

Free Speech and the 527 Prohibition

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Executive Summary

Proponents of measures to make independent section 527 organizations into “political committees” under the Federal Election Campaign Act, subjecting the organizations to federal campaign limits and reporting requirements, misunderstand both the role and result of regulation in campaigns and the jurisprudence in this area.

Such measures would leave much activity unregulated and would induce a shift of activity from one legal structure to another, thus rendering any perceived partisan advantage arising from the measures improbable or incalculable.

Organizations engaged in independent speech and association with no connection to candidates or officeholders cannot be made to register with the Federal Election Commission simply because they mention candidates; and they cannot be limited in the financial contributions they may receive for their independent communications. Independent organizations do not corrupt the legislative process. They are not corrupting the balloting process. They are a part of, not corrupters of, the information exchange process in and around elections.

That politicians and party chairmen on both sides of the aisle favor restricting the speech of independent organizations on vaguely egalitarian grounds ignores the Supreme Court’s clear instruction that limiting the voice of some to enhance the relative voice of others is foreign to the First Amendment. The instrumental value of this maxim is backed by data. Studies show that more speech in campaigns, not less, benefits voters of all socio-economic backgrounds.

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Introduction¹

At present there are proposals in the Senate and a companion measure in the House to “ban 527s,” which is tantamount to requiring independent organizations registered under section 527 of the Internal Revenue code to register as political committees under the Federal Election Campaign Act of 1971 (“FECA”). Under section 527, a political organization is not subject to taxation on its exempt function income.² “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.”³ Exempt function income includes campaign contributions and membership dues.⁴

In 1971 Congress created the “political committee” under FECA. In 1975 Congress created section 527 to allow multi-purpose tax-exempt organizations to characterize much of their prior activity as “political activity” subject to a favorable tax treatment. The IRS knew that certain 501(c) organizations—(c)(4) (social advocacy organizations), (c)(5) (labor unions), and (c)(6) (trade associations)—were engaged in a combination of social welfare, advocacy, and political activities, but Congress anticipated that

a section 501c organization that is permitted to engage in political activities would establish a separate organization that would operate primarily as a political organization and directly receive or disburse all funds related to [political] activities. In this way, the campaign-type activities would be taken entirely out of the section 501(c) organization, to the benefit of both the organization and the administration of the tax laws.⁵

Thus, the federal government drove mixed-purpose organizations into apparently single-purpose operations, although the overarching organizations continued to perform multiple functions. In 2000 Congress required the 527-arms of such organizations to report their activity in detail as a condition of keeping their privileged tax treatment.⁶ In 2002 Congress made it much more difficult for political party committees and others to finance their operations. In 2006 it appears Congress stands ready to make it nearly impossible for the independent organizations that made full use of the section 527 haven Congress created to speak about politics. But in doing so, Congress seems to ignore the legitimate bases for such regulation, which are: preventing the corruption of officeholders (or its appearance) by large contributions; prohibiting spending of corporate and union treasury funds in connection with federal elections; and preventing circumvention of the limits designed to prevent that corruption.

BCRA Cut the Link to Officeholders

The Bipartisan Campaign Reform Act of 2002 (BCRA)⁷ cut the link between federal officeholders and non-federal funds or “soft money” by prohibiting officeholders from soliciting, directing, or spending soft money, or establishing, financing, maintaining, or controlling any entities that deal in soft money.⁸ BCRA forced the national party committees to renounce 60 percent of their funding, and to finance all their activities, both federal and non-federal, with federal dollars (“hard money”). BCRA also placed strict limits on state and local political parties in federal election years, including requiring them to fund their get-out-the-vote, voter registration, voter identification, and generic campaign activities with federally regulated money. The rationale was to prevent the appearance of corruption that results from large contributions going to officeholders or that reach officeholders *via* the political party committees to which those officeholders belong. BCRA also imposed restrictions on

independent, issue advocacy by unions, corporations, and incorporated non-profit advocacy organizations, trade associations and section 527 organizations, preventing those organizations from paying for any communication that names a federal candidate within 30 days of a primary, caucus, or convention or 60 days of a general election. “Congress found that corporations and unions used soft money to finance a virtual torrent of televised election-related ads during the periods immediately preceding federal elections [30 days preceding a primary, convention, or caucus or 60 days preceding a general election], and that remedial legislation was needed to staunch that flow of money.”⁹

The law also decreed spending made in coordination with a political party¹⁰ to be a federally regulable contribution capable of making the organization paying for the activity a federal political committee, subject to the full panoply of restrictions and reporting requirements. Thus, BCRA cut completely the link between officeholders and soft money.

