

# JUDICIAL SUPERVISION OF CAMPAIGN INFORMATION: A PROPOSAL TO STOP THE DANGEROUS EROSION OF MADISON'S DESIGN FOR ACTUAL REPRESENTATION

*[N]egative ads will be part of the equation. But we look forward to a fair fight in which no one is making up their own facts.*<sup>1</sup>

– *Denver Post Editorial Board*

## I. SELECTING OUR LEADERS: A STEADY EROSION OF MADISON'S DESIGN

On September 4, 2005, less than one week after Hurricane Katrina devastated New Orleans and the Gulf Coast, and more than three years into an escalating quagmire in Iraq, Frank Rich facetiously paraphrased Secretary of Defense Donald Rumsfeld, writing, “for now . . . we have no choice but to fight the war with the president we have.”<sup>2</sup> The failure in the United States’ mode for selecting public officials is the systematic undermining of informed debate. Election 2004 is defined by a steady flow of false and misleading advertising. Consequently, citizens are subjected to national disasters, the likes of which will alter the socio-political fabric of the country, before learning facts relevant to issues on which voting decisions were based years earlier. In the 2006 mid-term elections, and even more so in the 2008 Presidential campaign, voters will want to familiarize themselves with the *facts*, on matters such as homeland security, foreign policy, alternative energy sources, climate change/global warming, domestic poverty and the class divide, border protection, etc. Nevertheless, notwithstanding a sharp course alteration for federal campaign regulations, information will remain dangerously watered down by advertisements designed to foster an ignorant electorate.

Imagine sitting at home on Sunday afternoon in early September, watching your favorite NFL team. At the first commercial break you are suddenly assaulted with a bitter political advertisement suggesting

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1. Editorial, *Political Campaigns of Personal Destruction: Dishonest Attacks on Some Vietnam Veterans Go from John McCain to Max Cleland to John Kerry. Now Some Slime Has Oozed into Colorado's Senate Race, Too*, DENV. POST, Aug. 25, 2004, at B06 [hereinafter Editorial, *Political Campaigns of Personal Destruction*].

2. Frank Rich, *Falluja Floods the Superdome*, N.Y. TIMES, Sept. 4, 2005, at 10. Rich was referencing Rumsfeld's comment while appearing before a group of Army Reservists in Kuwait. Responding to an Army specialist's question about insufficient armor, Rumsfeld said, “As you know, you go to war with the Army you have, not the army you might want or wish to have.” See, e.g., *NBC Nightly News* (NBC television broadcast Dec. 8, 2004).

candidate X engaged in questionable behavior. As was the case for many ads broadcast throughout the 2004 election cycle,<sup>3</sup> this issue advertisement fails to explicitly identify its source.<sup>4</sup> Nevertheless, its harsh tone is likely to at least influence the opinion of some voters.<sup>5</sup> Would you prefer to: (a) take on a homework assignment to determine whether this ad is accurate;<sup>6</sup> (b) wait months to see how this issue plays out through the media, if it does in fact play out at all; or (c) be able to accept the assertions as fact and go back to watching the football game, or alternatively, be fully aware that the assertion is strictly an opinion and exactly whose opinion it reflects?

Wishing to select option (c) from the above stated choices is easy. The greater difficulty, however, is in appreciating why it is increasingly important to be able to do so. Crafting a legislative solution to this problem constitutes regulation of electioneering communication—any broadcast, cable, or satellite communication referring to a clearly identified candidate for Federal office, made within sixty days of a general election or thirty days of a primary that is targeted to the relevant electorate.<sup>7</sup> Necessarily, such a regulation implicates the entire campaign finance system.

Why does this matter? Because the parallel paths of campaign finance laws and the relationship between Congress and interest groups over the last century has rendered meaningless James Madison's design for a Representative Republic. Madison and his fellow Framers of the Constitution structured a government premised on actual representation,

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3. See, e.g., *Day to Day: Negative Campaign Ads* (NPR radio broadcast Aug. 18, 2004) [hereinafter *Day to Day*]. According to reporter Mike Pesca, "the ads bought by interest groups or so-called 527 committees . . . [are] almost all attack ads and it seems a little less truthful than official campaign commercials." *Id.*; see also Howard Kurtz, *Ads Push the Factual Envelope; Misleading Claims Have Candidates Battling Caricatures*, WASH. POST, Oct. 20, 2004, at A1.

4. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.) exempts "527 groups" from the disclosure rules that campaigns and political committees must follow. A "527 group" is named for the section of the Internal Revenue Code by which it was created. I.R.C. § 527 (2004). However, not every group actually referred to as a "527 group" in this post-BCRA era is "actually organized under section 527 of the Internal Revenue Code." *The Whoppers of 2004*, FACTCHECK.ORG (Annenberg Political Fact Check, Washington, D.C.), Oct. 31, 2004, <http://www.factcheck.org/article298.html>. Disclosure is required if the particular advertisement constitutes "express advocacy" regardless of whether the group is a registered 527. See George J. Terwilliger III & John C. Wells, '527' Organizations, NAT'L L.J., Sept. 13, 2004, at 16. However, an ad appearing prior to sixty days outside the election is excluded from these requirements. See *id.*

5. See, e.g., *Day to Day*, *supra* note 3 (suggesting that voters are mobilized by negative ads).

6. See, e.g., Press Release, Nielsen/NetRatings, Inc., Swift Boat Veterans Controversy and Political Bashing Drive John Kerry Website Traffic up 113 Percent; Bush Site Jumps 44 Percent, According to Nielsen/NetRatings (Aug. 26, 2004) (on file with author).

7. Bipartisan Campaign Reform Act, tit. II(a), § 201, 2 U.S.C. § 434 (2002).

secured by the electoral connection between a representative and his constituency. The Framers consciously rejected the concept of virtual representation, or representation premised on a community of interests.<sup>8</sup> During the revolutionary era, the British Parliament staked its legitimacy on this theory. For the new American Republic, it would be the electoral connection that renders an act of the government a legitimate act of the people. A steady erosion of this connection now plagues the United States.<sup>9</sup>

Madison's design was premised on striking a delicate balance between liberty to pursue self-interest, but stopping short of the point of tyranny (i.e., self-interests dominating other groups).<sup>10</sup> The 2004 election cycle exhibited an onslaught of false or misleading political advertisements sponsored by independent groups.<sup>11</sup> Allowing false and misleading ads to flood the airwaves on the interest groups' dollar is at the very core of the sort of tyranny Madison despised. In theory, the marketplace of ideas should be able to sort out the facts from the fiction through ongoing dialogue. However, the media is the gateway of information and during the 2004 election cycle it failed to satisfy this role.<sup>12</sup> Consequently, the electorate was overloaded with information of this false, self-interested variety. The inherent danger is further attrition of the electoral connection, potentially to the point where the government's legitimacy is in question.

In this discussion, the campaign finance system is relevant for two primary reasons. First, the twentieth century saw the rise of the active legislature as well as the evolution of interest groups. The campaign finance system's path during this period illustrates how each reform enhanced the connection between representatives and common interests, rather than that of the individual voter. This is despite the fact that each campaign reform was premised on ending corruption in government and enhancing the power of the people.

Second, the 2004 election was the first cycle since Congress overhauled the system in the form of the Bipartisan Campaign Reform Act of 2002<sup>13</sup> (hereinafter "BCRA"). BCRA's sponsors intended to further "regulate the role that corporations, unions, and wealthy contributors play in the electoral process" and address "the proliferation

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8. See *infra* Part II.

9. See *infra* Parts III-IV.

10. See *infra* Part II.

11. See, e.g., *The Whoppers of 2004*, *supra* note 4.

12. See *infra* Part IV.C.

13. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002).

of ‘issue ads’.”<sup>14</sup> Although BCRA may have addressed issue ads, it fell short of the mark. In fact, this Note will explain that Congress not only missed the mark on issue advocacy, but it set its sights on the wrong dart board. The target should have been the misleading information that non-candidate advocacy groups peddle in their ads without accountability.

This Note will establish that the campaign reforms of the past hundred-plus years have jeopardized actual representation, and will propose an alternative method for reigning in issue advocacy. To this point, Congress has regulated Federal campaigns by focusing on the amount of money used for the election or defeat of candidates for public office.<sup>15</sup> Upon reviewing BCRA in *McConnell v. FEC*, Justices Stevens and O’Connor explained that the Court’s standard of review “reflects the importance of the interests that underlie contribution limits—interests in preventing both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption.”<sup>16</sup> However, in steamrolling down this path, Congress failed to consider the *quality* of the expenditures as it relates to advertising and the information<sup>17</sup> conveyed therein. That is to say the number and cost of broadcast communications should be irrelevant, so long as the information contained therein is reasonably rooted in some factual basis.

Moreover, the evolution of the television age of politics has created a “virtualization” of the public sphere.<sup>18</sup> Non-candidate groups’ ads tend to not only be exaggerated or misleading, but they also advance a government rooted in representation of community interests (virtual representation),<sup>19</sup> rather than “actual representation” promulgated by an active electorate.<sup>20</sup> The greater the number of misleading ads, the less likely it is that voters get the actual representation Madison had envisioned. Enhancing financial disclosure rules and contribution limits, however, is insufficient to end this erosion. Consequently, the American people have been dragged down a road where misinformation and false information flood television and radio airwaves precisely because

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14. *McConnell v. FEC*, 540 U.S. 93, 122 (2003).

15. *See infra* Part III.

16. *McConnell*, 540 U.S. at 136 (quotations omitted).

17. *See, e.g., NRA Ad Falsely Accuses Kerry*, FACTCHECK.ORG (Annenberg Political Fact Check, Washington, D.C.), Oct. 28, 2004, <http://www.factcheck.org/article296.html>.

18. *See infra* Part II.

19. *See* JOHN PHILLIP REID, *THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION* 47-50 (1989).

20. *See, e.g.,* Martin S. Flaherty, *Historical Perspective: More Apparent Than Real: The Revolutionary Commitment to Constitutional Federalism*, 45 KAN. L. REV. 993, 1000 (1997).

legislators generally overlook this disconnect.<sup>21</sup>

At its core, the proposed legislation to protect our endangered actual representation would allow the average citizen to choose option (c) from the scenario above. Preceding the proposed language for this bill, Part II of this Note examines the very basis for the structure of the federal government, reaffirming the notion that the American Republic is premised on actual representation. Thus, staying true to the Framers' design requires that "We the People" maintain a firm electoral connection with government, rather than allowing interest groups to usurp that connection.

Part III provides a chronological exposition of campaign finance laws beginning at the turn of the twentieth century. The historical analysis of the group dynamic in America, in conjunction with the subsequent discussion of modern day campaign finance, evidences interest groups' consistently growing role. Accordingly, this Part illustrates how various gaps in campaign finance laws enable the nation's digression into virtual representation. Also, this Part concludes with a brief description of BCRA.

Part IV considers BCRA's impact upon the 2004 election cycle, exactly what went wrong, and the media's perpetuation of the false information that independent groups disseminated into the marketplace of ideas. Specifically, first it will establish that there was an onslaught of false advertisements by independent advocacy groups. Second, this Part highlights the media's shortcomings during this crucial campaign season, which circulated the false and misleading misrepresentations contained in these ads, rather than acting as a channel for public deliberation.

Part V brings home the notion that legislation in the vein of the proposed Informed Electorate Act is the only viable solution to false advertising sponsored by unaccountable independent interest groups.

## II. MADISON'S DESIGN FOR THE AMERICAN REPUBLIC

The United States is a democratic republic or representative democracy.<sup>22</sup> According to Madison, the unique characteristic of American politics during the revolutionary era was "actual" representation<sup>23</sup>—"the delegation of the government . . . to a small

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21. See, e.g., *NRA Ad Falsely Accuses Kerry*, *supra* note 17 (illustrating some of the misinformation that defined the 2004 election).

22. See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 595 (1998).

23. See *id.* at 597.

number of citizens elected by the rest.”<sup>24</sup> Its significance is that it is unequivocally distinguishable from the theory of representation in eighteenth century England known as “virtual” representation.<sup>25</sup> The American conception of actual representation reflected the Framers’ belief that “the right of representing is conferred by the act of electing.”<sup>26</sup>

The British doctrine of virtual representation, however, extended beyond British electors to British non-electors<sup>27</sup> and the American colonists.<sup>28</sup> The prevailing legal argument for the constitutionality<sup>29</sup> of this theory as it applied to the colonists was interests. Generally, a “community of interests” existed between Americans and members of Parliament because of trade. Accordingly, this connection was enough for British electors and non-electors to have an interest in preventing oppression in the colonies.<sup>30</sup> Even the likes of Englishman Edmond Burke, an eighteenth-century writer and member of Parliament with a reputation for being an aggressive advocate of British subjects around the globe, said of this theory: “Such a representation I think to be in many cases even better than the actual . . . . The people may err in their choice; but common interest and common sentiment are rarely mistaken.”<sup>31</sup>

For reasons touched on throughout *The Federalist Papers*, the Framers structured a government that implicitly rejected the virtual in favor of the actual. To this end, James Madison declared in *The Federalist No. 52*:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.<sup>32</sup>

The modern debate on campaign reform has overtones consistent with the Framers’ struggle to limit tyrannical self-interest without

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24. *Id.* at 596.

25. *See* REID, *supra* note 19, at 50.

26. WOOD, *supra* note 22, at 597.

27. *See* REID, *supra* note 19, at 54. Put simply, a British freeholder could not vote unless the value of his estate met a threshold statutory requirement. *Id.*

28. *Id.* at 48-59.

29. For the sake of clarity, this is constitutionality under the governing documents of Great Britain.

30. REID, *supra* note 19, at 47, 51.

31. *Id.* at 58 (alteration in original) (citation omitted).

32. THE FEDERALIST NO. 52, at 360 (James Madison) (Tudor Publishing Co. 1947).

restricting liberty. Recall that the Framers faced the challenge of reconciling republicanism (the belief in the public good) with liberty.<sup>33</sup> Republicanism, in this classical sense was championed by the likes of Thomas Paine; he asserted that a republic by definition means *public good*.<sup>34</sup> Indeed, the American Republic's actual representation rested upon a hope that "[t]he representatives of the people would not act as spokesmen for private and partial interests, but all would be disinterested men, who could have no interest of their own to seek . . . ."<sup>35</sup> To be sure, if liberated men inherently acted only for the public good, this conflict would have abated. However, as dominant as the phrase "public good" was among the Revolutionaries, the phrase "liberty" was invoked more often.<sup>36</sup>

Factions or parties were going to be a consequence of liberty. The difficulty for the founders was that they set out to devise a structure for a free state, yet the majority of them despised the notion of party dominance. "The founders' antipathy toward political parties rested on their belief that parties were the vehicles by which self-interested groups and individuals—'factions,' in their terminology—coordinated and pressed their efforts to seize political power."<sup>37</sup> Madison, a proponent of the public good, believed self-interest had no place in government. He is associated, however, with the perception that the evil of parties are inevitable in a free state and "they must therefore be endured with patience by all men who esteem liberty."<sup>38</sup> Thus, in Madison's view, the only acceptable cure for the mischief of faction was a structure to minimize its influence.<sup>39</sup>

Legal scholars such as Professor William N. Eskridge, Jr. suggest "[t]he genius of Madison's thought lay in its reconciliation of our potentially antipodal desires for both legitimate majoritarian government and rational public-seeking government . . . . The latter was abetted by a constitutional framework assuring deliberative lawmaking and checking factional domination."<sup>40</sup> Madison's *The Federalist No. 10* is regarded as

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33. See, e.g., WOOD, *supra* note 22, at 55.

