 2004 Cycle Federal 527 Organizations*, available at http://www.politicalmoneyline.com/cgi-win/irs_ef_527.exe?DoFn=&sYR=2004 (Jan. 10, 2005).

¹¹ The Center For Responsive Politics obtained this figure from 527 group filings with the IRS. However, as of the date of publication, nearly half of the 527 expenditures have not yet been coded. This amount, therefore, could increase substantially. Center For Responsive Politics, *527 Committee Activity Expenditure Breakdown - Federally Focused Organizations*, available at <http://www.opensecrets.org/527s/>

[527cmtes.asp?level=E&cycle=2004](http://www.opensecrets.org/527s/) (last visited Apr. 6, 2005).

¹² Jeffrey H. Birnbaum & Thomas B. Edsall, *At the End, Pro-GOP '527's' Outspent Their Counterparts*, WASH. POST, Nov. 6, 2004, at A6.

¹³ RNC Tells TV Stations Not to Run Anti-Bush Ads, at <http://www.cnn.com/2004/ALLPOLITICS/03/07/moveon.ads> (March 7, 2004); Letter from Marc Elias, General Counsel, Kerry-Edwards 2004, and Joseph Sandler, General Counsel, Democratic National Committee, to several television station managers (Aug. 5, 2004), available at <http://www.gwu.edu/~action/2004/ads04/dem080504ltrswift.html>.

¹⁴ *GOP Challenges Anti-Bush Ads*, at <http://us.cnn.com/2004/ALLPOLITICS/04/01/ad.complaint> (April 1, 2004); *Kerry Files FEC Complaint Against Swift Boat Group*, at <http://www.cnn.com/2004/ALLPOLITICS/08/20/kerry.swiftboat> (Aug. 21, 2004).

¹⁵ See, e.g., *Complaint in Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

¹⁶ S. 2828, 108th Cong. (2004).

¹⁷ Certain 527 commercials, like the controversial SBVFT anti-Kerry ads, dramatically affected the 2004 presidential election. Conversely, 527 "get out the vote" activities were relatively ineffective. 527-paid workers padded voter registration rolls with people who didn't show up to the polls; the paid workers also lacked effectiveness of their volunteer counterparts on Election Day. Thus, 527's will probably spend a higher percentage of their money on television advertising in the future. Also, if left unrestricted, 527 groups will probably be able to raise even more money in the coming years because many prominent groups are now better-established and have better-organized fundraising divisions than they did in 2004.

¹⁸ 26 U.S.C. § 527 (2004).

¹⁹ *Now* (PBS television broadcast, Aug. 27, 2004).

²⁰ The Supreme court pointed out that Congress enacted the BCRA section regulating soft money contributions (which amended FECA and was codified in 2 U.S.C. § 441i) “as an integrated whole to vindicate the Government’s important interest in preventing corruption and the appearance of corruption.” *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 142 (2003).

²¹ *Id.* at 141–45.

²² *Bipartisan Campaign Reform Act of 2002: Supreme Court Ruling in Campaign Finance Case Will Help Halt Erosion of Democracy*, Public Citizen, available at <http://www.citizen.org/congress/campaign/legislation/bcralaw/index.cfm> (last visited Apr. 6, 2005) [hereinafter Public Citizen BCRA].

²³ 2 U.S.C. § 441i (2004).

²⁴ See *McConnell*, 540 U.S. at 142.

²⁵ *Id.*

²⁶ Woody Zimmerman, *First Amendment Shines Through*, ATLANTIC HIGHLANDS HERALD, at http://www.ahherald.com/atlarge/2004/040909_first_amendment.html (Sept. 9, 2004).

²⁷ See 2 U.S.C. § 441i(a), note (2004); Bipartisan Campaign Reform Act of 2002, Pub Law 107-155, 11 Stat. 95 (2002) (codified as 2 U.S.C. § 444(a)) (repealed 2005).

²⁸ See *McConnell*, 540 U.S. at 142.

²⁹ Whitaker, *supra* note 8, at 4.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*; see *McConnell*, 540 U.S. at 133 (2003) (citing 2 U.S.C. § 441i(a) (2003)).

³³ See *McConnell*, 540 U.S. at 141–45.

³⁴ Dorf, *supra* note 1.

³⁵ *McConnell*, 540 U.S. at 119.