But BCRA did not “ban soft money,” as reform organizations like to say. The concept “soft money” is not so much a quantifiable entity as the inverse of a quantifiable entity. “Soft money” is merely money not regulated by the Federal Election Commission. Attempting to “ban soft money” is like attempting to “ban darkness.” The question in the first case is where else to apply federal regulation, just as the question in the second is where to shine additional light.

The actions of section 527 organizations in the 2004 election cycle did not “circumvent” the limits of BCRA, as many have alleged. First, BCRA cut the soft-money tie to federal officeholders by prohibiting soft money solicitations and banning soft money donations to the national party committees to which the officeholders belong. The 527 organizations of 2004 were not party committees and had no officeholders as members. The 527s had no ties to the party committees to which those officeholders belong; if they had, they would have been captured under BCRA. Consequently, the 527s did not “circumvent” the soft money ban, which applies only to national parties or their affiliates, or other entities controlled by federal officeholders.

Second, BCRA did not limit the independent speech of independent entities, because it could not do so constitutionally. American law countenances no limits on independent advocacy (outside of a voluntary limit compensated by public financing). But there are funding source prohibitions. Even BCRA’s electioneering communication provisions—a source prohibition—only redrew the election-related line to within 30 days of a primary, caucus, or convention or 60 days of a general election for advertising that mentions candidates and is paid for with union or corporate treasury funds. The activity of section 527 organizations in the 2004 cycle—that is, advocacy by entities wholly detached from officeholders and made outside of the time restraints contained in BCRA—were not a “circumvention” of BCRA in any meaningful sense of the term.

Proposals to convert the remaining 527 organizations into FECA regulated political committees have nothing to do with limiting the flow of money to candidates or parties, or deterring any other corruption the courts have ever recognized. Rather, the 527 ban strips wholly independent organizations of their right to full-throated advocacy under the First Amendment in a ham-fisted attempt to restore the storied role of America’s political parties in our democratic system, an attempt to put the BCRA genie back in the bottle.

Some Features of the 527 Proposal

The proposals would compel most non-federal section 527 organizations—whether they are independent, affiliated groups or the separate funds of section 501(c) organizations—to operate instead as federal political committees, subjecting them to all of FECA’s hard money, registration, and reporting requirements. The measures would declare every organization described in section 527 of the Internal Revenue Code a federal PAC, unless it fits within one of several narrow exceptions. And any excepted 527 organization loses its exception if it spends more than \$1000 during any calendar year on either a public communication that “promotes, supports, attacks, or opposes” a clearly identified candidate at any time during the year before a general election or engages in “voter drive activity” (partisan or non-partisan voter registration, voter identification, get-out-the-vote activity, or generic campaign activity). The measures also limit donations to the non-federal account of any applicable organization—used for purely non-federal activities—to \$25,000 per year from individuals.

Partisan Advantage is Improbable or Incalculable

There is no denying that measures are being considered and rejected due to perceived partisan advantage in regulating the activities of 527s.¹¹ But that apparent partisan advantage is largely overstated and is lessening as both sides of the political aisle adapt to the changing legal landscape. Before passage of BCRA the speculation was that the Democratic party would be unable to match the Republicans in hard dollar fundraising but had a clear advantage in raising soft money. The first proved to be less true than imagined, although in “2004 the three Republican Party committees—RNC, NRSC, and NRCC—outraised the comparable Democratic Party committees \$898 million to \$679 million in hard money receipts.”¹² And in the soft money comparison, seven of the ten largest 527s in 2004 were pro-Democrat.¹³ The Republicans got a late start in the 527 fundraising game, waiting as late as May of 2004, by some accounts, to fully engage,¹⁴ but once fully engaged they were besieged with donations from donors at all income levels.