34. *Id.*

35. *Id.* at 59 (citation omitted).

36. *Id.* at 55.

37. James A. Gardner, *Law and Political Parties: Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 668 (2000).

38. Steven G. Calabresi, *Mediating Institutions: Beyond the Public/Private Distinction: Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1488 (1994).

39. See, e.g., William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 280 (1988).

40. *Id.* at 281.

the foundation for American political thought.<sup>41</sup> Accordingly, under the “good social contract” theory, the desire is for political deliberations that yield satisfying end-products for *all* participants in the process.<sup>42</sup> While this theory assumes that the process produces what might be described as happy customers, a more academic perspective suggests that Madison’s goal and the general goal of the new republic was simply to protect against domination by a central tyrannical body. Thus, so long as the legislative body possesses the three legitimizing characteristics—representativeness, accessibility, and deliberativeness—the act of the legislature is legitimate.<sup>43</sup>

Regarding representativeness, elections are perhaps the most defining element.<sup>44</sup> As mentioned above, what made the United States unique was actual representation. This meant that the authority to act on behalf of “We the People” flowed from the act of voting. All else being equal, the vote legitimizes government action. After World War II, however, another player began to impact the legislative process. The 1950s political theory reflected this alteration to the process. In particular, optimistic pluralism, the prevailing political theory of the time, accepted what had become interest group domination of government.<sup>45</sup> This theory’s subscribers “were optimistic that the role of interest groups would not result in mere shifting, temporary majorities. Groups, it was hoped, would emerge on all sides of each issue and the protective procedures of lawmaking (bicameralism, the veto, committee review) would ensure rational accommodation of interest group needs.”<sup>46</sup>

Further, Professors Henry Hart and Albert Sacks asserted that the deliberative process—“those steps of the legislative process that slow legislative decisionmaking and distance it from the passions and immediacy of the prevailing desires of individual legislators and of various constituencies”<sup>47</sup>—counters the impact of interest group lobbying for legislation because *process* was the true test for a legitimate legislative product.<sup>48</sup> The crux of Hart and Sacks’ argument was that the deliberative process manufactures “rational, purposive statutory law.”<sup>49</sup>

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41. *Id.* at 280.

42. Richard A. Epstein, *The Necessity for Constrained Deliberation*, 24 HARV. J.L. & PUB. POL’Y 159, 161 (2000).

43. See ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 369 (2d ed. 2002).

44. See *id.* at 509.

45. See Eskridge, *supra* note 39, at 281.

46. *Id.*

47. MIKVA & LANE, *supra* note 43, at 677.

48. Eskridge, *supra* note 39, at 282.

49. See *id.*



Optimistic pluralism has since been substantially discredited. The rise of the public choice theory, which exposes at least some of the problems that interest groups pose for a legitimate republic,<sup>50</sup> was at least partially responsible for this shift in attitude.

Public choice theory is best described as a realistic, transparent view of how and why legislation is actually enacted.<sup>51</sup> Professor Eskridge suggests that one of the reasons the public choice theory debunks optimistic pluralism is that “interest groups skew public decisionmaking toward private rent-seeking and away from public interest statutes.”<sup>52</sup> Considering the inescapable connection between lawmakers and those demanding legislation, this indictment is indeed troubling. Madison envisioned an electoral connection between the representative government and the voting constituency.<sup>53</sup> Interest groups, however, grew increasingly active in government, just as radio and eventually television became important campaign mediums. It became inescapable to notice “that the American system of financing elections through sometimes secret, often unlimited private donations” armed the wealthy and the well-organized with an increasing influence in politics and government “at the expense of the unorganized public.”<sup>54</sup>

Consequently, although the existence of special interest contributors led to the perception that government is fraught with favoritism and corruption, the campaign finance reform movement led to piecemeal legislation over the course of a century “which, ironically, may have helped further the very corruption that was the original target.”<sup>55</sup> BCRA is the most recent reform in this trend. This latest measure, intended to enhance the electoral process, failed to curb non-candidate interest group advertising. Although not necessarily related to the amount of money spent, it is this paid advertising that has created “the politics of manipulation” and devaluation of responsibility and participation.<sup>56</sup>

According to writer Glenn W. Smith, “the domination of politics by

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50. *See id.* at 283.

51. *See id.* at 276. *But see* Abner J. Mikva, *Forward to Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 168-70 (1988) (objecting to the public-choice theory for attempting to apply a purportedly scientific method to politicians and public officials whose behavior cannot be accurately attributed to a single motivating factor).

52. Eskridge, *supra* note 39, at 283.

53. *See* THE FEDERALIST NO. 52 (James Madison), *supra* note 32, at 360.

54. HERBERT E. ALEXANDER, *FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM* 15 (2d ed. 1980).

55. *Id.* at 14-15.

56. GLENN W. SMITH, *THE POLITICS OF DECEIT: SAVING FREEDOM AND DEMOCRACY FROM EXTINCTION* 1 (2004).

television advertising amounts to a virtualization of the public sphere . . . .”<sup>57</sup> Smith’s notion of virtual is simply what he calls a “world of illusion and coercion.”<sup>58</sup> The fact is, though, the era of misleading non-candidate advertising threatens to reduce what was structured as an actual representative democracy to the type of virtual representation our founders worked to avoid. Unfortunately, “[t]he problem of the election reformer in the final third of the 20th century [and early 21st century] is how to apply democratic principles to elections in an age of media politics . . . .”<sup>59</sup>

### III. WHERE ARE WE NOW: A CHRONOLOGICAL HISTORY OF CAMPAIGN FINANCE REGULATION

#### A. *The Birth of the Group Dynamic*

Campaign finance reform’s most ardent opponents ridicule such measures as being too restrictive of speech. The fundamental basis for this argument is “that contributions and expenditures are at the very core of political speech . . . .”<sup>60</sup> Therefore, any restriction of either activity amounts to a restraint on First Amendment liberty.<sup>61</sup> This position parallels Justice Oliver Wendell Holmes’ free marketplace of ideas theory. In Holmes’s dissenting opinion in *Abrams v. United States*,<sup>62</sup> he explained this theory:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.<sup>63</sup>

Holmes did qualify this statement, however, by suggesting that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless* they so imminently threaten immediate interference with the lawful and

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57. *Id.* at 63.

58. *Id.* at 1.

59. ALEXANDER, *supra* note 54.

60. *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

61. *See id.*

62. 250 U.S. 616 (1919).

63. *Id.* at 630 (Holmes, J., dissenting).

pressing purposes of the law that an immediate check is required to save the country.”<sup>64</sup>

The Supreme Court has taken the latter path in upholding the majority of campaign finance restrictions. In 2000, for example, the Court in *Nixon v. Shrink Missouri Government PAC* “upheld the constitutionality of contribution limits as a tool for remedying real or perceived corruption of the political process.”<sup>65</sup> Nevertheless, despite free market theorists’ criticism, the campaign finance laws of the last thirty years have been, on the whole, less restrictive than its predecessors.

In addition to thinking about the chronological history of campaign finance reform, which follows below, in terms of the free market of ideas theory, also consider the parallel history of problem solving in the United States. The first major campaign finance regulations were enacted close to the start of the twentieth century.<sup>66</sup> Not coincidentally, this corresponds with a shift from an inactive legislature to an increasingly active legislative body. This occurred for two reasons. First, the 1800s was a period of westward expansion, embodied by a public perception of growth.<sup>67</sup> By 1900, however, “the factory age, the age of money, the age of robber barons, of capital and labor at war” recast public opinion to reflect “the economy as a pie to be divided, not a ladder stretching beyond the horizon.”<sup>68</sup>

Second, although directly related to the first reason, “[i]ndividual confrontations increasingly gave way to group confrontations, which needed a different arena for their resolution.”<sup>69</sup> While the judicial arena was for private problem solving and disputes between individuals, the “open door jurisdiction of the legislative branch” catered to public dispute resolution or solving conflicts between large groups.<sup>70</sup> The need for group problem solving increased as did the size and number of groups hoping to preserve their fair share of the economic pie. Professor Lawrence M. Friedman provides that “there developed groupings which

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64. *Id.* (emphasis added).

65. David K. Ryden, *To Curb Parties or to Court Them? Seeking a Constitutional Framework for Campaign Finance Reform*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 171, 171-72 (David L. Ryden ed., 2d ed. 2002). See generally *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377 (2000).

66. See, e.g., ALEXANDER, *supra* note 54, at 26 (discussing that momentum for legislation increased following the 1904 presidential race and culminated in “[t]he first federal prohibition of corporate contributions” in 1907).

67. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 338-39 (2d ed. 1985), reprinted in MIKVA & LANE, *supra* note 43, at 8-9.

68. *Id.*

69. MIKVA & LANE, *supra* note 43, at 7.

70. See *id.* at 6, 11.

centered around economic interests—labor unions, industrial combines, farmers organizations, occupational associations. These interest groups jockeyed for position and power in society.”<sup>71</sup>

Additionally, just as this new group dynamic was about to explode, a wave of electoral reform stifled the dominance of local political parties.<sup>72</sup> Consequently, the influence of local party bosses dwindled and candidates became more independent.<sup>73</sup> Accompanying this new independence was a necessity to seek out fresh sources of campaign funds.<sup>74</sup> These reforms, implemented in the 1880s and ’90s, gave rise to what has been described as the “industrialization” of electoral politics.<sup>75</sup> Candidates could no longer rely on powerful party machines to get them elected, so candidates hired a professional campaign staff to organize and disseminate the candidate’s message to the public.<sup>76</sup>

Of course this was not free. In fact, “[d]uring the 1888 presidential election, the Republican Party leader in Pennsylvania, Matthew Quay, reached out to steel makers and oil companies worried about tariff reduction and raised more than three million dollars on behalf of Benjamin Harrison.”<sup>77</sup> Moreover, that same election marked the entrance of Mark Hanna to the campaign scene.<sup>78</sup> Referred to as the genius and pioneer of campaign financing, “[i]n 1888 he raised more money than the Republican National Committee could spend”<sup>79</sup> and returned the balance to the donors.<sup>80</sup> In 1896, Hanna raised \$100,000 to secure William McKinley’s presidential nomination by the Republican Party.<sup>81</sup> Later that year, as chairman of the Republican National Committee, he spearheaded the groundbreaking campaign responsible for McKinley’s election.<sup>82</sup>

Hanna’s arrival on the campaign landscape also sowed the seeds for the growing electoral connection between interest groups and elected officials. The opportunity to contribute was certainly not lost on groups fighting to secure their slice of the economic pie. On the one hand,

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71. FRIEDMAN, *supra* note 67, at 338-39.

72. See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO. L.J. 871, 881 (2004).

73. *Id.*

74. *Id.*

75. See *id.* at 882.

76. See *id.*

77. *Id.*

78. See *id.*; see also ALEXANDER, *supra* note 54, at 47 (discussing Mark Hanna as a pioneer of “the fund-raising techniques of later generations”).

79. ALEXANDER, *supra* note 54, at 47.

80. See *id.*

81. See *id.*

82. See *id.*

“Hanna tried to make it clear that there were to be no favors for contributions; McKinley wanted to remain clean. In 1900 Hanna returned a \$10,000 gift to a Wall Street brokerage firm which he believed was making a specific demand.”<sup>83</sup> Conversely, Hanna was sure to capitalize off the economic fears 1896 Democratic Presidential nominee William Jennings Bryan instilled upon the business community.<sup>84</sup> Bryan was a populist and his race against McKinley was telling of the era’s escalating group conflicts.<sup>85</sup>

Further, Hanna took contributions from life insurance companies.<sup>86</sup> These large donations from a number of New York life insurance companies may have been the catalyst to a public movement to rid elections of their corporate influence. The scandal itself, known as the New York life insurance scandal of 1905, was about misuse of shareholder funds by management executives.<sup>87</sup> However, these management executives used these funds to support candidates who would legislate for management’s benefit at ownership’s expense.<sup>88</sup> Incidentally, this brand of corruption was the impetus behind “the radical transformation in corporate law at the end of the nineteenth century, which broadened managerial discretion, restricted traditional rights of owners, and paved the way for the separation of ownership from control in the modern firm.”<sup>89</sup>

In 1907, Congress reacted to the growing anti-“Big Money” sentiment, implementing an outright ban on corporate contributions of money to federal campaigns.<sup>90</sup> This Act rendered it “unlawful for any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office.”<sup>91</sup> Theodore Roosevelt’s Secretary of State, Elihu Root, advocated for the enactment, declaring to the House Committee on

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83. *Id.*

84. *See id.*

85. *See id.* (commenting that this campaign “pitted the rich against the poor, the Eastern establishment against Western farmers.”); *see also* MIKVA & LANE, *supra* note 43, at 10 (reflecting on the notion that organization of interests was instrumental to the protection and advancement of any individual in need of the limited resources available).

86. *See, e.g.,* Winkler, *supra* note 72, at 884-85.

87. *See id.* at 887.

88. *See id.*

89. *Id.* at 873, 883-92 (discussing the New York life insurance scandal of 1905). It is worth noting that Winkler’s article argues that the ban on corporate money enacted in 1907 was in the interest of agency costs. *See id.* at 873. The Supreme Court, however, has treated the agency costs issue as nothing more than a supporting argument for the 1907 Act. *See FEC v. Beaumont*, 539 U.S. 146, 154 (2003).

90. *See* The Tillman Act, Pub. L. No. 59-36, ch. 420, 34 Stat. 864 (1907).

91. *Id.*

## Elections:

It strikes at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government. And I believe that the time has come when something ought to be done to put a check to the giving of \$50,000 or \$100,000 by a great corporation toward political purposes upon the understanding that a debt is created from a political party to it.<sup>92</sup>

Theodore Roosevelt's administration actively pursued this Act's passage.<sup>93</sup> Ironically, the public demanded federal action because of a resurgence of charges following Roosevelt's election in 1904.<sup>94</sup> Corporations allegedly contributed millions of dollars to the Republican campaign.<sup>95</sup> Recall that, as discussed above, the New York life insurance scandal broke shortly thereafter.