³⁶ See Dorf *supra* note 1.

³⁷ *Id.*; see also Zimmerman, *supra* note 26.

³⁸ See Dorf *supra* note 1.

³⁹ Anne Gearan, *Supreme Court Weighs Campaign Finance Law*, available at <http://www.twincities.com/mld/twincities/6719811.htm> (Sept. 8, 2003).

⁴⁰ *McConnell v. FEC: Litigation Over the Bipartisan Campaign Reform Act of 2002*, Public Citizen, available at <http://www.citizen.org/congress/campaign/legislation/bcralaw/articles.cfm?ID=8521> (Dec. 18, 2003).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Supreme Court Hears Arguments In Campaign Finance Challenge*, at http://www.pbs.org/newshour/updates/scotus_09-08-03.html (Sept. 8, 2003).

⁴⁴ *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 232 (2003); see Public Citizen BCRA, *supra* note 22.

⁴⁵ *McConnell*, 540 U.S. at 212–19, 233.

⁴⁶ *Id.* at 142.

⁴⁷ See Center For Responsive Politics, *Top Individual Contributors to 527 Committees 2004 Election Cycle*, available at <http://www.opensecrets.org/527s/527indivs.asp?cycle=2004> (last visited Apr. 6, 2005).

⁴⁸ Statement made by the Supreme Court after predicting the BCRA would not be Congress’ last effort “to confine the ill effects of aggregated wealth on our political system.” *McConnell*, 540 U.S. at 224.

⁴⁹ See 2 U.S.C. § 441i (a), note (2004); see also Bipartisan Campaign Reform Act of 2002, Pub Law 107-155, 11 Stat. 95 (2002) (codified as 2 U.S.C. § 444(a)) (repealed 2005).

⁵⁰ See *Shays v. Fed. Election Comm’n*, 340 F. Supp.

2d 39, 42 (2004).

⁵¹ Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶¶ 7–8 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁵² *Id.*

⁵³ See, e.g., *id.*

⁵⁴ Press Release, Democracy 21, The Federal Election Commission: A Failed Agency On the Verge of Big Time Failure Once Again (May 12, 2004), available at http://www.democracy21.org/index.asp?Type=B_PR&SEC={A8B4DE06-6-CC2-419D-8A26-B5870F580B57}&DE={589C30AF-88FC-48C4-9983-92760690CC2D}.

⁵⁵ *Id.*

⁵⁶ Fred Wertheimer *et. al.*, *Democracy 21 et. al.*, Complaint Before the Federal Election Commission (Aug. 2004) (on file with JELP).

⁵⁷ Thomas J. Josefiak, General Counsel Bush-Cheney '04, Jill Holtzman Vogel, Chief Counsel Republican National Committee, Complaint Before the Federal Election Commission (Mar. 31, 2004) (on file with JELP).

⁵⁸ *Id.* The complaint specifically named The Media Fund, Inc., America Coming Together, America Votes, Voices for Working Families, Moveon.org, Partnership for America's Families, Moving America Forward, and John Kerry for President, Inc.

⁵⁹ *Id.* The complaint named Harold Ickes, Ellen Malcolm, Bill Richardson, Steve Rosenthal, Jim Jordan, George Soros, Laurie David, Steven Bing, and Peter Lewis.

⁶⁰ *Id.* In their complaint, Republicans asked the commission to take an "extraordinary" measure and immediately dismiss the complaint. Conservatives made their unusual request because they needed swift action. Going through the appropriate FEC enforcement process would have taken too long. Conversely, by quickly dismissing the complaint, the FEC

would have "allow[ed] for immediate judicial review" by giving Republicans standing after having exhausted their administrative remedies. *Id.* The RNC justified seeking "unprecedented relief from the FEC to deal with [the] unprecedented situation." Republican National Committee, *Summary of the FEC Action Filed by the RNC and Bush Cheney Campaign*, at <http://www.gop.com/media/FECSummary.pdf> (last visited Apr. 6, 2005).

⁶¹ Fred Wertheimer *et. al.*, *supra* note 56.

⁶² Whitaker, *supra* note 8.