Countering the advantage on the ground

The advantage the Republican Party enjoyed in the 2004 election cycle was its ground game operation; that is, its ability to mobilize voters through the use of an improved system of data mining, micro targeting, and voter file enhancement that allowed the Republican Party to know the issues that moved voters and whether those voters were inclined to vote Democrat or Republican.¹⁵ Weeks ago, however, the *Washington Post* reported that Democrats are making inroads on the technological front.¹⁶ George Soros and Harold Ickes have started a for-profit company designed to enhance lists for Democratic voters.¹⁷ They intend to sell the lists to existing organizations that might use them on election day—an operation that will not be captured by a 527 ban and could cumulatively eclipse the nearly \$200 million hard money advantage Republicans enjoyed in the 2004 cycle. The data could be purchased by organizations whose respective “major purposes” (a constitutional requirement for registration as a political committee) were determined long ago—organizations such as section 501(c)(5) labor unions and left-leaning 501(c)(4) advocacy organizations—groups the Federal Election Commission (FEC) would never call political committees. The *Post* notes that the Ickes and Soros activity is a no-confidence vote in the efforts of the DNC and its chairman Howard Dean.¹⁸ But their activity is more likely a no-confidence vote in the current campaign finance system that starved the national party committees of as much as 60 percent of their previous resources. Democratic data mining has moved offshore and has not been placed in a section 527 organization. That the news story mentioned a potential rift between Soros and

Ickes, on one hand, and the DNC and Dean, on the other, serves only to show that the two entities are not coordinating their efforts and working in tandem. Coordination would place the activity squarely within BCRA.

Activity the measures leave behind

Data mining is not the only activity left-leaning individuals and organizations can perform outside the strictures of a 527 ban or BCRA. There is no reason the private efforts of George Soros—or Peter Lewis, or Steve Bing—would have to stop at data mining. Political activity of any kind could be financed in their individual capacities after a 527 ban becomes law, and if past practice is any indication, they will have no qualms about doing so.

Nothing stops 501(c)(3) organizations from engaging in “nonpartisan” voter registration activity, even though such activity can easily be skewed to influence one party or another—registering voters in Cleveland rather than Cincinnati, for example, or Marin County but not Orange County.¹⁹ And the left has multiple coalitions and union members that tend to favor the Democratic Party and have proven willing in the past to get involved or to volunteer time.

Tax exempt organizations under 501(c)(4) (social advocacy) may spend for election-related activity without jeopardizing their tax exempt status provided such activity is not their primary purpose or activity.²⁰ Unless section 501(c)(4) organizations are added to the 527 proposal—a highly dubious proposition, constitutionally—social advocacy organizations such as the Sierra Club, Children’s Defense Fund, Earth First, NOW, and NARAL may register and identify left-leaning voters, may conduct get-out-the-vote activities, and may even run broadcast advertising naming candidates, so long as they avoid the electioneering communication restrictions of BCRA. Well-established advocacy organizations should have no trouble proving first that their respective primary purposes are not to intervene in politics, and, second, that more than half of their activity over the years has been for genuine advocacy of left-leaning causes. Because many 501(c)(4) organizations currently make use of a 527 arm, they are well poised to shift much activity into the (c)(4) with little effort were a section 527 measure to pass Congress and be signed into law. Established advocacy groups would have a marked advantage over newly minted organizations as the rule on election-related activity is essentially that the organization must be able to show more than \$1 of advocacy activity for every dollar of election-related activity. There are established (c)(4) organizations that can engage on the right as well, such as National Right to Life, the U.S. Chamber of Commerce, and the National Rifle Association, which has between 3 and 4 million members.²¹

Section 501(c)(5) organizations (labor unions) will also be able to spend nearly half of their resources in election-related activity to the general public, unless, of course, Republicans add labor unions to the 527 proposal. Labor unions claim 12 to 13 percent of wage and salaried workers nationwide—nearly ten times the size of the NRA—with nearly 30 million members.²² Because unions have the well-established primary purpose of collective bargaining they should be able to get out the vote, identify and register voters, run phone banks to the general public, engage in direct mail campaigns, and run broadcast advertising naming candidates outside the electioneering provisions of BCRA with little concern of running afoul of the Internal Revenue Service.

There is also the “membership exception” to federal campaign law,²³ not excluded in proposals to regulate 527s, which allows corporations to make communications to their executives and allows unions to make communications to their members on any subject, including express advocacy. Messages can be coordinated with candidates.²⁴ Communications can include printed materials, candidate appearances before the members, operation of phone banks to tell members to register and vote for a particular candidate, even member-focused registration and get-out-the-vote drives.²⁵

Hampering and enhancing relative voices

Republicans also seem to believe that sidelining large donors on both sides of the aisle will keep the Democratic message, carried by the Media Fund and other organizations in the 2004 cycle, off the air. Thus, they would extend BCRA's ban on corporate or union-paid advertising within 30 or 60 days of an election to 365 days per year for section 527 organizations, and include advertising paid with funds from individuals, not just corporations or unions.