In 1910, Congress acted again to further regulate federal elections.<sup>96</sup> After a similar endeavor to amend the Act failed in 1909, the House and Senate voted to institute a reporting requirement for specified contributions and expenditures.<sup>97</sup> Additionally, a 1911 amendment capped congressional candidates' spending during the nomination and election process, "and forbade them from promising employment for the purpose of obtaining support."<sup>98</sup> A similar restriction applied to Senate candidates.<sup>99</sup>

When it first meets the eye, this amendment appears to strike at the heart of what the *Buckley* Court suggested was directly tied to a candidate's quantity of free expression, as well as "the number of issues discussed, the depth of their exploration, and the size of the audience reached."<sup>100</sup> Notwithstanding the ceiling on candidates' personal expenditures, however, the 1911 amendment happens to be less restrictive because it not only left alternative avenues for spending (aside from corporations), but it also carved out an exception for "travel and subsistence, stationery and postage, writing or printing (other than in newspapers), and distributing letters, circulars, and posters, and for

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92. *United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 571 (1957) (citation omitted).

93. *Id.* at 574-75.

94. *See* ALEXANDER, *supra* note 54, at 26.

95. *See id.*

96. *See id.*

97. *Int'l Union United Auto. Workers*, 352 U.S. at 575-76.

98. *Id.* at 576.

99. Publicity of Political Contributions Act, Pub. L. No. 62-32, ch. 33, 37 Stat. 25 (1911).

100. *Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

telegraph and telephone service” to be excluded from the meaning of “expenditure.”<sup>101</sup> Nevertheless, in under a decade, the regulatory scheme had already advanced beyond what President Theodore Roosevelt proclaimed to Congress would be “an effective method of stopping the evils aimed at in corrupt practices acts.”<sup>102</sup> Evidently these measures were inadequate.

In 1918, Congress forged forward in the battle against the evils of “Big Money” politics. Though the 1907 Act was on par with President Roosevelt’s goals, it “was merely the first concrete manifestation of a continuing congressional concern for elections free from the power of money.”<sup>103</sup> Thus, “in 1918 Congress made it unlawful either to offer or to solicit anything of value to influence voting.”<sup>104</sup> Shortly thereafter, legislators met a constitutional hurdle in *Newberry v. United States*.<sup>105</sup>

In *Newberry*, the Court considered whether a Republican candidate seeking to represent Michigan in the United States Senate was subject to the expenditure limits set forth by the Corrupt Practices Act, as amended in 1911.<sup>106</sup> Specifically, the defendant was charged with exceeding the expenditure limits in securing his party’s nomination.<sup>107</sup> The unique issue before the Court was whether the federal government had the power to regulate party primaries and conventions. Upon considering the timeline of the enactment of the expenditure limits at issue (1911), the ratification of the Seventeenth Amendment providing for the popular election of Senators (1913),<sup>108</sup> and a 1914 Act “[p]roviding a temporary method of conducting the nomination and election of United States Senators”<sup>109</sup> that expired a year prior to the alleged expenditures,<sup>110</sup> the Court determined that elections and primaries are different.<sup>111</sup> Thus, the Court invalidated federal regulation of Senate primaries on the ground that the people have delegated power to Congress via Article I, section 4 and the Seventeenth Amendment to regulate elections, which is defined as “final choice of an officer by the duly qualified electors.”<sup>112</sup>

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101. Ch. 33, 37 Stat. at 28.

102. *Int’l Union United Auto. Workers*, 352 U.S. at 572 (quoting 40 CONG. REC. 96 (1905) (annual address of President Roosevelt)). The “corrupt practices acts” to which Roosevelt referred are the series of regulations amended by the various Publicity of Political Contributions Acts.

103. *Id.* at 575 (quotation omitted).

104. *Id.* at 576 (citation omitted).

105. 256 U.S. 232 (1921).

106. *See id.* at 247.

107. *See id.* at 243.

108. U.S. CONST. amend. XVII.

109. Act of June 4, 1914, Pub. L. No. 63-111, ch. 103, 38 Stat. 384.

110. *Id.*

111. *See Newberry v. United States*, 256 U.S. 232, 250 (1921).

112. *Id.* at 250 (citing *Hawke v. Smith*, 253 U.S. 221 (1920)).

Primaries, on the other hand, are “merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors.”<sup>113</sup>

Further, the Court opined that primaries were an unknown creature at the time the Constitution was framed and the more recent Seventeenth Amendment, did nothing to alter the definition of the word “election.”<sup>114</sup> Unless Congress enacted a statute expressly reaching the nominating process, as it did with the 1914 Act that had expired, a primary is not implicated by a statute governing general elections.<sup>115</sup> Consequently, the Court was sure to remind Congress that as “[e]ach House shall be the judge of the elections, returns and qualifications of its own members, and as Congress may by law regulate the times, places and manner of holding elections, the National Government is not without power to protect itself against corruption, fraud or other malign influences.”<sup>116</sup> Indeed, Congress accepted the Court’s advice and, in 1925, undertook “a comprehensive revision of existing legislation.”<sup>117</sup> Incidentally, years later the Court “held that primary elections were within the Constitution’s grant of authority to Congress.”<sup>118</sup>

Congress’s action in 1925, the Federal Corrupt Practices Act, was undoubtedly a more hard-line approach to combating corruption.<sup>119</sup> The tough regulations, including those proscribing jail time for violations, reflected the attitude the legislature came to embody. Senate Minority Leader Joseph Taylor Robinson said:

“We all know . . . that one of the great political evils of the time is the apparent hold on political parties which business interests and certain organizations seek and sometimes obtain by reason of liberal campaign contributions. Many believe that when an individual or association of individuals makes large contributions for the purpose of aiding candidates of political parties in winning the elections, they expect, and sometimes demand, and occasionally, at least, receive, consideration by the beneficiaries of their contributions which not infrequently is harmful to the general public interest. It is unquestionably an evil which ought to be dealt with, and dealt with intelligently and effectively.”<sup>120</sup>

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113. *Id.*

114. *See id.*

115. *See id.*

116. *Id.* at 258 (quotation omitted).

117. *United States v. Int’l Union United Auto. Workers*, 352 U.S. 567, 576 (1957).

118. *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976) (citing *United States v. Classic*, 313 U.S. 299 (1941)).

119. Federal Corrupt Practices Act, 1925, §§ 301–318, 43 Stat. 1070, 1070-74 (1925).

120. *Int’l Union United Auto. Workers*, 352 U.S. at 576-77 (quoting 65 CONG. REC. 9507-08.).



The 1925 Act expanded the definition of “contribution” to include the catch-all phrase “anything of value.”<sup>121</sup> Additionally, the new legislation set forth the term “political committee.”<sup>122</sup> This applied to any entity “which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors . . . .”<sup>123</sup> The financial restrictions included disclosure rules for contributions and expenditures, as well as an expenditure limit for candidates.<sup>124</sup>

Further, the mere solicitation by a Senator, Representative, Delegate, or Resident Commissioner or any candidate for those positions for a contribution for a political purpose was punishable by up to a year in prison.<sup>125</sup> Any candidate who promised “the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support for his candidacy”<sup>126</sup> could have been punished with up to two years in prison.<sup>127</sup> Additionally, this penalty extended to any person promising to make expenditures in return for such a favor.<sup>128</sup> Finally, section 313 completely barred corporations and national banks from making any contribution of anything of value.<sup>129</sup> Breach of this section subjected the recipient and the contributor to up to a year of jail time.<sup>130</sup>

Congress’s intent, once more, was adding transparency to the campaign finance system in order to discourage favoritism and corruption by elected officials. This powerful motive led the Court in *Burroughs v. United States*<sup>131</sup> to uphold the regulations in the face of a constitutional challenge. Petitioners asserted that Article II, section 1 of the Constitution forecloses Congress from encroaching upon a state’s right to determine the manner of appointment of its presidential electors.<sup>132</sup> To combat this fallacy, Justice Sutherland, writing for the Court, set forth poignant language from *Ex Parte Yarbrough*:<sup>133</sup>

If the government of the United States has within its constitutional

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121. § 302, 43 Stat. at 1070-71.

122. *Id.*

123. *Id.*

124. *See id.* at §§ 303-09.

125. *Id.* at § 312.

126. *Id.* at § 310.

127. *Id.* at § 314.

128. *Id.* at § 311.

129. *Id.* at § 313.

130. *Id.*

131. 290 U.S. 534 (1934).

132. *See id.* at 544.

133. 110 U.S. 651 (1884).

domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other.<sup>134</sup>

Thus, in light of Congress's interest in preventing corruption from decaying the republic and its constitutional authority to do so, the Court held it is within the legislature's discretion to choose the means to this end.<sup>135</sup>

By the time of the *Burroughs* decision, the nation was in the thick of the Great Depression. Although marked by organization conflict, the early part of the 1900s still reflected the notion of "laissez-faire individualism."<sup>136</sup> The Depression, however, "was an economic plague so sweeping that it altered expectations about the proper relationship of law to society, of government to the governed."<sup>137</sup> In 1933, President Franklin D. Roosevelt began to implement The New Deal. Roosevelt's agenda changed the course of American legal history because it "stood for the proposition that lawmakers should provide a social and economic security net to catch the victims of an impersonal industrial order."<sup>138</sup>

Further, The New Deal has been extremely influential in shaping the legislature's role and potential products. Not only was the New Deal geared towards remedying specific economic, social and legal problems of the 1930s, it also resulted in the development of massive programmatic legislation.<sup>139</sup> The implication is that Congress could now engage in public problem solving on a grander level. Interest groups were able to fight for a larger slice of the pie because Congress might be dishing out more. Thus, the New Deal marks the beginning of the period of a truly active legislature.

Chronologically speaking, this is the point at which subscribers to optimistic pluralism began to formulate their argument as to how interest groups did not destroy the representative characteristic the legislative process was intended to personify.<sup>140</sup> Nevertheless, to subscribers of any

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134. *Burroughs*, 290 U.S. at 547 (quoting *Ex Parte Yarbrough*, 110 U.S. at 667).

135. *See id.*

136. *See* KERMIT L. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* 267 (1989), reprinted in MIKVA & LANE, *supra* note 43, at 9.

137. *Id.*

138. *Id.*

139. *See* MIKVA & LANE, *supra* note 43, at 4 (citing Frank P. Grad, *The Ascendancy of Legislation: Legal Problem Solving in Our Time*, 9 DALHOUSIE L.J. 228, 228 (1985)).

140. *See supra* Part II.

theory, it is quite apparent that Congress's ability to enact programmatic legislation solidified the electoral connection between interest groups and elected officials. Richard A. Posner, proponent of the public choice theory,<sup>141</sup> suggests that only organized groups have the ability to influence legislation because of their membership numbers and financial support for sympathetic candidates.<sup>142</sup> With the advent of the active legislature "[s]uch legislation will normally take the form of a statute transferring wealth from unorganized taxpayers (for example, consumers) to the interest group."<sup>143</sup> Therefore, this turning point for the federal government's role in general also signifies a crossroads for the electoral connection between interest groups and legislators.

Shortly following *Burroughs*, Congress considered new reform measures. Although Congress had effectively limited corporate contributions, "new methods of raising and spending money soon were devised."<sup>144</sup> This speaks directly to what the true problem was and had always been: wealth and its consequences for the democratic process.<sup>145</sup> Senator John H. Bankhead, a Democrat from Alabama, echoed this sentiment while pushing for the next installment of campaign finance laws:

We all know that large contributions to political campaigns not only put the political party under obligation to the large contributors, who demand pay in the way of legislation, but we also know that large sums of money are used for the purpose of conducting expensive campaigns through the newspapers and over the radio; in the publication of all sorts of literature, true and untrue . . . .<sup>146</sup>

In 1940, Congress reacted to escalating concerns of possible corruption amongst the federal government's civil administration by amending the Hatch Act to restrict civil servants' political activity.<sup>147</sup> This action also reflected Senator Bankhead's concerns. As a result, Political Committees, as defined by the 1925 Act, could no longer spend or receive in contributions more than \$3 million in a single calendar year.<sup>148</sup>

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141. See *supra* Part II.

142. See MIKVA & LANE, *supra* note 43, at 18 (citing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 354-55 (1993)).

143. *Id.*

144. ALEXANDER, *supra* note 54, at 25.

145. See, e.g., *United States v. Int'l Union United Auto. Workers*, 352 U.S. 567, 577-78 (1957).

146. *Id.* (citing 86 CONG. REC. 2720). Senator Bankhead expressly took issue with the use of interest group money for not only true statements, but for the untruthful as well.

147. The Hatch Act of 1940, Pub. L. No. 76-753, ch. 640, 54 Stat. 767.

148. *Id.* at 772.

Additionally, there was now a restriction on personal wealth. All persons, including individuals, organizations, or any group of persons, were prohibited from contributing more than \$5000 to a committee or candidate for federal office, including President and Vice President, in a single calendar year.<sup>149</sup> There was no limit, however, on the amount a person may contribute to multiple committees working for the same purpose or candidate.<sup>150</sup> As interest groups were growing both in number and influence over legislative output, Congress enacted a law that actually created an even greater level of demand for a higher number of organizations. Incidentally, Senator Bankhead's complaint on the Senate floor referred to expensive campaigns using print and radio advertising disseminating untrue information, yet the legislative solution contemplated only the price of such campaign activity.

The ink was barely dry on the Hatch Act of 1940 when Congress addressed campaign finance yet again. World War II placed a high premium on labor. Consequently, the balance of power shifted towards trade unions.<sup>151</sup> As the public grew conscious of organized labor's power, it also grew weary of the immense political contributions with which unions influenced government.<sup>152</sup> In 1943, Congress protected defense production from the potential dangers of a labor strike via the Smith-Connally Act.<sup>153</sup> Also, legislators used this opportunity to extend the bans on corporate activity, in place since 1907, to organized labor unions.<sup>154</sup> The bill's author, Congressman Landis, made a compelling argument for affording labor unions the same treatment as corporations: "The public was aroused by many rumors of huge war chests being maintained by labor unions, of enormous fees and dues being extorted from war workers, of political contributions to parties and candidates which later were held as clubs over the head of high Federal officials."<sup>155</sup>

The Smith-Connally extension of the corporate ban to labor unions was merely temporary.<sup>156</sup> In 1947, however, Congress made the labor contribution ban permanent and imposed even further restriction.<sup>157</sup> Thanks, in part, to Congressional investigations into organized labor for large financial outlays during the 1944 election cycle,<sup>158</sup> Congress

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149. *Id.* at 770.

