8-1-2005

Regulating Section 527 Organizations

Gregg D. Polsky
University of Georgia School of Law, gregg.polsky@uga.edu

Guy-Uriel E. Charles
Duke Law School

Regulating Section 527 Organizations

Gregg D. Polsky* & Guy-Uriel E. Charles**

Table of Contents

In the last few years, the Federal Election Commission ("FEC") has been under increasing pressure to regulate independent[1] 527 organizations[2] as political committees under the Federal Election Campaign Act

* Associate Professor of Law, University of Minnesota Law School.

** Russell M. & Elizabeth M. Bennett Professor of Law, University of Minnesota Law School. We are grateful to Ned Foley, Luis Fuentes-Rohwer, Rick Hasen, and Marty Lederman for providing valuable feedback. We also thank Mychal Bruggeman for excellent research assistance.

1 For the purposes of this Essay, an independent 527 organization is an entity that does not coordinate its activities with political committees, candidates, or entities that are regulated under the Federal Election Campaign Act and does not make contributions to entities that are regulated under the Act. We are also defining an independent organization as an entity that does not receive contributions from general treasury funds of corporations and unions.

2 I.R.C. § 527 (West Supp. 2004).

("FECA").[3] In the wake of the hugely successful Bipartisan Campaign Reform Act of 2002 ("BCRA"),[4] which addressed what many viewed as the then-largest loophole in campaign finance reform legislation, the problem of soft money, many have urged Congress and particularly the FEC to turn their focus to independent 527 organizations.[5] To some, independent 527 organizations represent the latest challenge to effective campaign finance reform and a significant loophole to FECA and BCRA that must be closed.[6] Consequently, proponents of further reform have pressured the FEC to treat 527s as political committees under FECA.[7]

Regulation under FECA would subject independent 527 organizations to FECA's disclosure requirements, reporting requirements, and source and amount requirements. For all intents and purposes, the real dispute is not whether independent 527 organizations ought to be regulated—e.g., subject to the disclosure and reporting requirements. The real dispute is over the types of regulations that the FEC could and should impose. In particular, the crux of the matter is whether the FEC can subject independent 527 organizations to FECA's contribution limitations.[8]

The reformers' concerns with the regulatory status of 527 organizations are spurred by the confluence of a number of distinct but mutually reinforcing events. First, reformers are dismayed by the number of 527 organizations that are involved in federal elections and their pervasive involvement in federal election activity.[9] In particular, the 2004 presidential elections witnessed a notable increase of campaign activity by 527 organizations as well as a tremendous increase in contributions to 527 organizations.[10] These groups were capable of raising (and expending) large amounts of unregulated funds for print and television advertising as well as for get-out-the-vote efforts to support pet causes and candidates.[11]

---

3 Federal Election Campaign Act of 1971 § 301(d), 2 U.S.C. § 431(4) (2000) (defines political committee).

4 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C. & 47 U.S.C.).

5 *See* Political Committee Status, 69 Fed. Reg. 11,736, 11,743–49 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114).

6 *See, e.g., 527 Reform Act of 2005: 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 Before the Sen. Comm. on Rules & Admin.*, 109th Cong. (2005) [hereinafter *527 Hearing*] (statement of Sen. John McCain), http://rules.senate.gov/hearings/2005/030805_hearing.htm.

7 *Id.* (statement of Sen. Feingold).

8 To a lesser extent, also at issue is whether independent 527 organizations can be restricted from accepting contributions from the general treasury funds of unions and corporations. We leave aside this question for now and focus on whether the FEC has the authority to subject independent 527 organizations to FECA's contribution limitations as they apply to political committees.

9 *See, e.g., 527 Hearing, supra* note 6 (statement of Sen. McCain).

10 *See, e.g.*, Ctr. for Pub. Integrity, *Silent Partners: 527s in 2004 Shatter Previous Records for Political Fundraising*, http://www.publicintegrity.org/527/report.aspx?aid=435&sid=300 (Dec. 16, 2004).

11 *See, e.g., 527 Hearing, supra* note 6 (statement of Sen. McCain).

Second, reformers are frustrated by the proliferation of independent political entities that are organized as 527 organizations but not subject to regulation under FECA and BCRA. Some believe that § 527 of the tax code serves as a catalyst and incentive for political entities interested in affecting the political process to seek tax-exempt status as a political organization because § 527 offers these organizations a sizable tax exemption by sheltering their contributions and expenses from tax liability.[12] Reformers are troubled by the fact that these entities are permitted to take advantage of § 527 and organize as political organizations that have the primary purpose of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to . . . Federal . . . office,"[13] while at the same time arguing that they are not subject to regulation under FECA. Reformers have argued that, given the self-identified, stated purpose of independent 527 political organizations to influence federal elections, these organizations should be subjected fully to FECA's regulatory structure.[14]

Third, the Supreme Court's recent decision in *McConnell v. FEC*[15] has served as an impetus for reformers seeking to regulate independent 527 organizations. By most accounts, *McConnell* represents a total victory for advocates of campaign finance reform.[16] As one commentator has explained, *McConnell* is the "single greatest legal victory for campaign finance regulation since the modern era of campaign finance law."[17] This is in part because the Court upheld the most significant provisions of Congress's reform efforts.[18] In addition, the tenor of the Court's opinion reflected its willingness to expand significantly the justifications for regulating campaign financing, the First Amendment notwithstanding.[19] Consequently, one lesson that some

---

12 *Id.* (statement of Frances R. Hill, Tax Professor, University of Miami).

13 I.R.C. § 527(e)(2) (West Supp. 2004).

14 *See, e.g.*, Edward Foley & Donald Tobin, *Tax Code 527 Groups Not an End-Run Around McCain-Feingold*, 72 U.S.L.W. 2403 (Jan. 20, 2004); Letter from Public Citizen to Mai T. Dinh, Acting Assistant General Counsel, Federal Election Committee 10–11 (Apr. 5, 2004), http://www.citizen.org/documents/FEC_Pol_Com_Comments_04-05-04.pdf.

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

16 *See, e.g.*, Lillian R. BeVier, McConnell v. FEC*: Not Senator Buckley's First Amendment*, 3 ELECTION L.J. 127, 128 (2004) (noting that *McConnell* is a "stunning" victory for reformers); Richard Briffault, McConnell v. FEC *and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 147 (2004).

17 Briffault, *supra* note 16, at 147.

18 *Id.*

19 As Professor Briffault has noted:

> [The Court's] opinion significantly extended the notion of what constitutes the "corruption" justifying finance restrictions. It broadened the anticircumvention principle to permit regulation of campaign finance practices not connected to federal elections. It demonstrated relatively little concern about arguably overbroad regulations and the administrative burdens that federal regulators might place on political activities. Most importantly, the . . . opinion reframed the way the Court addresses the constitutionality of campaign finance regulation. Instead of treating campaign finance restrictions as a threat to freedoms of speech and association and therefore a challenge to constitutional values, the Court gave great weight to the interests in fair, informed democratic decision-making it found to be advanced by contribution limitations, disclosure requirements, and restrictions on corporate and union treasury funds.

have derived from *McConnell* is that the Court will not stand in the way of legislation designed to improve the integrity of the political process. Moreover, reformers have perceived in *McConnell* an invitation to regulate justified by the *McConnell* Court's supposed broad conception of the corruption and anticircumvention rationales.[20]

The FEC has responded to this pressure by proposing to change the definition of "political committee" to include independent organizations.[21] An important consequence of political committee status is that 527 organizations would be subject to the $5000 contribution limitations applicable to political action committees ("PACs").[22] The FEC has also proposed amending the current definition of "expenditures" to include some electioneering communications and federal election activities.[23] These proposed regulations would be specifically applicable to independent 527 organizations.[24] So far, the FEC has not decided to adopt any of the proposed rules as it is unsure whether it has the authority to regulate 527 organizations and whether such regulations would be constitutional.[25] It has instead decided to define as contributions funds received pursuant to a solicitation indicating "that any portion of the funds received will be used to support or oppose the election of a clearly identified federal candidate."[26]

In this Essay, we argue that the FEC should not regulate independent 527 organizations as political committees under FECA.[27] To appreciate why the argument in favor of FEC regulation is not compelling, Part I of this Essay presents the best case in favor of regulation by the FEC. Part II explains why an independent entity's status as a 527 organization does not tell us much with respect to whether it may be regulated by the FEC. Part III then uses principles of administrative law to argue that the FEC is not authorized to regulate independent 527 organizations. Part IV presents some prudential considerations against FEC regulation and argues that regulation of independent 527s by the FEC would be unconstitutional. Consequently, regulation, if at all, should be by Congress and not by the FEC.

I. The Case for FEC Regulation

To best understand why the FEC should refrain from regulating independent 527 organizations, one must first appreciate the arguments in favor of regulation. This Part lays out the case for regulation.

Id. at 148.

20 *See, e.g.*, *527 Hearing*, *supra* note 6 (statement of Sen. McCain).

21 Political Committee Status, 69 Fed. Reg. 11,736, 11,743–49 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114).

22 2 U.S.C. § 441a(a)(1)–(2) (2000).

23 Political Committee Status, 69 Fed. Reg. at 11,739–42.

24 *Id.* at 11,736.

25 *See, e.g.*, *527 Hearing*, *supra* note 6 (statement of Scott E. Thomas, Chairman, FEC).

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

27 We use the word "regulate" in this Essay to mean subjecting a 527 organization to full-fledged regulatory treatment as a political committee under FECA.

A. Independent 527 Organizations Are Political Committees

A threshold inquiry is whether the FEC can regulate independent 527 organizations as political committees under FECA. FECA defines "political committee" as "any committee, club, association, or other groups of persons" that receives contributions or makes expenditures "aggregating in excess of $1,000 during a calendar year."[28] FECA defines "expenditures" as outlays made for the purpose of influencing a federal election[29] and contributions as gifts, money, "or anything of value made by any person for the purpose of influencing any election for Federal office."[30]

In *Buckley v. Valeo*,[31] the Court maintained that FECA's definition of political committee raised vagueness concerns and "could be interpreted to reach groups engaged purely in issue discussion," in violation of the First Amendment.[32] To address this constitutional concern, the Court narrowed the scope of the term "political committee" by creating a significant threshold inquiry. For an organization to constitute a political committee, it must first be shown that either the organization (i) is "under the control of a candidate" or (ii) has as its "major purpose . . . the nomination or election of a candidate."[33] It is the second prong of this threshold determination—the major purpose test—that is at the heart of the question of whether the FEC may assert jurisdiction over independent 527 organizations.

Using the Court's redefinition of political committee in *Buckley*, one could argue that any group whose primary purpose is to affect federal elections is a political committee under FECA (provided that it meets the $1000 expenditure/contribution condition in the statute). If so, these organizations must be regulated by the FEC.[34]

With respect to the $1000 statutory condition, while the Court in *Buckley* limited the definition of "expenditures" for FECA purposes to outlays for express advocacy, the limitation only applies to outlays by groups that do not constitute political committees under this threshold test.[35] This argument is supported by a careful reading of *Buckley*.[36] Accordingly, once one deter-

---

28 2 U.S.C. § 431(4)(A) (2000).

29 *Id.* § 431(9)(A).

30 *Id.* § 431(8)(A)(i).

31 Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam).

32 *Id.* at 79.