Like all campaign finance regulation measures, a 527 ban tends to protect incumbents. That is why Congress may pass it: Congress is, after all, a collection of incumbents.²⁶ But Republicans seem to be missing the fact that 2008 will be the first presidential contest in decades devoid of incumbents. And looking at the two major parties vying for office in the 2008 cycle, the Democratic frontrunners for president exhibit the features of incumbent politicians more than do the Republican counterparts. Who is going to correct the record when the campaigns of Democratic officeholders begin? James Q. Wilson has cited a study by the Center for Media and Public Affairs (CMPA) demonstrating that, especially during the month before the election, Senator John Kerry received more favorable mentions than any presidential candidate in the history of CMPA's twenty-five year study of television broadcasting.²⁷ "Since 1980 (and setting aside the advent of Fox News), the Democratic candidate has received more favorable mentions than the Republican candidate in every race except the 1988 contest between Michael Dukakis and George H.W. Bush. A similarly clear orientation characterizes weekly newsmagazines like *Time* and *Newsweek*."²⁸ Peggy Noonan has opined that the Democratic frontrunner will have half of the mainstream media behind her, making it difficult for much of the other half to be against her.²⁹ There will be practical limits on the ability of the Republican Party to run advertising to correct the record because it is as likely as not that the Republican nominee for president will ask—or will be forced by the press to ask—that his party take the high road and keep critiques to a minimum. Other established Republican organizations may find themselves in a similar position.

But quite apart from the potential for 527 messaging to help the Republicans in the future, it helped the Republicans in 2004. Recall the Swift Boat Veterans and POWs for Truth, which challenged John Kerry's account of his service record during the Viet Nam War. Under federal communications law, a broadcast station cannot refuse to run a candidate's ad even if the broadcaster believes the ad is misleading or false.³⁰ (There are valid reasons for this.) Yet, a broadcast station is under no obligation to run an ad by a 527 organization that is false or misleading. 527 advertising, therefore, must be truthful; it can correct a candidate's record in public advertising; and it is a necessary and vital part of informing voters about the veracity of candidate assertions. There is no reason to believe this task should be left to the media, or that the media will hear about the story without advertising, or would run the story if they heard about it in the absence of advertising. Indeed, the Swift Vets held a press conference that went unattended; and they garnered little notice until they took to the airwaves.

Democratic dictum is equally disturbing

The apparent gaming of the political system is not one sided. Democrats are countering the Republican call for a 527 ban by advocating the full public funding of Senate and House races, thereby erasing the Republicans' hard money advantage.³¹ Both the Republican 527 ban and the Democrats' push for full public financing, however, seek, ultimately, to cut independent speakers and citizens out of the process. The Republicans' plan would do so today; the Democrats' plan would do so tomorrow.

Opposing candidates are not the only forces that candidates must respond to when attempting to win or keep political office. Systems of full public financing only forestall the question of how to restrict the efforts of independent actors³² that Republicans seem willing to “fix” in the current round of 527 measures. Indeed, the 2004 presidential contest was publicly funded. Most advocates for public financing presume, erroneously, that the desire of a candidate to respond with advertising comes only from an opponent. But a wealthy individual might run an independent ad campaign that would force a publicly funded candidate to react. A PAC could make an independent expenditure; a non-profit organization enjoying the *MCFL* exemption³³ could do the same; or a newspaper or broadcast outlet could run a news program or editorial that would force the candidate to respond. Some or all of those entities, including press entities, would have to be limited in their spending (or candidates highly subsidized) for full public financing to work to “level the playing field”—and some academics have suggested regulating the press and media for just this purpose.³⁴ While past restrictions in the campaign finance area depended on a link between the activity restricted and the officeholder, the rationale behind the Republicans’ 527 ban and the Democrats’ call for full public financing would stretch the notion of such a link to anyone an officeholder felt a need to respond to with advertising. There is no existing constitutional precedent that would not be altered or abandoned to make way for such measures. Put simply, limiting the speech of independent speakers lacks a compelling basis and is unconstitutional.