⁶³ See Press Release, RNC and Bush-Cheney Campaign, Joint Statement by Bush-Cheney Campaign Chairman Marc Racicot and RNC Chairman Ed Gillespie on Today's FEC Ruling on 527 Groups (May, 13, 2004), available at <http://www.gwu.edu/%7Eaction/2004/money/bushrnc051304st.html>.

⁶⁴ Under the new regulations, if a group's fundraising solicitation "indicates that any portion of the funds will be used to support or oppose a federal candidate," individuals may not contribute more than \$5,000, and corporations and unions may not give anything to the organization. See Thomas B. Edsall, *FEC Votes to Curb Nonparty Donations: Stricter Rules Will Go Into Effect in January*, WASH. POST, Aug. 20, 2004, at A6. Furthermore, the new rule required that 527's pay for half of their expenses with hard money. *Id.* However, the new rules may be meaningless when practically applied. The regulations could merely encourage 527's to play word games when drafting their fundraising solicitations.

⁶⁵ See John Bresnahan and Amy Keller, *Ney Ready to Act on 527 Regulation*, available at http://www.rollcall.com/pub/50_21/news/6610-1.html (Sept. 1, 2004).

⁶⁶ *Id.*

⁶⁷ See, e.g., Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶ 48 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁶⁸ This note will refer to the lawsuit filed in Sep-

tember 17, 2004 as *Shays II* in order to distinguish it from the separate, high-profile lawsuit filed by Senators Shays and Meehan (and containing the same name) two years before. See *infra* note 72.

⁶⁹ *Id.*

⁷⁰ D.C. Circuit Current Oral Argument Calendar, at <http://pacer.cadc.uscourts.gov/common/courtrm/60day.html> (last visited Apr. 6, 2005).

⁷¹ Press Release, The Campaign Legal Center, McCain, Feingold to Support “527 Group” Lawsuit (Sept. 14, 2004), available at <http://www.campaignlegalcenter.org/press-1299.html>.

⁷² In October, 2002, Congressmen Shays and Meehan filed a prior lawsuit asking the court to strike down numerous FEC regulations defining key BCRA terms. *Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28, 35 (2004). More precisely, their complaint asked the court to enjoin enforcement of the contested BCRA regulations. *Id.* at 129. The Representatives argued that the Commission’s regulations went against Congress’ intent in passing the bill by interpreting and applying BCRA terms too narrowly and consequently weakening campaign finance laws. See *id.* at 61.

On September 18, 2004, almost two years after *Shays I* was originally filed, United States District Judge Colleen Kollar-Kotelly struck down 15 of 19 challenged FEC regulations. *Id.* at 130-131. Her decision in *Shays I* invalidated, *inter alia*, regulations that defined the following terms: coordination, agent, solicit, direct, voter registration, get out the vote activity, voter identification, generic campaign activity. *Id.* at 131. However, the court failed to specifically enjoin enforcement of the invalidated rules, instead remanding the unlawful statutes back to the FEC for “further action consistent with” its opinion. *Id.* The FEC appealed the court’s decision regarding some of its regulations.

Of course, Judge Kollar-Kotelly’s *Shays I* decision did not consider whether the FEC erred in failing to define the term “political committee.” Representatives Shays and Meehan filed their original action in October 2002, long be-

fore the “political committee” debate escalated in 2004. Nevertheless, many saw the court’s decision as a clear win for campaign finance advocates critical of the Commission. Press Release, Democracy21, Federal Judge Strikes Down Fifteen FEC Regulations in Major Victory for Congressional Sponsors of BCRA; Key Regulations Rejected as “Arbitrary and Capricious” and “Contrary to Law” (Sept. 20, 2004), available at http://www.democracy21.org/index.asp?Type=B_PR&SEC=%7b0AD86D15-CC6E-478D-AB7D-E351E4DB1B38%7d&DE=%7b37299EA0-2FE4-4359-A0B1-9DCBBBE66FDE%7d.

⁷³ See, e.g., Complaint in *Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28, ¶ 48 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁷⁴ See *id.* ¶¶ 5-11.

⁷⁵ 2 U.S.C. § 431(4) (2004); see 11 C.F.R. § 100.5(a) (2004).

⁷⁶ A “contribution” is defined as “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(8)(A) (2004). Likewise, an “expenditure” is defined as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office....” 2 U.S.C. § 431(9)(A) (2004).