150. *See* ALEXANDER, *supra* note 54, at 26.

151. *See, e.g.,* United States v. Int'l Union United Auto. Workers, 352 U.S. 567, 578 (1957).

152. *See id.*

153. *See id.*

154. *See id.*

155. *Id.* at 579.

156. *See* ALEXANDER, *supra* note 54, at 27.

157. *See id.*

158. *See Int'l Union United Auto. Workers*, 352 U.S. at 579-80.

prohibited unions from making election-related expenditures.<sup>159</sup> Additionally, this Act explicitly applied to primary elections as well as general elections.<sup>160</sup> In a constitutional challenge to these measures, the Court's 1957 decision reflected its highly deferential approach.<sup>161</sup> Accordingly, the Court has since recognized that such deference is warranted where the undertaking is a "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations . . . ."<sup>162</sup>

### B. FECA

Following World War II, campaign finance reform laid relatively dormant. President John F. Kennedy, however, was "sensitive to the advantages wealth gave a candidate."<sup>163</sup> In fact, even before his inauguration he established the ground work for the creation of the Commission on Campaign Costs.<sup>164</sup> This Commission issued a report presenting a program for reform, including the first proposal for a matching funds system.<sup>165</sup> Nevertheless, the recommendations were not well received by anybody, politician or otherwise.<sup>166</sup> Following Kennedy's assassination, reform was ignored by the White House and the debate remained static.<sup>167</sup>

Notwithstanding a weak bill passed in 1966, which Congress subsequently rendered inoperative, the reform movement was dead until FECA.<sup>168</sup> In 1971, Congress overhauled the entire campaign finance system, replacing the Federal Corrupt Practices Act of 1925 with FECA<sup>169</sup> and the Revenue Act of 1971.<sup>170</sup> Actually passed in January of 1972, FECA "reaffirmed that funds from the general treasuries of corporations and unions could not be used for political contributions or expenditures."<sup>171</sup>

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159. See *McConnell v. FEC*, 540 U.S. 93, 117 (2003).

160. See *id.*

161. See *Int'l Union United Auto. Workers*, 352 U.S. at 584-86.

162. *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 209 (1982) (citations omitted).

163. ALEXANDER, *supra* note 54, at 27.

164. See *id.*

165. See *id.*

166. See *id.*

167. See *id.*

168. See *id.* at 28 (discussing the Long Act, enacted in 1966. Due to its waning popularity among influential Senators, Congress voted to make it inoperative only a year later.).

169. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

170. Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (1971).

171. Terwilliger & Wells, *supra* note 4.

A major shift in Congress's approach, and perhaps the major catalyst for problems with non-candidate group spending today, is FECA's creation of political action committees or PACs.<sup>172</sup> This authorized corporations and unions to establish a segregated fund and solicit donations from shareholders, employees, or members for election-related contributions and expenditures.<sup>173</sup> The lone limitation was that PAC contributions may be accepted only from persons affiliated with the corporation or union.<sup>174</sup> Additionally, FECA set new disclosure requirements and contribution caps. For example, candidates and committees were required to disclose any contribution of \$5000 within forty-eight hours of receipt.<sup>175</sup> A number of other restrictive provisions, ultimately ruled unconstitutional in *Buckley*, were also included.<sup>176</sup>

The 1972 election cycle was the first in which FECA was effective. This reform was undoubtedly intended to promote transparency in the financing of campaigns, in order to prevent corruption and favoritism in government. Instead, it illustrated an undeniable quality of human nature to find creative ways to accomplish your goal in the face of adversity (a trait which doomed BCRA's fate as well). Wealthy committees were able to circumvent FECA's disclosure requirements by siphoning smaller sums to a vast number of fundraising committees working on behalf of President Richard Nixon's re-election campaign.<sup>177</sup>

Specifically, the break-in at the Democratic National Committee Headquarters at Watergate, in June 1972, turned out to have been funded by Nixon's re-election operation. This prompted a Senate investigation on presidential campaign activities. The Senate Committee revealed, among other things, that the donors' motivating force was "furthering business or private interests by facilitating access to government officials or influencing governmental decisions . . . ."<sup>178</sup> One corporation, American Milk Producers, Inc., provided a particularly insightful explanation of how and why the new FECA rules were avoided.<sup>179</sup>

According to congressional findings, the milk producers received legal advice to limit committee contributions to \$2500 in order to fly below the radar.<sup>180</sup> Following a meeting with Nixon fundraisers, the

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172. *See id.*

173. *McConnell v. FEC*, 540 U.S. 93, 118 (2003).

174. *See Terwilliger & Wells, supra* note 4.

175. *See ALEXANDER, supra* note 54, at 29.

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

177. *See McConnell*, 540 U.S. at 119-20.

178. *Id.* at 120.

179. *See id.*

180. *See id.*

corporation broke down what was initially a \$2 million donation into “numerous smaller contributions to hundreds of committees in various states which could then hold the money for the President’s reelection campaign, so as to permit the producers to meet independent reporting requirements without disclosure.”<sup>181</sup> The kicker is that the milk producers’ end game was to gain a meeting with the Nixon administration regarding price supports.<sup>182</sup> Thus, FECA Amendments of 1974 were inevitable; Congress of course felt obliged to take another stab at deterring “unseemly fundraising and campaign practices.”<sup>183</sup>

In 1973, the House and Senate each had obstacles to overcome. Debate on proposed measures was stalled for much of the year.<sup>184</sup> House members such as Representative Wayne L. Hays of Ohio made passage difficult because of “the greater frequency with which its members run for reelection.”<sup>185</sup> Additionally, the embattled Nixon sent his own proposals to Congress.<sup>186</sup> The perception, however, was that Nixon coupled legitimate proposals with those he knew would never pass.<sup>187</sup> Ultimately, on August 8, 1974, Nixon resigned. On October 15, 1974, his successor, President Gerald Ford, signed a version of the bill that passed by large margins in each chamber.<sup>188</sup> Despite his own reservations and Nixon’s reference to public financing as “taxation without representation,” Ford signed it into law at a White House ceremony, declaring, “the times demand this legislation.”<sup>189</sup>

The 1974 Amendments “restrict[ed] the use of unlimited numbers of political committees for fund-raising purposes, limit[ed] individual and aggregate contributions, impos[ed] spending limits on candidates and parties”<sup>190</sup> and established new disclosure requirements for contributions and expenditures above a specified floor amount.<sup>191</sup> Additionally, the amendments created the Federal Election Commission (“FEC”) and set forth parameters for a public financing and matching funds program.<sup>192</sup> Although the FEC was “created” by this Act and formally organized in 1975, *Buckley* required Congress to reorganize the

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181. *Id.*

182. *See id.*

183. *Id.* at 118.

184. *See* ALEXANDER, *supra* note 54, at 30-31.

185. *Id.*

186. *See id.*

187. *See id.*

188. *See id.*

189. *Id.*

190. Terwilliger & Wells, *supra* note 4.

191. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

192. *See* ALEXANDER, *supra* note 54, at 31.

agency in subsequent legislation.<sup>193</sup>

### C. Buckley, Soft Money, and Issue Advertising

Until recently, the 1976 *Buckley* decision was *the* authority on what variety of campaign finance regulations are impermissible.<sup>194</sup> Most of the 1974 Amendments were upheld. *Buckley*'s construction of those rules, however, along with the Court's reasoning for invalidating expenditure restrictions, directly impacted campaign strategy for the next thirty years. Having determined that election reforms, in general, are within Congress's constitutional authority,<sup>195</sup> *Buckley* considered whether regulating monetary contributions and expenditures for political purposes was tantamount to regulating political speech.<sup>196</sup>

The Court upheld contribution limits on the ground that contributions are merely proxy speech; a contribution enables others to speak on your behalf.<sup>197</sup> Accordingly, as an incidental restriction on speech, the Court required the government show only a compelling interest justifying whatever the impact may in fact be to First Amendment rights. The potentiality for corruption satisfied this standard because "Congress could legitimately conclude that the avoidance of the appearance of improper influence" is critical "if confidence in the system of representative Government is not to be eroded to a disastrous extent."<sup>198</sup>

Regarding limits on expenditures "relative to a clearly identified candidate,"<sup>199</sup> the Court held that this type of expenditure *is* speech. As such, and in light of the fact that actual corruption was accounted for by limiting contributions, the government failed to justify a limit on individual expenditures.<sup>200</sup> Thus, under *Buckley* "[c]andidates, committees, special interest groups and individuals have the constitutional right to spend all the money they wish for campaign advertisements."<sup>201</sup>

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193. *See id.* at 31-32.

194. *See generally* *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (reviewing the constitutionality of various portions of FECA).

195. *See id.* at 13.

196. *See id.* at 14-15.

197. *See id.* at 21; *see also* Craig Holman, *The Bipartisan Campaign Reform Act: Limits and Opportunities for Non-Profit Groups in Federal Elections*, 31 N. KY. L. REV. 243, 245-46 (2004).

198. *Buckley*, 424 U.S. at 27 (citation omitted).

199. *Id.* at 39.

200. *See id.* at 46-47.

201. Holman, *supra* note 197, at 245. The Supreme Court will revisit the issue of candidate spending limits in *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2002), *cert. granted*, 74 U.S.L.W. 3199 (U.S. Sept. 27, 2005) (No. 04-1528). The Second Circuit determined that the interests of avoiding



Additionally, the Court upheld the disclosure provisions. These requirements were narrowed, however, from expenditures “relative to a clearly identified candidate” to “communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.”<sup>202</sup> The Court determined the language was impermissibly vague and the resulting uncertainty would have encouraged silence. Instead, the Court formulated its infamous “Magic Words” test, providing a bright line rule distinguishing express advocacy from issue ads. Consequently, “communications containing express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ [or] ‘reject’”<sup>203</sup> were subject to FECA’s disclosure requirements and must have been funded by hard money. Conversely, issue advertising could be financed with soft money and therefore, aired without disclosure by the ad’s sponsors.<sup>204</sup>

Despite the limited disclosure rules and contribution limits upheld in *Buckley*, Congressional reform thrust non-candidate groups further into the forefront. Just as reforms in the first half of the twentieth century encouraged a larger number of interest groups to raise money for political purposes,<sup>205</sup> the permissible use of soft money by non-candidate groups under FECA as amended in 1974 enhanced the electoral connection between those interests and the government. True, it was the Supreme Court that created the “Magic Words” test. However, it was the FEC that subsequently issued rules allowing political parties to use soft money for activities intended to influence state or local elections, “legislative advocacy media advertisements,” and part of their mixed-purpose activity (i.e., get out the vote operations and generic party advertisements).<sup>206</sup> Therefore, federal law actually permitted corporations, unions, and individuals “who had already made the maximum permissible contributions to federal candidates, to contribute” soft money.<sup>207</sup>

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corruption or the appearance of corruption, and preventing elected officials from focusing so much attention on fundraising efforts, justifies Vermont’s restrictions. See generally Charles Lane, *High Court to Decide Campaign Finance Cases*, WASH. POST, Sept. 28, 2005, at A04. Nevertheless, election law expert, Professor Rick Hasen, is among those predicting that the Court will reverse the Second Circuit, thus affirming *Buckley*’s holding on expenditure limits. See Breaking News: Supreme Court Agrees to Hear Two Campaign Finance Cases; A New Era in the Court’s Jurisprudence?, <http://electionlawblog.org/archives/004069.html> (Sept. 27, 2005, 6:21 EST).

202. *Buckley*, 424 U.S. at 44.

203. *Id.* at 44 n.52.

204. See *McConnell v. FEC*, 540 U.S. 93, 127-28 (2003).

205. See *supra* Part III.A.

206. See *McConnell*, 540 U.S. at 123.

207. *Id.*

Moreover, Congress encouraged such activity by providing tax-exempt status to organizations that are:

[O]rganized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures . . . influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice Presidential electors, whether or not such individual electors are selected, nominated, elected, or appointed.<sup>208</sup>

This measure was initially adopted in 1975 as part of the post-Watergate reform movement. The legislative purpose was “to shield contributions and transfers to political parties from taxation . . . .”<sup>209</sup> A pre-*Buckley* Act, legislators presumed such groups would be subject to FECA’s disclosure rules, which had a broader definition of political activity.<sup>210</sup> But, as discussed above, the disclosure rules, were limited by *Buckley*. Consequently, section 527 evolved into a major loophole allowing non-profit groups to avoid FECA. The Sierra Club was the first such organization to register as a “527.”<sup>211</sup>

#### D. BCRA: What is it and Why Does it Exist?

The next key overhaul of the campaign finance regime did not come to fruition until 2002. It was following the 1996 Presidential election, however, that the movement began to build.<sup>212</sup> The impetus for the next wave of reform was the coordinated activity between federal candidates and wealthy soft money contributors. According to the *McConnell* Court, “[a] former Senator confirmed that candidates and officials knew who their friends were and sometimes suggested that corporations or individuals make donations to interest groups that run issue ads.”<sup>213</sup> This came to a head during the 1996 election cycle. A six-volume report, issued in 1998 by the Senate Committee on Governmental Affairs, chronicled the favoritism practiced by candidates of both major parties.<sup>214</sup>

The Majority and Minority each issued their own report; the

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208. Political Organizations, Pub. L. No. 93-625, 88 Stat. 2108, 2118 (1975) (codified at 26 U.S.C. § 527).

209. Holman, *supra* note 197, at 266.

210. *See id.*

211. *See id.*

212. *See, e.g.,* *McConnell v. FEC*, 540 U.S. 93, 122 (2003).

213. *Id.* at 129 (quotation omitted).

214. *See id.*

Democratic fundraising practices were investigated by the Majority, while the Minority investigated the Republican Party.<sup>215</sup> The findings were unanimous. Soft money contributions of corporations, unions, and wealthy individuals in conjunction with issue advertising had led to the campaign finance system's meltdown.<sup>216</sup>

Apparently, "both parties promised and provided special access to candidates and senior Government officials in exchange for large soft-money contributions."<sup>217</sup> For example, international businessman Roger Tamraz acknowledged contributing \$300,000 to the Democratic National Committee and state parties with the expectation of receiving "the Federal Government's support for an oil-line project in the Caucasus."<sup>218</sup> Similarly, the Republican National Committee had two "special access" programs dubbed Team 100 and Republican Eagles.<sup>219</sup> One donor in particular was escorted by the RNC chairman to a number of appointments regarding significant legislation affecting public utility holding companies.<sup>220</sup> Subsequently, the donor became "a hero in his industry."<sup>221</sup>

The Senate Committee concluded change was necessary. One matter addressed in their report was issue advertising.<sup>222</sup> These "ads were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money."<sup>223</sup> Ultimately, Senators John McCain (R-Ariz.) and Russell Feingold (D-Wis.) along with Representatives Christopher Shays (R-Conn.) and Marty Meehan (D-Mass.) sponsored "the most sweeping federal campaign finance legislation since the mid-1970s[.]" in a seven year effort "to close gaping loopholes in the federal campaign finance law."<sup>224</sup> Congress enacted BCRA in 2002, attempting to solve what it called "sham issue advertising" by eliminating soft money and replacing the Magic Words test for express advocacy with the term

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215. *See id.*

216. *See id.*

217. *Id.* at 130.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 130-31.