Limiting the Speech of Independent Speakers Is Unwise and Unconstitutional

Forcing PACs on citizens is a matter for courts, not just Congress

To constitutionally regulate campaign finance, the government must demonstrate that the “harms it recites are real,” not “mere speculation or conjecture.”³⁵ Proposals to subject section 527 organizations to political committee status, with scant regard to their activities, effectively impose an “any purpose” test in brazen disregard of the “major purpose” test the Supreme Court established in *Buckley v. Valeo*. Such proposals presume that any communication mentioning a candidate that promotes, supports, attacks, or opposes that candidate at any time of the year—or any “voter drive activity,” even if totally non-partisan—is sufficient to trigger political committee status. If such proposals were in effect during the last cycle, any mention of President Bush’s or Senator Kerry’s policies from November 2, 2003 to November 2, 2004, or any attempt to identify voters, would have turned the 527 organization into a federal political committee. In *FEC v. Beaumont*, the Court noted that a non-profit corporation entitled to the *MCFL* exemption of federal campaign law—which exempts certain non-profit corporations from FECA’s registration requirement—would have to register as a political committee to make contributions to federal candidates,³⁶ though it would not have to register to make independent expenditures. The direct nexus to a federal candidate and the entity’s enjoyment of the corporate form were ample reason to require it to register.³⁷ There is no such connection here, however, or existing 527 organizations would already be covered.

Establishing and maintaining a PAC, however, is not a minor administrative task, and it has become more onerous with each new round of restrictions on PACs and those who run them. Gone will be the ability of citizens to adapt quickly and associate freely in support of a position when issues arise. The various funding source, amount, and disclosure requirements of PAC compliance make it difficult to raise the quantities of money for broadcast communications. New or small organizations may have a hard time, given the limited number of employees or members from whom they can solicit at all: not just anyone may contribute to a PAC; you have to belong to the organization, or work for the company or union that sponsors it. That has practical consequences of which courts are aware. The Swift Vets’ communications would have been impossible, for example, without the modest seed money that would become illegal under current 527 proposals. Or if the PAC were wildly

successful, however unlikely, it would come at the expense of other right-leaning PACs or party committees, all of which rely on individual contributors bound by biennial aggregate limits on their contributions to all political committees during an election cycle. In other words, the question of who will join your PAC in time to raise enough funds at a maximum of \$5000 per person for advertising is a very real constraint on an organization's ability to run advertising—independent advertising, no less.

Independent voices can't be limited

Forcing political committee status on the organizations is only one question in assessing constitutionality. The “key question is whether individual contributions to any political committee—527 or not—that does not make contributions to a candidate but instead makes only expenditures can be subject to limitation.”³⁸ In *Buckley v. Valeo*, the Supreme Court stated that the First Amendment permits the government to regulate campaign spending to prevent the corruption of officeholders or its appearance. The Court has not recognized any interest in “equalizing” speech. Contributions and funds spent in coordination with a candidate can be limited to protect against legislative quid pro quos.³⁹ The Court has also said that contributions to an organization that in turn makes both contributions and independent expenditures (defined constitutionally as “express advocacy”) can also be limited to make regulatory oversight feasible; to prevent the possibility that unlimited funds would flow to candidates. But independent spending lacks the necessary connection to officeholders, is not corrupting, and cannot be limited. The “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.”⁴⁰ Independent spending is not corrupting.⁴¹ Likewise, contributions to organizations that engage in independent spending are also not corrupting. The Court has already granted constitutional protection to an individual's independent spending. George Soros may buy all the advertising he wants. That right extends also to an individual's donation to an organization that engages in independent spending. “The independent expenditure ceiling fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process ... and “heavily burdens core First Amendment protection.”⁴²

As stated by Professor Richard Briffault, “[t]wo Supreme Court decisions provide support for the argument that if an independent expenditure does not present a danger of corrupting or appearing to corrupt officeholders, then contributions to a political committee that makes only independent expenditures cannot be limited.”⁴³ The first case is *California Medical Ass'n v. FEC*, a case involving limits on contributions by a trade association to its own PAC. In the plurality was Justice Blackmun, who wrote in concurrence that although the limit on contributions to a political committee is valid “as a means of preventing evasion of the limitations on contributions to a candidate[,] ... a different result would follow [if the limit] were applied to donations to a political [organization] established for the purpose of making independent expenditures, rather than contributions,” because “a committee that makes only independent expenditures ... poses no threat” of corruption.⁴⁴ Professor John Eastman has noted that contributions to a committee that does not give to candidates, such as most section 527 organizations contemplated by current proposals, are deserving of even more constitutional protection because “the principal message expressed by a contribution to a noncandidate committee is agreement with and furtherance of that committee's views,” unlike the message expressed by contributions to a candidate committee or a committee that in turn gives to candidates. This approach is bolstered by the second case, *Citizens Against Rent Control*, which invalidated a contribution limit to a ballot proposition committee because the lack of a nexus to a candidate made corruption inapplicable.⁴⁵ Similarly, where the nexus to an officeholder is not present, the anti-circumvention rationale of *McConnell* is also not furthered by a limit on contributions to organizations that engage in wholly independent activity.⁴⁶