⁷⁷ The plain language of the preceding statutes, strictly interpreted, would mean that any group or company donating or spending over \$1,000 to influence a political campaign during a calendar year would have to register with the FEC and comply with cumbersome financial disclosure regulations.

⁷⁸ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976).

⁷⁹ *Id.*

⁸⁰ *Fed. Election Com. v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

⁸¹ Political Committee Status, 69 Fed. Reg. 11,736, 11,736-37 (Mar. 11, 2004) (to be codified

at 11 C.F.R. pts. 100, 102, 104, 106, 114); *see* 11 C.F.R. § 100.5(a) (2004); Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶ 23 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁸² 2 U.S.C. § 433 (2004); *see* 11 C.F.R. § 100.5(a); Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶ 6 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁸³ 2 U.S.C. § 434.

⁸⁴ *Id.* §§ 441b, 441a(f).

⁸⁵ *Id.* §§ 441a(a)(1)–(2).

⁸⁶ *Id.* § 441a(a)(1)(C); 11 C.F.R. § 110.1(n) (2004); *see* Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶ 6 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁸⁷ Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶¶ 5–6, 27–32 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁸⁸ The term “political organization” is defined as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1) (2004). In turn, an “exempt function” is defined as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.” *Id.* § 527(e)(2). “A Revenue Ruling issued by the IRS on December 23, 2003...identified a non-exhaustive list of factors that ‘tend to show’ whether an advocacy communication on a public policy issue is for an exempt function or not, in the absence of ‘explicit advocacy.’ The six identified factors that tend to show a communication is for an exempt function are: (a) the communication identifies a candidate for public office; (b) the timing of the communication coincides with an electoral campaign; (c) the

communication targets voters in a particular election; (d) the communication identifies that candidate’s position on the public policy issue that is the subject of the communication; (e) the position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and (f) the communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.” 69 Fed. Reg. 11,736 (Mar. 11, 2004).

⁸⁹ Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶¶ 27–32 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁹⁰ *Id.*; *see* 2 U.S.C. §§ 431(4), 433(a).

⁹¹ Complaint in *Shays v. Fed. Election Comm'n*, 337 F. Supp. 2d 28, ¶ 49 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁹² Helen Dewar, *Bill Would Curb ‘527’ Spending; No Action Expected Before Elections*, WASH. POST., Sept. 23, 2004, at A27, available at <http://www.washingtonpost.com/wp-dyn/articles/A43103-2004Sep22.html>.

⁹³ *See, e.g., Testimony of Ellen L. Weintraub Before The Comm. on Rules and Administration of the United States Senate*, 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_weintraub.htm; *Testimony of Bradley A. Smith Before The Comm. on Rules and Administration of the United States Senate*, 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_smith.htm.

⁹⁴ *See* Thomas B. Edsall & James V. Grimaldi, *New Routes for Money to Sway Voters: 501c Groups Escape Disclosure Rules*, WASH. POST., Sept. 27, 2004 at A1.

⁹⁵ *See supra* note 17.

⁹⁶ Woody Zimmerman originally used this simile when describing conservative talk radio. Zimmerman, *supra* note 26.

⁹⁷ 26 U.S.C. §§ 527(e)(1)–(2) (2004); Complaint in

“Bring It On”

Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶ 31 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁹⁸ Complaint in Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶¶ 31–32 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

⁹⁹ See Buckley v. Valeo, 424 U.S. 1, 79 (1976); Complaint in Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶ 6 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

¹⁰⁰ 2 U.S.C. §§ 441a(a)(1)(C), 441b(a) (2004); Complaint in Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶ 31 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

¹⁰¹ Political Committee Status, 69 Fed. Reg. 11,736 (Mar. 11, 2004); see 11 CFR 100.5(a); Complaint in Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶ 23 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

¹⁰² 69 Fed. Reg. at 1136-37; Complaint in Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, ¶ 23 (D.D.C. 2004) (No. 02-1984) (on file with JELP).

¹⁰³ 26 U.S.C. § 527(e)(2) (2004).

¹⁰⁴ See *infra* note 114 and accompanying text.

¹⁰⁵ Testimony of Ellen L. Weintraub Before The Comm. on Rules and Administration of the United States Senate 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_weintraub.htm.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Testimony of Bradley A. Smith Before The Comm. on Rules and Administration of the United States Senate 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_smith.htm.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Public Citizen BCRA, *supra* note 22.