222. *See id.* at 131.

223. *Id.* at 128.

224. Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 237 (2004).

“Electioneering Communication.”<sup>225</sup>

The broad language of electioneering communication is significant because of the enhanced disclosure requirements for issue ads now within FECA. Such compelled disclosure was upheld by the *McConnell* Court because “the important state interests that prompted the *Buckley* Court to uphold FECA’s disclosure requirements—providing the electorate with information, deterring actual corruption and avoiding any appearance thereof, and gathering the data necessary to enforce more substantive electioneering restrictions—apply in full to BCRA.”<sup>226</sup> Moreover, BCRA’s challengers asserted that it would prevent speech from being uninhibited, robust, and wide-open.<sup>227</sup> Summarily rejecting this argument, the Court opined that the challengers “never satisfactorily answer the question of how ‘uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the voting public.”<sup>228</sup> The Court continued that although the challengers claim BCRA tramples their First Amendment rights, they ignore “the competing First Amendment interests of individual citizens seeking to make *informed choices* in the political marketplace.”<sup>229</sup>

Additionally, section 214 of BCRA provides that “expenditures made by any person (other than a candidate or candidate’s authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions”<sup>230</sup> and subject to the contribution limits. The implication is that non-candidate groups are in no way affiliated with candidates, political parties, or the candidate’s designated committee. Nevertheless, despite BCRA’s new disclosure rules, a number of non-profit groups are expressly exempt. Thus, a new class of stealth organizations emerged during the 2004 election cycle. These groups were outside FECA’s scope and, by their very definition, were unaccountable for their actions.

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225. See Holman, *supra* note 197, at 248; see also Bipartisan Campaign Reform Act, tit. II(a), § 201, 2 U.S.C. § 434 (2002).

226. *McConnell*, 540 U.S. at 196.

227. See *id.* at 196-97.

228. *Id.* at 197.

229. *Id.* (emphasis added).

230. Bipartisan Campaign Reform Act, tit. II(b), § 214, 2 U.S.C. § 441a(a)(7)(B) (2002).

#### IV. WHAT WENT WRONG: ELECTION 2004, ADVERTISING, AND THE MEDIA

##### A. Gaps in the Complex Regulatory Scheme

The 2004 election cycle provided the first opportunity to consider BCRA's effectiveness in achieving its sponsors' chief aspiration: elimination of soft money's impact on politics.<sup>231</sup> Others, however, were skeptical of the success such legislation might enjoy in the long run. For example, Senator Bill Nelson (R-Neb.) said, "[t]he soft money ban in this bill will likely be more of a temporary road block than a true dead end . . . . [S]oft money will find a detour, and it will flow into federal elections from another direction."<sup>232</sup>

As Senator Nelson predicted, the 2004 Presidential race became the vehicle for a categorical illustration of the BCRA environment—an environment in which independent groups are unaccountable for their actions or ads. Similar to the way the Hatch Act of 1940 enabled interest groups (by requiring a greater number of groups to participate in the process) to ensure that their favored campaigns were sufficiently funded,<sup>233</sup> BCRA facilitated a massive non-candidate effort financed by wealthy individuals and non-profit groups.<sup>234</sup>

These independent groups had *carte blanche* to promote false or misleading facts because the 2002 Act expressly exempted a category of expenditures "that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents."<sup>235</sup> Additionally, BCRA provides that, "expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee of a political party, shall be considered to be contributions made to such party committee . . . ."<sup>236</sup> Thus, candidates are theoretically held accountable by the electorate, while non-candidate groups are by their very nature

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231. See generally Russell D. Feingold, *Policy Essay: Representative Democracy Versus Corporate Democracy: How Soft Money Erodes the Principle of "One Person, One Vote"*, 35 HARV. J. ON LEGIS. 377, 378 (1998).

232. 147 CONG. REC. S3240 (daily ed. Apr. 2, 2001) (statement of Sen. Nelson).

233. See *supra* Part III.A.

234. See, e.g., Mark L. Silow, *The Use of Tax-Exempt Entities in Political Campaigns*, THE LEGAL INTELLIGENCER, Sept. 28, 2004, at 7.

235. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 211, 116 Stat. 81, 92 (2002) (codified as amended at 2 U.S.C. § 431).

236. § 214, 116 Stat. at 94 (codified as amended at 2 U.S.C. § 441a(a)(7)(B)).

operating in a zone in which they answer to no one.

Rather than eliminate soft money, BCRA implicitly shielded a field of expenditures used to perpetuate misleading information at no political cost. In fact, Senator Nelson forecasted such an effect. In opposition to the bill, the Senator proclaimed: "This legislation, once enacted, likely will hurt the status quo more than it will help. And, ultimately, I predict it will foster campaign finance regression, rather than institute campaign finance reform."<sup>237</sup> Further, what was calculated to be an "outing" of "sham" issue ads actually resulted in a greater number of groups taking advantage of the various tax exempt statuses in the Internal Revenue Code ("I.R.C.").<sup>238</sup>

There are at least four different types of non-profit groups, under the Internal Revenue Code, that may participate in the campaign process in some way. The relevant categories are "political organizations" organized under Section 527 of the Internal Revenue Code<sup>239</sup>, "social welfare organizations formed pursuant to Section 501[c][4], labor organizations formed pursuant to Section 501[c][5] and business leagues formed pursuant to Section 501[c][6]."<sup>240</sup>

Traditionally, Section 527 groups were known as "Stealth PACs" because they avoided contribution limits applicable to PACs.<sup>241</sup> Also, they escaped the disclosure and filing requirements under FECA because of *Buckley's* narrow magic words test. Further, disclosure was not provided for in the Internal Revenue Code.<sup>242</sup> In July 2000, this began to change when advertisements during the presidential primaries were over the top.<sup>243</sup> Particularly troubling was an advertisement by a 527 organization called "Republicans for Clean Air."<sup>244</sup> The organization avoided all FECA requirements by running the following "issue ad":

Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air. Ohio Republicans care about clean air. So does Governor Bush. He led one of the first states in America to clamp down on old coal-burning electric power plants. Bush's clean air laws will reduce air pollution

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237. 147 CONG. REC. S3240 (daily ed. Apr. 2, 2001) (statement of Sen. Nelson).

238. See Silow, *supra* note 234.

239. 26 U.S.C. § 527 (2005). This section generally governs all political organizations regardless of whether they qualify as such under FECA. The standard under FECA is a "major purpose test." Thus, many organizations avail themselves of the Section 527 tax status while circumventing FECA's filing requirements. See generally Silow, *supra* note 234.

240. Silow, *supra* note 234.

241. See *id.*

242. See Holman, *supra* note 197, at 266.

243. See *id.*

244. See *id.*

more than a quarter million tons a year. That's like taking [five] million cars off the road. Governor Bush, leading so each day dawns brighter.<sup>245</sup>

Only later was it revealed that "Republicans for Clean Air" was merely Charles and Sam Wyly, two brothers who collectively spent \$25 million on ads supporting their favorite candidates.<sup>246</sup> As it turned out, the pair of Texas billionaires were "long-time friends and contributors to George Bush."<sup>247</sup> Their identity was known to the public only after they held a press conference to boast their achievement.<sup>248</sup> Congress immediately implemented modest disclosure requirements for these groups, hoping to shed some light on the wealthy individuals behind such "issue ads."<sup>249</sup> Additionally, BCRA's amendments and subsequent Internal Revenue Service ("I.R.S.") revenue rulings created a structure in which 527 groups must, at the very least, file quarterly reports with the I.R.S.<sup>250</sup> Consequently 501(c) non-profit groups became the new "Stealth PACs."<sup>251</sup>

What does this mean? A greater number of independent ads contaminated the market of information without being subject to the same disclosure rules as groups constituting a political committee under BCRA. According to a study issued by Public Citizen, at least thirteen groups organized under Section 501(c) were active in the 2004 election cycle.<sup>252</sup> As of September 2004, two of the largest groups, the AFL-CIO and the U.S. Chamber of Commerce, were on pace to spend over \$40 million on the presidential race alone.<sup>253</sup> Initially conceived as "lobbying organizations seeking to influence legislation and public policy in ways that are compatible with the mission of the organizations,"<sup>254</sup> the regulatory scheme permits electioneering activity consistent with the organization's primary purpose.<sup>255</sup> Moreover, until September 2004, the FEC exempted 501(c) (3) organizations' broadcast advertisements from regulations implementing BCRA.<sup>256</sup>

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245. *Id.* at 247 (alteration in original).

246. *See* *McConnell v. FEC*, 540 U.S. 93, 128 (2003).

247. Holman, *supra* note 197, at 247.

248. *See id.* at 266.

249. *See id.*

250. *See, e.g.,* Silow, *supra* note 234.

251. Holman, *supra* note 197, at 267.

252. *See* Silow, *supra* note 234.

253. *See id.*

254. Holman, *supra* note 197, at 267.

255. *See id.*

256. *See* *Shays v. FEC*, 337 F. Supp. 2d 28, 124 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005). In *Shays*, the court entertained a challenge to a number of FEC rules perceived to undermine BCRA. Among those struck down was the regulation providing that the term electioneering

“Precisely how much electioneering activity is permissible” without spilling over into the Section 527 category of “major purpose to influence elections” is a grey area.<sup>257</sup> Meanwhile, Section 501(c) organizations enjoy extremely lax disclosure requirements under the I.R.C. and operate outside the scope of FECA.<sup>258</sup> Moreover, *McConnell* interpreted BCRA’s solicitation rules to permit party officials to solicit funds for and donate money to these groups, so long as they were acting “in their individual capacities.”<sup>259</sup> Thus, the notion that BCRA has foreclosed the potentiality for corruption because of its restriction on coordinated activity is without merit. Not only may political parties openly transfer hard money to non-profits, but party officers in their individual capacities may solicit soft money contributions as well.<sup>260</sup>

Further blurring the lines between non-candidate interest groups’ expenditures, Section 501(c) groups may form their own PAC under Section 527.<sup>261</sup> This even permits groups to use 501(c) soft money to finance the administrative costs of operating the Section 527 organizations. Accordingly, there became a number of “family organizations.” MoveOn, for example, is one of the better known families of organizations. It consists of MoveOn.org, an issue advocacy group registered as a 501(c) (4) organization, MoveOnPac, a federal Political Action Committee that helps candidates get elected to office, and MoveOn.org Voter Fund, a 527 group that educates voters on issues and the positions of candidates for office.

BCRA, by implicitly encouraging fundraising and spending (i.e., advertising) by organizations without political accountability, undoubtedly enhanced the electoral connection between government and interest groups. As a result, the government is one step closer to a virtual representation—representation based on interests rather than the act of voting. However, the most obvious mode of defending and protecting actual representation is persistent voter participation. It seems logical to assume that if “we the people” go to the polls on election day and vote for a candidate for public office, the electoral connection is preserved. Unfortunately, the tactics independent groups used throughout the 2004 campaign circumvent the purpose and importance of voting.<sup>262</sup>

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communication excludes communication paid for by § 501(c)(3) organizations. *See id.* at 124-28.

257. Holman, *supra* note 197, at 268.

258. *See id.* at 280.

259. *See McConnell v. FEC*, 540 U.S. 93, 177-78 (2003).

260. *See id.*

261. *See Silow, supra* note 234.

262. *See infra* Parts IV.B-C.



*B. The Problems: Money and False Representation*

The sums of money non-candidate groups raised during the 2004 election cycle, for the purpose of influencing the outcome, supports the assertion that BCRA contributed to the American Republic's digression from actual representation to virtual representation. According to the Center for Public Integrity, "[i]n 2004 alone, 527s raised a total of \$434 million, \$60 million more than the amount raised in all of the previous three years combined."<sup>263</sup> More than half of the groups included in that figure were focused solely on the presidential race.<sup>264</sup> This would be acceptable but for the overwhelming use of such funds to perpetuate falsehoods on television and radio, thus threatening voters' ability to choose the candidate most closely aligned with *their* values.

The FEC requires 527 groups to disclose expenditures on television and radio broadcasts mentioning a federal candidate in the final sixty days of the election cycle.<sup>265</sup> Of those disclosed expenditures, 527 groups spent approximately \$40 million on advertising supporting or opposing the Presidential candidates in the final three weeks alone.<sup>266</sup> The broadcasting expenditures are particularly troublesome because non-candidate groups tend to use misleading or false information to influence the voting public. One advertising executive said, "The really grotesque aberrations from the truth this year have come from the 527s."<sup>267</sup>

The problem is not simply that there *is* a proliferation of false ads. Rather, it is the complete lack of accountability. Brown University professor Darrell West told the Washington Post's Howard Kurtz that independent groups "have run some of the most hard-hitting and misleading ads, because they are not on the ballot . . . . The candidates have to exercise some restraint. The groups have almost no accountability, so they can say whatever they want."<sup>268</sup> The Colorado Senate race was one of the tightest of the cycle and an example of independent groups using false facts to attack the candidates.

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263. *527s in 2004 Shatter Previous Records for Political Fundraising*, CENTER FOR PUBLIC INTEGRITY, Dec. 16, 2004, available at <http://www.publicintegrity.org/527/report.aspx?aid=435>.

264. *See id.*

265. *See* Alex Knott et al., *GOP 527s Outspend Dems in Late Ad Blitz: Progress for America and Swift Boats Dominated Airwaves in Swing States*, CENTER FOR PUBLIC INTEGRITY, Nov. 3, 2004, available at <http://www.publicintegrity.org/527/report.aspx?aid=421>.

266. *See id.*

267. *Creative Differences; Top Agency Executives Weigh in on the Good, Bad and Ugly of This Year's Presidential Election Ads—Most of Which Were Created Off Madison Ave.*, ADVERTISING AGE, Nov. 1, 2004, at 64.

268. Howard Kurtz, *Ads Aiming Straight for the Heart; Independent Groups Spend Millions on Hard-Hitting Spots*, WASH. POST, Oct. 27, 2004, at A01.