Even though the contribution limit applies to the independent spending of political committees that also contribute to candidates or make coordinated expenditures, it is not clear that the Court would approve limits on organizations that engage in wholly independent activity. As noted by Professor Briffault, the *McConnell* Court's treatment of this issue related to BCRA's application of contribution limits to the activities of political parties.⁴⁷ But the section 527 organizations Congress appears interested in and political party committees are not alike. "[F]ederal candidates and officeholders enjoy a special relationship and unity of interest" with their political party, said the *McConnell* Court.⁴⁸ "The national committees of the two major parties are both run by, and largely composed of, federal officeholders and candidates."⁴⁹ The "close connection and alignment of interests" between candidates and their political parties means that "large soft-money contributions to national parties are likely to create the actual or apparent indebtedness on the part of federal officeholders, regardless of how those funds are ultimately spent,"⁵⁰ and the same is true of "the close ties between federal candidates and state party committees."⁵¹

The same cannot be said of 527 organizations. There is no record that candidates or party committees coordinated their spending with the 527s. Section 527 organizations simply have no comparable ties to candidates, thus making the anti-circumvention rationale of *McConnell* far too tenuous and unsuitable. Spending by section 527 organizations does not corrupt the legislative process because there is no nexus to lawmakers. It does not corrupt the balloting process. And spending by section 527 organizations does not corrupt the process of information exchange in the run up to the election. Indeed, spending by section 527 organizations is an integral part of the process of information exchange. And the information exchange needs to be open, robust and uninhibited.

More speech is what is needed, not less

Studies indicate that campaign spending diminishes neither trust nor involvement by citizens in elections. Indeed, spending increases public knowledge of candidates among all groups in the population. "Higher campaign spending produces more knowledge about candidates," whether measured by name identification, association of candidates with issues, or ideology; and setting a cap on spending would likely produce a less informed electorate.⁵² Unlimited spending does not confuse the public,⁵³ and the benefits of campaign spending are broadly dispersed across advantaged and disadvantaged groups alike. That is, as incumbents are challenged by spending, both advantaged and disadvantaged groups gain in knowledge.⁵⁴ And so-called negative advertising campaigns do not demobilize the public, as many have alleged.⁵⁵

Razing speech to the same level

Yet many persons inside the beltway believe that 527s should be regulated on egalitarian grounds. Republican Party chairman Ken Mehlman is outspoken in support of 527 regulation, declaring that Congress “must reform 527s, so that everyone plays at the same level, and billionaires can’t once again use loopholes to try to buy elections.”⁵⁶ Democratic Party chairman Howard Dean signed expenditure limit legislation as Governor of Vermont and had the DNC file an *amicus* brief to the Supreme Court in support of the legislation.⁵⁷ Senator John McCain “said that lawmakers should support the bill out of self-interest, because it would prevent a rich activist from trying to defeat an incumbent by diverting money into a political race through a 527 organization. ‘That should alarm every federally elected Member of Congress,’ he said.”⁵⁸ Senator Trent Lott has called for limits on 527s to “level the playing field.”⁵⁹ That these candidates and party chairs notice the spending and how it may benefit or hurt them is also a tenuous justification for regulation. Dissenting in *McConnell*, Chief Justice William Rehnquist wrote that benefit—even benefit expressed in gratitude—is not enough to justify restrictions, otherwise this rationale could serve as a basis to regulate “editorials and political talk shows [that] benefit federal candidates and officeholders every bit as much as a generic voter registration drive conducted by a state party,”⁶⁰ a position adopted by the *McConnell* majority.⁶¹ Preventing circumvention of applicable contribution limits and source prohibitions was the rationale employed by the Court in *McConnell*. The rationale was not to foster egalitarianism.⁶²

Buckley long ago rejected the argument that “equalizing the relative ability of individuals and groups to influence the outcome of elections”⁶³ is a compelling interest, adding that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”⁶⁴ The Court has said elsewhere that trying to manipulate groups’ relative ability to speak “is a decidedly fatal objective.”⁶⁵ And there is good reason to be suspicious of the motives of incumbent legislators and party chairmen seeking egalitarianism in campaign spending. After a certain level of spending, the utility of further spending declines, and incumbents hit the point of marginal utility earlier than opponents.⁶⁶ Political free trade is both the norm and normative prescription for a healthy and constitutional political system in America. And “[p]olitical ‘free trade’ does not necessarily require that all who participate in the political marketplace do so with exactly equal resources.”⁶⁷

Notes

¹ My thanks to James Bopp, Jr. for his advice; to Professor Richard Briffault for placing most all of the relevant considerations into one law review article; and to Laurence Gold for his concise explanation of pending proposals, all of which were valuable to me on short notice. Thanks also to Roger Pilon and John Samples for their valuable editorial suggestions.