¹¹³ See *id.*; Daniel M. Yarmish, *The Constitutional Basis For a Ban on Soft Money*, 67 *FORDHAM L. REV.* 1257, 1269 (1998).

¹¹⁴ See 2 U.S.C. § 441i (2004).

¹¹⁵ *Id.*

¹¹⁶ The Supreme Court stated, “Title I [of the BCRA] is Congress’ effort to plug the soft-money loophole. The cornerstone of Title I is new FECA § 323(a), which prohibits *national party committees and their agents* from soliciting, receiving, directing, or spending any soft money. In short, § 323(a) takes *national parties* out of the soft-money business.” *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 133 (*citing* 2 USC § 441i(a) (2003)) (emphasis added).

¹¹⁷ See 2 U.S.C. § 441i(a) (2004).

¹¹⁸ See *infra* notes 135–42 and accompanying text.

¹¹⁹ See 2 U.S.C. § 434(f); *McConnell*, 540 U.S. at 173–82 (2003).

¹²⁰ Testimony of Bradley A. Smith Before The Comm. on Rules and Administration of the United States Senate, 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_smith.htm.

¹²¹ S. 2828, 108th Cong. (2004).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Dorf, *supra* note 1.

¹²⁶ *Id.*

¹²⁷ See *infra* notes 135–42 and accompanying text.

¹²⁸ *McCConnell v. Fed. Election Comm'n*, 540 U.S. 93, 141–45 (2003).

¹²⁹ Dorf, *supra* note 1.

¹³⁰ Some may argue that politicians are aware of those who contribute to independent 527's and will still seek to reward them, and therefore Congress is constitutionally justified in suppressing 527 speech. Such an argument stretches *McCConnell's* logic well beyond its breaking point. Using the same logic, Congress could use the heavy boot of campaign finance laws to constitutionally suppress any political speech that helped or hurt a federal candidate as long as the candidate was aware of such speech.

¹³¹ Robert J. Samuelson, *So Much for Free Speech*, WASH. POST, Aug. 25, 2004, at A17.

¹³² See Edward B. Foley & Donald Tobin, *The New Loophole?: 527's, Political Committees, and McCain-Feingold*, at <http://www.bna.com/moneyandpolitics/loophole.htm>.

¹³³ *Testimony of Bradley A. Smith Before The Comm. on Rules and Administration of the United States Senate* 108th Cong. (July 14, 2004), http://rules.senate.gov/hearings/2004/071404_smith.htm.

¹³⁴ *Id.*

¹³⁵ See *McCConnell v. Fed. Election Comm'n*, 540 U.S. 93,133 (citing 2 U.S.C. § 441i(a) (2003)).

¹³⁶ See *infra* text accompanying note 139.

¹³⁷ *McCConnell*, 540 U.S. at 121 (emphasis added).

¹³⁸ *Id.*

¹³⁹ *Id.* at 221.

¹⁴⁰ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 44 (1976)).

¹⁴¹ *Id.*

¹⁴² *Id.* at 222.

¹⁴³ See *id.* at 220–22.

¹⁴⁴ See generally *id.*

¹⁴⁵ *McCConnell*, 540 U.S. at 306–07 (Kennedy, J., dissenting).

¹⁴⁶ *Id.* at 306 (Kennedy, J., dissenting).

¹⁴⁷ For example, Miller explains that restricting political ideas “increases the role and influence of the media, which are expressly exempted from FECA and BCRA with respect to news stories, commentaries, and editorials. Incumbents have a considerable advantage here: they have taxpayer-paid press spokesmen; they *make* news, and thus have more access to the media; and they have access to ‘inside information,’ which they communicate to, and curry favor with, the press. The reporting requirements also accentuate the role of the media in campaigns (and diminish the role of the candidates): in effect, this information is a subsidy to the media — giving it stories that it otherwise would not have been able to secure so easily.” Dr. James C. Miller III, Report in *Paul v. Fed. Election Comm'n*, available at http://www.realcampaignreform.org/miller_rpt.htm (last visited Apr. 6, 2005). Banning 527 speech would have a similar effect.

¹⁴⁸ *C.f. id.*

¹⁴⁹ *C.f. id.*

¹⁵⁰ *C.f. id.*

¹⁵¹ *Id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ Zimmerman, *supra* note 26.