33 *Id.*

34 *See, e.g.*, *527 Hearing*, *supra* note 6 (statement of Sen. McCain).

35 *See, e.g.*, *Disclosure of Political Activities of Tax-Exempt Organizations: Hearing Before the House Subcomm. on Oversight of the Comm. on Ways & Means*, 106th Cong. 60 (2000) [hereinafter *2000 Campaign Finance Hearings*] (statement of Glenn J. Moramarco); Letter from Edward B. Foley, Professor, Ohio State University Moritz College of Law, to Mai T. Dinh, Acting Assistant General Counsel, FEC 2–4 (Apr. 5, 2004) [hereinafter Foley FEC Letter] (concluding that opponents of the proposed regulation "misread *Buckley*" and that a "proper understanding of *Buckley*" requires the FEC to regulate groups that have the major purpose of influencing an election regardless of the amount of funds spent on express advocacy), *available at* http://www.fec.gov/pdf/nprm/political_comm_status/moritz_college_law_foley.pdf.

36 *See* Foley FEC Letter, *supra* note 35, at 3–4; *2000 Campaign Finance Hearings*, *supra* note 35, at 60 (statement of Glenn J. Moramarco). The commentators point to the following language in *Buckley*:

> To fulfill the purposes of the Act [the words "political committee"] need only en-

mines that an organization meets the major purpose test, the $1000 expenditure qualification in the statutory definition of political committee is applied by aggregating all outlays, regardless of whether they fund express or issue advocacy (or anything else, for that matter).[37]

Based on this reading of *Buckley*, one could derive two conclusions. First, one could conclude that any organization that receives contributions or makes expenditures of $1000 or more is a political committee under *Buckley* so long as the organization's major purpose is to influence a federal election. Second, one could also maintain that the fact that an organization engages in little or no express advocacy is not relevant to the determination of whether the organization is a political committee.

One could buttress these conclusions by using language from the Supreme Court's opinion in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*.[38] In *MCFL*, the Court addressed whether the FEC could constitutionally prohibit Massachusetts Citizens for Life ("MCFL"), a nonprofit, pro-life organization that primarily engaged in issue advocacy, from using the MCFL's general treasury funds to advocate in favor of pro-life candidates.[39] MCFL produced and distributed a newsletter urging voters to support pro-life candidates for federal and state offices.[40] The FEC argued that MCFL violated 2 U.S.C. § 441b, the FECA provision that forbids a corporation from using its general treasury funds to make campaign contributions or expenditures with respect to federal elections.[41]

The Court agreed with the FEC that MCFL's newsletter constituted an expenditure—which the Court defined as express advocacy[42]—in violation of

---

> compass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.
>
> But when the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political committee"—the relation of the information sought to the purposes of the Act may be too remote. To insure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

Buckley, 424 U.S. at 79–80.

37 *See* Foley FEC Letter, *supra* note 35, at 3–4. *But see* Allison R. Hayward & Bradley A. Smith, *Don't Shoot the Messenger: The FEC, 527 Groups, and the Scope of Administrative Authority*, 4 ELECTION L.J. 82, 85 (2005).

38 FEC v. Mass. Citizens for Life, Inc. (MCFL), 479 U.S. 238, 241 (1986).

39 *Id.* MCFL's corporate purpose as stated in its articles of incorporation is "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized." *Id.* (citations omitted).

40 *Id.* at 243.

41 *See* 2 U.S.C. § 441b (2000).

42 *MCFL*, 479 U.S. at 249 ("[A]n expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b.").

§ 441b.[43] The Court, however, ultimately agreed with MCFL that applying § 441b to an entity such as MCFL[44] violates the entity's First Amendment rights because "[g]roups such as MCFL . . . do not pose [a] danger of corruption" to justify such regulation.[45]

In the course of reaching its conclusion that applying § 441b to MCFL violates the organization's First Amendment rights, the Court noted that MCFL could not be regulated as a political committee because it does not meet *Buckley*'s major purpose test. MCFL's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates."[46]

The fundamental epistemological question, of course, is how does one determine an organization's major purpose? The *Buckley* Court did not address this question directly. It has been the administrative practice of the FEC since *Buckley* to deny jurisdiction over independent organizations that do not engage in any express advocacy.[47] To some reformers, *MCFL* provides an answer, one that is contrary to current FEC practice.

In *MCFL*, the Court remarked that although MCFL is not a political committee,

> should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee. As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to influence political campaigns. In sum, there is no need for the sake of disclosure to treat MCFL any differently than other organizations that only occasionally engage in independent spending on behalf of candidates.[48]

---

43 *Id.* at 249–50.

44 MCFL is a nonprofit corporation, does not make contributions to candidates, does not accept contributions from business corporations or unions, and engages primarily in issue advocacy.

45 *MCFL*, 479 U.S. at 259.

46 The Court stated:

> In *Buckley v. Valeo* . . . this Court said that an entity subject to regulation as a "political committee" under the Act is one that is either "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." It is undisputed on this record that MCFL fits neither of these descriptions. Its *central organizational purpose* is issue advocacy, although it occasionally engages in activities on behalf of political candidates.

Id. at 252 n.6 (emphasis added). Although not entirely clear, it appears that the Court's use of the term "central organizational purpose" was in reference to MCFL's corporate purpose as articulated in its articles of incorporation. This portion of *MCFL* thus appears to suggest that, in applying the major purpose test, an entity's organizational documents are to be used to determine whether the organization was created solely or primarily for the purpose of electing certain candidates for office. For a discussion of whether simply filing as a 527 organization for federal income tax purposes should suffice under this test, see *infra* Part II.B.

47 *See* Political Committee Status, 69 Fed. Reg. 11,736, 11,743–49 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114).

48 *MCFL*, 479 U.S. at 262.

One could construe this language from *MCFL* to support the contention that the FEC can regulate an independent 527 organization as long as the entity's purpose is to influence federal elections. As one commentator has argued, the FEC should characterize an entity as a political committee "when more than 50 percent of [the entity's] spending in any given year is devoted to election-motivated activities broadly conceived."[49]

With respect to the epistemological question—determining an organization's major purpose—one could resolve that question by arguing that independent 527 organizations should be regulated by the FEC because they have self-identified as political entities "organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . to influence the selection, nomination, election, or appointment of any individual to Federal . . . office."[50] This argument is supported ostensibly by the Court's implication in *MCFL* that an entity's major purpose can be ascertained by the organization's public pronouncements.[51]

Figure 1 graphically summarizes the reformers' arguments that independent 527 organizations are political committees under current campaign finance laws as those laws have been interpreted by the Supreme Court. As Figure 1 shows, the threshold inquiry is whether the organization is under the control of a candidate. If it is, then the organization is always a political committee. If not, then the question is whether the organization's major purpose is the nomination or election of a candidate. That is: (a) are the organization's express-advocacy outlays so extensive that its major purpose must be considered to elect or defeat a candidate; or (b) is election or defeat of a candidate the organization's central organizing purpose? If the answer to either question is yes, then the organization is a political committee.

B. The FEC's Statutory Interpretations Are Entitled to Chevron *Deference*

Notwithstanding these arguments, reformers could also argue that the major purpose test as articulated in *Buckley* and confirmed in *MCFL* is, at the very least, ambiguous as to how it should be applied to independent organizations. Because of this gap in the Court's interpretation of FECA, one could argue that any attempts to fill that gap by FEC regulation should be entitled to *Chevron* deference, pursuant to which any reasonable interpretation of the major purpose test would be upheld.[52]

---

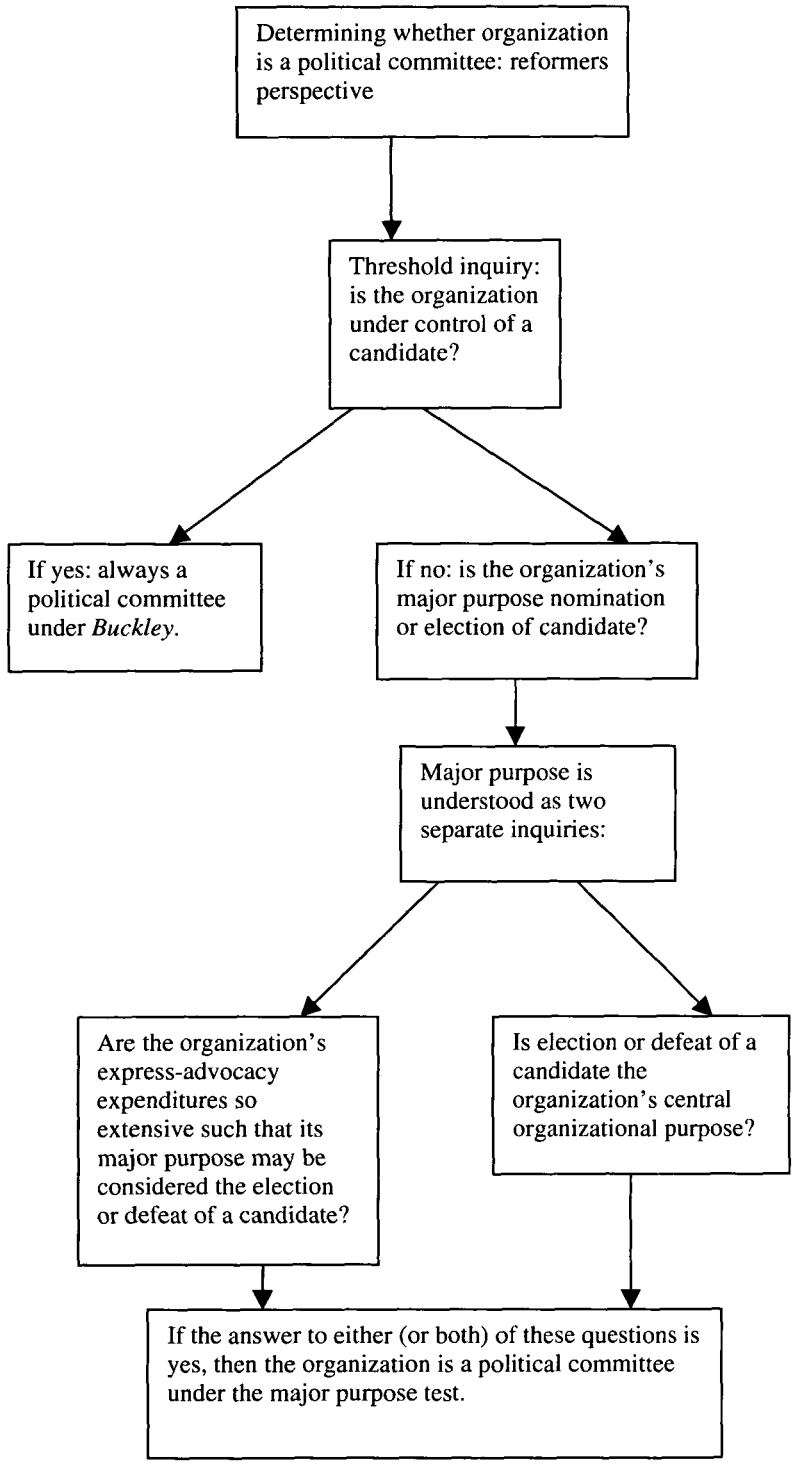
49 Foley FEC Letter, *supra* note 35, at 3.