² A section 527 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 for making expenditures, or both, for an exempt function.” 26 U.S.C. 527(e)(1) (2000).

³ 26 U.S.C. 527(e)(2) (2000).

⁴ 26 U.S.C. 527(e)(3) (2000).

⁵ S. REP. NO. 93-1357 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478, 7506.

⁶ Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 63-636 (2003).

⁷ Pub. L. No. 107-155, 116 Stat. 81 (2002).

⁸ 2 U.S.C. 441(e).

⁹ *McConnell v. FEC*, 540 U.S. 93, 207 (2003).

¹⁰ Coordination with candidates was already captured by FECA. 2 U.S.C. 441a(a)(7)(B)(i).

¹¹ Byron York, *To Stifle or Compete: That is the Question of 527s*, National Review, p.16, Apr. 10, 2006; Heather L. Sidwell, *Taming the Wild West: the FEC's Proposed Regulations to Bridle 527 Political Groups*, 56 ADMIN. L. REV. 939, 940 (2004) (claiming that the Republican party supported restrictions to “harm the Democratic party”).

¹² Byron York, *supra* note 9.

¹³ *Id.*

¹⁴ As stated by former FEC Chairman Bradley Smith, the Republican disadvantage was due to a tactical decision gone awry—although Republicans did keep the Executive and Legislative branches in 2004:

It is true that liberal 527s far outspent conservative 527s in 2004, but that was to be expected, seeing as how Republican Party lawyers were caught flatfooted right up to the late fall of 2003, and Republican party political honchos spent the next eight months threatening conservatives who donated to 527 organizations with jail time—a threat based on a ridiculously faulty legal analysis [see Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELEC. L. J. 82 (2005)] and a failure to understand the workings of the Federal Election Commission. There is no doubt that, if they put their minds to it, conservatives can do just fine at the 527 game.

Bradley A. Smith, *527 Fever*, available at www.redstate.com.

¹⁵ Thomas B. Edsall, ‘527’ Legislation Would Affect Democrats More: Proposals Seek to Limit Groups that Provide Millions, THE WASHINGTON POST A3, (Mar. 28, 2006).

¹⁶ Thomas B. Edsall, *Democrats Data Mining Stirs An Intra Party Battle*, WASHINGTON POST, March 8, 2006.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ 2 U.S.C. 431(9)(B)(ii).

²⁰ Rev. Rul. 04-6 (2004), available at <http://www.irs.gov/pub/irs-drop/rr-04-6.pdf>.

²¹ See “About NRA-ILA,” available at <http://www.nraila.org/About/NRAILA.aspx>.

²² Bob Williams, *Union Membership Rates Continue to Slide*, BUDGET & TAX NEWS (Mar. 1, 2006).

²³ 2 U.S.C. 431(9)(B)(iii).

²⁴ 11 CFR 114.3(a) *et seq.*

²⁵ *Id.*

²⁶ Robert F. Bauer, *Why Internet Deregulation is “Out” and 527 Regulation is “In”* (Mar. 16, 2006), available at http://www.moresoftmoneyhardlaw.com/updates/other_related_legal_developments.html?AID=651.

²⁷ James Q. Wilson, *Divided We Stand: Can a Polarized Nation Win a Protracted War?*, Opinion Journal, Feb. 15, 2006, available at <http://www.opinionjournal.com/federation/feature/?id=110007966>.

²⁸ *Id.*

²⁹ Peggy Noonan, *Riding the Waves* Opinion Journal (Mar. 31, 2005) available at <http://www.opinionjournal.com/columnists/pnoonan/?id=110006487> (“[I]n 2008 we will have millions of 18- to 24-year-old voters who have no memory of her as the harridan of the East Wing and the nutty professor of HillaryCare”).

³⁰ 47 U.S.C. 315(a).

³¹ U.S. Newswire: *Public Campaign Praises Senators Durbin and Dodd for Public Financing Push*, February 9, 2006.