¹⁵⁵ *Id.*

¹⁵⁶ Letter from Ken Mehlman, 2004 Bush-Cheney Campaign Manager, to 250 television stations (March 8, 2004) (on file with JELP).

¹⁵⁷ *Id.*

¹⁵⁸ Josefiak, *supra* note 57.

¹⁵⁹ Press Release, *supra* note 63.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* (quoting FEC Commissioner Michael Toner).

¹⁶³ *Id.*

¹⁶⁴ See Yarmish, *supra* note 113.

¹⁶⁵ See *Oversight Hearing on the Federal Election Commission, Before the S. Comm. on Rules and Admin.*, 108th Cong. (July 14, 2004) (statement of the Chairman, S. Comm. on Rules and Admin.), available at <http://www.rules.senate.gov/hearings/2004/071404LottOpen.htm>.

¹⁶⁶ See Senate Roll Call Vote no. 54, 107th Cong., 2nd Session, Mar. 20, 2002, available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=2&vote=0054.

¹⁶⁷ Evan Stephenson, *Game Theory and the Passage of McCain-Feingold: Why the Democrats Willingly and Rationally Disadvantaged Themselves*, 19 J. L. & POL. 425, 426 (2003) (citing Senate Roll Call Vote no. 54, *supra* note 166; and House Roll Call Vote no. 34, 107th Cong., 2nd Session, Feb. 14, 2002, available at <http://www.clerkweb.house.gov/cgi-bin/vote.exe?year=2002&rollnumber=34>).

¹⁶⁸ Robert B. Bluey, *Wealthy Donors Help Leftist 527 Groups Amass Huge Money Advantage*, available at <http://www.newsmax.com/archives/articles/2004/6/29/94603.shtml> (June 29, 2004).

¹⁶⁹ Zimmerman, *supra* note 26.

¹⁷⁰ *Id.*

¹⁷¹ Such as the accusation featured in a MoveOn.org commercial that President Bush knew about the September 11th attacks before they happened. Zimmerman, *supra* note 26.

¹⁷² For example, “82 percent of congressional votes in favor of the [BCRA] were cast by Democrats.” Stephenson, *supra* note 167 at 426.

¹⁷³ See *Washington Week* (PBS television broadcast, Feb. 6, 2004) transcript available at <http://www.pbs.org/weta/washingtonweek/transcripts/transcript040206.html>.

¹⁷⁴ *The White House Derby: Despite Veterans’ Ad, Kerry Remains in the Lead*, at <http://www.msnbc.msn.com/id/5770431> (Aug. 20, 2004).

¹⁷⁵ *Any Questions?*, *supra* note 2.

¹⁷⁶ See Frank James & Rick Pearson, *Kerry Files Complaint With FEC Over Ads: Bush Campaign Denies it Works With Vets Group*, CHI. TRIB., Aug. 21, 2004, available at <http://www.chicagotribune.com/news/specials/elections-utl-0408210178aug21,0,7360783.story?coll=chicago-elections-utl>.

¹⁷⁷ However, unlike the previous Bush letter, Kerry’s letter focused on content of the ads rather than their funding. See Letter from Marc Elias & Joseph Sandler, *supra* note 13.

¹⁷⁸ Zimmerman, *supra* note 26.

¹⁷⁹ *Id.*

¹⁸⁰ Zimmerman, *supra* note 26.

¹⁸¹ Dorf, *supra* note 1.

¹⁸² See *id.*

¹⁸³ See Edsall & Grimaldi, *supra* note 94.

¹⁸⁴ *Id.*

¹⁸⁵ For example, “[a] 501c (3) group can register voters, and donations to it are tax deductible, but it is prohibited from engaging in par-

tisan or electioneering work. A 501c (4), (5) or (6) group can be involved in elections, but the cost of doing so must be less than one-half the group's total budget IRS rules also stipulate that electioneering by 501c (4), (5) and (6) groups cannot be 'express advocacy' — that is, telling people to vote for or against specific candidates. But such groups can run ads that address public issues such as immigration or taxes and that refer to the stands of candidates in ways that help or hurt them." *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Dorf, *supra* note 1.

¹⁹¹ Foley & Tobin, *supra* note 132.