50 I.R.C. § 527(e)(1)–(2) (West Supp. 2004). For examples of this argument, see *Hearing to Examine the Scope and Operation of Organizations Registered Under Section 527 of the Internal Revenue Code: Hearing Before the Senate Rules & Admin. Comm.*, 109th Cong. (2004) (statement of Sen. Russ Feingold), http://rules.senate.gov/hearings/2004/031004_hearing.htm; *2000 Campaign Finance Hearings*, *supra* note 35, at 60 (statement of Glenn J. Moramarco).

51 *MCFL*, 479 U.S. at 631.

52 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984). Although *Chevron* deference does not apply to all agency interpretations, *see* United States v. Mead Corp., 533 U.S. 218, 226–27 (2001), it appears clear that FEC interpretations of FECA set forth in its regulations would merit *Chevron* deference. *See, e.g.*, AFL-CIO v. FEC, 333 F.3d 168, 172–80 (D.C. Cir. 2003) (applying *Chevron*'s deferential framework to FEC regulation).

Figure 1


Determining whether organization is a political committee: reformers perspective
Threshold inquiry: is the organization under control of a candidate?
If yes: always a political committee under *Buckley*.
If no: is the organization's major purpose nomination or election of candidate?
Major purpose is understood as two separate inquiries:
Are the organization's express-advocacy expenditures so extensive such that its major purpose may be considered the election or defeat of a candidate?
Is election or defeat of a candidate the organization's central organizational purpose?
If the answer to either (or both) of these questions is yes, then the organization is a political committee under the major purpose test.

Although *Chevron* deference traditionally applies when an agency fills gaps in statutes (rather than judicial interpretations of statutes), the Court has treated its statutory interpretation precedent as effectively "incorporated" into the underlying statute,[53] and given that, an argument can be made that deference ought to apply equally to agency gap filling of such precedent.[54] The *Chevron* doctrine is premised on the presumption that Congress prefers politically accountable agencies rather than politically insulated judges to resolve statutory ambiguities,[55] and this presumption would seem to apply with equal force regardless of whether the source of the ambiguity arises out of the statutory language itself or judicial interpretations thereof.[56]

Reformers would argue that the FEC's proposed regulation, at a minimum, is consistent with the FECA, *Buckley*, and *MCFL* conception of political committee status. As a result, they would argue, the proposed regulation constitutes a lawful exercise of agency authority under the deferential *Chevron* framework.

C. *The Supreme Court's* McConnell *Decision Supports FEC Authority*

Lastly, reformers could take comfort from the Court's recent decision in *McConnell v. FEC*.[57] Three characteristics of the Court's opinion support the reformers' position. First, the tenor of the opinion seemed to emphasize the constitutional legitimacy of campaign finance regulation that protects the integrity of the political process over the cost of campaign finance legislation to First Amendment speech and associational values.[58] In contrast to *Buckley*,

---

53 *See* Neal v. United States, 516 U.S. 284, 290 (1996) (holding that once the Court interprets a statute, the interpretation is as binding on the agency as the underlying statute); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536–37 (1992) (same); Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 130–31 (1990) (same); *see also Mead Corp.*, 533 U.S. at 247 (Scalia, J., dissenting) (citing these three cases for the proposition that "[o]nce the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed"); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1273–74 (2002) (criticizing the rule); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. REV. 185, 199–207 (2004) (describing the basis and impact of this "incorporation" rule).

54 *See* Rebecca Hanner White, *The Stare Decisis "Exception" to the* Chevron *Deference Rule*, 44 FLA. L. REV. 723, 758 (1992) (arguing that agency interpretations of ambiguous Supreme Court statutory interpretations should merit *Chevron* deference). Of course, to the extent an agency interpretation runs afoul of the Constitution, the interpretation would be invalid regardless of whether *Chevron* deference applies.

55 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) (noting that *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps"); *see also* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 870–72 (2002) (concluding that *Chevron* is best understood as based on presumed congressional intent).

56 Nevertheless, it must be remembered that the incorporation rule itself is fundamentally at odds with *Chevron*'s foundational principles. Despite the presumption that Congress prefers politically accountable agencies as opposed to politically insulated judges to resolve statutory ambiguities, the incorporation rule makes judges the final arbiters of ambiguous statutory language (at least until Congress amends the statute) in cases where the ambiguity is first resolved by the judiciary. *See* Bamberger, *supra* note 53, at 1295; Polsky, *supra* note 53, at 203–04.

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

58 *Id.* at 115.

which fastened the constitutionality of campaign finance legislation to the notion of corruption and the appearance of corruption, *McConnell* appears prepared to sign off on campaign finance regulation so long as such regulation is directed toward maintaining the integrity of the political process. As the FEC has stated in its Notice of Proposed Rulemaking, "*McConnell* recognized that regulation of certain activities that affect Federal elections is a valid measure to prevent circumvention of FECA's contribution limitations and prohibitions."[59] The argument thus is that the FEC has the authority—confirmed by the Court in *McConnell*—to regulate activities that affect federal elections.

Second, in *McConnell* the Court explicitly stated that the express/issue advocacy line was not a constitutional requirement, but one of statutory construction borne of the necessity to address vagueness concerns.[60] The Court maintained that *Buckley* did not "suggest[ ] that a statute that was neither vague nor overbroad would be required to toe the same express advocacy line."[61] Additionally, the Court noted that the express/issue advocacy distinction "is functionally meaningless."[62] The Court then went on to uphold BCRA's restrictions on electioneering communications[63] on the ground that they represent a legitimate attempt by Congress to "combat real or apparent corruption."[64]

From this observation in *McConnell*, one could argue that if the express/issue advocacy line is not a constitutional one, then the FEC can amend its rules to regulate the electioneering communications or federal election activity of independent 527 organizations. Indeed, the FEC has considered precisely those types of amendments in the wake of *McConnell*.

Third, *McConnell* confirms that the Court will examine contribution limitations under a more relaxed standard of review. The Court stated that the "less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress's ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[65] Consequently, the Court concluded that "a contribution limit involving even significant interference with associational rights is nevertheless valid if it satisfies the lesser demand of being closely drawn to match a sufficiently important interest."[66]

In the remainder of this Essay, we address each of these arguments and explain why they are not sufficiently compelling to justify FEC regulation of independent 527 organizations.

---

59 Political Committee Status, 69 Fed. Reg. 11,736, 11,736 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114).

60 *McConnell*, 540 U.S. at 191–92.

61 *Id.* at 192.

62 *Id.* at 193.

63 *Id.* at 194. Electioneering communications are "broadcast, cable, or satellite communications" that are made within sixty days before a general election or thirty days before a primary election and are targeted to a relevant electorate. 2 U.S.C. § 434(f)(3)(A)(i)–(ii) (2000).

64 *McConnell*, 540 U.S. at 194.

65 *Id.* at 137.

66 *Id.* at 136 (citations omitted).

II. FEC Authority and MCFL

There are two arguments against the FEC's authority to regulate independent groups that do not engage in express advocacy, even assuming that the proposed FEC regulation is not unconstitutional.[67] First, one could argue that the Court's interpretation of the major purpose test in *MCFL* precludes the FEC from adopting its proposal. Second, it can be argued that the FEC's authority to regulate independent organizations has been foreclosed by Congress, using a *Chevron*-step-one analysis. We address the *MCFL* argument below and the *Chevron*-step-one analysis in Part III.

A. MCFL's Gloss on Buckley

Opponents of the FEC could argue that although *Buckley* does not give any explicit guidance as to how to apply the major purpose test, *MCFL* provides some important insights on the question.[68] The Court in *MCFL* suggests two ways an independent organization such as MCFL could have the requisite major purpose. First, the entity's "central organizational purpose" could be to influence an election.[69] Although not entirely clear, it appears that the Court's use of this term was in reference to MCFL's corporate purpose as articulated in its articles of incorporation.[70]

Alternatively, the Court noted that an entity's "independent spending" could become so extensive that the organization would be deemed to satisfy the major purpose test.[71] Though the Court did not define the term "independent spending" explicitly for this purpose, it seems reasonably clear that the Court was referring to funds spent on express advocacy, as that is how the Court used that term (and its synonym "independent expenditures") throughout the opinion after the Court initially defined "expenditure" for § 441b purposes in that manner.[72]

Therefore, *MCFL* may suggest[73] that an independent organization would avoid political committee status if both (i) the organizational documents avoid characterizing its major purpose as the influencing of certain elections, and (ii) the organization engages in no more than de minimis express advocacy. If this is the correct reading of *MCFL*, then this Supreme

---

67 We address the issue of constitutionality in Part III, *infra*.

68 FEC v. Mass. Citizens for Life, Inc. (MCFL), 479 U.S. 238, 251–56 (1986).

69 *See id.* at 253.

70 MCFL's articles of incorporation were quoted verbatim in the opinion: "'To foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activities and in addition to engage in any other lawful act or activity for which corporations may be organized.'" *Id.* at 241–42 (citation omitted).

71 *Id.* at 262.

72 *See id.* at 249 (holding that *Buckley*'s rationale "requires a similar construction of [§ 441b's] more intrusive provision that directly regulates *independent spending*. We therefore hold that an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." (emphasis added)).

73 We say "may suggest" because *MCFL* does not explicitly provide that these two tests—the central organizational purpose and the independent expenditure test—are the exclusive means by which an independent organization could satisfy the *Buckley* major purpose test, though this could certainly be implied.

Court interpretation of the term "political committee" in FECA is absolutely binding on the FEC; accordingly, an inconsistent interpretation by the FEC would be unlawful.[74]

Reformers would appear to have two counterarguments to this view of *MCFL*. First, they could argue that *MCFL* merely indicated two ways in which an organization could be deemed to satisfy the major purpose test, but did not explicitly preclude the possibility that other ways might exist. Second, reformers could argue that *MCFL*'s "central organizational purpose" analysis would properly include a review of the organization's tax filings. Because these organizations file as "political organizations" under the Internal Revenue Code, reformers could maintain that they have the requisite central organizational purpose to be treated as political committees.

B. Arguments Against Using the Tax Code's Definitions for Election Law Purposes

Reformers essentially argue that, in applying *Buckley* and *MCFL*, the federal tax law's definition of "political organization" should be imported in a wholesale manner into the federal election code. We believe this argument to be flawed for two reasons.

First, the requisite activities for § 527 purposes include activities related to the nomination of judicial office and to the election or nomination of state or local office, activities which are clearly beyond the proper jurisdiction of the FEC.[75]

Second, because the definition of political activity for tax purposes does not comport with a proper definition for election law purposes, a 527 organization should not automatically be deemed to constitute a political committee for FEC purposes.[76] These divergent definitions are a result of the vastly different policies underlying these two bodies of law.

The federal income tax law has an extremely sensitive trigger for concluding that an organization has engaged in political activities.[77] As a result, using the tax law's definition of political organization as a proxy for political committees under election law would be unconstitutional and normatively unwise.[78]

---

74 *See supra* note 53 and accompanying text.

75 Some commentators who would import the tax law's definition of political organization into election law recognize this problem and call for political committee status only with regard to predominantly federal-election 527 organizations. *See* Foley & Tobin, *supra* note 14; Letter from Public Citizen to Mai T. Dinh, *supra* note 14, at 10.