In the Colorado race, Democratic Senate candidate Ken Salazar was attacked by “Americans for Job Security.”<sup>269</sup> A 527 organization based out of Alexandria, Virginia, this group was able to avoid disclosing its financial backers by focusing on state issues and launching its attack ads outside the sixty day window during which the piece would be subject to FECA’s regulations.<sup>270</sup> Mounting the race’s first attack ad, the group asserted that Salazar was at least partially responsible for “the worst cyanide spill in American history” while running the state’s Department of Natural Resources.<sup>271</sup> The Denver Post, however, pointed out that the Summitville mine, to which the ad refers, actually started polluting in 1986. Salazar first began heading the state agency in late 1990 and had the mine shut down within one year.<sup>272</sup> The Post went as far as calling out the group for making up its own facts, editorializing that “negative ads will be part of the equation. But we look forward to a fair fight in which no one is making up their own facts.”<sup>273</sup>

The 2004 Presidential race was every bit as acrimonious as the contest for Colorado’s open Senate seat. However, the stakes were clearly higher and so was the number of false or misleading ads. Many of the ads attacking Democratic nominee John Kerry focused on foreign policy and his opposition of the Vietnam War. One such ad appeared in Iowa and Wisconsin the weekend of September 25, sponsored by “Progress for America Voter Fund.”<sup>274</sup> This was an independent group funded by wealthy Republican donors.<sup>275</sup> The ad opened with images of Osama bin Laden, Mohammed Atta, and other terrorists associated with the September 11, 2001 attack on the World Trade Center.<sup>276</sup> Next were images of the Towers following the attack, and finally, images of hooded terrorists.<sup>277</sup> In addition to this “fearsome imagery” the ad featured “somber background music” and a narrator speaking in a “voice-of-doom manner.”<sup>278</sup>

As the images of Osama bin Laden took the screen, the announcer said:

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269. *Co: Salazar Calls on Coors to Rebuke Ad*, THE FRONTRUNNER, Aug. 25, 2004.

270. *Id.*

271. *Id.* (discussing the Denver Post editorial from August 25, 2004).

272. *Id.*; see also Arthur Kane, *Ad Watch Cyanide Salazar*, DENV. POST, Aug. 25, 2004, at B-04.

273. Editorial, *Political Campaigns of Personal Destruction*, *supra* note 1.

274. *The “Willie Horton” Ad of 2004?*, FACTCHECK.ORG (Annenberg Political Fact Check, Washington, D.C.), Sept. 28, 2004, <http://factcheck.org/article268.html>.

275. *See id.*

276. *See id.*

277. *See id.*

278. *Id.*

These people want to kill us. They kill hundreds of innocent children in Russia and killed 200 innocent commuters in Spain, and 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changing positions on Iraq. Would you trust Kerry against these fanatic killers? President Bush didn't start this war, but he will finish it.<sup>279</sup>

According to Annenberg Political Fact Check,<sup>280</sup> a nonpartisan, not-for-profit voter advocacy organization aiming to minimize the deception in politics, this fear-mongering ad lacks factual bases for its claims.<sup>281</sup> The ad refers to a thirty-year record supporting cuts in defense spending.<sup>282</sup> The truth is that Kerry had not opposed a Pentagon budget in more than eight years and in his twenty years as a Senator (not thirty) he "voted for Pentagon budgets far more often than he's opposed them . . ."<sup>283</sup> Further, the reference to a thirty-year record includes Kerry's 1972 failed bid for a seat in Congress during which he famously opposed the Vietnam War.<sup>284</sup>

Regarding the alleged support for intelligence spending cuts, Kerry only did so twice. In 1994, he supported a failed bill calling for modest cuts as part of a deficit-reduction package.<sup>285</sup> In 1995, he supported a Republican-sponsored bill calling for one percent cuts in the intelligence budget in order to account for one billion dollars, which intelligence officials secretly hoarded, that remained unspent.<sup>286</sup> This measure passed with bipartisan support.<sup>287</sup>

As for Kerry's position on the war in Iraq, despite attacks to the contrary, it had been consistent. Prior to the vote authorizing the President to use force in Iraq, Kerry said on the Senate floor:

Let there be no doubt or confusion about where we stand on this. I will support a multilateral effort to disarm [Saddam Hussein] by force, if we ever exhaust those other options, as the President has promised, but I will not support a unilateral U.S. war against Iraq unless that threat is imminent and the multilateral effort has not proven possible under any circumstances.<sup>288</sup>

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279. *Id.*

280. A project of the Annenberg Public Policy Center of the University of Pennsylvania.

281. See *The "Willie Horton" Ad of 2004?*, *supra* note 274.

282. *Id.*

283. *Id.*

284. *Id.*

285. See *id.*

286. See *id.*

287. See *id.*

288. 148 CONG. REC. S10174 (daily ed. Oct. 9, 2002) (statement of Sen. Kerry).

Consistent with this statement prior to the Iraq vote, Kerry campaigned on the fact that the President failed to exhaust other options and entered Iraq unilaterally.<sup>289</sup> Further, the evidence relied on by the Bush administration for its argument that Saddam Hussein posed an imminent threat was disingenuous at best.<sup>290</sup> Moreover, The San Francisco Chronicle assessed 200 Kerry speeches on Iraq and determined that Kerry remained constant despite “clumsy phrases and tortuously long explanations that made [his] position difficult to follow.”<sup>291</sup>

For better or worse, false representation was a bipartisan affair. The Media Fund, an independent Democratic organization which spent over \$54 million to influence the Presidential contest,<sup>292</sup> sponsored an anti-Bush radio ad which “state[d] as fact some of the most sensational falsehoods that Michael Moore merely insinuated in his anti-Bush movie *Fahrenheit 9/11*.”<sup>293</sup> The radio spot was released on October 25, less than two weeks from Election Day and during a period in which voting-by-mail and early voting had already begun in some states.<sup>294</sup> Just as the anti-Kerry groups played up foreign policy issues, this ad focused on the popular view that the Bush family has close ties with the Saudi royal family.

In the ad dubbed “Flight Home” the narrator said:

After nearly 3,000 Americans were killed, while our nation was mourning the dead and the wounded, the Saudi royal family was making a special request of the Bush White House. As a result, nearly two dozen of Osama bin Laden’s family members were rounded up . . . Not to be arrested or detained, but to be taken to an airport, where a chartered jet was waiting . . . to return them to their country. They could have helped us find Osama bin Laden. Instead the Bush White House had Osama’s family flown home, on a private jet, in the dead of night, when most other air traffic was grounded. We don’t know whether Osama’s family members would have told us where bin Laden was hiding. But thanks to the Bush White House . . . we’ll never

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289. See *The “Willie Horton” Ad of 2004?*, *supra* note 274.

290. See, e.g., *CNN Presents: Dead Wrong* (CNN television broadcast Aug. 21, 2005) (focusing on the intelligence used to support Secretary of State Colin Powell’s case for war in Iraq before the United Nations).

291. *The “Willie Horton” Ad of 2004?*, *supra* note 274 (quotation omitted); see also Marc Sandalow, *Flip-Flopping Charge Unsupported by Facts; Kerry Always Pushed Global Cooperation, War as Last Resort*, S.F. CHRON., Sept. 23, 2004, at A1.

292. Jonathan Riskind, *Political Groups Poured Millions into Campaigns*, COLUMBUS DISPATCH (Ohio), Dec. 17, 2004, at 3A.

293. *Media Fund Twists the Truth More Than Michael Moore*, FACTCHECK.ORG (Annenberg Political Fact Check, Washington, D.C.), Oct. 27, 2004, <http://www.factcheck.org/article294.html>.

294. See *id.*

find out.<sup>295</sup>

According to Annenberg Fact Check and the National Commission on Terrorist Attacks Upon the United States (“9/11 Commission”), almost every claim here is false.<sup>296</sup>

The piece suggests that the Saudis were flown home while most other air traffic was grounded. The truth, however, is that this was September 20, “one week after the FAA allowed commercial air traffic to resume”<sup>297</sup> on September 13. Perhaps the most powerful accusation is that bin Laden’s family members were not detained for questioning and the Bush White House is responsible for their ultimate departure. The 9/11 Commission, however, determined that “[t]he FBI interviewed all persons of interest on these flights prior to their departures. . . . [N]o one with known links to terrorism departed on these flights.”<sup>298</sup> Moreover, President Bush was not involved in this decision. In fact, it was Richard Clarke, “the national security aide who later became one of Bush’s strongest public critics” and he “testified repeatedly that *he* made the decision to allow the flights, after consulting with the Federal Bureau of Investigation . . . .”<sup>299</sup>

Egregious false statements were a common feature in the 2004 campaigns. Unfortunately, flooding the marketplace of ideas with blatantly inaccurate information completely eliminates the public’s opportunity to preserve their electoral connection and Madison’s design for actual representation. These non-candidate groups flood the airwaves with falsehoods, influencing the public to vote for an idea, a false premise, rather than a candidate. Thus, these independent interest groups accomplish the task of making the government a representative body based on interests by inducing the voting public to support their interests based on false information.

### C. *The Media in 2004: Perpetuating Falsehoods*

Ideally, the flood of false information into the marketplace of ideas should be a non-factor in elections. “What do voters do when confronted with too much information? They turn to trusted or ‘objective’ sources, like newspapers and television news.”<sup>300</sup> This is the last line of defense

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295. *Id.* (alteration in original).

296. *See id.*

297. *Id.*

298. *Id.* (quoting NAT’L COMM’N ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT 330 (2003)).

299. *Id.*

300. David B. Magleby & J. Quin Monson, *The Consequences of Noncandidate Spending, with a Look to the Future*, in *THE LAST HURRAH?: SOFT MONEY AND ISSUE ADVOCACY IN THE 2002*

for the American Republic's actual representation because media outlets have the means for promoting discussion. During the 2004 election cycle, however, the media actually added to the problem. Rather than the 24-hour news cycle creating a more informed world, it was merely an echo chamber of misinformation and false accusations. Moreover, the media lost almost all credibility and credit for objective reporting with "Rathergate," the Pundit Payola scandal, and government funded pre-packaged fake news stories supporting government policies that local networks across the country aired without disclosure.<sup>301</sup>

### 1. The Echo Chamber of 24-Hour News

Generally, 24-hour news is an echo chamber for the day's top headlines. By simply repeating sensational headlines and mere unsupported opinion, false assertions fail to be weeded out through independent fact-finding by journalists. Instead, news coverage takes the form of either horse race coverage or he said, she said journalism. On the one hand you have the traditional short-form reporting where reporters have abandoned the notion of fact-checking, in favor of relaying each side of the story regardless of whether the facts warrant equal treatment.<sup>302</sup> False balancing of a factually unequal issue is partly attributable to journalists "afraid of the consequences that verifying facts could lead to" in terms of offending official White House or government sources.<sup>303</sup>

On the other hand you have horse race coverage. *The New Yorker* staff writer David Grann explains it as the media adopting "the operative's worldview, and the way it covers campaigns in many respects reflects the same ethos that the operatives share; that is: Is this ad effective? Is this slogan effective? How did the candidate package himself during the debates? It literally keeps score."<sup>304</sup> Exemplifying horse coverage is "Hardball: The Horserace," MSNBC's re-named Friday edition of its political show "Hardball" for the final two months leading up to the election. For example, on September 24, 2004, host Chris Matthews opened the show with the following:

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CONGRESSIONAL ELECTIONS 258, 271 (David B. Magleby & J. Quin Monson eds., 2004).

301. See, e.g., 151 CONG. REC. S896 (daily ed. Feb. 2, 2005) (statement of Sen. Lautenberg). Senator Frank Lautenberg of New Jersey spoke of these news broadcasts on the Senate floor, stating that "[t]he Government Accountability Office investigated the legality of these fake news stories and came back with a clear decision: it was illegal propaganda." *Id.*

302. See *Talk of the Nation: Politics and the Media* (National Public Radio broadcast Oct. 20, 2004).

303. *Id.*; see also Alan Greenblatt, *Media Bias*, CQ RESEARCHER, Oct. 15, 2004, at 855.

304. *Talk of the Nation*, *supra* note 302.

Welcome to Hardball: “The Horserace,” your best guide to the finish line on November 2. We’ve asked NBC News reporters, as well as MSNBC election team people, to join us for this weekly line on the presidential election, plus key state and local races. Our trifecta tonight, the top three political stories of the week. From Kelly O’Donnell, who’s covering the Kerry campaign, and Andrea Mitchell with the inside story on how the candidates are prepping for their first debate next week.<sup>305</sup>

Rather than examine policy issues, the industry standard is to discuss technique and methodology.<sup>306</sup> There is value in this sort of programming because there are viewers interested in politics in the academic sense. That value is lost, however, when it is at the total expense of independent reporting.

This problem is magnified during campaign season, amplifying the problem with 527 groups’ false advertising. Once these ads are broadcast, the sort of public deliberation that *should* take place is that which lies at the heart of the American republic. However, “[t]elevision networks often replay these attack ads with only periodic attempts at verifying them.”<sup>307</sup> Consequently, the Swift Boat Veterans for Truth ad campaign of August 2004 will go down in history as a marker for the change in presidential campaign strategy. The Swift Boat Veterans was an anti-Kerry 527 organization focused purely on Kerry’s Vietnam War record.<sup>308</sup> That month commenced with Kerry’s acceptance speech at the Democratic National Convention, largely focused on his Vietnam experience. The convention was framed to make Kerry out as the war hero candidate. However, shortly after the convention, the Swift Boat group launched the first of its many television ads.

On August 5, the Swift Boat group aired its ad “Any Questions?” in seven media markets in just three states.<sup>309</sup> It was a full fledged assault on Kerry’s war record. Featured were Swift Boat Veterans such as Louis Letson declaring, “I know John Kerry is lying about his first Purple Heart because I treated him for that injury.”<sup>310</sup> The treatment in question was on December 3, 1968.<sup>311</sup> The truth is that Kerry’s medical records

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305. *Hardball: For September 24, 2004* (MSNBC television broadcast Sept. 24, 2004).

306. See *Talk of the Nation*, *supra* note 302.

307. Howard Kurtz, *Ads Push the Factual Envelope; Misleading Claims Have Candidates Battling Caricatures*, WASH. POST, Oct. 20, 2004, at A1.

308. See, e.g., Greenblatt, *supra* note 303, at 856.

309. See *id.*; see also *Republican-funded Group Attacks Kerry’s War Record*, FACTCHECK.ORG (Annenberg Political Fact Check, Washington, D.C.), Aug. 6, 2004, <http://www.factcheck.org/article231.html>.