¹⁹² *See id.*

¹⁹³ *See id.*

¹⁹⁴ *See id.*

¹⁹⁵ Dorf, *supra* note 1.

¹⁹⁶ *See* 2 U.S.C. § 441a, n.2 (2004) (Enforcement Authority); Bipartisan Campaign Reform Act, 2 U.S.C. § 444(a), Pub. L. No. 107-155, 116 Stat. 95 (2002) (repealed 2005).

¹⁹⁷ *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). When determining whether to defer to an administrative agency, such as the FEC, the court should apply the *Chevron* standard. *See id.* at 842–44. First, courts should examine statutes to determine whether Congress has passed legislation addressing "the precise question at issue." *Natural Resources Defense Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (citing *Chevron*, 467 U.S. at 843 n.9). If statutes are "silent or ambiguous with respect to the specific issue," courts should defer to an agency policies or actions unless the agency is acting arbitrarily and capriciously in enforcing the

provision. *Chevron*, 467 U.S. at 843–44. More precisely, *Chevron* states "if Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* A Court should not order an administrative agency to take a specific action just because the court disagrees with the way an agency reasonably interprets a law. *See id.*

¹⁹⁸ *See supra* notes 115–19 and accompanying text. Congress as a whole intended the major soft-money prohibitions of the BCRA to apply only to federal candidates, national parties, and committees coordinating with such candidates or parties. Although the Congressmen who sponsored the BCRA would now like to extend Title I's scope to apply to 527 organizations the Act itself suggests that Congress as a whole did not intend for the Act to have such sweeping impact.

¹⁹⁹ An "independent" 527 group is one not coordinating with national parties or federal candidates.

²⁰⁰ *See supra* notes 135–42 and accompanying text.

²⁰¹ *See supra* notes 137–42 and accompanying text.

²⁰² Some who advocate squelching 527's might move away from the problematic "political corruption" argument and instead contend that politicians or government agencies should shield voters from being manipulated by untrue 527 ads. They may believe that disingenuous, wealthy activists lead droves of misinformed Americans like sheep to polling places by spreading lies through 527 organizations. They may further believe that government should police political discourse to ensure a level playing field.

However, democracy works best when the American people, rather than politicians or Washington bureaucracies, determine whether particular political speech is relevant or true. This is, in part, because political "truth" is diffi-

cult to identify; it often seems to lie in the eye of the beholder. Those contributing money to MoveOn.org may view Iraq military operations as a tragic waste of American lives and resources distracting us from the war on terror, fanning the flames hatred towards America, stirring the mid-east hornet's nest, and breeding a new generation of terrorists. Conversely, those contributing to conservative 527's may believe that invading Iraq was an indispensable part of the war on terror that would help secure Americans' safety by killing or capturing terrorists and by making Iraq a beacon of democracy and stability in the Middle East. Similarly, in 2004 the veterans and former-POW's sponsoring SBVFT may have viewed Kerry's Vietnam service and conduct after the war as reprehensible, while others viewed it as heroic. People on each side charge the other side with lying, while asserting they have a monopoly on political "truth."

²⁰⁹ Samuelson, *supra* note 131.

²¹⁰ See Dorf, *supra* note 1.

²⁰³ Dorf, *supra* note 1.

²⁰⁴ John R. Lott Jr. & Benjamin Ginsberg, *A Short, Unhappy History of Campaign Finance Reform*, AM. ENTERPRISE (Oct.-Nov. 2004), available at http://www.findarticles.com/p/articles/mi_m2185/is_7_15/ai_n6335399.

²⁰⁵ See, e.g., Michael Saxl & Maeghan Maloney, *The Bipartisan Campaign Reform Act: Unintended Consequences and the Maine Solution*, 41 HARV. J. ON LEGIS. 465 (2004).

²⁰⁶ Lott & Ginsberg *supra* note 204.

²⁰⁷ See *id.*

²⁰⁸ See *supra* notes 114–19 and accompanying text. The plain language of Title I of the BCRA suggests that Congress intended soft-money restrictions to apply to groups coordinating with national parties or federal candidates as well as the parties and candidates themselves, but not to independent political groups. Although the Congressmen who sponsored the BCRA would now like to extend Title I's scope to apply to 527 organizations, the Act itself suggests that Congress as a whole did not intend for the Act to have such sweeping impact. See *id.*

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