76 The notion that the federal tax law definition of a term may differ from how that term is defined in another body of law is extremely commonplace. What may constitute "property" for state law purposes may not constitute property for federal income tax purposes, or vice versa. What may constitute a "security" for federal securities law purposes may not constitute a "security" for federal income tax purposes, or vice versa. Additional examples in the tax code abound.

77 We will develop this argument in great detail in a later paper, so we will only outline it here.

78 *See* Elizabeth Kingsley & John Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV. 55, 114–18 (2004).

The tax law threshold in defining political activity is extremely low for two reasons. First, it ensures that the funding of any activity that could possibly constitute electioneering comes from after-tax dollars by guaranteeing that § 501(c)(3) charities (which have the ability to receive tax-deductible contributions) do not engage in any such activity.[79] This "hair-trigger" for finding electioneering activities attempts to prevent clever taxpayers from designing creative end-runs around this very critical tax policy objective.[80]

Second, the hair-trigger arises from the tax law's quite anomalous[81] imposition of the gift tax on donations to § 501(c)(4) (i.e., generally issue-fo-

---

79 Section 501(c)(3) organizations are absolutely barred from "participat[ing] in, or interven[ing] in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (2000). The IRS has interpreted "campaign intervention" for this purpose extremely broadly, for the very good reason described in note 80 below. Furthermore, the IRS has concluded that the activities that constitute "campaign intervention" under § 501(c)(3) are the precise activities that would qualify an entity as a political organization under § 527. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996). As a result of this broad definition of campaign intervention, the § 527 category is "simply enormous, not necessarily in the number of organizations involved, but in the range of activities it encompasses." Rosemary Fei, *The Uses of Section 527 Political Organizations*, *in* 1 NONPROFIT ADVOCACY AND THE POLICY PROCESS: STRUCTURING THE INQUIRY INTO ADVOCACY 23, 30 (Elizabeth J. Reid ed., 2000), *available at* http://www.urban.org/UploadedPDF/structuring.pdf.

80 It is critical that electioneering activities be funded with after-tax dollars. The Code does this in part by denying individuals deductions for electioneering activities and for contributions to organizations that engage in these activities (so as to prevent the use of the organization as a conduit for deductible electioneering). *See 2000 Campaign Finance Hearings*, *supra* note 35, at 40 (statement of Joseph Mikrut, Tax Legislative Counsel, U.S. Department of Treasury) ("The current-law tax rules provide appropriate and consistent treatment of political organizations and other organizations that engage in electioneering activities by generally ensuring that only after-tax dollars are used to fund such collective activities."). This is a critical function. If electioneering expenses could be funded with pretax dollars, the result would be a government-funded matching grant program, where the rate of the match rises with the contributor's income, a problematic regime. This can be best shown using an example. Assume that two campaign donors, one whose marginal tax rate is 35% and the other's whose is 10%, each give $100 under a regime that allows campaign donations (and similar expenditures) to be deductible by the donor. The high bracket donor would effectively be giving only $65 (i.e., the $100 contribution less the $35 tax benefit derived from the $100 deduction) with a 54% match (i.e., $35) from the federal government. On the other hand, the low bracket donor would be giving $90 (i.e., the $100 contribution less the $10 tax benefit derived from the $100 deduction) with only an 11% (i.e., $10) match. *See also* Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 845–46 (2001) (noting this inverse relationship between the amount of taxpayer's after-tax cost and income level, and explaining how the standard deduction exacerbates this phenomena). This direct relationship between the donor's income level and the rate of the government match is clearly undemocratic. A strong tax rule disallowing deductions for electioneering expenditures (or for contributions to organizations that make these expenditures) prevents this inequity and justifies the tax law's hair-trigger for finding electioneering activities.

81 The application of the gift tax to 501(c)(4) organizations is inappropriate in light of the intended purposes of the gift tax. The primary purpose of the gift tax is to backstop the estate tax, which effectively imposes a tax on inherited wealth. Without a gift tax, one could avoid this inheritance tax through inter vivos gifts to one's heirs. The unified estate/gift tax regime has two main purposes. First, it is intended to break up large concentrations of wealth by taxing large inheritances. Second, it backstops the income tax to ensure that wealth in the form of unrealized appreciation of property gets taxed at some point. Neither of these purposes is relevant whatsoever when a taxpayer makes contributions to a social-welfare organization. This conclusion is confirmed by the fact that contributions to charitable organizations (i.e., 501(c)(3)s) and political

cused) organizations. As a result, many organizations strongly prefer to be treated as § 527 organizations to avoid this onerous—and unjustified—result for their wealthy donors.[82] Consequently, many issue-based organizations strive to be treated as 527s when, in fact, they might more appropriately be treated as 501(c)(4)s. The IRS, apparently realizing that the imposition of the gift tax is inappropriate as a policy matter in this context,[83] seems to freely allow any group that can plausibly be considered a 527 to be treated as one even though they might, as a technical matter, better fit in the 501(c)(4) box.[84]

Given the unique policies underlying (and pathologies inherent in) the tax law, using § 527 as a linchpin for political committee status would be ill advised. Nevertheless, some might still argue that an organization ought to be "estopped" from professing its electioneering motivations to obtain the "tax benefits" under § 527 and denying these motivations to the FEC to avoid campaign regulation. For example, Senator Levin has lamented the "Section 527 loophole" that

> happens because these organizations . . . say one thing to the IRS to get the tax exemption and say the opposite to the Federal Election Commission to avoid having to register as a political committee. . . . We often say, 'You can't have it both ways,' but persons forming

---

organizations (527s) are excluded from the gift tax by specific statutory provisions. These organizations are, from a gift-tax policy perspective, wholly indistinguishable from 501(c)(4) entities.

The only justification for imposing a gift tax on 501(c)(4) donations is to prevent large donations of appreciated property (e.g., stock) to these organizations. The tax law does not treat these contributions as resulting in a realization event for the donor, allowing the donor to pass untaxed wealth to these organizations, and the gift tax effectively limits this opportunity. It would seem that it would be more appropriate for the tax law to treat contributions of appreciated property to these organizations as realization events (as I.R.C. § 84 does with respect to 527 organizations) while exempting the contributions from the gift tax (as I.R.C. § 2501(a)(4) does with respect to 527 organizations). In essence, the gift tax on 501(c)(4) donations solves one tax problem (substantially limiting the opportunity to pass untaxed dollars to 501(c)(4) organizations) while creating another (the incentive for organizations to characterize themselves as 527s rather than 501(c)(4)s).

82 Fei, *supra* note 79, at 27 ("[I]n trying to solve the gift tax problem for major donors to 501(c)(4) organizations, tax lawyers pushed both donors and recipients further along the political spectrum, sometimes reluctantly, into forming Section 527 [organizations]. Then, in an effort to make these [organizations] as flexible as possible, tax lawyers substantially broadened the reach of Section 527, at least as it was commonly understood."). While the issue of whether a gift tax applies to contributions to 501(c)(4) organizations is not entirely free from doubt, *see generally* Barbara K. Rhomberg, *Constitutional Issues Cloud the Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 164, 170–71 (2004); Barbara K. Rhomberg, *The Law Remains Unsettled on Gift Taxation of Section 501(c)(4) Contributions*, 15 TAX'N EXEMPTS 62, 65–66 (2003), it is clear that, given the risk, well-advised donors generally would avoid making large contributions to 501(c)(4) organizations. Fei, *supra* note 79, at 26.

83 As noted above, the only possible justification for imposing a gift tax on 501(c)(4) donations is to prevent large donations of appreciated property (e.g., stock) to these organizations. There is no such problem with respect to 527 organizations, as I.R.C. § 84 provides for the realization of gain by the donor in such a scenario. *See* I.R.C. § 84 (2000). Thus, there is absolutely no policy reason for the IRS to guard the floodgates to 527 status very carefully.

84 *See, e.g.*, I.R.S. Priv. Ltr. Rul. 96-52-026 (Oct. 1, 1996) (stating that the education of voters on the voting record of candidates on certain selected issues constituted electioneering activities for purposes of qualifying the organization as a 527).

> these organizations . . . turn that saying on its head. They are, so far, having it both ways.[85]

Outrage over this alleged statutory arbitrage is misplaced, however. Properly understood, § 527 does not provide any tax benefits or subsidy; rather it simply treats these entities as they should be treated under a normative income tax.

The major "tax benefit" of characterization as a political organization under § 527 is that the organization avoids tax on the contributions it receives.[86] This was how the IRS consistently applied the tax law even before § 527 was enacted.[87] Furthermore, this tax treatment is completely consistent with fundamental tax principles. Taxing a political organization's contribution receipts would effectively tax these contributions twice merely because they are pooled together. There is simply no support for such a proposition under general tax principles.[88]

In other words, § 527 merely codifies the tax treatment that would apply under general tax principles. Electioneering expenses are treated as consumption expenditures by the taxpayer in that the taxpayer may not take deductions for them. As a result, electioneering expenses, like all consumption expenditures, are made with dollars that have been already taxed. If taxpayers pool these after-tax consumption expenditures, there should be no further tax.[89]

---

85 146 CONG. REC. S6044 (daily ed. June 29, 2000) (statement of Sen. Levin).

86 Another purported tax benefit for 527s is that the gift tax does not apply to the contributions they receive. Contributors to 527s thus do not have to worry about the gift tax, unlike contributors to 501(c)(4), 501(c)(5), and 501(c)(6) organizations. We have already explained that the application of the gift tax to these tax-exempt organizations is totally inconsistent with the purposes of the gift tax and can only be defended on the grounds that contributions of appreciated property to these organizations do not result in the realization of income. Because contributions of appreciated property to § 527 organizations result in the realization of gain under § 84, there is no justification whatsoever to apply the gift tax to 527 contributions. Accordingly, exempting 527 contributions from the gift tax is *not* properly viewed as a tax benefit or subsidy to the organization or the donor; rather, this treatment simply achieves the entirely appropriate tax result.

87 *See* S. REP. NO. 93-1357, at 25 (1974), *reprinted in* 1975 U.S.C.C.A.N. 7478, 7501–02 (stating, prior to the enactment of § 527, that the political contributions were treated as nontaxable to the recipient); Tax Treatment of Contributions of Appreciated Property to Committees of Political Parties, 37 Fed. Reg. 22,427 (Oct. 19, 1972) (noting, prior to the enactment of § 527, that the IRS had always taken the position that political contributions are nontaxable to the recipient); Rev. Rul. 74-21, 1974-1 C.B. 14 (1974) (ruling, in the year preceding the enactment of § 527, that political contributions are not taxable to the recipient).

88 *See 2000 Campaign Finance Hearings*, *supra* note 35, at 40 (statement of Joseph Mikrut, Tax Legislative Counsel, U.S. Department of Treasury) ("[S]ection 527 merely codifies the same tax treatment that would result under general tax principles."); Fei, *supra* note 79, at 30 ("[I]t appears [that] the nature of political contribution income is such that it is not includable in gross income in the first place."). The concept that contributions to 527s do not generate gross income is fully consistent with § 118 of the Code, which exempts capital contributions from a corporation's gross income, regardless of whether the contributor is a shareholder or not. I.R.C. § 118 (2000).

89 *See 2000 Campaign Finance Hearings*, *supra* note 35, at 40 (statement of Joseph Mikrut, Tax Legislative Counsel, U.S. Department of Treasury) (making the pooling argument in the context of 527 organizations).