³² Indeed, this question was reserved by the Second Circuit Court of Appeals in the Vermont expenditure limits case now pending in the U.S Supreme Court. *Randall v. Sorrell*, Nos. 04-1528, -1530& -1697 (2005).

³³ *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986) (“MCFL”).

³⁴ Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 TEX. L. REV. 1627 (1999) (egalitarianism requires reconsidering the media exception to otherwise applicable campaign laws); Edward B. Foley, *Equal Dollars Per Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1252 (1994) (proposal to treat media enterprises the same as other corporations under campaign finance law).

³⁵ *Greater New Orleans Broadcasting Ass’n. v. United States*, 527 U.S. 173, 188, 192 (1999).

³⁶ *FEC v. Beaumont*, 539 U.S. 146 (2003).

³⁷ *Id.*

³⁸ Richard Briffault, *The 527 Problem ... and the Buckley Problem*, 73 GEO. WASH. L. REV., 1701 (August 2005); the only case that addressed this question upheld the limitation. *Mott v. FEC*, 494 F. Supp. 131, 135-37 (D. D.C. 1980); yet the Fourth Circuit has invalidated such a limitation. *N.C. Right to Life, Inc. v. Leake*, 344 F.3d 418, 435 (4th Cir. 2003), vacated in light of *McConnell*, *Leake v. N.C. Right to Life, Inc.*, 541 U.S. 1007 (2004).

³⁹ *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

⁴⁰ *Id.* at 47.

⁴¹ Indeed, the Supreme Court may already be showing signs of impatience since the time of its opinion in *McConnell* for restraints on independent speech paid for by corporations, let alone the independent speech of individuals. In *Wisconsin Right to Life v. FEC*, the Court needed only six days to issue its rejection of the argument that there are no exceptions for grassroots communications in BCRA’s electioneering communications restrictions. 126 S. Ct. 1016, 546 U.S. ___ (2006).

⁴² *Id.* at 47-48.

⁴³ Briffault, *supra* note 21 at 1739.

⁴⁴ *California Medical Ass’n v. FEC*, 453 U.S. 182, 203 (Blackmun, J., concurring).

⁴⁵ *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

⁴⁶ *McConnell v. FEC*, 540 U.S. 93 (2003).

⁴⁷ Briffault, *supra* note 21, at 1743.

⁴⁸ *McConnell* at 146, 149.

⁴⁹ *Id.* at 155.

⁵⁰ *Id.* at 161.

⁵¹ *Id.* at 164, n. 60.

⁵² John J. Coleman, *The Benefits of Campaign Spending*, Cato Institute, Briefing Papers, No. 84, p.4 (Sept. 4, 2003).

⁵³ *Id.*

⁵⁴ *Id.* at 6.

⁵⁵ *Id.* at 7.

⁵⁶ Edsall, *supra* note 13; *see also*, statement of Judge Calabresi, questioning the validity of the egalitarian interest. *Landell v. Sorrell*, 406 F.2d 159, 161 (2d Cir. 2005) (Calabresi, J., concurring in the denial of rehearing en banc).

⁵⁷ Randall, *supra* note 18, construing Vermont's Act 64, in which the DNC Services Corporation filed an *amicus* brief.

⁵⁸ Stephen Dinon, *Congress Pushes to Close Loophole*, WASHINGTON TIMES, February 3, 2006.

⁵⁹ *Hearing to Examine and Discuss S.271, a Bill Which Reforms the Regulatory and Reporting Structure of Organizations Registered Under Section 527 of the Internal Revenue Code*, 109th Cong. (2005) (statement of Chairman Trent Lott).

⁶⁰ *McConnell*, *supra* note 8 at 355 (Rehnquist, C.J., dissenting).

⁶¹ *Id.* at 156 n. 51.

⁶² The only openly egalitarian provision in BCRA was the so-called Millionaire's Amendment, see 2 U.S.C 441a(i); 441a-1, which was not addressed by the Court in *McConnell*.

⁶³ *Buckley*, *supra* note 22 at 48.

⁶⁴ *Id.* at 48-49.

⁶⁵ *Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995).

⁶⁶ *See, e.g.* Gary C. Jacobson, *Enough is Too Much: Money and Competition in House Elections*, ELECTIONS IN AMERICA (Kay Scholzman ed., 1987); John R. Lott, Jr. *Brand Names and Barriers to Entry in Political Markets*, 52 PUB. CHOICE 87 (1986).

⁶⁷ *MCFL*, *supra* note 34.