310. See *Republican-funded Group Attacks Kerry’s War Record*, *supra* note 309.

311. See *id.*

list J.C. Carreon as the medical officer who treated the injury on that date, not Letson.<sup>312</sup> Moreover, Letson himself admits he based his statement on hearsay.<sup>313</sup> In fact, his account varies as to whether the information he received regarding the wounding was second-hand or third-hand.<sup>314</sup>

Despite evidence refuting the Swift Boat Veterans' false attacks, Kerry remained silent on the issue for almost the entire month.<sup>315</sup> The false ad "had an impact on the race because they bought ads in three states, and cable gave them 24-7 coverage without, at least initially, scrutinizing what they had to say."<sup>316</sup> Thus, Kerry's campaign's failure to react damaged his candidacy because of its inability to adapt to the new reality of the 24-hour news cycle, "which can magnify the impact of the smallest news item."<sup>317</sup>

The publicity surrounding the August Swift Boat ad was indicative of another aspect of the 2004 election cycle—big publicity bounce from a modest small market media buy. Nevertheless, in this case too the media is culpable because "they are so hungry to cover these ads that they're an easy target."<sup>318</sup>

## 2. Obstacles to Media Credibility

It is in the public interest to have media outlets provide independent insight and analysis with respect to catalyzing political ads. Yet, if journalists covering the Swift Boat story engaged in independent fact-checking, who would believe it? According to the Pew Research Center for the People & the Press, media credibility is on a steady decline.<sup>319</sup> Thirty-three percent of those polled by Pew believe all or most of CBS' "60 Minutes" while thirty-two percent believe all or most of CNN's news coverage.<sup>320</sup> With far less than fifty percent of the public believing their coverage, these are actually the highest credibility ratings of all broadcast and cable news sources.<sup>321</sup> As for print media, U.S. News and World Report and the Wall Street Journal are tied for the highest

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312. *See id.*

313. *See id.*

314. *See id.*

315. *See, e.g.,* Greenblatt, *supra* note 303, at 856.

316. *CNN Reliable Sources: Media in 2004* (CNN television broadcast Dec. 26, 2004).

317. Greenblatt, *supra* note 303, at 856.

318. *Talk of the Nation*, *supra* note 302.

319. *See* Press Release, Pew Research Center for the People & the Press, Online News Audience Larger, More Diverse: News Audiences Increasingly Politicized (June 8, 2004) (on file with author).

320. *Id.*

321. *See id.*



credibility with a miniscule twenty-four percent of those polled believing all or most of their coverage.<sup>322</sup>

Of course this begs the question, “if citizens can’t even agree about what the facts are because they don’t trust major sources of information,”<sup>323</sup> how can an electorate come to a consensus on facts to determine for whom to cast their vote? If the press is not credible, the proliferation of inaccurate non-candidate advertising certainly does not help. Moreover, since the completion of the Pew survey, there were three noteworthy scandals that undermine the media’s credibility to an even greater degree: Rathergate, Pundit Payola, and government funded fake news broadcasts.

Rathergate is the fallout from a “60 Minutes II” feature in early September 2004 that questioned President Bush’s Texas Air National Guard service.<sup>324</sup> Dan Rather was the correspondent on this story in which he used sketchy documents to support the relatively well established claim that President Bush received preferential treatment during his service.<sup>325</sup> Specifically, the memos were supposedly written by Bush’s late commander, Lt. Col. Jerry Killian. In them, Killian explained that Bush had not taken “a mandatory medical exam and that [he] felt pressured to sugarcoat an evaluation of Bush.”<sup>326</sup> Right-leaning bloggers, or web loggers, were the first to question the memos’ authenticity.<sup>327</sup> Doubters seized on the fact that the documents appeared to have been drafted using a typewriter that would have been unavailable to Killian at the time the memos were supposedly written, thirty years ago. After much reluctance, Rather admitted during the “CBS Evening News” “that the documents were fake and that CBS had been gulled by a partisan source.”<sup>328</sup> Although a secretary later confirmed the substance of the memos, the damage to Rather and CBS’ credibility had indeed been done.<sup>329</sup> Furthermore, the collateral damage is an increased level of distrust for political news, in general, as partisan.

Pundit Payola paints a much gloomier picture for the state of

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322. *See id.*

323. Greenblatt, *supra* note 303, at 853.

324. *See, e.g.,* Nancy Franklin, *Rather Knot; This Time, CBS Really Broke the News*, THE NEW YORKER, Oct. 4, 2004, at 108.

325. *See id.*

326. *CBS’ Rush to Air a Story Produces Fiction, Firestorm*, USA TODAY, Jan. 11, 2005, at 14A.

327. *See, e.g.,* RATHERGATE.COM, <http://www.rathergate.com> (last visited Nov. 28, 2005). Rathergate.com is a blog that was launched in light of the speculation that the memos were forgeries. Additionally, Rathergate.com was among the blogs that spearheaded the call for Rather to resign.

328. Greenblatt, *supra* note 303, at 855.

329. *See id.*

independent journalism. As of April 2005, the Bush administration acknowledged paying at least three conservative journalists to “regularly comment on” Bush’s programs and policy decisions.<sup>330</sup> In early January 2005, news first broke that Armstrong Williams, a conservative newspaper columnist for the Detroit Free Press and Washington Times, and talk-show host, received \$240,000 of taxpayers’ money to propagandize on behalf of the Bush administration’s No Child Left Behind (“NCLB”) policy through the end of the election cycle.<sup>331</sup> Immediately after the story broke, Williams not only apologized for the ethics lapse, but admitted he was “among many others.”<sup>332</sup>

Since Williams suggested that he is only the tip of the iceberg, two other journalists have been outed: syndicated columnist Michael McManus and writer Maggie Gallagher.<sup>333</sup> These two received \$10,000 and \$21,500 respectively from the Department of Health and Human Services.<sup>334</sup> Williams’s payments were siphoned through the Department of Education.<sup>335</sup> Subsequently, the new education secretary, Margaret Spellings, released a list of outstanding contracts the department has with other media outlets.<sup>336</sup> Among those listed were ABC Radio Networks, the Bauhaus Media Group, and Radio One Inc.<sup>337</sup>

Regarding Williams’s contract with the government, his money came from the Department of Education, yet “he was not only a cheerleader for [NCLB] but also for President Bush’s Iraq policy and his performance in the presidential debates.”<sup>338</sup> Williams’s first contract with the government was effective December 2003.<sup>339</sup> It called for “the production of two television and two radio ads that would run on [Williams’s radio and television show] ‘The Right Side,’ featuring the Secretary of Education and Mr. Williams.”<sup>340</sup> Additionally, Williams

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330. See Frank Rich, *All the President’s Newsmen*, N.Y. TIMES, Jan. 16, 2005, at 2, 32; see also Anne E. Kornblut, *Third Journalist Was Paid To Promote Bush Policies*, N.Y. TIMES, Jan. 29, 2005, at A17.

331. See U.S. GOV’T ACCOUNTABILITY OFFICE, B-305368, DEP’T OF EDUC.—CONTRACT TO OBTAIN SERVICES OF ARMSTRONG WILLIAMS 2-4 (Sept. 30, 2005) [hereinafter GAO, B-305368]; Rich, *supra* note 330.

332. See Rich, *supra* note 330.

333. See Kornblut, *supra* note 330; see also U.S. GOV’T ACCOUNTABILITY OFFICE, B-304716, DEP’T OF HEALTH & HUMAN SERVS.—CONTRACT WITH MAGGIE GALLAGHER 5 (Sept. 30, 2005) [hereinafter GAO, B-304716].

334. See Kornblut, *supra* note 330.

335. See *id.*

336. See *id.*

337. See *id.*

338. Rich, *supra* note 330.

339. See GAO, B-305368, *supra* note 331, at 3. For clarification, the Department of Education contracted with Ketchum, Inc. for Williams’s services. See *id.*

340. *Id.*

was to regularly comment on NCLB and have other Department officials appear as studio guests.<sup>341</sup>

That same month, Williams was granted an exclusive interview with Vice President Dick Cheney, along with the vice president of the Sinclair Broadcast Group,<sup>342</sup> owner of sixty-two major network affiliates across the country.<sup>343</sup> “In that chat, Mr. Cheney criticized the press for its coverage of Halliburton and denounced ‘cheap shot journalism’ in which ‘the press portray themselves as objective observers of the passing scene, when they obviously are not objective.’”<sup>344</sup> Ironically, the federal government had just signed up Williams to behave precisely as Cheney described.

Further, Sinclair made headlines of its own during the election cycle by first ordering its ABC affiliates to ban an episode of “Nightline” where anchor Ted Koppel recited the names of the United States armed servicemen who lost their lives in Iraq,<sup>345</sup> and second, by attempting to air an anti-Kerry documentary called “Stolen Honor” just days before the election, under the guise of “news.”<sup>346</sup> Sinclair, however, ultimately reconsidered airing the documentary because of plummeting stock prices and threats of a shareholder lawsuit.

On September 30, 2005, the Government Accountability Office (“GAO”), an investigative arm of Congress, reported that the Department of Education’s arrangements with Williams and Ketchum “violated the fiscal year 2004 publicity or propaganda prohibition.”<sup>347</sup> In a companion decision, the GAO concluded that the government’s contract with Gallagher “does not offend the publicity or propaganda prohibition.”<sup>348</sup> The latter decision, however, reflects the application of a law aimed at the government’s role in contracting for publicity, rather than a journalist’s role in articulating an administration’s policies.<sup>349</sup> Indeed, the GAO declared that while Gallagher was under contract, she *chose* to publish articles favoring Bush’s Healthy Marriage Initiative.<sup>350</sup> Thus, whether violative of the law against covert propaganda or not, both of these “journalists” encroach upon the public’s ability to rely upon the media for trustworthy political and campaign information.

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341. *See id.*

342. *See Rich, supra* note 330.

343. *See Greenblatt, supra* note 303, at 868.

344. *Rich, supra* note 330.

345. *See id.*

346. *See Greenblatt, supra* note 303, at 868, 870; *see also Rich, supra* note 330.

347. GAO, B-305368, *supra* note 331, at 14.

348. GAO, B-304716, *supra* note 333, at 6.

349. *See id.* at 6-7.

350. *See id.* at 7.

The third prong of the media's declining credibility is the apparent fake news reports prepackaged by the federal government and broadcast without disclosure by local networks across the nation.<sup>351</sup> As of March 2005, the GAO released three reports containing findings that the federal government had produced and distributed "video news releases" for the last four years.<sup>352</sup> Ranging from topics as controversial as Medicaid reform and Iraq, to less contentious issues such as an effort to reduce childhood obesity, these ninety-second pieces were crafted to disguise their origin.<sup>353</sup> Generally, they featured former professional reporters along with administration officials.<sup>354</sup>

To date, the most infamous series of fake reports are those known by the reporter's sign-off: "In Washington, I'm Karen Ryan reporting."<sup>355</sup> Ryan, a public relations consultant hired by the Department of Health and Human Services and the Office of National Drug Control Policy, presented "reports" on Medicare beginning in January 2004.<sup>356</sup> This was shortly before President Bush hit the campaign trail touting his Medicare policy. The White House press secretary defended this method of video news releases as "an informational tool to provide factual information to the American people."<sup>357</sup> The GAO, on the other hand, "found that the segment was 'not strictly factual,' that it contained 'notable omissions'"<sup>358</sup> and it made its way into approximately twenty-two million households in the nation's forty largest television markets.<sup>359</sup> Worse is the lack of disclosure; the viewer believes she is watching an unbiased news report. In reality, she is being fed a positive story with misleading facts, prepared by the government on her tax dollars.<sup>360</sup>

The GAO held that news reports, which fail to disclose to the viewing audience that the government is the source of the material, are illegal covert propaganda.<sup>361</sup> The Justice Department, however, issued a

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351. See David Barstow & Robin Stein, *Under Bush, a New Age of Prepackaged News*, N.Y. TIMES, Mar. 13, 2005, at A1.

352. See *id.*

353. See *id.*

354. See *id.*

355. *Id.*

356. See *id.*

357. Editorial, *Viewer Beware*, WASH. POST, Mar. 16, 2005, at A22.

358. Barstow & Stein, *supra* note 351.

359. See *id.*

360. See Stop Government Propaganda Act, S. 266, 109th Cong. § 2 (2005). The findings section of the proposed Senate bill, known as the Stop Government Propaganda Act, includes a list of explicit acts the GAO deemed to be illegal covert propaganda.

361. 151 CONG. REC. S896 (daily ed. Feb. 2, 2005) (statement of Sen. Lautenberg).

memorandum instructing the federal agencies to ignore the GAO.<sup>362</sup> While ignoring the GAO's findings of illegal behavior in the executive branch, the Bush administration deflected criticism upon the news media for its complicity in omitting disclosure or reporting of their own.<sup>363</sup> The fact of the matter is that television news stations' budgets and staff are shrinking while their airtime is growing, creating a need for inexpensive filler.<sup>364</sup> Although the number of these pre-packaged reports has doubled since the government delved into the fake news business, their origin actually dates back to the first Clinton administration.<sup>365</sup> Perhaps the difference now is the way the media handles ethical questions. Columnist Frank Rich suggests that "[t]he errors of real news organizations have played perfectly into the administration's insidious efforts to blur the boundaries between the fake and the real and thereby demolish the whole notion that there could possibly be an objective and accurate free press."<sup>366</sup>

The erosion of media credibility benefits independent advocacy groups because the electorate is left without a reliable avenue of information. The GAO investigations into the various instances of covert propaganda illustrate the existence of checks and balances against the conduct of government officials. When it comes to independent advocacy groups, however, the public's check is supposed to be a free press. Thus, non-candidate groups broadcast whatever they please with little worry that a credible news source will conduct an independent investigation into the facts.

#### *D. What Would Congress Do?: Introduced Bills and FEC Proposals Subsequent to the 2004 Election*

The 2004 election cycle put on display for the nation BCRA's shortcomings. While there appears to be a consensus as to the necessity for congressional action, the same could hardly be said for the specifics of future legislation.<sup>367</sup> BCRA's sponsors, for example, introduced the

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362. See Barstow & Stein, *supra* note 351.