For example, assume that a group of neighbors wish to build fences around their homes. They could hire a contractor to build the fences and then have each neighbor write their own check directly to the contractor for their portion of the cost. In such a case, each neighbor would pay with after-tax dollars, as no deduction would be allowed for these consumption expenditures.

Alternatively, the neighbors could pool their money together into a fund and then pay the contractor out of this fund. The tax results in this scenario are the same as above—the neighbors do not get to take a deduction for their contribution to the fund, and importantly, there is no further tax as a result of the mere pooling of their money into the fund. Once again, consumption expenditures are made with dollars that are taxed once and only once. This latter scenario is analogous to the 527 context, where taxpayers are merely pooling their after-tax dollars to make a collective consumption expenditure.[90] The appropriate tax treatment, under general tax principles, is to disallow a deduction for the contribution to the pool and to not impose any additional tax thereafter on either the contributors or the pool (i.e., the 527 organization) itself.[91] Section 527 thus should not be considered to provide any real subsidy or tax benefit; rather, it merely codifies a result that would be entirely appropriate under a normative income tax.

III. Chevron *Step One: The* FDA v. Brown & Williamson *Argument*

As we have shown in Part II, the fact that an independent entity is registered as a 527 organization under the tax code is immaterial to the question of the entity's status as a political committee under FECA. We now turn to the question of whether these issues are so ambiguous that the FEC is permitted to regulate independent 527 organizations. We argue in this Part that Congress did not intend to include independent 527 organizations as political committees. We conclude that the FEC is not permitted to adopt a statutory construction that is contrary to Congress's intent.

Even if it is assumed that *Buckley* and *MCFL* are ambiguous regarding the application of the major purpose test, there still remains a significant *Chevron*-step-one issue.[92] In step one of the *Chevron* analysis, the Court, using traditional tools of statutory interpretation, determines whether "Congress had an intention on the precise question at issue," and if so, that intention would control over an inconsistent agency interpretation.[93] Opponents of the FEC's proposal would argue that Congress has in fact made clear its intention with respect to the regulation of independent organizations, and

---

90 *See id.*

91 *See id.* ("In effect, the tax consequences under the current-law rules are the same regardless of whether electioneering activities are conducted collectively through a nonprofit entity or by a group of individuals without the use of a separate legal entity or segregated fund.").

92 For purposes of this discussion, we assume that *Chevron*'s deferential framework applies to situations where the agency fills gaps in the Supreme Court's interpretation of an ambiguous statute. *See supra* notes 52–52 and accompanying text.

93 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

would make an analogy to the 2000 Supreme Court case of *FDA v. Brown & Williamson Tobacco Corp.*[94] in support.

A. Brown & Williamson

In *Brown & Williamson*, the Court was faced with the question of whether the FDA's assertion of jurisdiction to regulate tobacco—after decades of denying such jurisdiction—was permissible.[95] The FDA asserted this jurisdiction by concluding in a proposed regulation that nicotine constituted a "drug" and that cigarettes and smokeless tobacco constituted "drug delivery devices" under the Food, Drug, and Cosmetic Act ("FDCA").[96] The Court, in a 5-4 decision authored by Justice O'Connor, struck down the proposed regulation.[97]

It is significant that, as the dissent points out, there was no question that the interpretations asserted by the FDA were consistent with the relevant statutory language, nor was there any doubt that the regulation of tobacco products was consistent with the basic purpose of the FDCA.[98] The critical issue was whether the FDA's proposed actions were nevertheless unlawful.

The Court analyzed the question in *Chevron*-step-one terms, framing the issue as whether "Congress has directly spoken to the issue here and precluded the FDA's jurisdiction to regulate tobacco products."[99] Before applying step one to the facts at hand, Justice O'Connor outlined three broad principles that would guide the analysis. First, she emphasized that the step-one analysis is a contextual one, where statutory terms must be interpreted "with a view to their place in the overall statutory scheme"[100] and to "fit, if possible, all parts into an harmonious whole."[101] Second, Justice O'Connor noted that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."[102] Finally, she acknowledged that the Court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[103] Justice O'Connor then applied these principles to the FDA's proposal to regulate tobacco, concluding under each that the proposal had been foreclosed by Congress.[104]

1. Contextual Interpretation

The majority first considered the FDA's interpretation in the context of the entire FDCA. The majority interpreted other provisions of the FDCA to

94 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125–27 (2000).
95 *Id.* at 125.
96 *Id.* at 127.
97 *Id.* at 125.
98 *Id.* at 167 (Breyer, J., dissenting).
99 *Id.* at 133.
100 *Id.* (quotation omitted).
101 *Id.* (quotation omitted).
102 *Id.*
103 *Id.*
104 *Id.*

require, after applying the FDA's proposed interpretations of "drug" and "drug delivery device," the outright banishment (and not merely the regulation, as the FDA asserted) of tobacco products.[105] The majority also determined that, because Congress enacted six different pieces of legislation since 1965 addressing the health-related issues of tobacco, but stopped well short of an outright ban, such a ban "would contradict Congress's clear intent as expressed in [this] more recent, tobacco-specific legislation."[106] Accordingly, the Court concluded that Congress had precluded the FDA's proposed interpretation.[107]

2. *Effect of Subsequent Related Legislation*

The majority reached the same *Chevron*-step-one conclusion as a result of a more detailed analysis of the six separate pieces of health-related tobacco legislation passed after the enactment of the FDCA. In this part of its analysis, the Court first explained how legislative activity subsequent to the enactment of a particular statute could narrow the scope of permissible interpretations of the statute:

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand. As we recognized recently in *United States v. Estate of Romani*, "a specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended."[108]

The Court then found that the six pieces of health-related tobacco legislation, all of which were enacted "against the backdrop of the FDA's consistent and repeated statements that it lacked authority under the FDCA to regulate tobacco," constituted a "distinct regulatory scheme to address the problem of tobacco and health."[109] The Court concluded that this distinct regulatory scheme, which contemplated no role for the FDA, foreclosed any opportunity for the FDA to regulate tobacco.[110] In essence, the Court found that, because Congress created this distinct regulatory regime for tobacco with full knowledge of the health issues as well as the FDA's denial of jurisdiction, Congress had effectively ratified the FDA's prior jurisdictional position re-

---

105 *Id.* at 135–36.

106 *Id.* at 143.

107 *Id.* at 142–43.

108 *Id.* at 143 (citations omitted).

109 *Id.* at 144.

110 *Id.*

garding tobacco.[111] As a result, for the FDA to now assert jurisdiction over tobacco, Congress would have to affirmatively act.

3. Effect of the Economic and Political Significance of the Issue

In addition to using statutory context and subsequent legislative activity to strike down the FDA's proposed regulation, the Court also determined that the sheer economic and political magnitude of the question of how to regulate tobacco undermined the notion that Congress would have implicitly delegated the issue to an agency.[112] In so doing, the Court reiterated the fundamental precept of *Chevron*—that by leaving an ambiguity in a statute, Congress is presumed to have implicitly delegated the authority to resolve that ambiguity to the agency charged with administering the statute.[113] The Court noted that, although this presumed delegation makes sense in the ordinary case, "[i]n extraordinary cases . . . there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[114] Accordingly, the Court determined that it would require a more explicit delegation of authority (i.e., more explicit than the act of merely writing an ambiguous statute) to uphold an agency's extraordinary action.[115]

The Court found the FDA's assertion of jurisdiction over tobacco to be an extraordinary action, given the significance of tobacco to the American economy, "its unique place in American history and society," and "its unique political history."[116] In light of this, the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."[117] Lacking an explicit delegation to regulate tobacco, the Court found that the FDA was precluded from asserting jurisdiction over tobacco products.[118]

B. Applying Brown & Williamson *to the FEC's Proposal*

The FDA's assertion of jurisdiction over tobacco products in *Brown & Williamson* is, in many respects, quite analogous to the FEC's assertion of jurisdiction over independent 527 organizations. At their most basic levels, the cases involve an agency asserting its authority over organizations that the agency had previously concluded were outside of its statutory jurisdiction.[119] Much more important, similarities between the two cases are evident when one applies the three broad statutory interpretation principles used by Justice

111 *Id.* at 156. The Court buttressed this point by noting that Congress had in the past "considered and rejected several proposals to give the FDA the authority to regulate tobacco." *Id.* at 147.

112 *Id.* at 159–60.

113 *Id.* at 159.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.* at 160.

118 *Id.* at 161.

119 In *Brown & Williamson* the organizations were the tobacco companies, while in the FEC context the organizations are independent 527 organizations.

O'Connor in *Brown & Williamson* to analyze the *Chevron*-step-one issue of whether Congress has precluded the agency's proposed action.

1. Contextual Interpretation

As in *Brown & Williamson*, a contextual analysis of campaign finance regulation reveals that Congress did not intend that the FEC regulate independent 527 organizations. FECA currently defines expenditures as "any purchase, payment, . . . or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[120] The FEC has proposed changing this definition to include electioneering communications made by independent 527 organizations and federal election activity by independent 527 organizations.[121] Independent 527 organizations whose major purpose—determined on the basis of their expenditures—is to influence federal elections would be regulated as political committees.[122]

As some commentators have noted, the FEC's proposed regulation of independent 527 organizations would create serious anomalies in campaign finance law when considered in connection with BCRA. Three such instances are worth focusing upon.[123] First, defining electioneering communications as expenditures would be in direct contravention of Congress's intent. Congress in BCRA specifically provided that "the term 'electioneering communication' does not include . . . a communication which constitutes an expenditure or an independent expenditure under this Act."[124]

Second, by requiring independent 527 organizations to register as political committees when they make electioneering communications, the FEC would subject independent 527 organizations to much greater regulation than Congress thought necessary.[125] The only condition Congress imposed upon those who make electioneering communications is that they must disclose such communications to the FEC within twenty-four hours if the costs of producing and airing the communications exceed $10,000.[126] Under Congress's statutory directive, an independent 527 organization that produces an electioneering communication is only subject to minimal reporting requirements. Under the FEC's proposed directive, an independent 527 organization that produces an electioneering communication is subject to the more serious source and amount limitations of FECA. This greater prohibition is clearly inconsistent with Congress's clear command as stated in BCRA.

Third, in BCRA Congress provided that federal candidates are permitted to raise funds on behalf of organizations, some of which could be independent 527 organizations, "whose principal purpose" is to engage in certain types of federal election activity—including specifically voter registration and

120 2 U.S.C. § 431(9)(A)(i) (2000).

121 Political Committee Status, 69 Fed. Reg. 11,736, 11,739–42 (proposed Mar. 11, 2004) (to be codified at 11 C.F.R. pts. 100, 102, 104, 106 & 114).

122 *Id.* at 11,743–44.

123 *Id.*

124 Bipartisan Campaign Reform Act of 2002 § 201(a)(3)(B)(ii), 2. U.S.C.A. § 434 (West 2005).

125 Political Committee Status, 69 Fed. Reg. at 11,742.

126 2 U.S.C. § 434(f)(1) (2000).

get-out-the-vote activity.[127] Congress only specified that federal candidates limit their solicitation to individuals and that they could not raise more than $20,000 from an individual in a calendar year.[128] Notably, Congress did not prohibit federal candidates from raising money on behalf of organizations that engage in partisan federal election activity. The only type of organizations that Congress precluded federal candidates from soliciting on behalf of are those whose principal purpose is to engage in public communication "that refers to a clearly identified candidate for Federal office . . . and that promotes . . . supports . . . attacks . . . or opposes for that office."[129]

Two lessons are worth drawing here. First, Congress contemplated that independent 527 organizations would engage in federal election activity, and Congress chose to do nothing to prohibit them. Indeed, Congress permitted federal candidates to help them under certain circumstances. Second, Congress specifically chose to regulate the federal election activities of only federal candidates, national committees of political parties, and state or local political parties.[130] Allowing the FEC to use the federal election activities of independent 527 groups to define them as political committees would permit the FEC to do precisely what Congress declined to do.