363. See *id.*

364. See *id.*

365. See *id.*

366. Frank Rich, *The White House Stages Its 'Daily Show'*, N.Y. TIMES, Feb. 20, 2005, at 1.

367. For discussion of a number of campaign finance bills already being considered, see Susan Crabtree, *Campaign Finance Goes Retro*, CQ WEEKLY, June 10, 2005, at 1590 (discussing House Republican leaders' effort to roll back portions of BCRA as well as the post-Watergate era law); Susan Crabtree, *New Limits Set for the 527s*, CQ WEEKLY, Apr. 29, 2005, at 1150 (providing details regarding a Senate bill that would require 527 groups to register with the FEC, as well as Democrats' concerns that Republicans will attempt to repeal changes made in BCRA); Susan Ferrechio, *Fall Agenda: Campaign Finance Changes*, CQ WEEKLY, Sept. 5, 2005, at 2319

“527 Reform Act of 2004” even before the actual election.<sup>368</sup> At the start of the 109th session of Congress, this bill was re-introduced as the “527 Reform Act of 2005.”<sup>369</sup> Proponents of the 527 Reform Act undertook, in part, to “define political committee and clarify when organizations described in section 527 of the Internal Revenue Code of 1986 must register as political committees . . . .”<sup>370</sup> Competing bills, however, offer differing objectives, some of which are likely to polarize the parties.<sup>371</sup>

Recall that concerns punctuated by the 1996 presidential race were finally reflected in legislation six years later. Similarly, it is unlikely that Congress will resolve current divisions in the near future. There are two primary reasons. First, in *Shays v. FEC*,<sup>372</sup> the United States District Court for the District of Columbia invalidated a number of FEC regulations implementing BCRA.<sup>373</sup> Consequently, the FEC commenced its rulemaking process, seeking comment on proposed regulations in accordance with the court’s order.<sup>374</sup>

Particularly noteworthy is the fact that the FEC must bring at least some Internet activity within BCRA’s coverage of public communications.<sup>375</sup> Legislators responded, however, by introducing competing bills in hopes of superceding FEC policy decisions.<sup>376</sup>

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[hereinafter Ferrechio, *Fall Agenda*]; Susan Ferrechio, *House Promises Fast Action on Campaign Finance Overhaul*, CQ WEEKLY, July 1, 2005, at 1829.

368. H.R. 5127, 108th Cong. (2004); S. 2828, 108th Cong. (2004). On September 22, 2004, Congressmen Shays and Meehan introduced this bill in the House, where it was referred to the Committee on House Administration. On the same date, Senator McCain introduced the bill into the Senate, where it was referred to the Committee on Rules and Administration.

369. S. 271, 109th Cong. (2005).

370. H.R. 5127, 108th Cong. (2004).

371. See, e.g., S. 678, 109th Cong. (2005) (amending FECA 1971 to expressly exclude communications over the internet from the definition of “public communication”); see also Crabtree, *New Limits Set for the 527s*, *supra* note 367, at 1150 (reflecting Senator Charles E. Schumer’s concern that the Senate bill “is serving as an anti-campaign finance reform Trojan horse”).

372. 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005).

373. See *id.* at 130-31.

374. See, e.g., Electioneering Communications, 70 Fed. Reg. 49508 (proposed Aug. 24, 2005) (to be codified at 11 C.F.R. pt. 100); Internet Communications, 70 Fed. Reg. 16967 (proposed Apr. 4, 2005) (to be codified at 11 C.F.R. pts. 100, 110 and 114).

375. See Internet Communications, *supra* note 374, at 16969-71; see also Joelle Tessler, *Web Pundits May Find It’s Not So Free Speech*, CQ WEEKLY, Aug. 8, 2005, at 2172. Initially, the FEC exempted the Internet from regulation, assuming it was acting consistent with congressional intent. The *Shays* court, however, determined that the plain language of BCRA does not expressly exclude the Internet. Thus, the FEC must now “consider online activity in its rule-making” and is forced “to decide whether and how it should regulate such practices as political blogging, e-mail distribution and online advertising.” *Id.*

376. See, e.g., Stand By Your Internet Ad Act of 2005, H.R. 1580, 109th Cong. (2005) (proposing to amend FECA 1971 by subjecting audio and video communications transmitted over the Internet to disclosure requirements); *cf.* 527 Reform Act of 2005 § 5, S. 1053, 109th Cong.

Additionally, Senate Minority Leader Harry Reid introduced legislation limited to overruling *Shays* with respect to its determination that BCRA fails to exclude the Internet from regulation.<sup>377</sup> He is also among legislators who responded to the FEC's notice and comment period by submitting letters articulating a legislative intent to exclude the Internet from BCRA.<sup>378</sup>

It is apparent that the policy implications of any of the Internet-related bills or regulations being considered are enormous. For example, election law Professor Richard L. Hasen suggests that should the FEC subject the Internet to BCRA, then it is likely it will also extend the media exemption<sup>379</sup> to online magazines and, to some extent, political bloggers.<sup>380</sup> Hasen raises the concern that "as everyone gets to own the equivalent of a printing press, and everyone can become a journalist, the corporate and labor limit on campaign activity stands to be swallowed up by the media exemption."<sup>381</sup> Thus, in ordering the FEC to regulate the Internet, *Shays* inadvertently erected an obstacle to additional reforms.

The second reason for a likely delay in the next round of reform is that BCRA's opponents are attempting to take a second bite at the apple. Lawmakers who lost this debate in 2002 are now trying to roll back BCRA's accomplishments while also imposing restrictions upon 527 groups.<sup>382</sup> Interestingly, one of the bills favored by Republican House leadership would take the affirmative step of reforming 527 organizations, while repealing older measures upheld by the Supreme Court because they were intended to combat corruption or the appearance of corruption.<sup>383</sup> Meanwhile, any legislative efforts with respect to 527s pose strategic problems for Democrats because while campaign reform is an element of the party platform, this particular development "would damage them politically by eliminating what has

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(2005) (introduced into the Senate in lieu of S. 271) (modifying the definition of "public communication" by expressly excluding communications over the Internet).

377. S. 678, 109th Cong. (2005); see also Tessler, *supra* note 375.

378. Letter from Harry Reid, U.S. Senate Minority Leader, to Scott Thomas, FEC Chairman (Mar. 17, 2005) (on file with author).

379. "[B]ona fide news stories and commentaries distributed through a broadcast station, newspaper, magazine, or 'other periodical publication[s]'" are exempt from limits applicable to other corporate entities. Richard L. Hasen, *The Ripple Effects of the FEC's Rules on Political Blogging: Why They Will End Up Undermining Limits on Corporation and Union Campaign Finance Activities*, FINDLAW.COM, Apr. 5, 2005, [http://writ.news.findlaw.com/commentary/20050405\\_hasen.html](http://writ.news.findlaw.com/commentary/20050405_hasen.html).

380. See *id.*

381. *Id.*

382. See, e.g., H.R. 1316, 109th Cong. (2005); Ferrechio, *Fall Agenda*, *supra* note 367.

383. See H.R. 1316; Ferrechio, *Fall Agenda: Campaign Finance Changes*, *supra* note 367; see also cases discussed *supra* Parts III.C-D, IV.A.

been a huge source of campaign money.”<sup>384</sup> Thus, the fate of any of these bills in the Senate remains uncertain.<sup>385</sup>

Congress should abandon the notion of reigning in 527 groups altogether. The 527 Reform Act, for example, serves the same purpose as its predecessor (BCRA)<sup>386</sup> and is likely to suffer the same fate: ineffectiveness. Once again, Congress is seeking to sure up public confidence in the system by tinkering with the campaign finance rules rather than taking on the burden of eliminating or suppressing the factors that contribute to an uninformed electorate and, therefore, towards virtual representation.

This line of reasoning ignores the past century of campaign finance reform and recent case law, which offers, “Money, like water, will always find an outlet.”<sup>387</sup> Conventional wisdom suggests that 501(c) groups will simply fill the void left by 527s.<sup>388</sup> Additionally, it is not a foregone conclusion that Congress could justify regulating 527 organizations under *McConnell*. In *McConnell*, the Court determined that corruption or the appearance of corruption justified the regulation of electioneering communication. For 527s, however, the problem is not corruption, but deception.<sup>389</sup> Therefore, Congress should tailor legislation to combat *this* deception.

In light of the competing policy goals exhibited by legislation presently before Congress, along with the deterioration of actual representation caused by the campaign finance measures enacted throughout the last century, Madison’s agenda would be best achieved by enacting the following proposal.

## V. PROPOSAL: THE INFORMED ELECTORATE ACT

### A. *A Summation of the Case for the Informed Electorate Act*

Recall the question posed at the start of this Note. Following a typical political advertisement, two of the options above, (a) and (b), require a credible and objective media to help inform the public.

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384. Ferrechio, *Fall Agenda: Campaign Finance Changes*, *supra* note 367.

385. *See id.*

386. On the floor of the Senate, Senator McCain said, “We are introducing legislation that will accomplish the same result. We are going to follow every possible avenue to stop 527 groups from effectively breaking the law, and doing what they are already prohibited from doing by longstanding laws.” 150 CONG. REC. S9526 (daily ed. Sept. 22, 2004) (statement of Sen. McCain).

387. *McConnell v. FEC*, 540 U.S. 93, 224 (2003).

388. Jonathan Rauch, *Here’s a New Campaign Finance Reform Plan: Just Stop*, NAT’L L.J., May 7, 2005, available at <http://www.brook.edu/views/op-ed/rauch/20050507.htm>.

389. *Cf. id.* (opining that the problem with 527s is influence, and influence *is* corruption).



Therefore, a legislative solution is required to allow the public to choose option (c) with confidence. The proposal dubbed here “The Informed Electorate Act” is intended to provide a level of transparency for the targeted electorate.

Congress’s track record in handling the group dynamic in America has thrust non-candidate interest groups into such a position that they are either in the process of, or have already, shattered the quality of “actual representation” on which the American republic was built. Instead it has become more like “virtual representation” or representation based on common interests, which was the foundation for representation in England expressly rejected by the Framers. This Act would not silence the common interests; it would allow the electorate to know whether the advertisement is purely opinion and who is fostering that opinion, or alternatively, whether they could accept the information as fact. Moreover, the *McConnell* Court itself alluded to the public’s First Amendment interest in making informed choices.<sup>390</sup>

### B. The Proposal

#### An Act

To amend the Federal Election Campaign Act of 1971 to provide a standard by which independent persons shall be held accountable for false or misleading advertisements.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### Sec. 1. Short Title

That this Act shall be cited as the “Informed Electorate Act.”

#### Sec. 2. Definitions

All definitions, including “political committee” and “person” are as provided in the Federal Election Campaign Act of 1971 as amended.

#### Sec. 3. Applicability of this Act

(a) The provisions of this Act shall apply to any non-candidate political committee, person, or organization registered under § 527[e][1], § 501[c][4], § 501[c][5], or § 501[c][6] of the Internal Revenue Code.<sup>391</sup>

(b) This Act applies to paid communication broadcast on radio and/or television that is aired within 360 days of a scheduled primary election or general election.

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390. See *McConnell*, 540 U.S. at 197. As discussed above in Part III.D., rejecting BCRA’s opponents’ assertion that the legislation tramples their First Amendment rights, the Court expressly recognized and indeed favored “the competing First Amendment interests of individual citizens seeking to make *informed choices* in the political marketplace.” *Id.* (emphasis added).

391. These are the not-for-profit organizations excluded from BCRA 2002. See *supra* Part IV.A.

#### Sec. 4. Prohibition of False or Misleading Advertisements

(a) Any advertisement, paid for by a person, committee, organization, or any group, other than a candidate for federal office, intended to impact or affect a voter's decision shall not include false or misleading description of fact, or false or misleading representation of fact, which is likely to cause confusion or mistake, or to deceive.

(b) The treasurer of any organization within this Act shall sign a sworn statement of good faith as to the merit of the message contained in the advertisement. This sworn affidavit shall be filed within 24 hours of the first time the communication is broadcast. It must be filed in one of the United State District Court houses in a district in which the targeted electorate is found. It need only be filed in one of the districts in which the communication was broadcast during the first 24 hours.

(c) If the treasurer satisfies subsection (b) above and the advertisement violates subsection (a) above, then such person and the organization for which he is working shall be subject to penalties as described below, if and only if he acted in reckless disregard as to the truth of the content of the advertisement when he signed the statement of good faith.

(d) All communication under this section must comply with the Clarity Standards for Identification of Sponsors of Election-Related Advertising set forth in § 318 of the Federal Election Campaign Act of 1971, as amended by § 311 of the Bipartisan Campaign Reform Act of 2002 (2 U.S.C. § 441d).<sup>392</sup>

#### Sec. 5. Disclosure of Opinion Message

(a) Any message that is not intended to be a strict conveyance of fact and that does not violate section 5(a) of this Act, shall comply with the Clarity Standards for Identification of Sponsors of Election-Related Advertising set forth in § 318 of the Federal Election Campaign Act of 1971, as amended by section 311 the Bipartisan Campaign Reform Act of 2002 (2 U.S.C. § 441d).

(b) Additionally, an audio statement by the organization's treasurer or donor of their choice shall identify the organization at the start of the communication and state: "the following is the opinion of [name of person, committee or organization]."

#### Sec. 6. Violations

(a) Every communication broadcast on radio or television which is sponsored by an entity within section 3 of this Act must be either a section 4 communication or a section 5 communication.

(b) Any communication broadcast on radio or television that (i) does not begin with the "opinion disclosure" statement pursuant to

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392. This section is intended to provide notice to voters regarding the identity of the non-candidate interest group financing the potentially misleading ad.

section 5 of this Act, and also (ii) is not accompanied by a filed affidavit pursuant to section 4 of this Act, is explicitly in violation of this Act.

(c) Any party whose signature is affixed to the required affidavit under section 4 of this Act is considered to have committed perjury and to be in violation of this Act if the communication turns out to be false, subject to the standard set forth in section 4(c).

## VI. CONCLUSION: THE INFORMED ELECTORATE ACT IS THE PATH BACK TO ACTUAL REPRESENTATION

Justice Holmes's marketplace of ideas theory posits that you combat false information with more information.<sup>393</sup> The Informed Electorate Act does exactly that. Rather than beating the same tired drum (i.e., the 527 Reform Act), this proposition provides the voter with knowledge that the ad he or she just viewed or heard was either reasonably accurate or strictly the opinion of a particular group.

For example, a group like the Media Fund would be unable to use television or radio to perpetuate claims that the Bush White House permitted two dozen Saudis to fly in September 2001 while all major airlines were grounded, when facts suggest otherwise. While it is well settled that truthful content of an advertisement cannot constitutionally be restricted,<sup>394</sup> "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake."<sup>395</sup>

Virtual representation and interest group influence is indeed of a broader scope than discussed in this Note. Yet, certainly the downright false advertising by non-candidate groups during the 2004 election is a leap in the wrong direction, to the detriment of voters. The people must be empowered to firm up *their* electoral connection for the preservation of any semblance of Madison's design for actual representation. Compared to the measures Congress is considering, the Informed Electorate Act is the lone policy initiative with this legislative purpose.

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393. See *supra* Part IV.A.

394. See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 773 (1976) (holding that the State cannot "completely suppress the dissemination of concededly truthful information").

395. *Id.* at 771.

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