2. Effect of Subsequent Related Legislation

As in *Brown & Williamson*, Congress created a "distinct regulatory scheme" to address the campaign finance issues associated with independent organizations that would appear to contemplate no role for the FEC. In creating this regime, Congress acted against the backdrop of the FEC's well-established denial of jurisdiction over these groups. Using the reasoning of *Brown & Williamson*, one can argue that these legislative actions effectively ratified the FEC's original position of nonjurisdiction over these organizations.

a. Enactment of Public Law 106-230: Campaign Regulation Through the Tax Code

Prior to 2000, all independent organizations that avoided express advocacy were entirely unregulated. This lack of regulation appears to have been first exposed as a significant problem in the 2000 presidential primaries when the "Republicans for Clean Air" ran prominent television advertisements that (while avoiding express advocacy) clearly supported the nomination of George W. Bush and savagely attacked his most significant opponent, John McCain.[131] Because, under the FEC's then-existing interpretation of "politi-

127 2 U.S.C.A. § 441i(e)(4).

128 *Id.* § 441i(e)(4)(B)(ii).

129 *Id.* § 441i(e)(1)(A) (federal candidate cannot solicit for federal election activity); *see also id.* § 431(20)(A)(iii) (defines federal election activity). This limitation is in fact sensible as Congress did not want to create a sizable loophole by permitting federal candidates directly to solicit money on behalf of organizations that are promoting and supporting them or attacking and opposing their opponents.

130 *See* 2 U.S.C.A. § 441i (West 2005).

131 *See* Donald B. Tobin, *Anonymous Speech and Section 527 of the Internal Revenue Code*, 37 GA. L. REV. 611, 614–16 (2003).

cal committee," Republicans for Clean Air was not regulated under FECA, the organization claimed it had no duty to disclose who was behind the negative ads.[132]

As a result of the proliferation of similar so-called "stealth PACs," McCain and fellow Senators Joseph Lieberman and Russell Feingold proposed legislation that would regulate these groups, not through FECA, but rather through the Internal Revenue Code.[133] The legislation, which ultimately was enacted as Public Law 106-230,[134] constituted the first significant campaign finance reform measure in more than twenty-five years.[135] The legislation amended I.R.C. § 527 to require, in general, that 527 organizations disclose publicly their expenditures and contributors. This requirement, however, did not apply to any 527 organization that constituted a "political committee" under FECA and, thus, was already subject to disclosure requirements and other stricter regulation.[136] If a 527 organization failed to make the required disclosures under the new legislation, it would be subject to tax on the amount of its undisclosed expenditures or contributions.[137]

There are three noteworthy aspects of this legislation for our purposes. First, Congress chose low-level (i.e., disclosure only) regulation of 527s through the Internal Revenue Code instead of amending FECA to expressly include federal 527s as a "political committee" or otherwise explicitly instructing the FEC to regulate these groups. An explanation for this choice (other than the obvious one that Congress desired only low-level regulation of these groups as opposed to the more intense regulation under FECA) is that Congress was seriously concerned about the constitutionality of regulating independent organizations in this manner.[138] As a result, Congress chose to tie a purported tax subsidy (i.e., exemption from tax on the contributions that the 527 receives) to the speech restriction (i.e., disclosure of donors) to invoke the *Regan v. Taxation with Representation* (*TWR*) doctrine.[139] This doctrine provides generally that the government may condition a subsidy on speech restrictions relating to the use of the subsidy without violating the First Amendment.[140]

Congress's serious First Amendment concerns are evident in the legislative history behind Public Law 106-230. For example, then-Majority Whip Tom DeLay stated with respect to the House bill:

> I am first and foremost a constitutionalist, and this bill is a clear violation of the First Amendment. Again and again, the courts have upheld the right of groups to participate in the political process

---

132 *Id.* at 615.

133 *See, e.g.*, 146 CONG. REC. S5995 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

134 Amendment to 1986 Internal Revenue Code to Require 527 Organizations to Disclose their Political Activities, Pub. L. No. 106-230, 114 Stat. 477 (2000).

135 148 CONG. REC. S10,779 (daily ed. Oct. 17, 2002) (statement of Sen. Lieberman).

136 *See* I.R.C. § 527(i)(6) (2000).

137 *Id.* § 527(j)(1)(A).

138 *See infra* notes 139–40 and accompanying text.

139 146 CONG. REC. S5996 (daily ed. June 28, 2000) (statement of Sen. Lieberman).

140 *See* Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983).

> while retaining privacy for their members. I am therefore confident that the courts will quickly and decisively strike down this legislation.[141]

Similarly, Senator McConnell opined: "[C]aselaw demonstrates that there are serious questions as to whether the government can require public donor disclosure of groups that are not engaging in express advocacy."[142]

To allay these concerns, sponsors of the legislation invoked the *TWR* doctrine to support their view that the law would be upheld. In fact, Senator Lieberman specifically cited *TWR* in the Senate debate:

> [T]his bill does not prohibit anyone from speaking, nor does it force any group that does not currently have to comply with FECA or disclose information about itself to do either of those things. Instead, the bill speaks only to what a group must do if it wants the public subsidy of tax exemption—something the Supreme Court has made clear no one has a constitutional right to have [in *TWR*]. . . . Under this bill, any group not wanting to disclose information about itself or abide by the election laws would be able to continue doing whatever it is doing now—it would just have to do so without the public subsidy of tax exemption conferred by section 527.[143]

Co-sponsors McCain and Feingold later reiterated this point. Senator McCain emphasized: "I just want to point out again that making these requirements a contingency for certain tax credit status ensures that these requirements are clearly constitutional. The Constitution guarantees freedom of speech and association, not an entitlement to tax-exempt status."[144] Finally, Senator Feingold argued "that there is no constitutional argument against this bill because these organizations receive a tax exemption."[145]

The argument that *TWR* necessarily shields the disclosure requirements in Public Law 106-230 from constitutional challenge is dubious because, as we have already explained, § 527 does not really provide any tax benefit or subsidy.[146] It merely taxes these organizations appropriately; accordingly, the 527 "tax" on nondisclosing 527s is, properly understood, a penalty (not a withdrawal of a subsidy) on anonymity. The *TWR* analogy thus is not particularly apt.

Nevertheless, for our purposes the significant point is that Congress made a clear choice to subject independent political organizations to low-level regulation through the tax code, rather than to full-fledged regulation as a political committee through the election code. This strategy was, at least in

---

141 146 CONG. REC. H5287 (daily ed. June 27, 2000) (statement of Rep. DeLay).

142 146 CONG. REC. S5997 (daily ed. June 28, 2000) (statement of Sen. McConnell).

143 *Id.* at S5996 (statement of Sen. Lieberman).

144 *Id.* (statement of Sen. McCain).

145 *Id.* at S6000 (statement of Sen. Feingold).

146 *See supra* notes 86–91 and accompanying text. *But see* Tobin, *supra* note 131, at 673–78 (arguing that *TWR* might protect Public Law 106-230 from constitutional challenge); Daniel L. Simmons, *An Essay on Federal Income Taxation and Campaign Finance Reform*, 54 FLA. L. REV. 1, 96–101 (2002) (arguing that a political organization's exemption from tax on contribution receipts may be considered a tax subsidy).

part, designed to bolster the chances that this regulation would survive a First Amendment challenge.

The second important aspect of Public Law 106-230 is that the disclosure requirements are based entirely on campaign finance concerns and have no relationship whatsoever to tax policy.[147] Absent the campaign finance issues, there is no reason to require these disclosures. The IRS is generally obligated to keep taxpayer information nonpublic, while under § 527, as amended, the IRS is obligated to disclose 527 information to the public, a duty more commonly associated with the FEC. Public Law 106-230 thus is simply campaign finance legislation implemented through the tax code.

Third, it is clear from the text of the law and its purpose that Congress was fully aware of the FEC's position that it lacked jurisdiction over independent organizations. The legislation specifically exempts from its disclosure requirements those organizations that were already regulated as "political committee[s]" under FECA. At the time of its enactment, the FEC's interpretation of that term vis-à-vis independent entities was abundantly clear.[148] Thus, when Congress used that term, it should be presumed that Congress understood and approved of the meaning given to it by the agency charged with administering the statute. The clear purpose of Public Law 106-230 also supports this view. It was precisely the FEC's position that created the problem (i.e., the "loophole" for "stealth PACs") that Congress sought to solve through mandated disclosure.[149]

b. Public Law 107-276

More than two years after Congress mandated these 527 disclosures, it tweaked the disclosure regime. In Public Law 107-276,[150] Congress amended I.R.C. § 527 to improve the public's access to the disclosed information and to avoid duplicate reporting obligations for nonfederal political organizations that already were subjected to similar disclosure obligations under local law.[151]

Although the specifics of this tweaking are beyond the scope of this Essay, it is clear that Congress endeavored to improve the distinct regulatory regime that it put into place in 2000. It is also clear that, once again, Congress acted against the backdrop of the FEC's stance that it lacked authority to regulate these groups under FECA. Congress could have, after reevaluat-

147 *See* 146 CONG. REC. S5994–S6000 (daily ed. June 28, 2000); 146 CONG. REC. S6041–47 (daily ed. June 29, 2000). Tax policy is concerned with raising revenue efficiently and fairly in an administratively feasible manner. Public Law 106-230, which was enacted for the sole purpose of increasing public disclosure by 527s, does nothing to further these goals.

148 *See* Hayward & Smith, *supra* note 37, at 98 (noting that, in amending § 527, "Congress acted against a well-established background of Court decisions and Commission action that limited the definition of 'political committee' to groups spending over $1,000 on express advocacy").

149 The legislative history confirms this as well. *See, e.g.*, *2000 Campaign Finance Hearings*, *supra* note 35, at 46 (statement of Lindy Paull) (testifying that under then-existing law "[e]xpenditures for issue advocacy by organizations other than national parties are not subject to disclosure under the FECA").

150 *See* Income Tax Notification and Return Requirements—Political Committees, Pub. L. No. 107-276, 116 Stat. 1929 (2002).

151 *Id.* §§ 1–5, 116 Stat. at 1929–32.

ing the efficacy of its low-level regulation of independent organizations through the tax code, amended FECA or given the FEC explicit instructions to regulate these organizations. Congress chose not to do so, deciding instead merely to modify the existing regulatory regime.[152]

c. BCRA

Whether one believes that the FEC ought to regulate independent 527 organizations or not, there are some facts that are difficult to dispute. In BCRA Congress enacted comprehensive and sweeping legislation to specifically address what it viewed—legitimately in our view—as problems with the manner in which federal campaigns are financed. Though one could argue that the issue of regulating independent 527 organizations was not as acute as it became during the 2004 presidential elections,[153] there is no doubt that Congress was aware of what some viewed as the 527 "problem."[154] Moreover, Congress was aware of the FEC's refusal to regulate independent entities. Lastly, Congress was also aware that regulating independent entities would raise significant constitutional concerns.

As the Court recognized in *McConnell*, Congress carefully enacted this comprehensive legislation to address a very specific problem. Congress overwhelmingly chose to apply its regulation to federal candidates, national parties, and in some instances state and local parties.[155] Knowing both the concern with independent entities and the FEC's position, Congress chose not to regulate independent entities.

As a result of BCRA and the two prior pieces of legislation creating the distinct regulatory regime designed to address the "stealth PAC" issue, Congress appears to have ratified the position of the FEC regarding its jurisdiction over independent organizations. If so, even if *Buckley* and *MCFL* could be interpreted in a manner consistent with the proposed FEC regulation, these legislative actions would preclude the FEC from changing its position absent specific congressional authorization.

3. Effect of the Economic and Political Significance of the Issue

The *Brown & Williamson* opinion stands for the proposition that, although *Chevron*'s presumption of implicit congressional delegation by virtue of statutory ambiguity generally applies with respect to an agency's run-of-the-mill interpretations, a more explicit delegation will be required when the agency's interpretation will have very significant ramifications.[156] Although

---

152 As noted above in note 110, the majority in *Brown & Williamson* buttressed their use of subsequent legislative activity by pointing to the fact that Congress had previously considered and rejected bills that would have explicitly required the FDA to regulate tobacco. Similarly, Congress has previously considered and rejected bills that would have explicitly required the FEC to regulate nonconnected 527s. *See, e.g.*, H.R. 3688, 106th Cong. (2000); S. 2582, 106th Cong. (2000).

153 *See supra* note 6 and accompanying text.

154 *See, e.g.*, 148 CONG. REC. S10,779 (daily ed. Oct. 17, 2002) (statement of Sen. Lieberman).

155 2 U.S.C.A. § 441i(e) (West 2005).

156 *See supra* notes 112–18 and accompanying text.

Brown & Williamson focused on the economic and political ramifications of the proposed agency action, the Court has drawn a very similar counter-*Chevron* inference in instances where the agency's interpretation raises significant constitutional concerns.[157] The overriding principle behind all of these counter-*Chevron* inferences is that, notwithstanding *Chevron*, the agency is precluded from doing anything that might raise very significant concerns without an explicit delegation, regardless of whether the issues raised are economic, political, or constitutional.

Professor Cass Sunstein has described this counter-*Chevron* inference in the constitutional context as follows:

> The principle appears to say that constitutionally sensitive questions (for example, whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own. So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement.[158]

Applying this "nondelegation canon," as Professor Sunstein calls it, the critical issue here is whether the FEC's interpretation of "political committee" raises serious and substantial constitutional doubts.[159] As explained below, it is clearly plausible that the proposed regulation would violate the First Amendment.[160] Thus, this nondelegation canon could serve as grounds to strike down the proposal.

This conclusion is reinforced when one considers recent campaign finance legislation. In creating the distinct campaign finance regulation for 527 organizations through the tax code, Congress was well aware of the potential serious First Amendment issues. Instead of taking these issues head on (or specifically authorizing the FEC to take them head on, as would be required under the nondelegation canon), Congress actively strove to circumvent these concerns by tying the regulation to a purported tax subsidy to invoke the *TWR* doctrine.[161] In significant contrast, Congress obviously intended to push the constitutional envelope as much as possible in BCRA, but only with respect to connected organizations.[162] Not only is there a lack of specific congressional authority for the FEC's constitutionally suspect proposed interpretations, Congress's actions imply that it affirmatively desires to avoid

---

157 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 331 (2000).

158 *Id.*

159 We have already explained that the relevant statutes and *Buckley* and *MCFL* are arguably ambiguous as to whether nonconnected organizations constitute political committees. *See supra* Part II. Therefore, if the FEC's proposal raises serious constitutional issues, it would seem that the Court would require a more explicit delegation from Congress before it would uphold the agency's action.

160 *See infra* Part IV.

161 *See supra* text accompanying notes 139–45.

162 *See supra* Part III.B.2.c.

pushing the constitutional envelope in the independent entity context. It would seem, therefore, that the nondelegation canon would be even stronger in this context, where Congress has attempted to creatively circumvent a constitutional problem.

IV. FEC Regulation Would Be Unconstitutional

Notwithstanding these administrative law concerns, regulation of independent 527 organizations by the FEC would be unconstitutional. Four reasons, discussed below, support our conclusion. First, the FEC can only regulate independent 527 organizations if the FEC's justifications for doing so are to prevent corruption, the appearance of corruption, or the circumvention of campaign finance rules that are designed to prevent corruption or the appearance of corruption. Second, contribution limitations on independent 527 organizations should be understood as limitations on direct advocacy, which is a violation of the First Amendment. Third, *McConnell* is not the invitation to regulation as some reformers have perceived it to be. Last, the Court has never intimated that limitations on independent contributions are constitutional.

A. Independent Advocacy Does Not Pose Any Dangers of Corruption

The central logic of the campaign finance regulatory regime and of the Supreme Court cases that sanction that regime is based upon two complementary elements. First, federal candidates constitute the central concern of campaign finance reform; they are the primary targets of reform legislation. As the Court recognized in *Buckley*, Congress's rationale for regulating campaign financing is to affect the behavior of federal candidates.[163] Second, the Court has never changed what we are calling as a term of art the "primary rationales" for regulating campaign financing. These have always been—and still are—a concern with corruption, the appearance of corruption, and anticircumvention.[164] More precisely, the "primary rationales" are not simply a general concern with corruption but a concern with the corruption of federal candidates or federal officeholders.[165] As the Court stated in *FEC v. National Conservative Political Action Committee*,[166] "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances."[167] The central logic of the current campaign finance regime thus is that federal can-

---

163 Buckley v. Valeo, 424 U.S. 1, 25–26 (1976) (per curiam).

164 McConnell v. FEC, 540 U.S. 93, 143–60 (2003). The anticircumvention rationale need not be viewed as a separate rationale, but as a more specific concern with preventing corruption in the political process.

165 *Id.* at 143 ("The Government defends § 323(a)'s ban on . . . soft money as necessary to prevent the actual and apparent corruption of federal candidates and officeholders."). As the Court has noted, "Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns." FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497 (1985).

166 FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480 (1985).

167 *Id.* at 496–97.

didates and federal officeholders need to be isolated from potentially corrupting influences.

All entities whose campaign financing is regulated and all justifications for campaign finance regulations must be consistent with this central logic in order to comport with the First Amendment. For example, in explaining why FECA's $5000 contribution limitation to political action committees ("PACs") is constitutional, the Court in *Buckley* maintained that the purpose of the contribution limitation is to prevent "individuals from evading the applicable contribution limitations by labeling themselves committees."[168] We regulate PACs because, without doing so, influence-seekers would be able to make large contributions directly to the PACs of federal candidates. Hence, the Court promulgated the anticircumvention rationale.

Similarly, in discussing why expenditure limitations are unconstitutional, the Court stated that "independent advocacy . . . does not . . . pose dangers of real or apparent corruption."[169] Independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."[170] This is because these expenditures are truly independent, which "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."[171]

The Court reaffirmed this approach in *Colorado Republican Federal Campaign Committee v. FEC*,[172] concluding that limiting the independent expenditures of political parties was unconstitutional because there are no "special dangers of corruption associated with political parties that tip the constitutional balance in a different direction."[173]

Two lessons are worth extrapolating from *Buckley* and its progeny. First, Congress must always link campaign finance reform legislation to a primary rationale.[174] Second, independent advocacy does not lead to corruption or the appearance of corruption so as to justify contribution limits.[175]

The constitutional problem with the FEC's regulation of independent 527 organizations is that such regulation could not be justified on the basis of a primary rationale. The FEC has not explained how contributions to independent 527 organizations and expenditures by such organizations would lead to corruption or really what corruption means in this context. In the absence of coordination, it is not enough that independent 527 organizations raise and spend large amounts of money that could benefit federal candi-

---

168 *Buckley*, 424 U.S. at 35–36.

169 *Id.* at 45–46.

170 *Id.* at 47.

171 *Id.*

172 Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604 (1996).

173 *Id.* at 616.

174 *See, e.g.*, Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296–97 (1981) (stating that the Court has "identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*.").

175 *See, e.g.*, FEC v. Nat'l Conservative Political Action Comm. (NCPAC), 470 U.S. 480, 497–98 (1985).

dates.[176] This is so even if federal candidates take or affirm public policy positions in anticipation that independent 527 organizations would raise and spend money on their behalf.[177] As the Court has stated on numerous occasions, the lack of coordination by independent groups with candidates or parties "undermines the value of the expenditure to the candidate, and thereby alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."[178] The FEC cannot regulate independent 527 organizations simply because those entities wish to have an impact on the political process. As the FEC has not articulated a justification for bringing independent 527 entities within the regulatory framework of FECA, FEC regulation would be unconstitutional.

B. *The State Cannot Substantially Impair an Individual's or a Group's Direct Political Expression*

Regulation by the FEC would also be unconstitutional because such regulation would substantially impair the ability of individuals and groups to engage in independent and direct political expression. As the Court has stated on a number of occasions, there is "a fundamental constitutional difference between money spent to advertise one's views independently of the campaign and money contributed to the candidate to be spent on his campaign."[179]

One could argue that the constitutional line is the contribution/expenditure line and as long as the FEC is only regulating contributions to independent 527 organizations—which it is—such regulations would be subject to the more deferential standard of review that applies to contribution limitations. This view is mistaken. As we argue above, the contribution/expenditure line is based upon the Court's determination that contributions, particularly large contributions, to candidates, parties, and their PACs, would lead to corruption and the appearance of corruption. By contrast, independent expenditures would not. The fundamental question thus is whether state regulation would further the primary rationale.

Second, as the Court explained in *Citizens Against Rent Control v. City of Berkeley*,[180] individuals have a First Amendment right to engage in direct political advocacy, which cannot be impaired by the state unless the state identifies a compelling interest.[181] In *Citizens Against Rent Control*, the City of Berkeley enacted an ordinance that limited the amount of money that individuals could contribute to political associations to support or oppose a

---

176 *Id.*

177 *Id.* at 498 ("The fact that candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACs can hardly be called corruption, for one of the essential features of democracy is the presentation to the electorate of varying points of view.").

178 *Id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 47–48 (1976) (per curiam) (stating that the "independent expenditure ceiling . . . fails to serve any substantial governmental interest in stemming the reality or appearance of corruption").

179 *NCPAC*, 470 U.S. at 497; *see also* Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 614–15 (1996).

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

181 *Id.* at 298–99.

ballot measure.[182] The Court concluded that the ordinance was unconstitutional as an invalid infringement upon the right of individuals and groups to engage in protected First Amendment activity.

The Court articulated two reasons to support its conclusion. First, the Court noted that the contribution limitation is an infringement on the right of the individual or group to engage in expenditures to support their positions.[183] The Court stated, "Placing limits on contributions which in turn limit expenditures plainly impairs freedom of expression."[184] The Court concluded that the "contribution limit thus automatically affects expenditures, and limits on expenditures operate as a direct restraint on freedom of expression of a group or committee desiring to engage in political dialogue concerning a ballot measure."[185]

Second, the Court also stated that the ordinance violated the right of association. The Court remarked that "[u]nder the Berkeley ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted."[186] The Court concluded that "[c]ontributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression."[187]

The Court reasoned that the City did not articulate a sufficient justification to support the substantial infringement on direct advocacy wrought by the ordinance. Though the City stated that the purpose of the ordinance was to prevent corruption—preventing special interest groups from spending large amounts of money to unduly affect the outcome of a ballot measure[188]—the Court concluded that the governmental interest was not compelling because the risk of corruption "simply is not present in a popular vote on a public issue."[189]

The lessons from *Citizens Against Rent Control* are very clear. First, calling a restriction a "contribution" limitation does not insulate it from exacting judicial review. The Court has sanctioned state legislation that limits contributions to candidates and parties because of the force of the corruption rationale. Second, in *Citizens Against Rent Control*, the Court understood the contribution limitation not as applied to contributions but as directed against expenditures by the individual and the group. The purpose of the Berkeley ordinance was not to restrict contributions because there is something inherently corrupting with those contributions, but to limit the amount of money that an entity can spend. Third, the Court objected to the state burdening the right of association without sufficient justification. As the Court stated, to "place a Spartan limit—or indeed any limit—on individuals wishing to band

182 *Id.* at 292.
183 *Id.* at 299.
184 *Id.*
185 *Id.*
186 *Id.* at 296.
187 *Id.* at 298.
188 *Id.* at 293–94.
189 *Id.* at 298.

together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."[190]

Consider also *California Medical Association v. FEC (CalMed)*,[191] in which the Court sustained FECA's contribution limitation that precluded a nonprofit association from contributing more that $5000 per year to a PAC established by the association. *CalMed* is significant for two reasons. First, the Court articulated a primary rationale for upholding the contribution limitation. The Court noted that under contributions that were applicable at that time, individuals and associations were precluded from contributing more than $1000 to individual candidates and no more than $25,000 per year in the aggregate.[192] The Court explained that because PACs are permitted to contribute up to $5000 to individual candidates, if the association were permitted to make unlimited contributions to the PAC, the association would be able to circumvent FECA's limitations on contributions to individual candidates "by channeling funds through" a PAC.[193]

Second, the Court distinguished as constitutionally significant a contribution limitation that would limit the amount that individuals could spend in concert to promote their own views.[194] The Court's distinction implied that it would view the case differently if the limitation restricted the ability of individuals to spend their money, individually or jointly, to propagate their own political views.[195]

The lessons from these cases are clearly applicable to FEC regulation of independent 527 organizations. The fact that FEC regulation would apply to contributions is of no moment and should not insulate the regulation from exacting judicial review. Second, *Citizens Against Rent Control* makes clear that the state cannot burden independent expenditures by limiting independent contributions.[196] Because the FEC and reformers are really concerned about expenditures by independent 527 organizations, they should not be permitted to limit contributions to independent 527 organizations. Lastly, the state is not permitted to unduly burden the right of association. If George Soros can independently spend his millions to support or oppose a candidate, he should be permitted to join with others to do so unless the state has a compelling reason for preventing the association. The fact that the association would spend a lot of money does not provide a compelling governmental interest to regulate it.

---

190 *Id.* at 296.

191 Cal. Med. Ass'n v. FEC, 453 U.S. 182 (1981).

192 *Id.* at 198.

193 *Id.*

194 *Id.* at 195 (noting that the provision at issue does not "limit[ ] the amount [that the association] or any of its members may independently expend in order to advocate political views").

195 *Id.* at 197 & n.17 ("Contributions to [PACs] are . . . distinguishable from expenditures made jointly by groups of individuals in order to express common political views.").

196 *But see* Richard L. Hasen, *Rethinking the Unconstitutionality of Contribution and Expenditure Limits in Ballot Measure Campaigns*, 78 S. CAL. L. REV. 885 (2005) (arguing that *Citizens Against Rent Control* has been undermined by subsequent cases including *McConnell*).

C. McConnell *Is Not an Invitation to Regulate 527s*

Contrary to the opinion of the reformers, the Supreme Court's decision in *McConnell v. FEC* may not be the open invitation to regulation that some have perceived it to be. In *McConnell*, the Court was addressing the power of Congress to address what we term "core regulated entities"—institutions that form the raison d'être of campaign finance reform. These are federal candidates and their PACs, national parties and their PACs, corporations and their PACs, unions and their PACs, and, to a lesser extent, state officials (parties and candidates) and their PACs.[197]

McConnell is best understood as a case that is consistent with the central logic of the Court's approach to addressing the constitutionality of campaign finance reform efforts. That is, where the state is regulating a core regulated entity and presents a primary rationale for doing so—corruption, appearance of corruption, or anticircumvention—the Court has tended to defer to the state's determination. For example, in addressing BCRA's prohibition on the use of soft money by state officials to engage in federal election activity, the Court stated that Congress's conclusion, "based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternate avenue for precisely the same corrupting forces."[198]

In BCRA, Congress was regulating core regulated entities such as national parties,[199] unions,[200] corporations,[201] federal officeholders,[202] and state officials to the extent that their campaign activities brought them in close proximity with federal candidates.[203] Further, Congress articulated a primary rationale for regulating these core entities. Even where the state is regulating a core entity, the Court has been less willing to defer to the state where the regulation is not based upon a primary rationale. Put differently, an entity can become a regulated entity or subject to further regulation only where the state can offer a primary justification for regulation. This is the best way to understand the Court's distinction between expenditure and contribution limitations in *Buckley*.

For instance, in upholding the prohibition on the receipt of soft money by national parties, the Court in *McConnell* stated that "it is the close relationship between federal officeholders and the national parties, as well as the means by which parties have traded on that relationship, that have made all large soft-money contributions to national parties suspect."[204] National parties have "sold access to federal candidates and officeholders" giving "rise to the appearance of undue influence."[205] We regulate national parties because

197 *See* McConnell v. FEC, 540 U.S. 93, 131–32 (2003).
198 *Id.* at 164.
199 2 U.S.C.A. § 441i(a) (West 2005).
200 *Id.* § 441i(d).
201 2 U.S.C. § 441a(a)(5) (2000).
202 2 U.S.C.A. § 441i(e).
203 *Id.* § 441i(f).
204 McConnell v. FEC, 540 U.S. 93, 154–55 (2003).
205 *Id.* at 153–54.

they serve as a conduit to federal candidates, and "[g]iven this close connection and alignment of interests, large soft-money contributions to national parties are likely to create actual or apparent indebtedness on the part of federal officeholders."[206] The end result is either corruption or the appearance thereof.[207]

McConnell did nothing to undermine the central logic of the Court's approach to determining the constitutionality of campaign finance legislation. If *McConnell* is best understood as a case that is consistent with the central logic of the Court's approach to the constitutionality of campaign finance legislation, it cannot be used as an indication of the Court's posture toward a regulation by the state that is inconsistent with that central logic. Put differently, that the Court upheld overwhelmingly[208] the regulations at issue in *McConnell* does not signify that the Court will be similarly solicitous of FEC regulations that do not regulate a core entity and are not based upon a primary justification.

Notably, *McConnell* deferred to congressional determination, not to the judgment of the FEC. In *McConnell*, the Court remarked that Congress relied upon factual findings to support its conclusion that soft money contributions to political parties, federal candidates, and state officials affected the integrity of federal officeholders.[209] The Court noted Congress's "lengthy deliberations leading to the enactment of BCRA."[210] Further, in justifying its decision to apply a lesser standard of review to contribution limitations, the Court maintained that the "less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress's ability to weigh competing constitutional interests in an area in which it enjoys particular expertise."[211] The Court commented on the "respect that the Legislative and Judicial Branches owe to one another."[212] There is very little doubt that when the Court reviewed BCRA, it was doing so in the context of a deliberative act by Congress designed to address what Congress had come to understand as a persistent, recurring, and difficult problem.

D. The Court Has Never Sanctioned Contribution Limitations on Independent Organizations

Lastly, the Court has never sanctioned contribution limitations on independent organizations—organizations that do not make contributions to or receive contributions from core regulated entities. The closest the Court came was in *MCFL*. There the Court suggested the possibility that MCFL—an independent organization that engages in issue advocacy, that did not accept contributions from corporations and unions, and that did not make con-

206 *Id.* at 155.

207 *Id.* at 156.

208 And rightly so in our view.

209 As the Court stated in *McConnell*, "[C]ommon sense and the ample record . . . confirm Congress's belief" that "large soft-money contributions . . . have a corrupting influence or give rise to the appearance of corruption." *McConnell*, 540 U.S. at 145.

210 *Id.* at 137.

211 *Id.*

212 *Id.*

tributions to federal candidates—could be regulated as a political committee should its "independent spending become so extensive that [its] major purpose . . . be regarded as campaign activity."[213]

But the Court in *MCFL* fully understood that Congress can only regulate political entities if those entities pose a threat to the core values that make campaign finance reform necessary. In fact, the Court concluded that the FEC could not constitutionally prohibit MCFL from using its general treasury funds to publish its newsletter precisely on the grounds that MCFL did not pose a threat to the values that undergird campaign finance reform. The Court stated that the justification for regulating corporate political activity is to prevent "resources amassed in the economic marketplace [from] be[ing] used to provide an unfair advantage in the political marketplace."[214] The segregated fund requirement is justified by a "concern over the corrosive influence of concentrated corporate wealth," which "reflects the conviction that it is important to protect the marketplace of political ideas."[215]

The Court noted, however, that "[g]roups such as MCFL . . . do not pose that danger of corruption," and that "MCFL was formed to disseminate political ideas, not to amass capital. The resources it has available are not a function of its success in the economic marketplace, but its popularity in the political marketplace."[216] Consequently, the Court concluded, requiring MCFL to use a segregated account in order to make its independent expenditures would be unconstitutional because the regulatory concerns that gave rise to the separate fund requirement "are simply absent with regard to MCFL."[217]

FEC regulation of independent 527 organizations thus would raise, at the very least, significant constitutional questions and would arguably be unconstitutional. The FEC has nowhere concluded that these independent entities would exert a corrupting influence on federal candidates. The FEC has also not concluded that regulating these independent entities is necessary to prevent the circumvention of existing campaign finance laws. As the Court stated in *MCFL*: "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."[218] The FEC would be wise to heed this admonishment from the Court.

Conclusion

The issue of the FEC's authority to subject independent 527 organizations to the full regulatory framework of FECA is an extremely complex one. It involves a fairly sophisticated understanding of election law, tax law, and administrative law. As we demonstrate in this Essay, viewing this issue from

213 FEC v. Mass. Citizens for Life, Inc. (MCFL), 479 U.S. 238, 262 (1986).

214 *Id.* at 257.

215 *Id.*

216 *Id.* at 259.

217 *Id.* at 263.

218 *Id.* at 265.

these diverse perspectives, it is clear that the FEC does not have the statutory authority to regulate independent 527 organizations.

It may very well be the case that independent 527 organizations pose a distinct challenge to FECA's campaign finance regime by permitting these ostensibly independent groups to circumvent FECA's legitimate regulatory aims. Though reformers have not presented any such evidence, to the extent that independent 527 organizations undermine the current regulatory framework, this is an issue that only Congress can address. Congress has not yet done so, and therefore the FEC does not yet have the delegated authority to regulate.